

IN THE SUPREME COURT OF TONGA
CIVIL JURISDICTON
NUKU'ALOFA REGISTRY

CV 80 of 2015

07/06/17
Scan, email &
file.

BETWEEN: CHARLETT MILLEN

Plaintiff

AND: ISLAND MANAGEMENT LIMITED

First Defendant

SHYLA KALI

Second Defendant

ISILELI KALI

Third Defendant

BEFORE LORD CHIEF JUSTICE PAULSEN

**Counsel: Mrs. F Fa'anunu for the plaintiff
Mrs. P Tupou for the defendant Shyla Kali**

**Hearing: 2 June 2017
Date of Ruling: 7 June 2017**

RULING

The applications

[1] In a ruling of 23 June 2016 the Court made an order for specific performance (the Order) requiring the defendants to transfer to the plaintiff the business and assets of the Coconet

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Café at Vava'u pursuant to a written agreement of 27 February 2015 (the Agreement). The plaintiff was also awarded costs which were subsequently fixed by the Registrar.

- [2] The plaintiff now applies to discharge the Order. She also seeks the issue of a writ of distress to enforce payment of the costs award. She has also applied for an injunction to restrain the second defendant from removing or dealing with any assets of the Coconet Café until this action has been heard. The applications are opposed by the second defendant.

The facts

- [3] The protagonists are the plaintiff, Charlett Millen (Mrs. Millen), and the second defendant, Shyla Kali (Mrs. Kali).
- [4] The ruling of 23 June 2016 sets out the facts upon which the Court based its decision to make the Order. It is unnecessary to recite those facts again.
- [5] The Order has not been complied with and each party blames the other for that. Mrs. Kali remains in possession of the business and its assets. Mrs. Millen paid \$15,000 (Canadian) upon signing the Agreement but has nothing to show for her money. She alleges that Mrs. Kali has failed to maintain and has been selling the business assets.
- [6] Mrs. Kali did not accept the making of the Order. She appealed from the ruling of 23 June 2016 to the Court of Appeal but abandoned that appeal. For her part Mrs. Millen applied to have Mrs. Kali committed to prison for contempt. There have also been lengthy negotiations in an effort to reach a compromise.

- [7] Much of the correspondence that has passed between the parties and their lawyers has been put before the Court with without objection. It has taken me a great deal of time to absorb the correspondence (which is largely emails) and the various other documents that have been put before the Court in an excessive number of affidavits and memoranda. The file has become cumbrous. I am concerned that the parties have lost all perspective. There is a need for the Court to give the parties a clear direction as to the way forward and to closely monitor the case to a conclusion.
- [8] Fortunately it is not necessary for me to begin a narrative from the time of the making of the Order or to traverse all the correspondence to explain my decision. It will suffice to refer to the matters that follow.
- [9] In pursuit of a settlement, on 23 February 2017 Mrs. Fu'anunu, acting for Mrs. Millen, sent an email to Mrs. Tupou, acting for Mrs. Kali, with a proposal in principle to complete the Agreement and a related agreement (that was not the subject of the Order) to acquire the shares in the third defendant. The costs award made in favour of Mrs. Millen was to be set off against the price of the shares. Whilst the parties worked towards settlement on this basis it is clear from the correspondence that they were never at one as to what they were each obligated to do, what was to be handed over at settlement or indeed even when settlement would occur.
- [10] The correspondence suggests, and I understand Mrs. Fa'anunu to accept, that what ultimately prevented settlement was the matter of the lease of the Coconet Café. The holder of the land and buildings from which the business operates was Tevita Ula Afuha'amango (the landlord) who lived in the

United States. The landlord entered into a written agreement to lease the premises to the third defendant on 11 July 2007. The lease was not registered. It provided for an initial term of five years with two rights of renewal of 5 years. It was a term that there could be a change of tenant with the landlord's knowledge and consent. Mrs. Kali contends that when the initial term of the lease expired in 2012 there was a verbal agreement with the landlord to extend the lease until 2017 on the existing terms. Mrs. Millen does not appear to accept that.

[11] The landlord died in the United States on 9 November 2015. Mrs. Millen was not informed of this until November 2016. The landlord had not given his consent to the transfer of the lease to Mrs. Millen. Mrs. Millen says that the landlord's successor has indicated that she will have to negotiate a new lease on new terms and at an increased rent.

