

26/09/17

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

**CV 72 of 2014**

**BETWEEN: SIONE MOEHAU**

**First Plaintiff**

**EPIC INTERNATIONAL Limited**

**Second Plaintiff**

**AND: KINGDOM OF TONGA**

**First Defendant**

**TONGA INVESTMENTS LIMITED**

**Second Defendant**

**TONGA ASSETS MANAGERS & ASSOCIATES  
LIMITED**

**Third Defendant**

**BEFORE LORD CHIEF JUSTICE PAULSEN**

**Counsel: Mr. W C Edwards Snr SC for the plaintiffs  
Mr S Sisifa SC for the first and second defendants  
Mrs D Stephenson for the third defendant**

**Date of Hearing: 22 September 2017**

**Date of Ruling: 25 September 2017**

**RULING**

**The application**

[1] The plaintiffs seek an order removing this action to the Land Court on the ground that the action is within the Land Court's exclusive jurisdiction. The defendants oppose the application

rec'd 26/09/17  
AKC

principally on the ground that this Court has no power to order removal.

**The background**

- [2] The plaintiffs' latest pleading is a second amended statement of claim filed 6 June 2017. The relevant facts for the purposes of this application are taken from paragraphs [3]-[17] of the ruling in the related proceedings *Moehau & Or v Kingdom of Tonga & Or* (Unreported Supreme Court, CV 51, of 2016, 26 April 2017 Paulsen LCJ) and the plaintiffs' second amended statement of claim.
- [3] TIL is a registered company and wholly owned by the Government of Tonga. It has recently been restored to the Register of Companies by order of this Court on the application of the plaintiffs in CV 51 of 2016.
- [4] In 2007 TIL proposed to dispose of assets including leases of land. It put the leases up for public tender and on around 20 July 2007 the first plaintiff (Mr. Moehau) lodged a bid for three leases. His tender was accepted. Mr. Moehau nominated the second plaintiff (Epic) to complete the purchase of the leases. One of the leases was registered lease number 2934 (the lease) which is the subject of this action.
- [5] On 8 October 2007 TIL and Epic entered into a written agreement for the transfer of the lease. The agreement recorded that the transfer price was TOP\$725,000. Epic paid a 10 percent deposit of TOP\$72,500. A further 30 per cent of the transfer price amounting to TOP\$217,500 was paid on 24 August 2007. The balance of TOP\$435,000 was payable within 14 days of Epic being advised in writing that the lease transfer

documentation had been completed by the Lands Department and that the transaction had been approved by Cabinet.

- [6] On 30 November 2007 TIL gave notice to Epic calling for settlement in terms of the agreement. However on 6 December 2007 TIL wrote that Epic should disregard TIL's letter of 30 November 2007 until further notice.
- [7] Cabinet did not approve the transfer of the lease until 8 February 2013. On 18 February 2013 TIL gave notice that the lease transfer documentation had been completed and that Cabinet approval had been obtained to the transfer of the lease. Epic was given 14 days to pay the balance of the transfer price or Epic would forfeit its deposit.
- [8] On 25 February 2013 TIL again wrote reminding Epic that it had seven days (i.e. by 4 March) to pay the balance of TOP\$435,000 on the transfer of the lease and again stating that failure to pay would result in Epic forfeiting its deposit.
- [9] On 6 March 2013 TIL advised Epic that due to non-payment of the balance of \$435,000 by 4 March 2013 Epic had forfeited both the \$72,500 deposit and the further payment of \$217,500.
- [10] On 12 March 2013 Mr. Moehau wrote to TIL acknowledging receipt of the letter of 18 February 2013 and explaining that after TIL's lengthy delay a decision had been made to utilise its funds on other projects. He proposed that the parties enter into an instalment plan to pay the outstanding balance.
- [11] On 5 June 2013 the Board of TIL resolved to transfer the lease to the third defendant TAMA. TAMA is another company owned by the Government of Tonga. Cabinet approved the transfer

on 1 July 2013. However on 12 July 2013 TIL was removed from the Register of Companies.

- [12] It was not until 24 June 2015 that the Minister of Public Enterprises, purporting to act on behalf of TIL, signed an assignment of the lease to TAMA. The assignment was registered that same day.

**The pleading**

- [13] The second amended statement of claim alleges that TIL's purported termination of the agreement for the sale of the lease and forfeiture of the payments was unconscionable such that 'a Court of Equity' would intervene to avoid injustice.
- [14] The circumstances said to have made TIL's conduct unconscionable includes the lengthy delay between the agreement for the sale and purchase of the lease and TIL calling for settlement, the short period of notice given to Epic to settle after such a long period of delay and the failure to keep Epic advised of events and give it sufficient time to obtain funds to settle. Relevant for present purposes, paragraph 22e of the second amended statement of claim pleads that the transfer of the lease to TAMA was unconscionable:

..where there was no cause nor reason for such transfer other than to defeat any claim by the purchase [sic] as Plaintiff from having recourse to attaching it as the Seller, a judgment and/or decree to specific performance and/or damages.

