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Solicitor General
File 16/07/23.

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

CV 29 of 2021

BETWEEN:

SIOELI HELETA

Plaintiff

-and-

TAUNISIA ANOANO PAEA

Defendant

Assessment of damages

RULING

BEFORE: LORD CHIEF JUSTICE WHITTEN KC
 Appearances: Ms A. Kafoa for the Plaintiff
 No appearance by or for the Defendant
 Hearing: 8 December 2022
 Ruling: 8 December 2022

Introduction

1. This proceeding was listed for hearing today of an assessment of damages in respect of the Plaintiff's claim and the Defendant's counterclaim. The hearing had been listed, adjourned and re-listed several times in the last year as further detailed below.

Decision to proceed with the hearing

2. When the matter was called, the Defendant, Mr Paea, did not appear. On the afternoon of 7 December 2022, he emailed a medical certificate dated that day stating that he was unfit for duty between 6 and 9 December 2022. The certificate did not contain the name of the medical officer who apparently issued it.
3. For the reasons which follow, I determined to proceed with the hearing in Mr Paea's absence.
4. The background to the claims and counterclaims by the parties are set out in a ruling by me on 13 October 2021. Relevant excerpts are recited hereunder.
5. By Amended Statement of Claim filed on 16 August 2021, the Plaintiff claims damages against the Defendant for arrears of rent and breach of an oral tenancy

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agreement entered into in April 2020 for the use of a building owned by the Plaintiff and his father, in which the Defendant went on to operate a business known as the "Time Out bar". Relevantly, the Plaintiff alleges that:

- (a) the relevant term of the tenancy agreement was that the Defendant was required to pay rent of \$3,000 per month during the course of the tenancy;
 - (b) in breach of that obligation, for May 2020 the Defendant only paid \$535; for June 2020, the Defendant only paid \$300; for June 2020, the Defendant only paid a total of \$600; and the last payment by the Defendant was on 5 July 2020 in the sum of \$300;
 - (c) the Defendant has therefore short paid the agreed rent amount for those months and has not made any payment since;
 - (d) on 25 August 2020, the Plaintiff terminated the tenancy agreement and demanded that the Defendant vacate the subject building but that the Defendant refused to do so.
6. There are also other allegations in relation to misrepresentation by the Defendant as to the legal status of his business at the time of entering into the agreement which are no longer relevant.
7. The Plaintiff also sought an order that the Defendant vacate the premises (i.e. an eviction order).
8. By Statement of Defence filed by Mr Etika of counsel on 31 August 2021, the Defendant pleaded, in summary, that:
- (a) he denied that the agreement between the parties was verbal and that it was actually in writing;
 - (b) there was a "slight variation" of the written tenancy agreement which increased the stated rent from \$2,500 to \$3,000 per month and that it was to be paid within the first five days of each month after May 2020;
 - (c) there was a further oral variation to the parties' agreement to effect that:
 - (i) the timing for the monthly rent payments was "to be flexible" as long as it was paid within the current month;
 - (ii) the Plaintiff and his father could receive cash advances and operate a

bar tab for food and takeaways on credit from the Defendant's Bar and that the value thereof would be deducted from the rent payable each month;

- (iii) that occurred during May to July 2021 "before some disagreements occurred between the parties due to a series of unexpected events";
 - (iv) those "unexpected events" include an allegation that on 10 September 2020, the Plaintiff broke the lock to the Defendant's Bar and removed liquor, furniture and other items valued at \$27,861. The police were contacted and upon executing a search warrant at the Plaintiff's residence, some of the items were retrieved but most were "used and lost". The Plaintiff was charged for the incident.
- (d) he denies any arrears of rent and relies on the oral agreement for cash advances, etc. in lieu of rent, in respect of which, an account for the Plaintiff was "to be ready" by 9 September 2020 for the Plaintiff's verification;
- (e) on 1 September 2020, in response to the Plaintiff's lawyer's demand for the Defendant to vacate the premises and pay the arrears, the Defendant's lawyer replied that up to 15 September 2020, the Plaintiff owed the Defendant a total of \$9,970;¹ that the rent of \$3,000 for September 2020 would be deducted from the amount owed by the Plaintiffs, leaving a balance of \$6,970 owed by the Plaintiff to the Defendant;
- (f) the items taken by the Plaintiff were valued at \$13,240; and
- (g) the alleged break-in and theft of the Defendant's goods was a substantial breach of the tenancy agreement.
9. The Defendant also counterclaimed damages of:
- (a) \$27,861 being the alleged value of the goods taken by the Plaintiff and the costs of repairing damage to the premises; and
 - (b) \$50,000 as a result of the incident in September 2020, which caused his business to close due to loss of stock and for which the Defendant claimed

¹ Comprising a cash advance of \$1000 in April 2020, a cash advance of \$1400 in May 2020, a cash advance of \$2000 end of June 2020, a cash advance of \$1400 in July 2020 and a bar tab for food and take away totalling \$4178 for the period from April to August 2020.

loss of income and profits and mental and physical inconvenience.

