Solicitor General

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IN THE SUPREME COURT OF TONGA
CIVIL JURISDICTION
NUKU'ALOFA REGISTRY CV 11 of 2020

BETWEEN:

COCKER ENTERPRISES LTD Plaintiff

-and-

JUNIOR LEATA MCCARTHY
trading as LE-ATA FASHION BOUTIQUE & GIFT SHOP Defendant

JUDGMENT

BEFORE: LORD CHIEF JUSTICE WHITTEN QC
Counsel: Mrs P. Tupou KC for the Plaintiff
Mr S. Fonua for the Defendant
Date of trial: 17, 18 December 2020
Date of judgment: 6 January 2021

CONTENTS

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Introduction

1. The Plaintiff is the sublessee of an allotment and buildings on Taufa'ahau Road between the premises of EM Jones and Sioeli Tuita's property in Nuku'alofa ("***the property***"). The property was formerly held by Lord Lasike. The Plaintiff acquired the sublease from the ANZ Bank ("***the bank***") by mortgagee sale following default by Lord Lasike in his loan obligations to the bank. By a rental agreement with Lord Lasike, the Defendant rented a shop on the property.

2. The Plaintiff has demanded that the Defendant vacate the property so that it can demolish the existing buildings and redevelop the site into a shopping mall which is the purpose of the Plaintiff's acquisition of the sublease. The Defendant has refused to vacate. She says she is entitled to remain in occupation of her shop for the balance of her rental agreement with Lord Lasike.

3. The Plaintiff therefore seeks an order for eviction and damages.

4. The case raises apparently novel issues in the Kingdom, as to the proper characterisation of rights conferred by a tenancy agreement, the rights and obligations of a mortgagee in possession of the demised tenancy and any subsequent 'purchaser' (in truth, a sublessee), and the doctrine of notice.

Facts

5. The court heard evidence from two of the Plaintiff's directors, Mr Edgar Cocker and his wife, Mrs Tuilolo Cocker. The Defendant gave evidence remotely and she called evidence from Lord Lasike.

6. On 5 October 2004, Lord Lasike borrowed $170,000 from the ANZ bank. By way of security for the loan, Lord Lasike executed a mortgage over the land ("***land mortgage***") and a chattel mortgage ("***chattel mortgage***") in respect of his interest in the allotment and buildings thereon in favour of the bank. The land mortgage was registered on 6 October 2005.

7. Relevantly, the terms of the land mortgage included:

(a) (page 1) "... The mortgagor covenants with the mortgagee as set out in the Schedule and for the purposes of securing the repayment of such loan and interest and other monies the mortgagor hereby mortgages by way of a lease to the mortgagee all his rights, title and interest in the land above described with all buildings and fixed improvements thereon ("the mortgaged property")...".

(b) Clause 13 (b): "That if default shall be made by the mortgagor in payment of the principal interest and other monies hereby secured with the performance of any of the covenants of this mortgage it shall be lawful for the bank: ... (to) sublease the mortgaged property collecting the rents and profits thereof... and to accept the surrenders of any tenancies now existing or...to determine such tenancies and to compromise with or make any concessions or arrangements with the tenants or occupiers thereof...".

(c) Clause 15: "That the mortgagor will not do or suffer to be done or omit or neglect or suffer to be omitted any act or thing whatsoever whereby or as the result thereof the mortgaged property would or might become charged or encumbered in any manner in priority to or in derogation from the security or whereby the mortgaged property would or might become diminished in value or the interest of the bank as mortgagee may in any way become postponed diminished or otherwise prejudiced."

(d) Clause 18: "That the mortgagor will not during the continuance of this mortgage without the previous consent in writing of the bank signed by any of the officers of the bank assign surrender lease or sublease or agree to assign surrender lease or sublease or otherwise dispose of or subdivide or grant any lien charge or mortgage or any rights of whatsoever nature over the mortgaged property or any part thereof or grant any lien charge or mortgage or any rights over... chattels being on the mortgaged property."

8. The chattel mortgage provided:

(a) the "Property" the subject of the chattel mortgage was defined to include, relevantly, 'any property that can be completely transferred by delivery...';

(b) Clause 5(m): "The Borrower shall not at any time during the continuance of the security execute or create any mortgage lien charge or encumbrance over or affecting the property or any part thereof in favour of any person other than the bank without the previous consent in writing of the bank;"

(c) Clause 6: "The Borrower agrees that he will not give away to sell or otherwise dispose of (including entering into any further mortgage) the property until he has received from the bank a signed memorandum stating that the terms of this mortgage have been satisfied."

(d) Clause 10 gave the bank the right to obtain and retain possession and use of the property in the event that the borrower defaulted in the payment of any instalment or payment in reduction of the debt. For those purposes, the borrower granted the bank or its agents an irrevocable right of entry onto and into any premises where the property is or may be stored.

(e) Clause 12 provided, relevantly, that in the event of default, the Borrower shall forthwith give up control of the property to the bank on demand and the bank may lease, sell or dispose of the property as it sees fit in its absolute discretion without further process of law, and the proceeds of the lease, sale or other disposition of the property shall forthwith be applied in repayment of the debt.

9. Lord Lasike went on to establish on the property what became known as the 'Sandyboyz Motel'. It was not financially successful. He therefore decided to rent out rooms within the buildings to be used by tenants for shops.

10. On 1 March 2014, Lord Lasike, as landlord, entered into a rental agreement with the Defendant, as tenant, for room No. 4 within the reception area of the former motel ("***rental agreement***"). The rental agreement provided, relevantly, that:

(a) the purpose of the rental was for the Defendant to operate a boutique store described in the agreement as "Le-Ata Fashion Boutique & Giftshop";

(b) the term of the agreement was 15 years (clause 1);

(c) the rental was TOP$1,000 per month (clause 2);

(d) the Defendant agreed to renovate and upgrade the premises at her own expense (clause 3);

(e) the parties agree that if either of them withdrew "from the contract prior to the expiration of the remaining contract, the withdrawing party would be liable for breaching the contract and shall pay the remaining term of the contract" (clause 10); and

(f) in the event that both parties agreed to terminate and/or withdraw from the agreement, the Defendant agreed that all upgrades and renovations would remain the landlord's assets (clause 12).

11. Lord Lasike neither sought nor obtained the bank's consent prior to entering into the rental agreement. In his brief of evidence,[1] Lord Lasike stated that he did not tell the bank about the rental agreement because he considered that it "did not prejudice the interests of the bank" and that the rental payments from the tenancies would help the bank. During his oral evidence, he said that this was his first mortgage. He did not obtain any legal advice before executing the documents. He also said he did not read them before he signed them.

12. The bank's letter of offer to Lord Lasike dated 30 September 2004 set out, among other things, the nature of the securities to be taken for the loan. An acknowledgement on the last page provided: "*The borrower confirms that they have received a copy of and understand and accept the terms of this Letter of Offer and General Conditions contained therein*", below which, Lord Lasike's signature appears. He also signed the Form of Application for a Mortgage. He also signed the Memorandum of Mortgage in respect of the land. Below his signature on the final page of that document is the signature of a witness. Below the witness' signature are the words: "*The signature of Lasike Tu'uhetoka was made in my presence and I verily believe that such signature is the proper handwriting of the person described as the mortgagor and I certify that the contents hereof were explained to him in the Tongan language and he appeared to fully understand the effect and meaning thereof.*" Clause 15 the chattel mortgage provided the following acknowledgement: "*The borrower hereby*

[1] [12]

acknowledges that before entering into this transaction he has read the entirety of this document and acknowledges that he understands all the terms and conditions and their legal effect."

13. In any event, the general rule is that where there is no suggested vitiating element (such as, for example, fraud, misrepresentation, or the other party setting out to conceal from the other the terms and conditions on the document or to encourage him not to read them) and no claim for equitable or statutory relief, a person who signs a document which is known by that person to contain contractual terms, and to affect legal relations, is bound by those terms, and it is immaterial that the person has not read the document: *Toll (FTCG) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165. Further, as Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ said [45]:

> *'It should not be overlooked that to sign a document known and intended to affect legal relations is an act which itself ordinarily conveys a representation to a reasonable reader of the document. The representation is that the person who signs either has read and approved the contents of the document or is willing to take the chance of being bound by those contents, as Latham CJ put it, whatever they might be. That representation is even stronger where the signature appears below a perfectly legible written request to read the document before signing it."*

14. The Defendant established her shop in the rented space. She gave evidence that she spent $68,320 in renovations and maintenance. The Defendant also said that at the time of entering into the rental agreement with Lord Lasike, he did not tell her that he had mortgaged the property to the bank.

15. In or about 2016, Lord Lasike defaulted on the loan. Litigation ensued which concluded in favour of the bank.[2] By then, Lord Lasike's outstanding indebtedness to the bank had grown to TOP$1,159,391. The bank foreclosed pursuant to its rights under the mortgages.

16. On 12 September 2016, Lord Lasike signed a notice to all tenants of the premises directing them, until further notice, to pay their rent to the bank. The Defendant paid her monthly rent (as per the Lasike rental agreement) to the bank. She gave

[2] Australia and New Zealand Banking Group Ltd v Lasike [2016] TOCA 7

evidence that because the only alteration to her rental agreement with Lord Lasike was that she was then required to pay the rent to the bank, she had the "impression" that her rental agreement with Lord Lasike "was alright".

17. Further, the Defendant gave evidence that in mid 2017, representatives from the bank, which included Mr Ralph Stephenson as the bank's lawyer, together with Lord Lasike and Clive Edwards who acted for Lord Lasike at the time, met with the Defendant at her shop. She said that after the others left, Mr Stephenson asked her whether she had a tenancy agreement to occupy the shop. She said that he did. He asked for a copy and mentioned that other tenants of the property did not have tenancy agreements. The Defendant subsequently provided Mr Stephenson with a copy of her rental agreement with Lord Lasike. She said that discussion gave her the "impression" that because she had a tenancy agreement, her position was "quite secure."

18. On or about 18 August 2017, the bank 'sold' the property under a mortgagee sale to the Plaintiff for $750,000. The resulting Deed of Agreement of Sublease of Land ("***the Deed***") provided, relevantly:

    (a) Recital D:

    > *"The Vendor has disclosed to the Purchaser that the Buildings and Improvements are subject to certain Tenancy arrangements as set out in Schedule 'A' to this Agreement, and that to the Vendor's knowledge and belief (but the Vendor does not warrant or undertake) each of the Tenancies (with the exception of the Tenancy to Leata Store, the terms of which tenancy are set out in the Tenancy Agreement attached as Schedule 'B' to this Agreement) are on a month to month basis only, and prior to execution of this Agreement the Purchaser has had an opportunity to conduct his own enquiries regarding the tenancies."*

    (b) Clause 5 "Possession of the Property":

    > *(a) Unless otherwise agreed in writing, upon receipt by the parties of notification of the granting of Cabinet approval to the sublease and the payment of the balance of the price by the purchaser in accordance with the terms of this agreement the Vendor shall grant vacant possession of the property to the purchaser, subject to the Tenancies as listed in the schedule to this Agreement.*
    >
    > *(b) the Purchaser acknowledges that he is purchasing the property upon an 'as is, where is' basis, and subject to the tenancies as listed in the Schedules*

"A" and "B" to this Agreement, and the purchaser further acknowledges that the Vendor gives no warranty or undertaking of any kind as to the accuracy or veracity of the terms of the tenancies as shown in the Schedules to this Agreement. The Vendor discloses to the Purchaser and the Purchaser hereby acknowledges that as at the date of this Agreement the tenant I-Coffee currently owes rent arrears in the sum of $15,060 for that period dating back to October 2016, as set out in the payment matrix attached as Schedule 'C' to this Agreement. All other tenants have paid the rent due in terms of the arrangements set out in Schedule 'A' to the date of this Agreement.

