

28/10/16

Scan, email
+ file.

**IN THE SUPREME COURT OF TONGA
CIVIL JURISDICTION
NUKU'ALOFA REGISTRY**

CV 39 OF 2014

BETWEEN: YUZHEN YANG

- Plaintiff

**AND: 1. 'OLIONI MANOA
2. MATELITA MANOA**

- Defendants

L. M. Niu SC for the Plaintiff

S. T. Fonua for the First Defendant

Mrs P. Taufaeteau for the Second Defendant

JUDGMENT

INTRODUCTION

[1] This dispute has been the subject of three previous judgments; of the Land Court [2014] To. L.R 165; of the Supreme Court 7 August 2015 and of the Court of Appeal (AC 22 of 2015) 11 April 2016. Following the Court of Appeal's very helpful elucidation of the overlapping jurisdictions of the Supreme and Land Courts in *Fonua v Westpac Bank of Tonga* [2015] To. L.R 410 and of the irrelevance of section 13 of the Land Act to the type of interest in the premises held by the Plaintiff in AC 22 of 2015, the way is now clear to resolve the question whether the Plaintiff holds a valid contractual licence

to occupy premises largely erected by her on the First Defendant's land at Haveluloto.

PLEADINGS AND DOCUMENTS

[2] The Statement of Claim was filed on 6 June 2014. A Second Plaintiff discontinued on 16 February 2015. Although the prayer seeks several reliefs Mr Niu indicated that the principal focus of the Plaintiff's claim was that set out in paragraph 22 namely that:

"... the tenancy agreement of 20/10/07 is valid and binding and that in the circumstances it should be specifically performed, and in accordance with its provisions until 9 June 2013".

It is clear that the date "2013" is a mistake and that the correct year should in fact be 2023. The injunction referred to in paragraph (a) of the prayer was granted on 19 June 2013 and remains in place.

[3] An amended Statement of Defence and Counterclaim of both Defendants was filed on 12 September 2016, without leave or objection, by Mr Fonua. Paragraph (1) of the prayer of the Counterclaim seeks an order declaring the agreement of 20 October 2007 to be null and void, in the alternative an order for payment to the Defendants of TOP\$16,000.

[4] The Defendants admit the existence of the 2005 and 2007 agreements but claim that they relate to the upper storey of the premises only, that the Plaintiff has no right to occupy the

lower level and that the Plaintiff's claim is unconscionable or the result of mistake.

- [5] On the first day of the trial 26 September 2016, I gave leave to Mr Niu to file an Amended Defence to the Counterclaim pleading that the claim for \$16,000 was statute barred. I cannot find an unamended Defence to the Counterclaim on the file but no issue is raised by this apparent omission.
- [6] All parties filed bundles of documents which were produced by consent. Plaintiff's documents are P-1 to P-71, the First Defendant's are D1-1 to 34 while the Second Defendant's are D2-1 to 14. Two photographs, exhibits A and B, were also tendered by consent. They are recently-taken photographs of the front and part of the rear of the building in question.

THE WRITTEN AGREEMENTS

- [7] The agreement in issue, that of 20 October 2007, is the fourth of five agreements relating to the First Defendant's town allotment drawn to the attention of the Court. The first, D1-2, is only very slightly relevant to these proceedings. All five agreements are intitled "Tenancy Agreement" with the parties being described as "Landlord" and "tenant". In English law a tenancy creates an interest in land but the Court of Appeal has now definitively reaffirmed (AC 22 of 2015) that in Tonga agreements for the exclusive use and occupation of premises erected on town or tax allotments which are not leases conforming with the requirements of the Land Act, are merely contractual licences and confer no interest in the land. The terms and conditions of these contracts must primarily be ascertained by examination of the contracts themselves.

[8] The second agreement is at P3 to 6 of the documents and is dated 29 June 1999 (the 1999 agreement). As will be seen, it is between the First Defendant ('Olioni) and one Meng Sen Tsay (Tsay). In the preamble the "Premises" are stated to be "a retail store at the frontage of (Olioni's) land ".." for the purpose of a retail store". The term runs from 2nd June 1999 to 18 June 2008 at a rent of \$400 per month. Two clauses of the agreement should be noted. First, 6.3:

"the tenant agrees not to use the premises for any other purpose than a retail store".