10. On 23 September 2021, the Plaintiff filed a Statement of Reply in which, relevantly, he alleged that:
 - (a) the Magistrates Court proceedings (concerning the break-in) were withdrawn;
 - (b) the written tenancy agreement entered into by the parties was null and void (on the basis that it was entered into between the Plaintiff and his father, on the one hand, and the Defendant's company, on the other, which unbeknownst to the Plaintiffs at the time, was struck off at the time of entry into that agreement);
 - (c) all the items taken by the Plaintiff had been returned to the Defendant without any loss or damage; and
 - (d) the Defendant had still failed to pay any rent from September 2020 to date.
11. On 3 September 2021, directions were given for all interlocutory steps in the proceeding culminating in a trial date commencing 17 January 2022.
12. On 16 September 2021, I granted the Plaintiff's application for an interim injunction restraining the Defendant from conducting construction works on the subject premises without the Plaintiff's permission other than maintenance or repairs of normal wear and tear. The further hearing of that application was made returnable on 30 September 2021.
13. On 30 September 2021, Mr Etika did not oppose the continuation of that injunction pending the final hearing and determination of the proceeding. The balance of the directions made on 3 September 2021 were confirmed. The recitals to the orders made that day included the following:

“The Defendant’s current defence raises issues in relation to the Plaintiff’s entitlement to terminate the tenancy agreement between the parties on the basis of non-payment of rent. However, as explained to Mr Etika, the actual financial details in the defence are unclear. For instance, the Defendant refers to a statement of account which presumably sets out amounts of rent payable by the Defendant to the Plaintiff and amounts advanced by the Defendant to the Plaintiff, set off in lieu of rent, by way of bar tabs, cash advances and the like. It is also unclear as to what period that set off is said to apply. Therefore, if that alleged arrangement has not extended to cover more recent months, and the Defendant has failed to pay rent for those recent

months, without any legal justification for doing so, then the Plaintiff may be at liberty to issue a fresh notice of termination on that basis. In that event, a further application for injunctive relief may be entertained. Until then, the issue of the Defendant's entitlement to remain in occupation of the subject premises and conversely the Plaintiff's entitlement to terminate the tenancy agreement, remain the ultimate issues for determination at trial."

14. On 7 October 2021, the Plaintiff filed an application for an "urgent eviction order". The basis of the application was the Defendant's failure to pay the full amount of rent payable between May and July 2020 and the failure by the Plaintiff to pay any rent since August/September 2020. The application also referred to the Plaintiff through his counsel having accepted a request by the Defendant's counsel to give the Defendant seven days to discuss the unpaid rent (since June 2020) with the Defendant personally, and that as at the date of the application, the Plaintiff had not received any payment or updated position from the Defendant. As the matter was said to be urgent, it was listed for 13 October 2021.
15. On 11 October 2021, Mr Etika filed a notice of ceasing to act.
16. When the matter was called on 13 October 2021, Mr Etika appeared to formally seek leave to withdraw from acting for the Defendant. Leave was granted. He confirmed that the file had been returned to the Defendant and that he had informed the Defendant's assistant of the matter being listed for that day. There was no appearance by the Defendant.
17. After hearing from Ms Kafoa, I determined to treat the application as one for summary judgment in respect of the Plaintiff's claim for an eviction order on account of unpaid rent.
18. The pleaded defence did not explain the shortfalls in rent paid for the months of May through to July 2020 and no rent paid for August 2020. At most,² the Defendant claimed a set off of \$9,978 which appeared to be the total of the "statement of account" dated 15 September 2020 referred to elsewhere in the pleading. Assuming that amount was correct, the total of that account plus the amount of partial rent payments between May and July 2020 did not add up to the \$15,000 payable for the period from May to September 2020. More importantly, the defence, including the alleged set-off and counterclaim, even with

² [16]

those allegations taken at their highest, did not provide an answer to the Defendant's failure to pay any rent since at least September 2020, that is, for over a year. The pleading was entirely silent in relation to any further payments of rent by the Defendant since September 2020. The Defendant's claimed set off did not seek to account for any rent payments due since that time.