(c) The parties agree that risk in the Property shall pass with vacant possession.

19. Schedule A listed six tenants and their monthly rent. The last was the Defendant's business with a monthly rent of $,1000. Her tenancy agreement with Lord Lasike was annexed as Schedule B.

20. During his evidence, Mr Cocker said that the day before execution of the Deed, he was informed by Mr Stephenson lawyer that none of the tenancies between Lord Lasike and his various tenants would be binding on the Plaintiff. He said that is why he agreed to pay $750,000 for the sublease, and had it been otherwise, he would not have paid that price and "the sublease agreement would have been cancelled". Mr Stephenson was not called to give evidence at the trial. Neither party made any claim against the bank. Mr Cocker's evidence of the statements attributed to Mr Stephenson, which were tantamount to legal advice, was impermissible hearsay, in that it was not admissible as evidence of the truth of the content of the statements. However, no objection was taken by opposing counsel. As Mr Fonua sought to further explore the matter was Mr Cocker, I eventually intervened and directed that no further hearsay evidence be given. Mr Cocker was entitled to give evidence about what he did as a result of his discussions with the bank's representatives at the time of executing the Deed.

21. Self-evidently, Mr Cocker was sufficiently satisfied with the terms thereof to have executed them. However, he said that he too, as a director of the Plaintiff, did not take any legal advice in relation to the transaction because he had conducted similar transactions with the ANZ bank in the past and he regarded this one as "straightforward". At one stage, he said that he relied on Mr Stephenson even though he knew the lawyer was acting in the bank's interests. Later, however,

he said he did not rely on any advice given by Mr Stephenson but relied on his own understanding and reading of the agreement.

22. Mr Cocker was asked about his understanding of recital D of the Deed and the reference therein to the tenancy arrangements. He said he understood that the landlord under those tenancies was the bank. Mr Fonua put to Mr Cocker that by annexing the Defendant's rental agreement to the Deed, the bank was informing the Plaintiff that the rental agreement would be binding on the Plaintiff. Mr Cocker denied that and said that he understood he was not dealing with any agreement between Lord Lasike and the Defendant. As far as he was concerned, he signed an agreement with the bank which involved the transfer of any tenancies granted by the bank to the Plaintiff.

23. The Defendant gave evidence that a few weeks after her meeting with Mr Stephenson and the others referred to above, representatives from the bank met with the Defendant and told her that the bank had sold the land and buildings to Mr Cocker. They told her that if she wanted to move out, the bank would arrange her relocation; or, that she if she wanted to stay, she should discuss the matter with the new landlord and it would be up to him.

24. The Plaintiff set about entering into fresh tenancy agreements with the other tenants occupying the property. Mr Cocker presented the Defendant with a rental agreement, the key terms of which were an increased rent to $1,500 per month and a period of only one year. The Defendant refused that agreement. She claimed that she was entitled to remain on the property under her tenancy agreement with Lord Lasike.

25. On 5 December 2017, the bank wrote to the Defendant in the following terms:

> *"As you know, late last year the ANZ Bank took over possession of the Sandyboyz Hotel premises from its former owner, Lord Lasike, under a foreclosure of the Bank's mortgages over the property.*
>
> *Since that time rental payments for your premises were required to be made to the Bank.*
>
> *This letter serves to confirm that the Bank has now sold the property to cocker Enterprises Ltd (of which the principles are Mr Edgar Cocker, Chief Executive Officer of the Ministry of Labour and Commerce, and his wife Tuilolo Cocker) under the terms of its mortgages.*

> *From now on the rent payments for your premises must be paid to Cocker Enterprises Limited's account at Bank of South Pacific Tonga, account number 2000 784591, and all enquiries regarding the property should be directed to them.*
>
> *Please make arrangements to make your next rent payment to that account."*

26. Thereafter, until the end of January 2020, the Defendant paid the Plaintiff the same monthly rent she had been paying to the bank.

27. During her evidence at trial, the Defendant said that the basis for her belief that the bank had 'honoured' her rental agreement with Lord Lasike was the fact that the bank accepted payment of the rent payable under that agreement and that it did not expressly terminate that agreement. She admitted that no one from the bank actually ever said to her that the bank was ratifying or adopting her rental agreement with Lord Lasike.

28. Further, she said that she believed the Plaintiff had similarly adopted her agreement with Lord Lasike by reason of the fact that the Plaintiff receive her rent for a time, that Mr Cocker knew about her arrangement with Lord Lasike, and that Mr Cocker told the Defendant that the Plaintiff could move her shop whilst the existing building was demolished and the new building constructed after which she could be relocated into a new shop in the mall. However, when Mr Cocker presented a new tenancy agreement, the Defendant refused to accept it. Similarly, the Defendant admitted that at no time did Mr Cocker or anyone else from the Plaintiff expressly state to her that the Plaintiff was adopting or ratifying her rental agreement with Lord Lasike.

29. The parties' correspondence became increasingly antagonistic. One issue raised by the Defendant was the Plaintiff's failure to carry out repairs to the shop, including a leaking roof after a cyclone. Mr Cocker explained that the roof leaks were not fixed because, after the Defendant refused the new tenancy agreement proffered by the Plaintiff, he considered that there was no tenancy agreement between the Plaintiff and the Defendant. He also referred to clause 3 of the Lasike rental agreement which, by Mr Cocker's interpretation, required the Defendant to carry out those repairs.

30. On 7 October 2019, the Plaintiff served the Defendant with a notice to vacate by 15 January 2020. The Defendant refused to do so.

31. On 12 December 2019, the Plaintiff's counsel served a further demand on the Defendant to vacate the property by 31 January 2020. Following correspondence between Mrs Tupou and Mr Fonua, counsel for the Defendant, the Plaintiff agreed to extend the date by which the Defendant was required to vacate the premises to 15 February 2020, failing which, the Plaintiff threatened to change the locks.

32. The exchanges between counsel included an email from Mr Fonua to Mrs Tupou on 29 January 2020, in which Mr Fonua wrote:

> *"... I had the opportunity to check the authorities in relation to the equitable licenses (equitable possession) [in] which you referred to the case of 'Taumoepeau'. In fact, all the authorities that I have researched support my client's right of occupation of the shop. She entered into a tenancy agreement with the landholder and paid her rent. She has an equitable interest in the property which was accepted by the landholder. The mortgagee at the same time accepted the occupation of my client of the commercial shop. Your client purchased the lease with full knowledge of my client's occupation of such premises. In other words, your client has notice of my clients equitable licence...."*

33. On 15 February 2020, the Defendant having failed to vacate the premises, the Plaintiff changed the locks to the premises. Subsequently, the Defendant arranged to have those locks cut and placed security guards at the premises to prevent the Plaintiff from accessing the property.

The Proceeding

34. The Plaintiff commenced these proceedings on 26 February 2020.

35. The originating proceedings were accompanied by an urgent application for an injunction effectively evicting the Defendant. The Plaintiff complained that the purpose of its purchase of the property, to redevelop it, was being stalled by the Defendant's refusal to vacate the premises. All other tenants had apparently done so. At that time, the Plaintiff planned to commence demolition of the existing buildings in the first week of March 2020 and to lay new foundations in the last week of March 2020.

36. In opposition to the injunction application, Mr Fonua submitted, in summary, that:

    (a) the Defendant's tenancy agreement with Lord Lasike protected her by equitable estoppel against the bank and the Plaintiff;

    (b) by its conduct of collecting the rent from 12 September 2016, the bank had, by implication, accepted the tenancy agreement between the Defendant and Lord Lasike as binding on the bank;

    (c) in 2017, after the bank sold (subleased) the property to the Plaintiff, the Plaintiff, by its conduct in accepting payments of rent from the Defendant, became bound by the same tenancy agreement; and

    (d) the Plaintiff had actual notice of the Defendant's presence in the building.

37. Mrs Tupou submitted, in summary, that:

    (a) the tenancy agreement between Lord Lasike and the Defendant was frustrated when the bank took over as mortgagee in possession; and

    (b) there was no evidence that the bank or the Plaintiff ever made any promises to the Defendant by which she could claim any equitable estoppel against either of them.

38. On 21 April 2020, after discussions with counsel, it was agreed that given the injunction application was effectively seeking final relief, the proper characterisation of the application was one for summary judgment. The application proceeded on that basis and directions was made for the filing of a defence and further affidavits in opposition to the application.

39. On 5 May 2020, the Defendant filed her (first) Statement of Defence and Counterclaim. Relevantly, she alleged that:

    (a) Towards the end of 2017, the lawyer for the bank came to her shop and asked whether she had a tenancy agreement to occupy the shop. She advised him that she did have such an agreement. He requested a copy because he said that the Defendant's "right to occupy the shop was dependent on whether she had a tenancy agreement". The lawyer also

advised that other tenants did not have such tenancy agreements. The Defendant gave the lawyer a copy of her rental agreement with Lord Lasike.

(b) Several weeks later, the bank requested a meeting with the Defendant. At that meeting, the bank representatives advised the Defendant that it had sold the property to the Plaintiff and that her continued occupation of the shop would have to be discussed with Mr Cocker of the Plaintiff.

(c) A few weeks after, Mr Cocker attended the Defendant's shop and told her that he was her new landlord. He explained the Plaintiff's plans for the development of the site into a shopping mall. The Defendant alleged that Mr Cocker asked her if she would be prepared to move her belongings to another shop while the demolition of the building took place and that she could then move back into a space in the new shopping mall once it was completed. The Defendant agreed and was happy with the agreement reached. Mr Cocker never asked her whether she had a tenancy agreement.

(d) From 5 December 2017, the Defendant paid her rent directly to the Plaintiff.

(e) Notwithstanding, she relied on her agreement with Lord Lasike as the legal basis for her asserted entitlement to remain in occupation of the shop.

40. By way of counterclaim, the Defendant alleged that by virtue of an oral agreement she entered into with the Plaintiff as described above, the Plaintiff is bound to allow her to occupy the shop until 28 February 2029. She sought a declaration that her tenancy agreement with Lord Lasike is valid against the Plaintiff until that date. In the alternative, she claimed compensation of $159,751 being her claimed loss of profit over the next nine years.