And 9.1:

"the tenant agrees not to attach any fixture or renovate, alter or add to the premises without the Landlord's permission".

It should also be noted that clause 13 states:

"the termination of this agreement shall not prejudice the Landlord's rights against the tenant for any prior breached of this agreement" (sic).

No rights are described. While Clause 14 deals with "Procedures for vacating" it is not stated who may give notice nor what the length of the notice or the grounds of the notice are required to be. The agreement was signed 'Olioni and Tsay

[9] The third agreement (the 2005 agreement) is somewhat similar to the second but several important differences must

be pointed out. It is dated 9 June 2005 but does not come into effect until 9 June 2008 and runs until 9 June 2013. The Landlords are stated to be not only 'Olioni but also his wife, the Second Defendant (Matelita). The tenant is no longer Tsay but the Plaintiff (Mrs Yang). The premises are no longer described as a retail store but as "the premises at his residential place". It seems clear that "his" refers to 'Olioni. The rent has been compounded to a sum of \$16500 for the whole term of 5 years "to be paid right away immediately after the agreement is signed." Calculations reveal that the monthly rent, previously \$400 per month, has been reduced to \$275 per month. Whereas the first agreement made no mention of a right of assignment, the second agreement includes a new clause 2.2 which provides:

"the tenant has the right and freedom to transfer this tenancy to a third party during the period of the tenancy".

Clause 4 which deals with the use of the premises, no longer restricts the use to a retail store. Furthermore a new clause 1.3 gives the tenant permission "to do any business at this property". There is also an additional clause 5:

"the Landlord agrees: 5.1 to attach any fixture or renovate or add to the premises to 230 square metres" (sic).

The agreement was signed by Matelita and Mrs Yang. Only Matelita's signature is dated 9 June 2005 and witnessed.

[10] The next agreement, which is the agreement which Mrs Yang seeks to have specifically performed, is at P11 to 13. It is dated 20 October 2007 (the 20 October agreement) but the

term was not due to commence until 9 June 2013 (the date the 2005 agreement was due to expire) and was to run for 10 years until 9 June 2023. The rent "the whole amount [of which] has to be paid right away immediately after the agreement is signed" was \$35,000 for the whole term. This works out at \$291.6 per month.

[11] The agreement includes an important new clause 2.2 which reads:

"The Landlord agrees: 2.2 that he will not terminate this agreement during the period of tenancy otherwise he will pay the tenant the amount of \$117,000 pa'anga for the cost of the improvement and repair of the building and the other expenses and losses".

Apart from this new clause this agreement is in substantially the same form as that of 9 June 2005. It was apparently signed by Matelita and Mrs Yang.

[12] The final agreement (the 29 October agreement) is at P14-16. It is also dated 20 October 2007. The only difference from its predecessor is that in clause 2.2 the figure of \$117,000.00 has been replaced with the figure \$170,000.00. The agreement appears to have been signed by Matelita and Mrs Yang.

THE ORAL EVIDENCE

[13] Mrs Yang was the first witness. She told the Court that in 1999 she began renting the shop from Tsay. When Tsay's agreement expired she entered into an agreement with 'Olioni

and Matelita. The agreement was prepared by her lawyer Mana. She was shown a copy of the 2005 agreement and identified her signature upon it. Shown the last page of the agreement, she stated that she did not understand the upper stamp next to the witnesses signature and did not know Kelepi Piukala. Mana was not present when it was signed and neither was 'Olioni; he had already gone to the USA (where he remained until 2010). Before the agreement was reached she had spoken to 'Olioni by telephone and secured his verbal agreement. This was followed by the receipt of P-10, an authorisation given by 'Olioni to Matelita and signed by him before being faxed from the USA to Tonga. The rent of \$16500 was paid to Matelita on the day the agreement was signed.