19. There was therefore no defence to that aspect of the claim. Any disputes about any amounts of cash or the value of goods provided by the Defendant to the Plaintiff by way of reduction of the Defendant's rent obligations or any damages arising from the alleged break-in and theft of the Defendant's goods could be dealt with on an assessment of damages. Even those aspects of the Defendant's counterclaim could not amount to an answer to the unpaid rent or provide the Defendant with any legal basis to continue to occupy the premises without paying rent.
20. For those reasons, I ordered that the Plaintiff was entitled to vacant possession of the subject premises and the Defendant was given 14 days to vacate. Directions were also given for the filing of affidavit material in relation to the assessment of damages. In particular, the Defendant was required to file such affidavit material in opposition to the Plaintiff's claim for damages and in support of any counterclaim he wished to press by 19 November 2021. The assessment of damages was listed to commence on 1 December 2021.
21. The Defendant subsequently filed an application to set aside the above judgment.
22. The case was then allocated to Niu J.
23. On 22 October 2021, his Honour recorded that counsel wished to discuss with their respective clients the possibility of settlement. He therefore adjourned the matter to be called again in chambers on 9 November 2021.
24. On 9 November 2021, Niu J recorded that the parties had not been able to agree on settlement and he listed the application to set aside summary judgment for hearing.
25. On 25 November 2021, Niu J dismissed that application.
26. On 30 November 2021, His Honour listed the hearing on the question of damages for 13 December 2021 and directed each party to file their documents by 10

December 2021.

27. On 13 December 2021, Mrs Mailangi was not ready to proceed and sought leave to withdraw as Counsel for the Defendant because even though Mr Paea had been informed of the hearing that morning and what was required for it, he had not provided his documents to Mrs Mailangi, and had only telephoned her that morning to tell her he was in Vava'u for the unveiling of his mother's headstone and that he would not be returning to Nuku'alofa until the next day. Ms Kafoa consented to an adjournment of the hearing. His Honour granted Mrs Mailangi leave to withdraw, adjourned the hearing to 16 December 2021 and ordered the Defendant to pay the costs thrown away.
28. On 16 December 2021, Mr Paea appeared and asked for a further adjournment of two weeks to find alternate counsel. Niu J directed the Defendant to file and serve all documents upon which he wished to rely by 14 January 2022 and adjourned the hearing on damages again to 19 January 2022. His Honour also stipulated that there would be no adjournment of that hearing except by consent or as ordered by the Court.
29. It is now a matter of record that on 15 January 2022, the Kingdom suffered the effects of a volcanic eruption and the disruption which followed.
30. The matter was called before Niu J on 19 January 2022. The Defendant failed to appear. Ms Kafoa was ready to proceed although she presented a bill from Tonga Power Limited for electricity for the subject premises of over \$4,000 which she sought to add to the Plaintiff's claim. His Honour directed the Plaintiff to amend his claim and serve the Defendant with a copy of the invoice forthwith. The hearing on damages was then adjourned to 25 January 2022 "*irrespective of the attendance or absence of the Defendant or the filing or serving of any documents by him as directed on 16 December 2021*".
31. On 25 January 2022, Niu J recorded that the hearing was unable to proceed because the Defendant was apparently in Vava'u for a prayer week with his family when the eruption occurred on 15 January 2022 and was only able to return on the 24th. The Defendant again asked for more time to file his documents and organise his witnesses. His Honour directed that the Defendant file and serve his documents by 28 January 2022 and again adjourned the hearing to 2 February

2022.