41. On 8 May 2020, after considering further affidavit material filed and submissions presented, I indicated that, in the context of the summary judgment application, I did not consider that the Defendant had an arguable defence based on equitable estoppel. There was, however, a question as to whether, as a matter of law, the bank's foreclosure had the effect of terminating the rental agreement between the Defendant and Lord Lasike. Mrs Tupou submitted that it did; Mr Fonua

submitted that it did not. Neither counsel was then able to provide authority for their respective positions. Both agreed that given some of the unique aspects of Tongan land law (such as the bank deriving a 'mortgage lease' from the foreclosure for the balance of the mortgage term), a determination of the question may be of broader interest. Accordingly, directions were made for the parties to file further submissions on that question.

42. On 5 June 2020, the summary judgment application was finally heard and determined. After lengthy exchanges with both counsel, I was satisfied that the question of whether the exercise by a bank of its rights of possession pursuant to a mortgage has the effect of terminating any tenancy agreement between the mortgagor and the tenant is a novel point in the Kingdom and one yet to be authoritatively decided. It was therefore a triable issue. It also transpired that the case concept Mr Fonua endeavoured to convey during submissions had not been fully reflected in the Defence and Counterclaim nor had it been adequately supported by the Defendant's affidavit material on the application. The exchanges with counsel also exposed a need for other evidence about, for instance, the bank's position in relation to the rental agreement both when it was made and upon foreclosure, whether the bank had notice of the rental agreement and the basis upon which the bank permitted the Defendant to continue to occupy the premises between foreclosure and when the bank granted the sublease to the Plaintiff. A number of other issues and potential issues were also canvassed. In all the circumstances, I was ultimately unable to be satisfied that there was no fairly arguable point to be advanced on behalf of the Defendant nor that any order for summary judgment, at that stage, would necessarily produce a just result. That was not to say that any of the arguments advanced by Mr Fonua would or would not ultimately succeed at trial. The determination simply acknowledged that the arguments exposed a need for further investigation and consideration of peculiar legal issues, better informed by further information concerning the matters referred to above, before the rights of the parties should finally be determined. Accordingly, the application for summary judgement was dismissed and further directions were made for the conduct of the matter.

43. The Plaintiff then applied for an order for non-party discovery against the bank. On 13 July 2020, the application was granted. It was originally contemplated that

that discovery process would be completed by 12 August 2020. For reasons which are not presently relevant, save that Mrs Tupou suffered a period of ill health and it took time for the bank to retrieve the documents from storage, the Plaintiff did not discover the documents it obtained from the bank until 27 October 2020. That delay led to a number of commensurate extensions to the then extant directions timetable.

44. Also, on 27 October 2020, the Plaintiff filed a Further Amended Statement of Claim. The material allegations have been outlined in the background above. However, the Plaintiff added a claim for damages resulting from the Defendant's continuing alleged trespass and delays caused to the Plaintiff's plans for the redevelopment of the site, totalling $194,800.

45. On 3 November 2020, the Defendant filed a Third Amended Statement of Defence and Counterclaim. The material allegations from that pleading may be summarised as follows:

    (a) the bank had notice of the Defendant's occupation of the property;

    (b) by reason of the bank's failure to terminate the Lasike rental agreement, the bank's rights on foreclosure were subject to the rental agreement;

    (c) the Defendant's rental agreement with Lord Lasike did not prejudice the bank's interest in the security property but was in fact beneficial to the bank because:

        (i) her rent helped pay the mortgage repayments;

        (ii) the renovations she undertook increased the value of the property; and

        (iii) her occupation of the property also increased the bank's prospects of finding a sublessee;

    (d) notwithstanding the provisions of clause 18 of the land mortgage, the bank 'consented' to the rental agreement between Lord Lasike and the Defendant;

(e) at the time she negotiated and entered into the rental agreement with him, Lord Lasike never mentioned to the Defendant that he had given the bank a mortgage over the property;

(f) the bank adopted the tenancy agreement as valid and was therefore bound by it because:[3]

(i) on 12 September 2016, Lord Lasike directed the Defendant to pay her rent to an account established by the bank;

(ii) the bank accepted that rent from the Defendant;

(iii) the bank never expressly terminated the rental agreement; and

(iv) the actions of Lord Lasike and the bank amounted to an assignment of the rental agreement from the former to the latter.

(g) under that section of her pleading entitled "Doctrine of Notice", the Defendant alleged that:

(i) when she entered into the rental agreement with Lord Lasike, she acquired an equitable interest to occupy the property for 15 years until 28 February 2029;

(ii) at the time it purchased the sublease, the Plaintiff had either actual or constructive notice of the Defendant's occupation of the property;

(iii) alternatively, the Plaintiff failed to enquire as to the rights of the Defendant to occupy the property;

(iv) as a result, the Plaintiff is bound by the Defendant's equitable interest which would have been discovered had the Plaintiff acted as a prudent man of business, placed in similar circumstances, would have acted;

(v) pursuant to the doctrine of notice, the Plaintiff is estopped from evicting the Defendant;

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[3] Paragraph 30.

(h) (it is inferred that the pleading intends to allege that by reason of) the discussions between Mr Cocker and the Defendant when they met at the shop at the end of 2017, and the subsequent direction by the bank for the Defendant to pay her rent to the Plaintiff, which she did and which the Plaintiff accepted (to the end of January 2020 at least), "the Plaintiff represented to the Defendant that it adopted as valid the tenancy agreement between her and Lord Lasike";[4] and

(i) on that basis, the Defendant claims an order of estoppel against the Plaintiff; alternatively, a declaration that her tenancy agreement dated 1 March 2014 is valid as against the Plaintiff.

46. Somewhat incongruously with that pleaded relief, in the last paragraph of her brief of evidence, the Defendant stated:

> *"[31] I no longer wish to have a commercial relationship with the Plaintiff. I want to be compensated for my loss of business, and the fairest way is for the Plaintiff to reimburse me the funds I have spent on renovating the property which is $68,320."*

47. By Reply filed 17 November 2020, the Plaintiff alleged, relevantly, that:

(a) at no time, and in no form or manner, did it give any assurance or promise to the Defendant as to her occupation of the property nor did the Plaintiff agree to be bound by the rental agreement between the Defendant and Lord Lasike;

(b) the bank was not aware of the existence or terms of the rental agreement until well after it exercised its right of foreclosure under the mortgage, and therefore, the agreement was in breach of the bank's mortgage and is invalid;

(c) alternatively, if the rental agreement was valid, then the Plaintiff pleads "first in time, first in right" against the Defendant;

(d) the bank's rights as mortgagee were not subject to the rental agreement;

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[4] Paragraphs 37 to 39.

(e) as the Defendant was assisted by a lawyer when drawing up the rental agreement, she had constructive notice of the bank's rights as she would have had notice of the bank's mortgage had proper enquiries been made by or on her behalf;

(f) the bank did not adopt the Defendant's rental agreement nor was it bound by it as no consent was given in the first place;

(g) the bank was entitled to make arrangements with tenants at the property at the time of foreclosure and it was in its interests to "maintain the status quo" to service the mortgage;

(h) such arrangements were by way of month-to-month tenancies as was evidenced by the purpose of the sale and purchase agreement with the Plaintiff to demolish the building which included the room being rented by the Defendant; and

(i) the rental agreement did not "arm" the Defendant with any equitable interest as it was an agreement in breach of the bank's mortgage and therefore invalid.[5]

48. The relevant evidence presented at trial has been encapsulated in the Facts section above.

Submissions

49. Counsel provided helpful written opening and closing submissions and made oral submissions.

Plaintiff

50. Mrs Tupou submitted, in summary:

(a) The provisions of the mortgages prohibited Lord Lasike from entering into the rental agreement (which was an encumbrance on the mortgaged

[5] Referring to Halsbury's Laws of England, 3rd edition, Volume 27, page 255 at paragraph 464: "A lease granted by a mortgagor after a mortgage without statutory or express power is good by estoppel between the mortgagor and lessee, but void as between mortgagee and lessee... A lease which is void as between the mortgagee and lessee is void against the purchaser on the mortgagee exercising his power of sale...".

property) with the Defendant without the bank's written consent. There is no evidence that at the time the rental agreement was entered into, the bank was aware of, let alone that it gave its written consent to, the rental agreement. Lord Lasike confirmed that he did not tell the bank about the tenancy and it was not until the bank exercised its rights on foreclosure that it was given a copy of the rental agreement. The rental agreement was therefore invalid because it was entered into after the date of the bank's mortgages, without its written consent and therefore the agreement:

(i) was in breach of the mortgage; and

(ii) cannot bind the bank as mortgagee or the Plaintiff as purchaser.

(b) "A lease granted by a mortgagor after a mortgage without statutory or express power is good by estoppel between the mortgagor and lessee but is void as between mortgagee and lessee... and is void against the purchaser of the mortgagee exercising his power of sale."[6]

(c) "Where leasing is prohibited except with the mortgagee's consent, the onus of proving consent lies with the tenant... Recognition by the mortgagee of a tenant is a question of fact; receipt of money from a tenant is not conclusive, for it may have been received by the mortgagee as part of the principal, or as interest."[7]

(d) The Defendant failed to discharge that evidentiary burden of demonstrating that the bank consented to the rental agreement.

(e) The Defendant's allegations that:

(i) the bank consented to her rental agreement with Lord Lasike by accepting the rent from her; and

(ii) the Plaintiff represented to her that it had adopted the rental agreement,

should be rejected.

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[6] Halsbury's, 3rd edition, volume 27, paragraph 625.
[7] Halsbury's, 3rd edition, volume 27, paragraph 629.

(f) Lord Lasike was not the agent of the bank. The Defendant's submission in that regard conflicts with clauses 15 and 18 of the memorandum of mortgage.

(g) In relation to the Defendant's claims that by each accepting rent from her, the bank and the Plaintiff adopted her rental agreement with Lord Lasike, the Defendant conceded during evidence that neither the bank nor the Plaintiff ever expressly stated to her that they were adopting her rental agreement.

(h) "A mortgagee and tenant may agree to have as between themselves the relationship of landlord and tenant. Such an agreement destroys the old lease between the mortgagor and tenant and creates a tenancy between mortgagee and tenant. ... Payment of rent by a tenant to the mortgagee raises an implication of a new tenancy. The terms of the tenancy are ascertained by evidence and inference from the facts and are not necessarily those on which the tenant held under the mortgagor. Notice by the mortgagee to the lessee to pay rent to him and payment in accordance with such notice would be such evidence. A mortgagee cannot, however, by notice to a tenant compel him to be his tenant, and the continuance in possession after notice from the mortgagee is no evidence of an agreement he would become a tenant."[8]

(i) The bank's acceptance of rent destroyed the rental agreement between the Defendant and Lord Lasike and was evidence of a new agreement - a tenancy at will - between the bank and the Defendant.

(j) That the Plaintiff did not adopt or ratify the rental agreement was evidenced by the Plaintiff proffering a new agreement between the Plaintiff and the Defendant, which the Defendant rejected.