[14] Some time later a second agreement was prepared. According to Mrs Yang, Matelita wanted money and asked for \$35,000 to extend the agreement for a further 10 years. Mrs Yang's evidence was that before this agreement (the 20 October agreement) was prepared she again telephoned 'Olioni in the United States. "I say I am building upstairs OK? He say OK you build. I say how your kids? He say OK".

[15] After Mana prepared the new agreement a second authority was received from 'Olioni. A copy of the authority, again received by facsimile, is P18 (translation P17). Mrs Yang met Matelita and gave her the new agreement. Matelita took it away for three or four days. Later she and Matelita met in the presence of an engineer, Malakai, who witnessed the agreement being signed and the money being paid. The lawyer Mana was not present.

[16] Asked about the \$35,000 rent, Mrs Yang stated that in fact she had not paid this whole amount to Matelita but had only actually paid her \$19,000. This was because Matelita owed her \$16,000 for goods bought from the shop on credit. "There were papers about the debts. I gave them to [Matelita]. She read them. She counted the money. She thanked me. I have not kept a copy of the papers".

[17] After the 20 October agreement was signed it was noticed that clause 2.2 included a figure of \$117,000.00. This was a typographical error and accordingly another agreement, the 29 October agreement, was prepared. She and Matelita, Matelita's son and Malakai met. The new agreement incorporating the figure of \$170,000.00 was signed.

[18] According to Mrs Yang, in 2005 the building she was renting had only a single storey. However she wished to build an upper storey which is why, in 2005, she spoke to 'Olioni and sought his consent, prior to the 2005 agreement being drawn up. In fact, 'Olioni did not merely agree to a second storey being added: "He said he was happy for me to do whatever I wanted". The building began in 2006 and was completed in 2007. She gave the work to one Zang who absconded before the work was finished. Although the estimate for the work had been \$170,000, by the time it was completed she had paid out a total of \$340,000. She did not have any receipts for this work.

[19] It was put to Mrs Yang that the 2005 and the two 2007 agreements only related to the upper storey and not to the ground floor. This she emphatically denied. She told the Court

that the upper storey is rented to a family of three but shortly after stated that it was not now used at all except occasionally as a storage space. She lets the downstairs at \$2000 per month.

[20] Mrs Yang was shown the photograph exhibit A. She agreed that this depicts a continuous frontage of the two buildings, the first occupied by "Xiang Long Trade Co. Ltd" and the second occupied by "Yummy Foods". She stated that the connection was made after a building licence had been obtained. She undertook to produce a copy of the licence but, in the event, was unable to do so.

[21] During the course of her evidence Mrs Yang conceded that she could not read or understand English. She was not able to distinguish in any detail between the various agreements although she could identify her signature and the various dates and numbers. She had relied on an interpreter (now returned to China) to explain to her and to her lawyer Mana, what the agreements were to contain. When she gave the agreements to Matelita for signature she did not know how much English Matelita understood, either.

[22] Chen Zhi Ning, Mrs Yang's son, explained that he had taken over the business from his mother in 2007. Although he had seen the 2005 agreement in 2005 he did not read it until 2010. The 2007 agreements were prepared by Mana whom he instructed on behalf of his mother. The lawyer had been paid by him. Once the 2007 agreements had been prepared he took them to his mother and Matelita. "I explained it and they read it. Both said this is OK and signed it. This happened

on 20th and 29th. On 29th the witness was a little late. Matelita saw the agreement for the first time on the 20th". "She saw both agreements for the first time on 20th and 29th". The substitution of the figure \$170,000 was explained to Matelita.

[23] Chen Zhi Ning stated that he saw Matelita receive the money on the 20th and count it "I also saw Matelita was given some papers. [My mother] had recorded some debits there".

[24] Chen Zhi Ning's evidence was that the upstairs storey was built in 2007. When he took over the business from his mother the two buildings Xiang Long Trade and Yummy were already connected. He was shown P23 dated March 2006 and agreed that this appeared to depict a strip of land approximately 1 metre wide between the wall of the proposed supermarket and 'Olioni's boundary running from peg 87451 to peg 87453. He was unable to explain how this could be the case if in fact the two buildings adjoined. He denied joining them himself after he had procured the lease of the Yummy building.