- [15] The pleading goes on to state that the plaintiffs are prepared to complete the purchase of the lease provided there is a

variation of the agreed terms so that the purchase price is payable by instalments.

[16] There is a further pleading that the first defendant has seized goods of the plaintiffs from the leased property to the value of \$121,614.

[17] The relief sought by the plaintiffs is the following:

- a. Specific performance of the agreement for the sale and purchase of the lease subject to a variation of its terms allowing for the balance of the purchase price to be made by instalments;
- b. Damages in lieu of specific performance;
- c. Damages for the conversion of the plaintiffs' goods;
- d. In the alternative a declaration that the money paid by the plaintiffs for the lease was not forfeit; and
- e. Interest on any sum awarded.

**The application for transfer**

[18] The application alleges that the plaintiffs' claim for specific performance of the agreement for the sale and purchase of the lease brings the action within the exclusive jurisdiction of the Land Court. I do not accept that is the case but in any event in his oral argument Mr. Edwards advanced the application on a different basis. He argued that the plaintiffs challenge TAMA's title to the lease and for that reason the exclusive jurisdiction of the Land Court is engaged (section 149(1)(a) Land Act) notwithstanding that other issues arising in the action could otherwise be determined by the Supreme Court.

[19] Mr. Edwards also argued that the Land Court is both the most appropriate and convenient forum because the action is almost ready for hearing and because, unlike the Supreme Court, the Land Court can hear all of the issues arising in the case. He relied upon *Fonua v Westpac Bank of Tonga* [2015] Tonga LR 410 in which the Court of Appeal noted the public interest in having one Court whose jurisdiction is legally invoked dealing with the entire controversy between the parties (at [12]).

[20] Mr. Edwards also relied upon *Public Service Association Inc v Tu'ivakano* [2015] Tonga LR 432 where the Court of Appeal held that the Supreme Court had jurisdiction to order the removal of an action from the Magistrates' Court to the Supreme Court. Mr. Edwards submitted that 'the point is clear that the Supreme Court has the power to exercise the powers for the time being vested in or capable of being exercised by the High Courts of Justice in England and Wales'. He referred me to The Allocation and Transfer of Proceedings Order 2008. Mr Edwards accepted that this Order did not directly apply to this case but cited it as 'an example of how proceedings are able to be transferred between the Courts'.

[21] For TAMA Mrs Stephenson argued that there is no authority in statute, the Rules of Court or in the case law which permits a civil action commenced in the Supreme Court to be removed to the Land Court. In the absence of authority Mrs. Stephenson contends that if a plaintiff has made a claim in the Supreme Court that invokes the exclusive jurisdiction of the Land Court their only option is to discontinue the action and commence a fresh action in the Land Court.

[22] The first and second defendants oppose the application but they presented no submissions.

**Discussion**

[23] The power exists for the making of rules providing for the removal of proceedings between the Courts of Tonga (s.6 Supreme Court Act and s.168 Land Act) and there may be good reason why such rules should be made. However, at the present time there are no such rules and I have formed the clear view that not only does the Supreme Court not have the power to order the removal of this action to the Land Court but that had such power existed I should refuse in the exercise of my discretion, to order it. On either basis the application must fail. My reasons are three-fold.

[24] First, I do not accept Mr. Edwards' submission that the exclusive jurisdiction of the Land Court has yet been engaged upon the pleadings presently before the Court. Whilst TAMA was joined as a party to the action at a late stage there is no cause of action pleaded against it challenging its title to the lease. Furthermore, there does not appear to be any relief sought against TAMA. In his oral submissions Mr. Edwards did not articulate the legal basis upon which a challenge to TAMA's title to the lease would be made and it is not for the Court to speculate on how such a claim might be framed. The Court should not order the removal of this action unless it is satisfied that a challenge to TAMA's title to the lease is arguable.

[25] Secondly, on the question of this Court's power to remove an action to the Land Court I begin by noting that in so far as the Court's practice is a source of its powers this suggest strongly against the plaintiffs' application. In cases where proceedings

have been filed in the Supreme Court and found to be within the exclusive jurisdiction of the Land Court the practice has not been to order removal to the Land Court.

[26] No authority was cited to me where the Supreme Court has claimed for itself the power to order the removal of an action to the Land Court. I note also that Mr. Edwards has not argued that the Supreme Court has an inherent power to order removal derived from its right to regulate its own procedures and I found no authority directly in support of that proposition.

[27] There was no provision that I was referred to under the Constitution, the Supreme Court Act, the Land Act or the Rules of the Court which expressly confers upon the Supreme Court the power to make an order removing this action to the Land Court.