(k) The Plaintiff did not deny having notice of the Defendant's occupation of the shop prior to the purchase. The Deed of Sublease between the bank and the Plaintiff attached the Defendant's rental agreement. However, and

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[8] Halsbury's, 3rd edition, paragraph 630.

subject to objection raised by Mrs Tupou during closing submissions, recital D expressly stated that the bank did not "warrant or undertake" each of the tenancy agreements. That was consistent with Mr Cocker's evidence that he was advised (by Mr Stephenson) that the tenancies were not legally binding on the Plaintiff. Mr Cocker emphasised that had he understood that the Plaintiff would be legally bound by the tenancies, he would not have paid $750,000 for the property.

(l) The defence did not plead reliance on recital D of the sublease agreement. For that reason, and the fact that the Plaintiff had been taken by surprise by Mr Fonua's reference to it in cross examination of Mr Cocker, the court should ignore recital D.

(m) Alternatively, the reference in recital D to the Defendant's rental agreement with Lord Lasike was not evidence of ratification of that agreement by the bank. By expressing its position in terms that the bank "does not warrant or undertake" the tenancies, the bank was distancing itself from the rental agreement. That position is consistent with the Defendant's evidence that the bank representatives offered to fund her relocation which the bank would not have done had it ratified or adopted the rental agreement.

(n) "A mortgagee is not bound because on being informed of the proposed tenancy he does not object or fails to evict a tenant...".[9] "Knowledge by the mortgagee of the tenant's occupation of the property and the fact that the mortgagee had refrained from taking possession himself for many years did not preclude the mortgagee from treating the tenant as a trespasser when the mortgagee chose to do so": *Taylor v Ellis & anor* [1969] 1 All E.R. 549. Therefore, the Plaintiff, as purchaser under the bank's exercise of its rights as mortgagee in possession, is not bound by the Plaintiff's knowledge of the Defendant's occupation of the property.

(o) The Defendant's evidence of the bank offering to relocate her or advising her that if she wanted to stay, it would be up to the Plaintiff purchaser, is

[9] Halsbury's, 3rd edition, paragraph 625.

inconsistent with her allegation that the bank accepted her rental agreement with Lord Lasike.

(p) The Defendant's evidence of her dealings with Mr Cocker, including the Plaintiff's request to increase the rent and the proffering of a new tenancy agreement, albeit for only one year, which was refused by the Defendant, is also inconsistent with the Plaintiff adopting the Lasike rental agreement.

(q) Accordingly, there is no evidence to prove that the bank or the Plaintiff accepted the Defendant's rental agreement with Lord Lasike.

(r) The Plaintiff permitted the Defendant to remain in occupation of the shop as a tenant at will on a monthly basis which could be terminated on notice. Notice was given on 7 October 2019 for a period of three months. The Defendant refused to vacate. That date was extended ultimately to 15 February 2020. The Defendant still refused to vacate.

(s) Where mortgaged property is in the occupation of the mortgagor or of a tenant or where the tenancy is not binding on the mortgagee, a mortgagee is entitled to exercise his right to possession either by entering on the land if that can be done peaceably, or by bringing an action in a...court...for delivery of possession.[10]

51. In relation to the Plaintiff's damages claim, in his brief of evidence, Mr Cocker asserted the various heads and amounts of loss and damage claimed by the Plaintiff without discovery or attempted reliance on any documentary or independent, objective evidence to support those claims. During his viva voce evidence, Mr Cocker repeatedly referred to being able to provide such documents. However, by the time of closing submissions, Mrs Tupou, no doubt on instructions, abandoned all heads of loss and damage other than the claim for the equivalent of unpaid rent since February 2020 which amounted to a total of $11,000.

[10] Halsbury's, 3rd edition, paragraph 677.

Defendant

52. Mr Fonua submitted, in summary:

(a) The rental agreement did not violate clause 15 of the land mortgage. Clause 15 only forbad transactions which adversely affected the interests of the bank. Therefore, clause 15 did not forbid any transaction or agreement entered into by Lord Lasike which had the effect of improving the security property. The rental agreement improved the property, thereby increasing the value of the bank's security. Lord Lasike was acting in the best interests of the bank. Therefore, the rental agreement was valid and enforceable.

(b) Even if the rental agreement contravened clause 15, it was still valid between Lord Lasike and the Defendant which is essential to the issue of ratification.

(c) Neither clause 15 nor 18 of the memorandum of mortgage provided that any agreement in breach thereof was invalid.

(d) By reason of the lack of express termination of the rental agreement by the bank and any surrender of it by the Defendant, the rental agreement survived foreclosure. "*In Tonga context, termination of a tenancy agreement must be expressed in writing. Anything short of that is not sufficient.*"

(e) Lord Lasike was the agent of the bank for the purposes of the rental agreement. A relationship of principal and agent may arise in a number of circumstances, including, relevantly, subsequent ratification by a principal of a contract made on his or her behalf without authorisation from the principal.

(f) Ratification arises when an agent does an act which binds the principal. An essential element of ratification is a relationship between the agent and the

principal.[11] In order for the ratification principle to apply, the contract must be professionally made on behalf of the principal.

(g) In the present case:

(i) when he entered into the rental agreement, Lord Lasike was still making his mortgage repayments to the bank;

(ii) the Sandyboyz Motel closed down;

(iii) the bank's interest was in repayment of the loans secured by the mortgages;

(iv) Lord Luani acted appropriately in trying to find a tenant to occupy the property in order to generate income to pay the bank;

(v) Lord Luani and the bank had a relationship of mortgagor and mortgagee;

(vi) Lord Lasike was acting as an agent of the bank when he entered into the rental agreement;

(vii) the bank stepped into the shoes of Lord Lasike as recipient of the rent thereby ratifying the rental agreement; and

(viii) void contracts cannot be ratified. The rental agreement was not voided. It was valid up to the point where the bank ratified it by accepting the rent payments from the Defendant.

(h) Further, the Plaintiff is bound by the rental agreement by operation of the doctrine of notice. "The doctrine of notice...is central to the doctrines of bona fide purchasers and mortgagees for value without notice....": *Stowers v Stowers* [2010] WSSC 36. If a purchaser or mortgagee has notice that the vendor or mortgagor is not in possession of the property, he must make enquiries of the person in possession (here, the Defendant) and find out what his (her) rights are. If he does not choose to do that, then whatever

[11] Cheshire & Fifoot's Law of Contract ,8th New Zealand edition at p.482.

title he acquires as purchaser or mortgagee will be subject to the title or right of the tenant in possession: *Hunt v Luck* [1901] 1 Ch 45. Here:

(i) the bank was not in occupation of the property;

(ii) the Defendant had been in occupation since 2014;

(iii) even though the Plaintiff had actual notice of the Defendant's occupation and rental agreement, the Plaintiff failed to make the necessary enquiries as a prudent businessman would about the Defendant's rights under the rental agreement; and

(iv) consequently, the Plaintiff is bound by the Lasike rental agreement and is estopped from evicting the Defendant.

53. During oral closing submissions, Mr Fonua submitted that recital D of the Deed of Sublease was relevant to the Defendant's plea of ratification.[12] He conceded that recital D was not referred to in his client's pleading. He sought to explain that the documents discovered by the bank (which included the Deed) had not been inspected by him until two or three weeks prior to the trial. It was only once he saw those documents that he noticed recital D and its relevance to his client's case. Notwithstanding, he did not seek to amend the defence further prior to trial. He attributed that to "the way in which the case had progressed with timetabling non-compliances and the order in which discovery of the bank's documents was made". When asked why he did not apply to amend once he became aware of recital D, even if that resulted in the trial date having to be vacated, Mr Fonua said that he did not think to do so and that he simply wanted to complete the case. Mr Fonua then made an oral application to amend the defence.

54. Mrs Tupou opposed the late application to amend. She submitted that:

(a) the Defendant had ample opportunity to plead her case;

(b) it took some time for the bank to discover the documents because they were in storage;

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[12] Paragraph 30 of the Third Amended Defence and Counterclaim.

(c) once they were discovered, the Plaintiff's additional list of documents was filed on 27 October 2020;

(d) Mr Fonua did not request inspection of those documents until some 2 to 3 weeks prior to the trial;

(e) Mrs Tupou's ill health delayed provision of those documents by several days;

(f) if the amendment was permitted, she would wish to call evidence from the bank in relation to recital clause D;

(g) any likely adjournment of the trial would compound the continuing delay being suffered by the Plaintiff in its ability to redevelop the site, and during which, the Defendant had not been paying any rent; and

(h) in that event, the Plaintiff would claim costs thrown away by reason of the late amendment and adjournment.

55. Mr Fonua replied that it was important that all facts were before the court whether for or against the Defendant's interests. At my suggestion, he attempted to telephone his client to obtain instructions. She did not answer. Mr Fonua then suggested that the issue of whether recital B was relevant should be left to the court. I indicated that that was unsatisfactory in a case which have been conducted by way of pleadings, and which had been amended on multiple occasions.

56. Ultimately, Mr Fonua withdrew the application to amend the defence. However, he concluded by repeating his original submission that recital D was still relevant to consider as part of the ratification argument. Mrs Tupou repeated her earlier remonstrations that the point had not been pleaded, it had been raised late, she had been taken by surprise, her client had not had an opportunity to respond to it, and therefore, it should not be considered.

57. In relation to the Defendant's counterclaim for damages, Mr Fonua's written submissions maintained the claim even though his client's current pleading no longer contained one. He eventually conceded that if the Court found that the

Plaintiff was bound by the rental agreement, the Defendant would be entitled to remain in occupation of the shop and therefore no claim for damages would arise. There had not been any pleaded claim that, in that event, by its conduct leading to and instituting these proceedings for eviction, the Plaintiff had repudiated the agreement by insisting on the Defendant vacating the property, which if accepted by the Defendant, might attract a claim for damages. The closest the Defendant's case came to that was in the final paragraph of her brief of evidence where the Defendant stated that she no longer wanted any business relationship with the Plaintiff and that she wanted to be paid the $68,320 she had spent on the premises. But, as noted, that had not been pleaded.

58. Conversely, Mr Fonua agreed that if the court found that the Plaintiff was not bound by the rental agreement, then again no claim by the Defendant for damages could arise as against the Plaintiff.

Consideration

59. I turn now to consider the cascading series of issues which arise from the pleadings, evidence and submissions.

Nature of the rental agreement – what rights?

60. In my view, the starting point in the analysis of this case is to identify what, if any rights, proprietary or otherwise, were enjoyed by the Defendant pursuant to her rental agreement with Lord Lasike. The proper legal characterisation of the rental agreement is necessary in order to determine whether it confers any rights on the Defendant which, directly or indirectly, may protect her from the Plaintiff's rights of possession of the property pursuant to its sublease with the bank and consequential claim for eviction of the Defendant.

61. A rental or tenancy agreement is not expressly recognised by the *Land Act*. In *Yang v Manoa* [2016] TOCA 3, the Court of Appeal noted that:

> *"This whole question of agreements authorising the use and occupation of a building and so called 'tenancy agreements' more generally was addressed in the 2012 report of the Royal Land Commission which also contained draft legislation. It is a matter for Parliament whether it wishes to act on those recommendations."*

62. As yet, no such legislation has been passed.

63. Leases, subleases and permits are recognised in the Act. Permits are not defined. Relevantly, provisions such as ss 14, 15 and 93 prohibit an alien from holding or residing upon or to occupying any land without having first obtained from the Minister of Lands a permit so to do.