[25] Malakai Vakasiuola told the Court that he had an architectural and engineering company. He witnessed the signing of both the 2007 agreements. "I just went and was shown the agreement. We all signed together". On the first occasion "there was a lot of money there. I do not know how much. I asked [Matelita] if she had everything - she said yes, took the money and left the premises".

[26] 'Olioni's evidence was that he had originally begun building a shop on his land measuring 20 x 40 feet. Tsay offered to complete it and to rent it. This led to the 1999 agreement. Some time later he went to Hawaii. In 2005 Mrs Yang telephoned him. She asked about the children. "She also asked for permission to use the upstairs of the building to make a restaurant. I said yes. I clarified that the first floor would belong to Mrs Yang and Matelita but the ground floor would belong to myself and Tsay". "I let Mrs Yang negotiate with Matelita as the money for upstairs would go to Matelita and the children". "We agreed that Matelita and Mrs Yang would have an agreement similar to mine with Tsay".

[27] In 2008 Mrs Yang again telephoned. "She informed me that the agreement with Tsay would expire in 2008. She asked for it to be extended to 2013, but for the ground floor to be under Tsay. I agreed.

[28] Shown the 20 October agreement 'Olioni agreed that he had negotiated with Mrs Yang about it. "She rang me about renting the upstairs because she had completed the construction". He agreed, and sent the letter of authorisation P17/18.

[29] In 2010 'Olioni returned to Tonga from the USA. "five to seven people were living in the building". "I was very surprised that what we had agreed was not complied with. The differences are the rent for upstairs and downstairs is combined".

[30] 'Olioni was shown Exhibit A. "I recognise it. Originally there was a gap between the building and the boundary. The two buildings have been joined together. I don't know when".

[31] Questioned by Mrs Taufaeteau, 'Olioni stated that he did not know that Mrs Yang was subletting from Tsay. Tsay stopped paying rent in 2003 but he did not find out about this until 2010. Matelita did not tell him before that. Later he told the Court that when he spoke to Tsay about the arrears Tsay declined to pay him anything saying that it was all a long time ago.

[32] Answering Mr Niu, 'Olioni was adamant that construction of the upstairs had commenced in 2005 and that was why the 2005 agreement only related to the upstairs. So far as he knew Tsay was still renting the downstairs. According to 'Olioni he only discovered that Mrs Yang considered that she had an agreement for the whole of the building when he was for the first time shown the two 2007 agreements by his lawyer in 2010 or 2011. He had never seen the agreements before they were signed "I trusted Mrs Yang". It was not until this time that he found out that the new agreements were "not the same" as the one he had with Tsay: "It seems as if Mrs Yang has taken control over [my premises] and can invite guests". He denied knowing that the agreement was to run from 2013 to 2023 and claimed that the rent of \$400 which he had agreed with Mrs Yang had not been included. 'Olioni told the Court that until his lawyer explained the contents of the 2007 agreements to him he had not understood them. This was because he is unable to read or understand English.

[33] Concluding his evidence, 'Olioni stated that there had never been a new agreement for the downstairs of the premises since 2008. Shown Document D-1-6 he agreed that the advance should have been \$2400, not \$4,200. "I have just realised that Tsay cheated me". "I have no other receipts". "I never had a rent book".

[34] The final witness was Matelita. "Mrs Yang came to my house in 2005 and asked if she could construct an upstairs. We called 'Olioni in Hawaii. 'Olioni told me that the agreement with Mrs Yang was to be the same as the agreement with Tsay". "The agreement was regarding the upstairs. Mrs Yang then began building the upstairs".

[35] According to Matelita, construction of the upstairs storey had already begun in 2005 and it was completed in 2006. In 2007 there was another agreement, also for the first floor. "I asked for money for the agreement". "I speak and read a little English". Matelita maintained that the 2007 agreements were not explained to her; they had been reached between Mrs Yang and 'Olioni. "I am not a party to this. It is between Mrs Yang and 'Olioni. I do not understand it. I had no knowledge of the change from \$117,000 to \$170,000".