[12] Against this background on 14 March 2017 Mrs. Fa'anunu wrote to Mrs. Tupou asking for 'a copy of the renewed lease'. Mrs. Tupou replied on 15 March 2017 advising that the lease had been extended until 2017 although there was nothing in writing and that:

The death of Uia of course has changed the circumstances somewhat. I am informed that this was explained to your client at the time.

[13] This did not satisfy Mrs. Millen. On 16 March 2017 Mrs. Fa'anunu wrote a lengthy email to Mrs. Tupou alleging, inter alia, that Mrs. Kali had lied about the terms of the lease and had failed to act prudently in securing a long term lease for Mrs. Millen. She also asserted that:

Now we cannot guarantee a new lease with the landlord.

and

But it remains that [*Mrs. Kali*] only had an agreement between herself and the old landlord. My client was therefore not privy to that verbal agreement. Thus a reasonable inference is that there was no lease agreement for your client to offer to my client in February 2015 to begin with and she had and has no proof of the landlord's approval for my client to take over the business as the new tenant. ...

I suggest that your client seriously considers removing herself from the place as soon as possible. My client has no intention to pay over the remaining of the money. She has already paid your client 15K CAD for nothing. My instructions are, if she doesn't consider vacating the place and to do so before Monday next week, we are to pursue other legal options.

[14] Mrs. Tupou replied on 20 March 2017 that:

The real issue now is because the landlord has now died and as you have informed, your client is having doubts about the new landlord. As you know this has nothing to do with my client.

[15] Mrs. Fa'anunu replied that same day that she had been instructed to apply to discharge the Order and to seek damages.

The submissions

[16] In her submissions Mrs. Fa'anunu argued that the Court could discharge the Order if it considers it just and equitable to do

so. She asserted that Mrs. Kali had failed to comply with the Order, that Mrs. Kali could not now pass over the assets that Mrs. Millen had purchased and that to continue with attempts to enforce the Order would be futile.

[17] Mrs. Fa'anunu identified the main assets that Mrs. Millen purchased as the lease, the liquor license and the assets listed in the schedule to the Agreement. She argued that Mrs. Kali either could not now provide these or for reasons of her own refused to do so. She submitted that there was no lease and Mrs. Millen was faced with trying to negotiate a new lease with a new landlord on new terms. In relation to the liquor licence she said that Mrs. Kali has maintained wrongly that this was not transferable. In relation to the listed assets she submitted that they can no longer be ascertained as Mrs. Kali has been selling them.

[18] Mrs. Kali's opposition to the application focused on what she regards as Mrs. Millen's breaches of the Agreement. Mrs. Tupou argued that the order for specific performance should not be discharged as Mrs. Kali is prepared to complete her obligations under the Agreement although I understand her to have been accepting of the fact that it was no longer possible for Mrs. Kali to provide a transfer of the lease agreement. Mrs. Kali also considers that it would cause her hardship to have to face an action for damages.

The law

[19] I accept Mrs. Fa'anunu's submission that the Court may discharge and order for specific performance if is just to do so. The granting of the remedy is discretionary but the Court will act on a principled basis having regard to the rules of equity and cases that that have been held to have brought about

such circumstances (Spry, *'Equitable Remedies'* 7th Edition at page 319).

[20] The sorts of circumstances that have been held to justify the discharge of an order for specific performance include where it is established that there is impossibility of performance which renders the order inappropriate or requires its modification (*Johnson v Agnew* [1980] A.C. 367), where there is a further default by the party in breach after specific performance has been ordered amounting to a repudiation of the agreement (*Vincent Street Trustee Ltd v Brent Andrew DeJongh and Stewart Hamilton Law* (Unreported Auckland High Court, CIV 2010-404-691, 18 June 2010, Bell AJ), the parties have subsequent to the making of the order terminated or modified their agreement or there has been laches, acquiescence or estoppel or some other like consideration that renders the continuance of the order unjust.

[21] It is just and equitable to discharge the Order. What was being acquired by Mrs. Millen was the business assets and the right to carry on the business from its existing premises under the lease agreement. The location of the business and the terms of the lease agreement were important considerations in Mrs. Millen's decision to acquire the business (paragraphs 21 and 28 of ruling of 23 June 2016). There is considerable doubt whether the lease agreement was renewed in 2012 but certainly the landlord's formal consent to transfer the lease agreement to Mrs. Millen was not obtained. Of even greater significance however, the lease agreement does not bind the landlord's successor who has refused to recognise it. Mrs. Tupou was correct when she said in her email of 15 March 2017 that the death of the landlord had 'changed the circumstances somewhat'. What had changed was that Mrs.