64. Section 124 requires, among other things, all permits to be in the form prescribed in Schedule IX. The operative provisions of the Form of Permit (Form No. 6) are quite basic. They provide that in return for rent being paid on a specified monthly basis, the grantee is permitted to (presumably) occupy specified land for a specified period and that upon the expiration of that period, possession is to be given up quietly and peaceably and the grantee may lawfully remove all improvements made.

65. Section 125 provides that a permit issued in Form No. 6, or substantially in that Form, of Schedule IX to the Act, shall not be capable of being transferred and shall cease to be valid on and after the death of the grantee.

66. Section 126 provides that, until registered in accordance with the Act, no lease, sub-lease, transfer or permit shall be effectual to pass or affect any interest in land.

67. There is no evidence in this case that the Defendant's rental agreement with Lord Lasike was ever registered.

68. Subsection149(b) [and (e)] confers jurisdiction on the Land Court to hear and determine disputes affecting any land or any interest in land, claims affecting any land or any interest in land, or questions of title affecting any land or any interest in land: *Mortimer v Fe'aomoeata* [2015] TOCA 5 at [11].

69. In *'Unuaki 'O Tonga Royal University of Technology v Kingdom of Tonga* [2013] TOLC 5, President Scott observed that tenancies are not among the various interests in land recognised by the Act.[13] The Land Court there declined to follow the decision in *Tonga Industries Traders Ltd v Shell Company Pacific Island*

[13] Citing *Maka v Kainga* [2006] To. L.R. 43.

Ltd [2005] TOLC3 to effect that the Land Court had jurisdiction in respect of claims for payments of rent due under a tenancy agreement. The Court opined that:

> *"The only interests in land which can legally be created are those permitted by the Act. All other purported interests are outside the purview of the legislation. ..."*

70. Here, the Plaintiff elected to commence this proceeding in the civil jurisdiction of the Supreme Court, not in the Land Court. The Defendant did not challenge that jurisdiction. That decision may be indicative, but not necessarily determinative, of the fact that the Plaintiff's claim and the Defendant's defence does not involve any question in respect of any interest in the property the subject of the rental agreement.

71. In *Mortimer v Fe'aomoeata*, ibid, at [13], the Court of Appeal declined to express a view on whether the tenancy agreement in that proceeding (which included, relevantly, a covenant of quiet enjoyment) created an interest in land.

72. As it appears that this is the first occasion on which the issues in this case have been considered in Tonga, it is necessary to resort to the English common law and rules of equity so far as the circumstances of the Kingdom and of its inhabitants permit.[14]

73. The English authorities use the term 'lease' generally in the context of landlord and tenancy relationships. In my view, the relevant principles considered hereunder are applicable, by analogy, to the lower ranked rights conferred by a tenancy agreement or contractual licence. Counsel did not submit otherwise.

74. At common law, a relationship of landlord and tenant arises when one person ('the landlord') grants to another ('the tenant') a right to the exclusive possession of land for a term less than that which the landlord has in the land. Originally, an interest for a term of years did not confer an estate in the land because, between lessor and lessee, there was only the relationship of contract. In the United Kingdom, the contractual liability suffered by the lessee was removed by

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[14] *Civil Law Act*, ss 3 and 4.

statute,[15] and the lessee thereafter enjoyed an estate in the land, although this interest still contains a contractual element which is present in the modern law of landlord and tenant.[16]

75. It is important, however, to distinguish between a mere contractual relationship (which creates rights *in personam*) and a lease (which may have contractual characteristics but which essentially creates an estate or interest in land and hence rights *in rem*): the significance of this distinction is that the doctrine of privity of contract provides that, as a general rule, a mere contract cannot confer rights or impose obligations on persons who are not parties to it.[17] A contractual right to occupy land that does not create any estate or interest in the property to which it relates is likely to constitute a licence. Save in exceptional circumstances, an agreement creates the relationship of landlord and tenant, and not that of licensor and licensee, where there is a grant of exclusive possession, the grant is for a fixed or periodic term and there is consideration of a premium or periodical payments.[18] The principles applied in determining whether a grant creates a tenancy or a licence are the same irrespective of whether the premises are for residential or business purposes.[19] Where the agreement is in writing, the question whether it creates a tenancy or a licence is determined by a consideration of the substantive terms of the agreement and not by the labels or terminology used.[20]

76. In the present case, the Lasike rental agreement contained a fixed term and a term for the payment of periodic rent. However, it did not expressly confer a grant of exclusive possession. By contrast, the rental agreement proffered by the Plaintiff provided, inter alia, that the tenant would have sole right of entry into the premises. Further, the Lasike agreement was referred to within its recitals as a

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[15] i.e. partially by 6 Edw 1 c 11 (Statute of Gloucester) (1278) (repealed) and later, more completely, by 21 Hen 8 c 15 (Recoveries) (1529) (repealed).

[16] Current on line edition of Halsbury's Laws of England, Landlord and Tenant (Volume 62 (2016), paras 1–560; Volume 63 (2016), paras 561–1166); Volume 64 (2016), paras 1167–1798).

[17] *Scruttons Ltd v Midland Silicones Ltd* [1962] 1 All ER 1, HL; and *Beswick v Beswick* [1967] 2 All ER 1197, HL. See also *Port Jackson Stevedoring Pty Ltd v Salmond & Spraggon (Australia) Pty Ltd, The New York Star* [1980] 3 All ER 257, PC; *Woodar Investment Development Ltd v Wimpey Construction UK Ltd* [1980] 1 All ER 571, HL.

[18] *Street v Mountford* [1985] 2 All ER 289 at 294, Honeywell.

[19] *London & Associated Investment Trust plc v Calow* [1986] 2 EGLR 80; but see *Dresden Estates Ltd v Collinson* [1987] 1 EGLR 45, CA.

[20] *Addiscombe Garden Estates Ltd v Crabbe* [1957] 3 All ER 563 at 570, CA, per Jenkins LJ.

'contract'. The subject matter of the agreement was simply that Lord Lasike 'rented out', and the Defendant was permitted to occupy and use, room No. 4 as a boutique store.

77. In light of the codification by the *Land Act* of land rights in Tonga, the domestic authorities, the common law principles referred to above, the terms of the rental agreement, and the fact that it was not registered (if it could be), I find that the rental agreement:

    (a) was a mere contractual licence;

    (b) conferring on the Defendant rights *in personam* to occupy and use room no. 4; and

    (c) did not confer on the Defendant any rights *in rem* i.e. any right or interest in the property.

Was the rental agreement in breach of the mortgages?

78. It is common ground that Lord Lasike entered into the rental agreement with the Defendant without the bank's knowledge or prior written consent.

79. Mr Fonua's written submissions focussed solely on clause 15 of the land mortgage. That focus was further confined to whether the rental agreement adversely affected the bank's interests by diminishing the value of the property or whether, as the Defendant contended, the rental agreement had the effect of improving the security property. The analysis was myopic. A more complete reading of clause 15 reveals that the prohibitions therein extended to any act by Lord Lasike which would or might result in the property becoming encumbered in any manner in priority to or in derogation from the security or where the bank's interests may in any way become postponed or diminished.

80. It is axiomatic that a lender's security interests will ordinarily include the ability, upon foreclosure, to liquidate the security assets as soon as practicable in order to recover or reduce the mortgagor's outstanding indebtedness. Where the security takes the form of real property, that ability will often depend on being able to transfer the property with vacant possession. Here, the rental agreement

was, as Mrs Tupou submitted, arguably a form of encumbrance on the property and, if enforceable against the bank, may have postponed or diminished the bank's interests in being able to sublease from its resulting leasehold interest to a 'purchaser' such as the Plaintiff herein, with vacant possession. Lord Lasike therefore contravened clause 15.

81. In oral submissions, Mr Fonua fleetingly referred to clause 18 thereof but did not descend into any analysis of its terms. The relevant terms of that clause prohibited Lord Lasike from granting any "rights of whatsoever nature over the mortgaged property or any part thereof" without the bank's prior written consent. As discussed immediately above, the rental agreement conferred on the Defendant rights of occupation and use of the shop premises within part of the mortgaged property. Lord Lasike therefore contravened clause 18.

82. As the chattel mortgage applied only to property of Lord Lasike which could be completely transferred by delivery, its provisions are of limited relevance to this issue.

83. Accordingly, I find that Lord Lasike entered into the rental agreement with the Defendant in contravention of clauses 15 and 18 of the land mortgage. Conversely, he did so without express power. The rental agreement was therefore ultra vires the land mortgage.

Was the rental agreement void as against the bank and the Plaintiff?

84. As Mrs Tupou submitted, a lease granted by a mortgagor after a mortgage without statutory or express power is good by estoppel between the mortgagor and lessee but void as between mortgagee and lessee. A lease which is void as between the mortgagee and lessee is void against a purchaser on the mortgagee exercising his power of sale without any express assurance of the mortgagee's rights against the mortgagor: *Rust v Goodale* [1956] 3 All E.R. 373 at 380.[21]

85. In his written submissions, Mr Fonua did not seek to contradict those principles. In fact, he did not engage with them and instead took a different approach.

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[21] Halsburys, 4th ed, vol 27, paragraph 34.

86. For the reasons given in the preceding section, and by application of the principles immediately above, I accept Mr Fonua's submission that the rental agreement remained valid as between Lord Lasike and the Defendant but I find that the rental agreement was void as against the bank and, by extension, as against the Plaintiff.

87. During oral submissions, in a brief but valiant attempt to belatedly address the principles above, Mr Fonua sought to draw a distinction between the rental agreement being void and voidable as against the bank. The principle stated is clear. The rental agreement was void, not voidable. Support for that proposition may be found in the decision of *Tajon Pty Ltd v Arvanitis & Anor* [2017] VSC 130 at [61][22] wherein it was held that "the rights of the mortgagee as against the tenant arise at the time of the creation of the mortgage and a tenant taking possession subsequently does so subject to the mortgagee's rights."

88. Further, Mr Fonua's submission[23] that in the absence of express termination of the rental agreement by the bank, the rental agreement survived foreclosure, cannot be accepted. He was unable to provide any authority for the proposition that "*in Tonga context termination of tenancy agreement must be expressed in writing. Anything short of that is not sufficient*". He candidly acknowledged that he was the author of that assertion.

89. An agreement rendered void by operation of law does not somehow become valid because one party to it did not expressly terminate the agreement. As a matter of logic, termination of a void agreement is a misnomer, for if the agreement is void ab initio, there is, as a matter of law, nothing to terminate.

90. Therefore, as the rental agreement was void as against the bank from its inception, unless the bank either expressly or by conduct waived the benefit of its legal position at law, the bank was not bound by the rental agreement when it foreclosed and became a mortgagee in possession. There was no evidence that the bank waived the benefit of its legal position at law.

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[22] See also Independent Order of Oddfellows Victoria Friendly Society v Telford (1991) V Conv R 54-419; Commonwealth Bank of Australia v Baranyay (1993) 1 VR 589; and Burke v Dawes (1938) 59 CLR 1 at 18.
[23] At 6.3 of his written submissions.