[28] The plaintiffs rely upon *Public Service Association* (supra) but two points should be noted about that case. First, the facts are distinguishable from the present case. What was in issue was the removal of an action from an inferior court to a superior court. This case is concerned with an application to transfer an action between superior courts. Secondly, the Court of Appeal found that the source of the Supreme Court's power to order the removal of the action to the Supreme Court was derived from section 41(1) of the County Courts Act 1984 (UK) as applied by section 5(1) of the Supreme Courts Act. Section 5(1) declares that the powers of the Supreme Court shall include, *mutatis mutandis*, all the powers for the time being vested in or capable of being exercised by the High Court of Justice in England and Wales. The Court held at [10]:

In our opinion, section 41(1) can and should be applied to the Supreme Court by adapting the provision so as to empower the Supreme Court to remove the proceeding from the court immediately below it in the judicial hierarchy, namely the Magistrates' Court.

[29] The Court of Appeal did not refer to any other source from which the power of the Supreme Court to order the removal of the action was derived.

[30] Mr. Edwards concedes that as far as he is aware there is no provision in any legislation or instrument in the United Kingdom vesting powers in the High Court which might by section 5(1) be applied to the circumstances of Tonga giving the Supreme Court the power to make the order that the plaintiffs seek. In the absence of any such provision the *Public Service Association* case does not advance the plaintiffs' application.

[31] Thirdly, the Court of Appeal stated in the *Public Service Association* case that a power to remove a case from one Court to another was likely to be made 'rarely and sparingly'. That leads me to consider the reasons advanced by the plaintiffs in support of the application, assuming the power to remove exists.

[32] Mr. Edwards argued that this action has advanced to the point where it is almost ready for hearing and that it can be heard more quickly if removed than would be the case if the plaintiffs must discontinue the action and re-file in the Land Court. I do not accept those submissions.

[33] Through little fault of Mr. Edwards, who has been Counsel for a short time, the plaintiffs conduct of this case has been shambolic paying no regard for the concerns of the Court and the other parties. Without attempting to list all matters relevant to my characterisation of the plaintiffs' conduct I note the following matters. The action was originally commenced against persons who clearly should not have been parties, there was an attempt to join new parties without seeking leave of the Court and in the case of TIL when it had been removed from the Register of Companies, there was a lengthy delay when the plaintiffs sought inappropriately to have TIL restored to the register in this proceeding and timetabling directions of the Court have been habitually ignored by the plaintiffs causing much inconvenience and delay. The plaintiffs have been aware at least since May 2015 (see the further amended statement of claim dated 27 May 2015) that the lease was transferred to TAMA but took no steps to seek the removal of the action until September 2017. In addition to all that, after three years since the action was commenced the plaintiffs' pleadings are still plainly inadequate.

[34] Mr. Edwards also advises that an application is to be made joining the Minister of Lands as a party and I understand that there is to be consideration given to whether the Kingdom of Tonga should remain a party. The joinder of the Minister will cause further substantial delays.

[35] This case is not even remotely close to a hearing and will not advance more quickly should it be removed to the Land Court.

[36] The re-filing of the action afresh in the Land Court (should the plaintiffs choose to do so) would provide a much needed opportunity for the plaintiffs to reconsider the claim, the causes of action they rely on and the persons who are necessary parties.

[37] I accept that should the plaintiffs discontinue they may be subject to applications for costs although only TAMA has indicated that it will seek costs. Given the unsatisfactory manner in which the plaintiffs have pursued the action to date, and the very considerable unnecessary costs to which it has put the other parties, I see no injustice in that.

[38] For the reasons I have given above this is not one of those cases where the Court would exercise its discretion in favour of the plaintiffs and remove the action to the Land Court even if I had been of the view that the Court had power to do so.

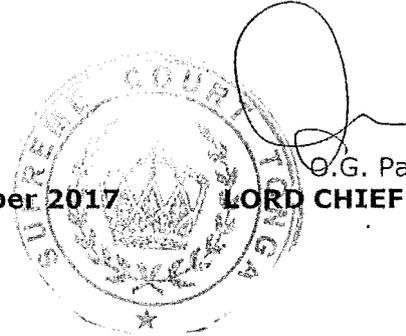
**Result**

[39] The plaintiffs' application to remove this action to the Land Court is refused.

[40] The third defendant is awarded costs on this application to be fixed by the Registrar if not agreed.

[41] Mr. Edwards indicated that if I refused the application he needs time to re-file on the plaintiffs' behalf in the Land Court as he has other pressing commitments which will prevent him from doing so immediately.

[42] I adjourn this action to be called again at **9am on 24 November 2017** for mention by which time I would have expected such proceedings to have been filed if the plaintiffs intend to do so.



O.G. Paulsen

**NUKU'ALOFA: 25 September 2017**

**LORD CHIEF JUSTICE**