[36] Asked about the money received by her after the signing of the first 2007 agreement Matelita said that she did not count the money she was given by Mrs Yang. "She was like a mother to me. I trusted her. When I got home I opened the bag and counted the money. I found that there was only \$19,000. I went back to Mrs Yang. She said she had deducted for goods bought on credit. She gave me a cigarette roll on

which she had written the items. It was written in Chinese. I said I am not indebted to you like that".

[37] In cross examination Matelita agreed that she had read and understood the 2005 agreement. "It concerns the upstairs only". "That is why we are in Court because the alterations made by Mrs Yang to the Tsay agreement. The differences were not discovered until 'Olioni returned from Hawaii".

[38] Matelita claimed that no rent had been paid by Tsay from 2003 to 2008. "I was afraid of Tsay and content with the money received from overseas". She agreed that Tsay was in breach of his agreement and that it could therefore have been terminated however "'Olioni was responsible for this". As to the substitution of \$170,000 "if I had known of this I would not have signed to allow charges against me or my son. I would not have known where to get that amount of money from".

WRITTEN SUBMISSIONS

[39] Helpful written submissions were filed by all Counsel. Further oral submissions were made on 10 October. I am grateful to all Counsel for their assistance.

[40] Put very briefly Mr Niu's central submission is that the written agreements should, on basic contractual principles, be upheld. Relying on *Lloyds Bank v Bundy* [1975] 1 QS 326 he submitted that the agreements were neither unfair nor was the consideration therefor grossly inadequate. In fact, Mr Niu suggested, it was probably the Defendants who would

ultimately profit by acquiring the valuable unencumbered building at the end of the tenancy in 2023.

[41] Mrs Fonua and Mrs Taufaeteau argue that the evidence clearly demonstrates that the Defendants did not intend the agreements which they signed to have the effects which the agreements embodied, in other words that the agreements were entered into as a result of mistake, either mutual or unilateral and that they should therefore be set aside. Mr Niu answered this submission in paragraphs 1-6 of his submissions in reply.

CONSIDERATION OF THE ISSUES

[42] (A) MISTAKE OR UNCONSCIONABLE CONDUCT:

As has been seen, much of the evidence was adduced in order to explain the intention of the parties when they entered into the various agreements. Such evidence however presents problems since by virtue of section 79 of the Evidence Act (Cap. 15) oral evidence is not generally admissible to contradict, vary, add to or subtract from the terms of the written agreement in fact reached. Quite early in the trial however it became clear that there were several factors which suggested that the proviso to section 79 was applicable. Those factors were principally, that neither Mrs Yang nor the First Defendant read or spoke English, that the agreements were written in English and that whereas Mrs Yang was located in Tonga, at all material times 'Olioni was resident in the United States. Counsel did not object to the evidence being led.

[43] Having examined the documents, principally the agreements, and having seen and heard the witnesses it is plain to me that over a period of several years Mrs Yang and her son significantly improved their position in relation to the Defendants and to the Defendants' detriment, without the Defendants being aware that this was the case.

[44] As has been seen from the evolution of the agreements, what started off as a simple non-transferable licence to operate a small shop which could not be altered or added to ended up as a right to occupy the premises now at least twice as large, to use the premises for "any business" and to transfer the "tenancy" to a third party. Whereas the rent for the original shop was \$400 per month in 1999 by virtue of the 2007 agreements it had shrunk to \$291.60 per month until 2023.

[45] Of course the fact that a transaction is manifestly disadvantageous to one side is not enough to warrant the transaction being set aside. Where, however:

"one party by reason of some condition or circumstance is placed at a special disadvantage vis-a-vis another and unfair or unconscientious advantage is then taken of the opportunity thereby created"

The court will set aside the transaction (*Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447, 462).

[46] In the present case it is not in dispute that neither Mrs Yang nor Olioni understand English to a sufficient extent to be able to comprehend the documents which they signed or which were signed on their behalf. Having heard Mrs Yang's attempt

to re-create her telephone conversation with 'Olioni in 2005 I am satisfied that it was simply not possible for them to reach any sufficient degree of agreement about what was being offered or accepted. It is not in dispute that the 2007 agreements were prepared by Mrs Yang's lawyer on her instructions. I find as a fact that Matelita was only given her copy of the agreements on the day that they were required to be signed. 'Olioni's claim not to have seen the agreements until his return to Tonga some time years later was not challenged.