91. At that point then, there being no legal relationship between the bank and the Defendant, the focus turned to the conduct of those parties thereafter by which the Defendant remained in occupation of her shop. That different 'approach' paved the way for Mr Fonua's alternative 'ratification' argument.

Did the bank 'ratify' the rental agreement?

92. The Defendant's ratification argument depends for its success on establishing that when he entered into the rental agreement with the Defendant, Lord Lasike was acting as the agent of the bank. Mr Fonua's submission that the relationship of principal and agent arose by 'subsequent ratification by the principal (bank) of the contract made *on his behalf* without any authorisation from the principal', falls at the first hurdle or 'condition' as it was framed in the submissions.

93. There was no evidence that the rental agreement was made on behalf of the bank. On the contrary, as found above, the rental agreement was ultra vires the land mortgage which embodied the bank's rights as mortgagee. The rental agreement was made for the benefit of Lord Lasike. From it, he was able to derive rental income from the Defendant's use of the shop. What he did with that income was a matter for him. There is no evidence that *prior* to foreclosure, the Defendant was directed by Lord Lasike to pay her rent directly to the bank to assist with his repayment obligations. Doubtless, the Defendant paid her rent to Lord Lasike. Whether he applied that rental income towards his repayments to the bank was also a matter for Lord Lasike. He may have had other income which he applied to that purpose. Whether he found tenants for the property or not was of no interest to the bank. It's only interest was in having the loan repaid according to its terms. Ultimately, Lord Lasike failed to meet his repayment obligations and defaulted on the loans. Beyond that, the only relationship between Lord Lasike and the bank was that of lender and borrower and, by virtue of the security arrangements underpinning that lending, mortgagee and mortgagor.

94. Contrary to Mr Fonua submissions, there is no evidence that the bank "stepped into the shoes of Lord Lasike as the recipient of the rent payments". As noted above, pursuant to clause 13(b) of the land mortgage, upon Lord Lasike's default,

the bank was entitled to sublease the mortgaged property and collect the rents and profits thereof and also create new tenancies of the mortgaged property or any part thereof. Further, clause 14 (erroneously printed as 13 in the memorandum of mortgage), provided that for the purpose of giving full effect to the mortgage, Lord Lasike irrevocably appointed the bank as his attorney to, among other things, recover and receive all rents owing to the mortgagor in respect of the mortgaged property under any present or future tenancy. Lord Lasike's written direction to the Defendant to pay her rent to the bank was nothing more than giving effect to that contractual obligation under the mortgage. If the submission was intended to suggest some form of subrogation, it was misconceived. The bank's right to receive the rents was a product of contract, not a creature of equity: *Australasian Conference Association Limited v Mainline Constructions Pty Ltd* (1978) 141 CLR 335 at 348.[24] The allegation in paragraph 30(d) of the Third Amended Defence and Counterclaim, that by reason of Lord Lasike's direction to the Defendant to pay the monthly rent to the bank, the bank's acceptance of that rent and the bank not expressly terminating the rental agreement, the rental agreement was assigned from the Lord Lasike to the bank, was, with respect, similarly misconceived. While it could be said that the relevant provisions of the mortgage amounted to an equitable assignment by Lord Lasike of his chose in action, in terms of his entitlement to the rent payable under the rental agreement, to the bank, there is nothing within those provisions or any other within the memorandum of mortgage to support the proposition that the bank's entitlement to receive the rents also amounted to an assignment of the obligations of Lord Lasike to the Defendant under the rental agreement. Further, such an outcome is directly inconsistent with the provisions of the mortgage discussed above, particularly clause 18, whereby the rental agreement was void as against the bank.

95. The second condition referred to by Mr Fonua in his written submissions[25] - that there must be a competent principal at the time of contract - does not arise in light of my conclusion on the first condition.

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[24] Referred to in "Equity, Doctrines & Remedies" by Meagher, Gummow & Lehane, 4th edition, [9-010].
[25] [7.4.2]

96. The third condition referred to by Mr Fonua - that void contracts cannot be ratified - completes the defeat of the argument. The rental agreement was void as against the bank. It therefore could not be ratified by the bank.

97. Before leaving this topic, I will address the issue sought to be raised by Mr Fonua in closing submissions in relation to recital D of the Deed.

98. As noted above, during the trial, Mr Fonua cross-examined Mr Cocker about his understanding of recital D. The upshot of that evidence was that Mr Cocker said that at the time of entering into the transaction for the sublease, the Plaintiff believed that it was not bound by any tenancies with Lord Lasike. In his oral closing submissions, Mr Fonua raised, for the first time, that recital D was evidence that the bank had ratified or adopted the rental agreement with the Defendant and that, in turn, the Plaintiff was bound by it. As also noted above, Mrs Tupou objected to the submission and urged the court to disregard it.

99. Reliance upon recital D, for the purpose sought to be deployed by Mr Fonua, or at all, was not pleaded by the Defendant. As discussed above, at paragraph 30 of her current pleading, the Defendant alleged that the bank adopted the tenancy agreement as valid, and was therefore bound by it, by reference to four specific bases or particulars, namely, Lord Lasike's direction to the Defendant to pay her monthly rent to the bank, the bank's acceptance of the rent, the bank never expressly terminating the rental agreement and the assertion that those matters amounted to an assignment of the rental agreement from Lord Lasike to the bank. Mr Fonua's submission was effectively an informal attempt to add recital D to those bases. When confronted with that reality, Mr Fonua raised, but ultimately withdrew, an oral application to amend his client's pleading. Despite that, he urged the court to still have regard to recital D as being relevant evidence on this issue.

100. Recently, in *Xi Yun Qian v Kingdom of Tonga* [2020] TOSC 16, I referred to the following remarks of Dalgety J (as his Lordship then was) in *Seiler v Kingdom of Tonga* [1992] Tonga LR 58 in relation to the purpose of pleadings:

> *"The purpose of pleadings is to ascertain and demonstrate with precision the matters on which the parties differ and those on which they agree, thus*

> *enabling parties, their Counsel, and the Court to ascertain with ease the issues upon which a judicial decision is required. Furthermore, pleadings must 'give fair notice of the case which has to be met so that the opposing party may direct his evidence to the issues disclosed by them': Esso Petroleum Company v Southport Corporation [1956] AC 218 per Lord Norman at page 238 (House of Lords).*
>
> *... Pleadings are designed to prevent one party taking the other by surprise by introducing issues not focused in the pleadings. Lord Guthrie in Morrison's Associated Companies Limited v James Rome and Sons Limited, [1964] SC 160 at page 190 (Scottish Appeal Case) stated that -*
>
> > *'It is a fundamental rule of our pleading that a party is not entitled to establish a case against his opponent of which the other has not received fair notice upon record (i.e. in the pleadings). It follows that a (Defendant) cannot be held liable upon a ground which is not included in the averments made against him by the (Plaintiff)'.*
>
> *The converse is equally true - 'These are not mere technical rules, since their disregard would tend to create injustice ....'"*

101. Further, in this regard, pleadings have been described as the 'backbone of litigation'. Reliance on them should not be treated as mere pedantry or formalism. It is a fundamental characteristic of the adversarial system that trials are conducted on the basis of the issues the parties agitate in the pleadings and, as a general rule, relief is confined to that claimed or available on those pleadings: *Ingot Capital Investments Pty Ltd v Macquarie Equity Capital Markets Ltd* (2008) 73 NSWLR 653, [424]–[428]. That is an emanation of the underlying principles of natural justice accorded to all litigants before the Courts. "A trial is not at large but is of the issues joined by the parties": *Water Board v Moustakas* (1988) 180 CLR 491.

102. It is clearly the duty of counsel to plead the case correctly and failure to do so may result in the claim being refused: *Mangisi v Filipe* [2001] TOSC 29. However, while observance of the rules of pleading is intended to facilitate the fair determination of the real issues in dispute between the parties, it is not an end in itself. Of particular relevance to the present case is the decision in *Banque Commerciale SA v Akhil Holdings Ltd* (1990) 169 CLR 279, where the Australian High Court observed:

"The function of pleadings is to state with sufficient clarity the case that must be met: Gould and Birbeck and Bacon v Mount Oxide Mines Ltd (In liq) ((1916) 22 CLR 490, at p 517), per Isaacs and Rich JJ. In this way, pleadings serve to ensure the basic requirement of procedural fairness that a party should have the opportunity of meeting the case against him or her and, incidentally, to define the issues for decision. The rule that, in general, relief is confined to that available on the pleadings secures a party's right to this basic requirement of procedural fairness. Accordingly, the circumstances in which a case may be decided on a basis different from that disclosed by the pleadings are limited to those in which the parties have deliberately chosen some different basis for the determination of their respective rights and liabilities. See, eg, Browne v Dunn ((1893) 6 R, at p 76); Mount Oxide Mines ((1916) 22 CLR, at pp 517 – 518).

Ordinarily, the question whether the parties have chosen some issue different from that disclosed in the pleadings as the basis for the determination of their respective rights and liabilities is to be answered by inference from the way in which the trial was conducted. It may be that, in a clear case, mere acquiescence by one party in a course adopted by the other will be sufficient to ground such an inference ...

That is not to say that a judgment needs to be precisely within the scope of the "particulars" alleged in a pleading so long as judgment is given on the causes of action pleaded. A fair amount of tolerance can be justified ***so long as the circumstances are such that all parties to the action have had fair notice of what will be determined.*** *Experience shows that* ***it is not infrequently the case that the evidence adduced at trial diverges from the pleaded particulars to some degree. That is not unexpected given that pleadings are prepared well in advance of all of the relevant information becoming known.*** *In this respect, in Water Board v Moustakas (1988) 180 CLR 491, 497, the majority of the High Court (Mason CJ, Wilson, Brennan and Dawson JJ) indicated that particulars are less confining than material facts. Their Honours said:*

> *'In deciding whether or not a point was raised at trial no narrow or technical view should be taken. Ordinarily the pleadings will be of assistance for it is one of their functions to define the issues so that each party knows the case which he is to meet. In cases where the breach of a duty of care is alleged, the particulars should mark out the area of dispute.* ***The particulars may not be decisive if the evidence has been allowed to travel beyond them, although where this happens and fresh issues are raised, the particulars should be amended to reflect the actual conduct of the proceedings. Nevertheless, failure to amend will not necessarily preclude a verdict upon the facts as they have emerged:*** *see Dare v Pulham (1982) 148 CLR 658; 44 ALR 117. In Leotta v Public Transport Commission (NSW) (1976) 50 ALJR 666 at 668; 9 ALR 437 at 446, a case having been submitted to the jury which was factually different from that alleged in the pleadings and particulars, Stephen, Mason and Jacobs JJ observed that the pleadings should have been amended in order to make the facts alleged and the particulars of negligence precisely conform to the evidence. The failure to apply for the amendment in that case was held not to be fatal. But in Maloney v Commissioner for Railways (NSW) (1978)*

> *52 ALJR 292; 18 ALR 147 Jacobs J, with whom the other members of the court agreed, pointed out (ALJR at 294; ALR at 151–2) that the conclusion in Leotta v Public Transport Commission (NSW) (1976) 9 ALR 437 was reached only upon the presupposition that* ***the new issue or new way of particularising the existing issue had emerged at the trial and had been litigated.***'
>
> [emphasis added]

103. To similar effect, the Court of Appeal in *Prasad v Morris Hedstrom (Tonga) Ltd* (No. 2) [1993] Tonga LR 69 cautioned that, if despite inadequate pleadings, an issue is clearly raised and is understood by the opposing party to be raised and then dealt with, it should not be excluded because of technicality of pleadings. In that case, the record made it apparent that the point was accepted as an issue by both parties.

