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14/03/18

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IN THE SUPREME COURT OF TONGA | CV 80 of 2015
CIVIL JURISDICITON
NUKU'ALOFA REGISTRY

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 defendants

Hearing: **1 March 2018**
Date of Ruling: **1 March 2018 with written reasons on 12 March 2018**

RULING

The application

[1] This action has already resulted in two written rulings of the Court. This third ruling is concerned with an application by the plaintiff for summary judgment as to liability. The application is opposed.

[2] At the conclusion of the hearing I dismissed the application and advised Counsel that written reasons would follow.

The course of the action

[3] The course of this action and the relevant facts are largely set out in the Court's rulings of 23 June 2016 and 7 June 2017. I do not

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propose to set them out again here. For the purposes of this application, and for the benefit of the reader, it is sufficient to note the following.

[4] The plaintiff is a Canadian national and on 27 February 2015 she entered into a written agreement with the defendants to acquire the business and assets of the Coconet Café at Vava'u. There were delays in the plaintiff moving to Tonga but she finally arrived on 10 July 2015. The defendants refused to hand over possession of the business to her notwithstanding that she had paid a substantial deposit.

[5] The plaintiff commenced this action and on 23 June 2016 obtained a decree for specific performance of the agreement.

[6] Following the issue of the ruling the parties entered into negotiations in an attempt to resolve their differences but they were unable to do so. It was during this period that the plaintiff learned that the landlord of the business premises had died in November 2015 and that the defendants were unable to provide her with a lease. I should note that I am aware from documents previously put before the Court that the negotiations between the parties were extended and difficult with both parties blaming the other for the failure to reach a resolution.

[7] The plaintiff then applied to set aside the decree for specific performance. In a ruling of 7 June 2017 the decree was set aside. Because of its relevance to this application I set out some of my reasons from that ruling:

> [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.

[8] The plaintiff filed an amended statement of claim on 17 July 2017 and the defendants have filed an amended statement of defence and counterclaim on 29 September 2017. Both blame the other for the failure to settle.

[9] The action was to be heard on 1-2 March 2018 and it was a surprise when the plaintiff filed this application for summary judgment on 15 December 2017.

[10] The plaintiff persisted with the application despite concerns expressed by the Court that ultimately the application might well delay the resolution of the case and add to the parties' costs (as has proven to be the case).

The summary judgment principles

[11] I understand both parties accept as correct the principles set out in *Westpac Bank of Tonga v Toloke* [2015] Tonga LR 367 at [12]-[14] as follows:

[12] The principles governing summary judgment applications are well known. In *Westpac Bank of Tonga v Moehau* CV 120 of 2011, 26 October 20112 Scott CJ quoted with approval from the White Book as follows:

> The purpose of [the Rule] is to enable a plaintiff to obtain summary judgment without trial if he can prove his claim clearly and if the defendant is unable to set up a bona fide defence or raise an issue against the claim which ought to be tried. When the judge is satisfied not only that there is no defence but no fairly arguable point to be argued on behalf of the defendant, it is his duty to give judgment for the plaintiff (*Anglo Italian Bank v Wells* (1873) 38 L.T. 197) [13]

[13] The onus is on the plaintiff to establish that there is no real doubt or uncertainty as to his entitlement to summary judgment. Where the evidence is sufficient to show that there is no defence the defendant will need to respond if the application is to be defeated.

[14] The Court will not normally seek to resolve conflicts of evidence or assess the credibility of witnesses but the Court will not accept uncritically evidence that is "inherently lacking in credibility, as for example where the evidence is inconsistent with undisputed contemporary documents and other statements by the same deponent or is inherently improbable". *Krukziener v Hanover Finance Limited* [2008] NZCA 187at [26] and *Eng Mee Yang v Letchmanan* [1980] AC 331, 341. The Court may take a robust and realistic approach when the facts warrant it. *Bilbie Dymock Corp Ltd v Patel* (1987) 1 PRNZ 84 (CA).

Discussion

[12] The plaintiff's application always faced insurmountable hurdles and was dismissed for the following reasons.

[13] First, the documents filed were unsatisfactory in important respects. The documents filed including affidavits that were not originals but photocopies. There was no apparent reason why originals were not put before the Court. There were exhibits attached to the plaintiff's first affidavit but no exhibit notes in compliance with O.27 Rule 5. Furthermore, email correspondence attached to Mrs. Millen's first affidavit had been redacted with no explanation. This is all entirely unsatisfactory. These matters alone would be enough for the Court to reject the application.

[14] But the difficulties faced by the application go deeper than this. One of the reasons for setting aside the decree for specific performance was that the defendants were not able to transfer to the plaintiff the right to operate from the business premises due to the death of the landlord. I stated in my ruling of 7 July 2017 'Whether as a result [*the defendants are*] in breach and liable for damages or there is some other consequence is not an issue I need resolve.' Put more directly there is an issue whether the death of the landlord frustrated the agreement between the plaintiff and the defendants with the effect that it was automatically brought to an end. If this was so then both parties would be discharged from further performance.

[15] The possibility of frustration appears to have been recognised by the plaintiff's lawyer, Mrs. Fa'anunu, in her email correspondence with the plaintiff of 14 March 2017 (exhibit G of the plaintiff's first affidavit).

[16] In addition, in paragraph 10 of the amended statement of claim the plaintiff pleads the reasons why she says the defendants breached the agreement entitling her to now cancel. In so far as

she relies on breaches that occurred before 23 June 2016 the claim might well be proceeding down a wrong path as the effect of her obtaining the decree of specific performance is to elect to treat the agreement as continuing notwithstanding those breaches.

[17] In so far as the plaintiff relies upon alleged breaches after 23 June 2016 her evidence is principally contained in one paragraph of her first affidavit. She relies upon a number of matters raising complex issues of fact and law. There is simply insufficient information upon which this Court can conclude that the defendants have no arguable defence to the plaintiff's claim.

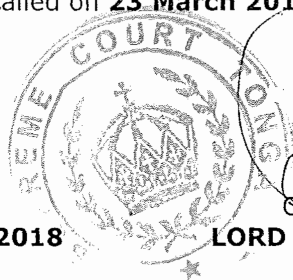
[18] The defendants contend that they are not in breach of the agreement and that the plaintiff had no intention of performing her obligations nor the ability to settle. Whilst the plaintiff denies this in light of the correspondence that passed between the parties lawyers during the period of negotiations I cannot reject the defence as unarguable.

Result

[19] The application for summary judgement is dismissed.

[20] Mrs. Tupou did not ask that costs be fixed in favour of the defendants at this stage and so I reserve costs.

[21] The action shall be called on **23 March 2018** for timetabling.



O G Paulsen

NUKU'ALOFA: 12 March 2018 **LORD CHIEF JUSTICE**