32. The court file does not contain any record of what, if anything, occurred on 2 February 2022.
33. On 2 March 2022, Niu J directed by consent that the hearing on damages be adjourned to 1 April 2022.
34. On 1 April 2022, Mr Paea did not appear. Earlier that morning, he sent an email to the Court attaching a letter from Dr Olivia Ma'u from the Ministry of Health stating that he had tested positive for Covid-19 on 28 March 2022 and that he was in home isolation. Therefore, the hearing was further adjourned to 22 April 2022.
35. On 22 April 2022, the hearing on damages commenced. However, Niu J recorded that the hearing was taking longer than anticipated because of difficulty in locating documents. The Plaintiff also accepted some of the items claimed by the Defendant which he said he had only just seen that morning. His Honour directed that the parties arrange only the documents required for the further hearing in chronological order, paginated and photocopied for ease of reference. He also directed the Plaintiff to confirm which of the Defendant's claims were accepted and those that remained in dispute. The hearing was adjourned part heard to 6 May 2022.
36. On 3 May 2022, an 'agreed bundle' of evidentiary documents was filed consisting of copies of invoices, purported financial statements, letters and photographs.
37. On 6 May 2022, Ms Kafoa advised Niu J that the parties would meet the following week to confirm the sums agreed and hopefully settle the whole matter. She said they would advise the court in writing as to the outcome of their talks. His Honour therefore adjourned the further hearing to 13 May 2022 unless the matter was settled sooner.
38. By 13 May 2022, the matter had not settled, and the parties had not identified which items remained in dispute. Niu J therefore adjourned the hearing again to resume on 11 July 2022.
39. At the end of June 2022, Niu J retired as a judge of this Court and the matter was transferred back to me.

40. On 3 August 2022, the matter was called before me. Mr Paea did not appear. The minute of mention that day recorded the recent history including that since December 2021, the damages hearing had been listed and re-listed on numerous occasions. Just prior to the matter being called that day, Mr Paea telephoned the Registry to advise that he had (again) contracted Covid-19 and was in isolation. The directions made that day included that the matter was adjourned to 10 August 2022; both parties were to consider and confer on appropriate directions for the future conduct of the assessment of damages; and Mr Paea was required to file a medical certificate in relation to his non-appearance. In that regard, on 8 August 2022, Mr Paea emailed a sick leave certificate dated 1 August 2022 (which had been emailed by Sisi Latu to Mr Paea on 5 August 2022). The certificate stated that Mr Paea was “suffering a medical condition” and was unfit for duty for four days from 1 August to 4 August which just happened to cover the date of 3 August 2022 when the matter was listed for hearing.
41. On 10 August 2022, Ms Kafoa and Mr Paea appeared. I directed, relevantly, that:
- (a) both parties file updated particulars of loss of damage of their respective claims and counterclaim by 24 August 2022
 - (b) both parties file affidavit/s in support of their respective claims for damages by 7 September 2022;
 - (c) any affidavit/s in response were to be filed by 21 December 2022;
 - (d) notices of deponents required for cross-examination at the hearing were to be filed by 10 November 2022; and
 - (e) the hearing of the assessment of damages was listed to commence on 24 November 2022 on an estimate of two days.
42. The reason for the last direction was because there was no record on the file and no transcript had been prepared of any of evidence adduced before Niu J when the hearing first commenced. It was therefore considered appropriate to start afresh with the benefit of the documents as directed to be filed.
43. On 24 November 2022, Ms Kafoa and Mr Paea appeared. Neither party had complied with the 10 August directions. No reasonable explanations were provided. Mr Paea initially stated that he had not been served with those

directions. However, after he was apprised of a certificate of service on file verifying that he had been served, and that in the circumstances, I would have to direct the relevant probation officer to attend court to give further evidence on the matter, Mr Paea recanted his earlier statement and appeared to then recall having been served. Ms Kafoa suggested that the hearing be adjourned to 2023.

44. However, in light of the poor history of numerous adjournments in the matter, I directed that the date by which the parties were to file updated particulars of loss and damage and affidavit/s in support of their respective claims be extended to 1 December 2022 and the hearing was adjourned to 8 December 2022. The balance of the 10 August directions were vacated so that any person who provided an affidavit filed in accordance with the extended timetable would be required to attend the hearing.
45. I also made preliminary observations that day, in order to assist Mr Paea in understanding the nature of any evidence which might support his counterclaim, about a number of documents he had included in the agreed bundle, such as:
- (a) in apparent support of his claim for \$50,000 for, inter alia, business disruption following the Plaintiff entering the premises in September 2020 (when Tonga's pandemic emergency restrictions prohibited places like bars from operating), a basic profit and loss statement for January to March 2019³ (more than 18 months prior) showed the Bar operation making a profit. However, the same form of statement for January to March 2020⁴ (six months before the Plaintiff's re-entry) showed a net loss for that period. Neither statement appeared to include costs of goods sold (such as the cost of alcohol and other products sold at the bar). There were no financial statements for the period just before or after the break in. There was also a single page document by the Defendant dated 28 January 2022 entitled "Business lost during break in by [the Plaintiff] on or about 2 or 3 September 2020". It listed eight items. The last three major items are difficult to understand:
- (i) "goods and assories [sic] damage on recovery & found – T\$4,800";

³ Page 17.