104. That is not the case here. I accept Mrs Tupou's complaints that it was not apparent from Mr Fonua's cross examination of Mr Cocker about his understanding of recital D, that Mr Fonua would subsequently seek to deploy it as a basis for the Defendant's argument that the bank ratified the rental agreement. Even if Mr Fonua did not have the bank's discovered documents including the Deed prior to filing the Third Further Amended Defence and Counterclaim on or about 3 November 2020, he certainly had them prior to trial and he was certainly sufficiently familiar with them prior to trial to appreciate the point he sought to make even though no further application to amend prior to trial was made, the point was not opened and it was reserved only to closing submissions. In those circumstances, I do not consider that the Plaintiff had fair notice that this was going to be an issue to be determined in the case. Although the issue emerged (albeit opaquely) at trial, it was not apparent until closing submissions precisely how recital D was going to be relied upon by the Defendant. The Plaintiff had no opportunity to appreciate or attempt to meet the point during the evidence. As Mrs Tupou remonstrated, had the issue been pleaded, her client would likely have called evidence from representatives of the bank in relation to recital D and the bank's position in relation to it. In that sense, I am not satisfied that recital D has been litigated.

105. There is also a question of admissibility. One of the fundamental requirements for admissibility of any evidence is relevance. Relevance is determined by the

pleadings, in terms of identifying what facts and legal consequences are in issue. As recital D was not pleaded, and the application to amend to include it was withdrawn, strictly speaking, it was irrelevant and therefore inadmissible. That is all the more so when it related to alleged conduct on the part of the bank which was not a party to the proceedings and neither party called evidence from a representative of the bank.

106. For those reasons, I consider it unfair to permit the Defendant to rely upon recital D as an unpleaded additional basis for her claim that the bank ratified her rental agreement.

107. However, if I am wrong about that, then, for the reasons which follow, I am not satisfied that recital D, properly construed, is sufficient evidence to support a finding that the bank ratified the rental agreement:

(a) Recital D was not an operative provision of the Deed. However, clause 1 of the operative provisions contained the parties' acknowledgement and confirmation of the content of the recitals.

(b) The evident purpose of recital D was for the bank to record that it had disclosed or given notice to the Plaintiff that the property was subject to certain "tenancy arrangements".

(c) Recital D did not identify whether, in those tenancy arrangements, the landlord was the bank or Lord Lasike.

(d) The tenancy arrangements were as set out in Schedule A to the Deed. That Schedule merely listed the names of the six tenants (which included the Defendant) and their monthly rent. The entry for the Defendant also referred to Schedule B, which was a copy of her rental agreement with Lord Lasike. Nothing within Schedule A could be construed as a statement by the bank that it had ratified or adopted any of the tenancies between Lord Lasike and of the six tenants, including the Defendant.

(e) The words *"... and that to the Vendor's knowledge and belief (but the Vendor does not warrant or undertake) each of the Tenancies (with the exception of the Tenancy to Leata Store, the terms of which tenancy are set*

out in the Tenancy Agreement attached as Schedule 'B' to this Agreement) are on a month-to-month basis only..." are, in my opinion, not capable of being construed with sufficient certainty to safely conclude, to the civil standard, that the bank ratified or adopted the Defendant's rental agreement. The obvious purpose of the statement was to inform the Plaintiff about the apparent terms or periods of each of the tenancies. The attachment of the Defendant's rental agreement to the Deed conveyed nothing more than the terms of that agreement as between Lord Lasike and the Defendant. In my view, the words under consideration could not be construed as the bank conveying to the Plaintiff that it had ratified that rental agreement and that therefore the Plaintiff would also be bound by it. Had that been the bank's intention, then instead of the words in the second line of recital D - "are subject to certain Tenancy arrangements" - it would have been a simple matter for the bank to have stated, in the case of the Defendant, that (notwithstanding the rental agreement was void as against it) the bank had adopted all the terms of the rental agreement and the property was therefore subject to those terms. Had that been the wording, it would have clearly conveyed to the Plaintiff that it was purchasing a property in which the bank had agreed to continue the Defendant's rental agreement in accordance with all its terms, including that it then had another 12 years to run.

(f) Further, if the bank had ratified the Lasike rental agreement, one would have expected an instrument of assignment or similar as between the bank, Lord Lasike and the Defendant, or even a letter from the bank to that effect, formally confirming the bank's position as mortgagee in possession, and for that document to be annexed to the Deed. There was no evidence of any such document.

(g) That the bank did not ratify the rental agreement is reinforced by the words in parentheses in recital D that it "does not warrant or undertake" which clearly indicated that it was not making any representation to the Plaintiff as to any of the terms of the "tenancy arrangement" including periods or durations. Again, if the bank did consider itself bound by the terms of the Defendant's rental agreement with Lord Lasike, it would have been a simple

matter for it to have specified, without any reservation of the kind seen in the words in parentheses, that it had entered into an agreement with the Defendant by adoption of the Lasike terms including the balance of the term of the rental agreement left to run.

(h) To the extent that the language in recital D is ambiguous in relation to this issue, it may have only been confidently resolved by evidence from a relevant representative of the bank. As noted, neither party saw fit to call evidence from the bank. From the Plaintiff's perspective, that decision is understandable for the only pleaded allegations which concerned the bank directly were that it collected rent from the Defendant for a time and that it did not expressly terminate the rental agreement. Those allegations, as matters of fact, were uncontroversial, and the legal consequences could be dealt with as questions of law. As the Defendant raised the allegation that recital D is evidence of the bank's ratification of her rental agreement, it was, as Mrs Tupou submitted, for the Defendant to prove the allegation. An unexplained failure by a party to give evidence, to call witnesses, to tender documents, or other evidence may (not must) in appropriate circumstances lead to an inference that the uncalled evidence or missing material would not have assisted that party's case. The rule can operate against parties not bearing the burden of proof and parties which do bear it as well. The appropriate circumstances exist where it was within the power of the party to tender the evidence which was not tendered. The significance to be attributed to the fact that a witness did not give evidence will in the end depend upon whether, in the circumstances, it is to be inferred that the reason why the witness was not called was because the party expected to call him feared to do so. The explanation for the failure to call the witness "must be established by evidence and is not merely to be presumed from the passage of time": Cross on Evidence (11th Edition) at [1215], p.38; *Jones v Dunkel* (1959) 101 CLR 298; *West v GIO* (NSW) (1981) 148 CLR 62 at 70. In the absence of any explanation by the Defendant for the failure to call any witness from the bank to give evidence on this issue, and were it necessary to do so, I would have been prepared to draw an adverse inference against the Defendant.

(i) The Deed is a commercial contract. The principles for construction of commercial contracts were discussed recently in *Public Service Commission v Public Service Tribunal* [2020] TOSC 63. As the content of recital D was confirmed by the parties to the Deed by clause 1 thereof, the construction of the words used in the recital requires consideration of all the language used by the parties, the surrounding circumstances known to them and the commercial purpose or objects to be secured by the contract: *Electricity Generation Corporation v Woodside Energy Ltd* (2014) 251 CLR 640, 656-7 [35]. In the case of ambiguity in the terms of a contract, 'where the words are susceptible of more than one meaning, even if one of them be an unusual meaning, the Court is entitled to look, indeed it must look, at the surrounding circumstances in order to ascertain from them, if it can, what the true intention was': *Weibenga v Uta'atu* [2004] Tonga LR 285.[26] The Court will have regard to the reasonableness of the result and adopt the construction producing the most reasonable and common sense result. The more unreasonable the result, the more unlikely it is that the parties intended it, and if they did intend it, the more necessary it is that they make that intention abundantly clear: *Airwork (NZ) Ltd v Vertical Flight Management Ltd* [1999] 1 NZLR 641 at p 651.[27]

(j) Subclause 5(a) of the Deed provided that the bank granted the Plaintiff vacant possession of the property "subject to the Tenancies as listed in the schedule" to the agreement. Although the reference to "the schedule" did not specify which of schedules A, B or C was intended, the Tenancies were only listed in Schedule A. As noted above, the only information provided in Schedule A about the tenancies were the names of each of six tenants and their monthly rent, save for the entry for the Defendant, which included reference to Schedule B.

(k) Subclause 5(b) referred to the Plaintiff purchasing the property subject to the tenancies listed in Schedules A and B. However, again, the clause went on to provide that the bank gave no warranty or undertaking of any kind as

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[26] Referring to *Quainoo v New Zealend Breweries Limited* [1991] 1 NZLR 161 at p 165.
[27] Citing L Schuler AG v Wickman Machine Tool Sales Ltd [1974] AC 235 at p 251.

to the accuracy or veracity of the terms of the tenancies as shown in the Schedules. Again, in my view, that is evidence of the bank distancing itself from any connection with, or liability in respect of, those tenancy arrangements. It was also an extremely curious statement for the bank to make if it had in fact ratified the Defendant's rental agreement according to the terms thereof as reproduced in Schedule B. The balance of that subclause is telling insofar as it only referred to rents having been paid (by all the tenants save for 'I-Coffee') as "due in terms of the arrangements set out in Schedule A". That suggests that the bank's only interest or involvement with the tenancies was the collection of monthly rents to which it was entitled pursuant to the terms of the land mortgage.

(l) I also take into account the surrounding circumstances including the bank's offer to relocate the Defendant if she wished to move, and that if she didn't, she would have to discuss her future occupation of the shop with the Plaintiff. The bank's conduct in that regard was not consistent with it ratifying, and thereby agreeing to be bound by, the terms of the rental agreement. None of the terms of the rental agreement provided for such a relocation. Clause 10 provided that should either party withdraw from the agreement prior to its expiration "the withdrawing party will be held liable for breaching the contract and shall pay the remaining term of the contract". The drafting was defective. Notwithstanding the reference to 'either party', it could only apply to withdrawal or early termination by the Defendant, in which case she would be liable for payment of the rent for the balance of the term of the agreement subject to the landlord's obligation to mitigate its loss. On the other hand, if Lord Lasike withdrew or terminated early, what would there be of 'the remaining term of the contract' for him to have to pay?