[47] In these circumstances it is not strictly necessary to evaluate the credibility or character of the principal witnesses. Since however, Mrs Yang had the agreements drawn up and their terms altered to suit the circumstances which she wished to see changed (for example in the 2005 agreement the right to add to the premises so as, in effect, to double their size which would be the result of adding an additional storey) it cannot plausibly be argued that she did not know what the agreements contained. On the other hand, while 'Olioni presented as somewhat obtuse and confused I found him to be genuine in his understanding that the agreements only related to the upper storey. The evidence was, and Exhibit A supports it, that Mrs Yang wanted to build a second storey in order to establish a restaurant. This is of course quite a different business from a supermarket. To have a separate agreement for each business and therefore each storey seems to me to be entirely reasonable. I also found Matelita to be a witness of truth and accept that she saw her only duty to be to sign the agreements on behalf of the landholder, 'Olioni, her husband, not to examine them and assess their worth.

[48] In my opinion it is absolutely unsatisfactory for an agreement of this type, conferring as it does a lease of substantial duration in almost all but name to be entered into in this way. In my view this type of agreement, to be fair to and binding on the parties should be drawn up in proper and adequate form, should be properly understood by both parties and should be the subject of independent legal advice. All these fundamentals were missing in this case and in my opinion it would be unconscionable to uphold these agreements. I decline to grant the Plaintiff the principal relief sought.

(B) ANCILLARY ISSUES

[49] Illegality

If there were breaches of the covenants against gambling or other illegal activities I was not satisfied that they were sufficiently serious to warrant avoiding the tenancy.

[50] The Plaintiff's son Chen Zhi Ning denied joining the two buildings Xian Long and Yummy together. It is plain however that the buildings were not joined together in 2006 (see D-1-25). Mrs Yang did not produce any building permit for the extension and the Plaintiff made no attempt to rebut the finding of the Director of Building, on 25 March 2014, that the extension was illegal (see D-1-21). As will be seen from exhibit A the direction to remove the extension has not been complied with. In my view however this is a matter, if it is pursued, for the Land Court and does not amount to a breach of the 2007 agreements warranting rescission.

[51] The Plaintiff's account of the disputed \$16,000 was also unsatisfactory. The 2007 agreements make no reference to pre-existing debts of \$16,000 and as has been seen the preamble "RENT" requires the payment of the *whole amount* of \$35,000 "right away after the agreement is signed". I accept Matelita's evidence that Mrs Yang made no mention of any reduced payment when the money was handed over. I find however that Mr Niu is correct and that this aspect of the counterclaim is statute-barred.

[52] The remaining issue, the need for a Lands Act Schedule 1X Form 6 permit for an agreement of this kind, raised in paragraph 28 of the counterclaim, is not, in my opinion within the jurisdiction of this Court.

CONCLUSION

[53] For the reasons given, I am of the view that the 2007 agreements must be rescinded. Mr Niu submitted that this result would be unfair. Alluding perhaps to *Vadasz v Pioneer Concrete (SA) Pty Ltd* (1995) 184 CLR 102 he suggested that relief short of full rescission should be available to the Plaintiff. Mr Niu suggested that if the Plaintiff was forced to quit the Defendants would unfairly acquire a valuable building which they had not built. I can, however, find nothing in the agreement either permitting or denying the Plaintiff the right to remove the building at the end of the tenancy; yet another highly unsatisfactory element of these agreements. In any event no alternative claim for relief was pleaded and no evidence on the matter was led.

Result

1. The Plaintiff's claim is dismissed with costs to be taxed if not agreed.
2. The injunction granted on 19 June 2013 is to remain in place until further order.
3. Prayers (2) and (3) of the Counterclaim are dismissed.

DATED : 14 OCTOBER 2016




M. D. Scott
JUDGE