Kali cannot now transfer the lease agreement and the right to occupy the premises to Mrs. Millen. It would be entirely inappropriate and unjust to maintain the Order in circumstances where Mrs. Kali cannot perform her obligations in a fundamental respect.

[22] I have not overlooked that the Order was made after the landlord had died. That would have been an important consideration had Mrs. Millen been aware of it when she obtained the Order. However that is not the case. Mrs. Millen only learned the landlord had died in November 2016 and the implications could not have been considered by her or the Court when it made the Order. Certainly had the Court been aware that the landlord had died it would not have made the Order.

[23] Mrs. Kali is not now able to transfer to Mrs. Millen the right to operate the business from the premises under the lease agreement. Whether as a result she is in breach and liable for damages or there is some other consequence is not an issue I need resolve. All I am concerned with at this juncture is whether it is just to set aside the Order and I am satisfied that it is.

[24] There are other reasons why I consider it just to set aside the Order. First, that Agreement itself is hopelessly inadequate in many respects and the risk of further arguments as to the parties' respective obligations is very high. Given the toxic state of the relationship between the parties there is no prospect they will ever complete the Agreement. By maintaining the Order I will be committing both to unending disputes and litigation. Secondly, I do not think there is anything in Mrs. Kali's argument that she will suffer hardship if

Mrs. Millen is able to seek damages. The ruling of 26 July 2105 reserved to Mrs. Millen the right to seek damages consequent on the defendants' delay in performing the Agreement. The maintenance of the Order will not insulate Mrs. Kali from an action in damages.

[25] During the hearing I mentioned to Mrs. Fa'anunu that whilst I was minded to set aside the Order given the totality of events since it was made and uncertainty as to the legal consequence of the death of the landlord on the parties' obligations under the Agreement I did not consider it appropriate to couple the discharge of the Order with a further order rescinding the agreement. Mrs. Fa'anunu had not objection to the Court proceeding on that basis.

The writ of distress

[26] As was noted in the minute of 10 April 2017 the Court dealt with this as if it were any application by the defendants for a stay under O. 31 Rule 4. The Court must not order a stay unless it is satisfied that there are special circumstances which make it inexpedient to enforce payment or that the debtor is unable to pay the full sum due. Mrs. Kali did not advance any arguments that either ground was made out.

[27] I am satisfied that Mrs. Millen did not compromise her right to payment of the costs award and that she is entitled to payment. Mrs. Tupou sought time to take instructions from Mrs. Kali as to whether she will make payment and avoid the issue of the writ. To provide her with that opportunity the writ will issue on 9 June 2017 unless the Court is advised prior that payment has been made.

The injunction

[28] At the hearing Mrs. Fa'anunu advised that Mrs. Millen no longer pursues this application.

Result

[29] The orders made in the ruling of this Court on 23 June 2016 at paragraphs [28] and [29] are discharged but not the orders at paragraphs [30] and [31].

[30] The writ of distress in respect of the costs awarded to Mrs. Millen under the ruling of 23 June 2016 will issue on 9 June 2017 unless the Court is advised that payment has been made prior to that date.

[31] Mrs. Millen's application for injunction is dismissed.

[32] Mrs. Millen intends to pursue a claim for damages. As far as a timetable for the future conduct of this action is concerned I direct:

[32.1] Mrs. Millen shall have until 4 July 2017 to file an amended statement of claim.

[32.2] The defendants shall file their defence to the amended statement of claim by 1 August 2017.

[32.3] Mrs. Millen shall have until 15 August 2017 to file a reply.

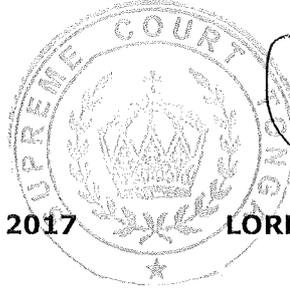
[32.4] The parties are to provide discovery of documents by 5 September 2017.

[32.5] There shall be a conference to monitor compliance with the timetable at 9am on 8 September 2017.

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[33] Costs are reserved.



A handwritten signature in black ink, appearing to read "O G Paulsen", is written over the right side of the court seal.

NUKU'ALOFA: 7 June 2017

**O G Paulsen
LORD CHIEF JUSTICE**