(m) For those reasons, I consider that the proper and commercially sensible construction of the references in the Deed to the Plaintiff purchasing the property "subject to the tenancies" was that the Plaintiff was on notice that there were six tenants continuing to rent shops within the property in return for specified monthly rent payments. I infer that the bank annexed the Defendant's rental agreement to the Deed simply because, according to the evidence, she was able to provide Mr Stephenson with a copy of her rental

agreement whereas it appears that the other tenants did not have such agreements in place with Lord Lasike notwithstanding his evidence that they did. Beyond that, I am not satisfied that the reference to and inclusion of the Defendant's rental agreement amounted to notice to the Plaintiff by the bank that it had ratified the Defendant's rental agreement and that the Plaintiff was therefore purchasing the property subject to all the terms of the rental agreement including the balance of the term or period left to run. To find otherwise would not produce a commercially sensible result. The Plaintiff made its intentions for the property known to the bank. The price agreed to be paid by the Plaintiff was consistent with it obtaining vacant possession of the property in order to effect its purpose of redevelopment forthwith. The provisions of the Deed considered had the effect of informing the Plaintiff that it could continue with those tenancies if it so wished. That is also consistent with the Defendant's evidence of what the bank representatives told her when they advised her that the bank had 'sold' the property to the Plaintiff.

Relationship between the bank and the Defendant post foreclosure

108. The last finding then begs the question as to the legal nature of the tenancy arrangements as between the bank and the Defendant, post foreclosure, and to which the Plaintiff agreed the sublease was subject.

109. On going into possession, a mortgagee is entitled to take the rents and profits by virtue of the legal or equitable ownership which the mortgage confers upon him: *Cockburn v Edwards* (1881) 18 ChD 449 at 457, CA. Where after the mortgage a tenancy is created which is not binding on the mortgagee, he is not entitled to demand payment of the rents as such, but after notice from him to the tenant to pay the rent to him the tenant must not pay rent to the mortgagor, and the tenant is justified in paying the rent to the mortgagee, as otherwise, on recovering possession, the mortgagee would be entitled to recover the rents as mesne profits: *Underhay v Read* (1887) 20 QBD 209, CA.

110. A tenancy agreement may be established against the mortgagee by his conduct: *Lysaght v Callinan* (1831) Hayes 141. The mortgagee and tenant may agree to

have as between themselves the relationship of landlord and tenant: *Brown v Storey* (1840) 1 Man & G 117 at 126 per Tindal CJ. Such an agreement destroys the old lease between the mortgagor and tenant and creates a tenancy between mortgagee and tenant: *Corbett v Plowden* (1884) 25 ChD 678 at 681–682, CA.

111. Payment of rent by a tenant to the mortgagee is evidence of a new tenancy: *Mann v Nijar* (1998) 32 HLR 223, CA. Notice by the mortgagee to the lessee to pay rent to him and payment in accordance with the notice would also be such evidence: *Chatsworth Properties Ltd v Effiom* [1971] 1 All ER 604, CA. However, as Mrs Tupou submitted, receipt of money from a tenant is not conclusive for it may have been received by the mortgagee as part of the principal, or as interest: Halsbury's, 3rd ed., Vol. 27, par. 629.

112. Acceptance of rent from the tenant by the mortgagee does not 'set up' or ratify the tenant's agreement with the mortgagor. At most, it creates only a periodic tenancy between the mortgagee and the tenant and not on the terms of the 'under lease' (which, here, was the rental agreement): *Keith v R. Gancia & Co Ltd* [1904] 1 Ch. 774.[28] The terms of the tenancy are ascertained by evidence and inference from the facts, and are not necessarily those on which the tenant held under the mortgagor: *Keith v R Gancia & Co Ltd* [1904] 1 Ch 774 at 783, CA.

113. Here, the conduct relied upon by the Defendant was the bank's acceptance of her rent following the direction to do so by Lord Lasike which he was obliged to provide under the terms of the mortgage. I have already dealt with, and rejected, the Defendant's allegation that the bank's failure to expressly terminate the rental agreement with Lord Lasike was evidence of the bank ratifying or adopting that rental agreement.

114. As I have found that:

    (a) as a matter of law, the rental agreement was void as against the bank;

    (b) there was no evidence before the Court that the bank had waived the benefit of that legal protection; and

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[28] Cited with approval in *Rust v Goodale*, ibid.

(c) the bank did not ratify or adopt the terms of the rental agreement,

I further find that the bank's post foreclosure conduct of permitting the Defendant to remain in occupation of her shop with her rent being paid to the bank, was evidence of a new periodic tenancy as between the bank and the Defendant. The only operative terms were the bank's grant of permission for the Defendant to remain in occupation of her shop, in return for which, the Defendant was required and agreed to pay the bank $1,000 per month. None of the other terms of the Lasike rental agreement applied to that new tenancy as between the bank and the Defendant. Even though the rental agreement was void as against the bank, if by some reason it did manage to survive, the new tenancy agreement between the bank and the Defendant destroyed the old rental agreement between the Defendant and Lord Lasike.

Is the rental agreement enforceable as against the Plaintiff?

115. On this ultimate question, the Defendant alleges that when she[29] entered into the rental agreement with Lord Lasike, she had an equitable interest to occupy the property for 15 years; that at the time it purchased the sublease, the Plaintiff had either actual or constructive of the Defendant's occupation of the property or failed to enquire as to her rights to occupy the property; and, that therefore, pursuant to the doctrine of notice, the Plaintiff is estopped from evicting the Defendant.

116. Within the context of the issues for determination in this case, the reference to the Defendant having an equitable interest to occupy the property is erroneous. The Defendant had a contractual right to occupy room no. 4 of the property pursuant to the terms of the rental agreement with Lord Lasike which I have found constituted a contractual licence.

117. Next, there is no issue that the Plaintiff had actual notice of the Defendant's occupation of the shop by reason, at least, of the bank's reference in the Deed to the Defendant being one of six tenants pursuant to certain tenancy

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[29] There appears to be a typographical error in paragraph 31 of the Third Further Amended Defence and Counterclaim in the reference to "the Plaintiff " which I assume was intended to read "the Defendant ".

arrangements. At that point in time, when the bank had been receiving rent from the Defendant for some time, those tenancy arrangements were between the tenants and the bank.

118. Mr Fonua was unable to refer to any decision in Tonga in which the doctrine of notice has been considered. I have not found any in my research. The Plaintiff's submissions did not directly engage with the issue.

119. For ease of reference, Mr Fonua's reference to the rule in *Hunt v* Luck is repeated:

> *If a purchaser or mortgagee has notice that the vendor or mortgagor is not in possession of the property, he must make enquiries of the person in possession (here, the Defendant) and find out* ***what his (her) rights are****. If he does not choose to do that, then whatever title he acquires as purchaser or mortgagee will be* ***subject to the title or right of the tenant in possession****.*
>
> [emphasis added]

120. Further, the doctrine, which has been described as being 'so far settled as not to be disputed', may be expressed in the following terms: if a person purchasing, when there is a tenant in possession, neglects to inquire into the title, he must take, subject to *such rights as the tenant may have*: *Randi Wixs Pty Ltd v Kennedy* [2009] NSWSC 933.30 In *Mortgage Express v Lambert* [2016] EWCA Civ 555, the Court of Appeal of England and Wales said of the doctrine: [31]

> *"The equitable doctrine of notice has no part to play in the system of registration of title. In the case of unregistered land, the purchaser's obligation depends upon what he has notice of – actual or constructive. In the case of registered land, it is the fact of occupation that matters. If there is actual occupation,* ***and the occupier has rights****, the purchaser takes subject to them. If not, he does not. No further element is material."*

121. In the present case, the key to this issue is not whether the Plaintiff had notice of the Defendant's occupation of the shop or whether the Plaintiff failed to make enquiries about the nature of the Defendant's rights as tenant in possession but rather what was the nature of the Defendant's rights?

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[30] Referring to *Smith v Jones* 1954 2 All ER 823; *Barnhart v Greenshields* 14 ER 204; *Allen v Anthony* (1816) 1 Mer 282, 35 ER 679, LC, 20 *Digest* (Repl) 348, 759.

[31] Citing *Williams & Glynn's Bank Ltd v Boland* [1981] AC 487, [504] (Lord Wilberforce); *Wishart v Credit & Mercantile plc* [2015] EWCA Civ 655, [2015] 2 P & CR 15 at [46] (Sales LJ).

122. On the basis of the findings above:

(a) the Defendant's rental agreement *was* enforceable against Lord Lasike;

(b) it was void as against the bank and the Plaintiff; and

(c) the bank granted the Defendant a new tenancy or licence on a periodic basis or at will (which, if it was not void by operation of law, had the effect of destroying the old rental agreement) which permitted her to continue occupation of the shop in return for rent of $1,000 per month.

123. Therefore, the only 'right' the Defendant had, and by which the doctrine of notice bound the Plaintiff, was her right to occupy the shop on what was effectively a monthly tenancy or licence with the bank. As the Plaintiff's rights under the sublease were derived directly from, and could therefore be no better or worse than, the bank's rights under its mortgagee lease, the Plaintiff took the property subject only to the Defendant's monthly tenancy with the bank.

124. The Plaintiff gave more than reasonable notice to the Defendant of the Plaintiff's termination of her tenancy of the shop and the demand for her to vacate it. For the reasons given, the Defendant's refusal to vacate the property was unlawful. Therefore, since 16 February 2020, the Defendant has been a trespasser on the property.

Plaintiff's damages

125. The quantum of the Plaintiff's reduced damages claim of $11,000 was not seriously contested. I am satisfied that damages in the sum of $1,000 per month, which was the amount of rent that the Defendant had committed to pay Lord Lasike, the bank and, for a time, the Plaintiff, over the last 11 months, is an appropriate award.

Result

126. For the reasons stated:

(a) the Plaintiff's claim is successful; and

(b) the Defendant's counterclaim is dismissed.

127. As a consequence, I order that the Defendant is to:

(a) vacate the property and remove her belongings from it within 28 days of the date hereof;

(b) pay the Plaintiff damages in the sum of $11,000; and

(c) pay the Plaintiff's costs of the proceeding to be taxed in default of agreement.

128. As a postscript, any umbrage the Defendant may understandably feel at this judgment ought be viewed, in truth, as the result of Lord Lasike's default in his obligations under a mortgage of which he never told the Defendant. By that default, Lord Lasike lost his rights of possession and occupation and triggered the bank's rights as mortgagee in possession. In doing so, Lord Lasike arguably breached his implied warranty of title and obligation not to derogate from his grant.[32] A lessee under a lease granted ultra vires may claim damages against the mortgagor for eviction.[33]

NUKU'ALOFA
6 January 2021

SUPREME COURT TONGA

M. H. Whitten QC
LORD CHIEF JUSTICE

[32] It has been described as a '*rule of common honesty*' (see *Harmer v Jumbil (Nigeria) Tin Areas Ltd* [1921] 1 Ch 200 at 225, CA, per Younger LJ); it involves identifying what obligations can be regarded as implicit, having regard to the particular purpose of the transaction at the time it was entered into (*Petra Investments Ltd v Jeffrey Rogers plc* (2000) 81 P & CR 267, [2000] 3 EGLR 120.

[33] *Costigan v Hastler* (1804) 2 Sch & Lef 160; *Carpenter v Parker* (1857) 3 CBNS 206; *Howe v Hunt* (1862) 31 Beav 420.