⁴ Page 18.

- (ii) "closer of business asses [sic] to sales monthly x 2 – T\$35,000"; and
- (iii) "suffer during this period the company profit 20% - T\$7,000".

Even though only loss of profit could be claimed (not both loss of profit and sales revenue), the Defendant has nonetheless added all the amounts on the list to total T\$51,355.

- (b) a letter from A/CIP Faeamani of the Tonga police concerning a housebreaking and theft at the Timeout Bar actually named the complainant as Mrs Losa Halai and that that break in occurred on 31 March 2020;⁵
 - (c) a list by the Defendant of goods, stock and other items said to have been stolen from the bar, dated 10 September 2020 and totaling \$27,861 (as pleaded),⁶ is followed by a three page police search list of goods seized by police at the Plaintiff's premises⁷ and which appear to largely correspond with the items taken (as pleaded by the Plaintiff) and then a separate list by the Defendant of "items, goods and stock" dated 30 September 2020 showing a total value of \$117,310.⁸
46. On 1 December 2022, the Plaintiff's affidavit of evidence for the assessment of damages was filed. However, Ms Kafoa advised that the Plaintiff's affidavit was only served on Mr Paea on 5 December 2022 which was a public holiday.
47. Mr Paea did not file any of the documents as directed by 1 December 2022 nor has he filed any since. He did not give any indication prior to that date that he would not be able to meet the direction nor has he provided any explanation since for his failure to comply yet again with directions. He has not communicated any prejudice occasioned by late service of the Plaintiff's affidavit.
48. The above history of defaults by Mr Paea in failing to comply with court directions and various non-appearances (including those apparently supported by medical certificates but for days which curiously coincided with hearing dates) provided a compelling basis to infer that he is deliberately endeavoring to delay and obfuscate the completion of this proceeding and prevent the Plaintiff from

⁵ Page 19.

⁶ Page 20.

⁷ Pages 21 to 23.

⁸ Page 25.

prosecuting his claim and obtaining judgment. It is also pellucid that Mr Paea has been afforded numerous opportunities to be heard and that (subject to the admitted reductions to the Plaintiff's claim discussed below) he either does not have or does not intend to adduce any sworn evidence in support of his substantive pleaded counterclaims.

49. Accordingly, I proceeded to hear from Ms Kafoa in relation to Plaintiff's claim for damages.

Plaintiff's claim for damages

50. In his affidavit, sworn 1 December 2022, Mr Heleta confirmed the elements and amounts of his pleaded claim. Even though the Defendant did not vacate the premises until late 2021, and without paying rent for that extended period, the Plaintiff limited his claim for rent to nine months from August 2020 to April 2021, totaling \$27,000 plus the short payments for the first three months. Further, he deposed, in summary, that:

- (a) he believed he had a legal right to enter the bar and remove the Defendant's belongings by reason of the Defendant's repeated breaches of their tenancy agreement and failure to pay rent and to allow others to view the property so that he could re-let it;
- (b) he denied any agreement with the Defendant for any cash advances or bar tab to be deducted from the rent payable;
- (c) all the goods he removed from the bar were found by police and returned to the Defendant;
- (d) after the Defendant vacated, the Plaintiff observed damage to the structure throughout, but he did not wish to claim for those repair costs;
- (e) in November 2021, he received invoices for electricity and water used at the premises.⁹

51. During her answers to questions from the Bench, Ms Kafoa made the following concessions:

- (a) Of the Defendant's alleged statement of account for cash advances and bar

⁹ Pages 28 and 29.

tab, totaling \$9,978, the Plaintiff admitted bar tab items totaling \$857.¹⁰ They were consistent with the source invoices made out in the Plaintiff's name whereas the balance were in other names. The Plaintiff denied liability for any of the claimed cash advances and it was impossible to decipher from the Defendant's handwritten informal ledgers¹¹ what, if any, amounts had been advanced to the Plaintiff.

- (b) Of the total amount for the water invoice for the period 1 October 2021 to 1 November 2021 of \$158, the Plaintiff only claimed the opening balance amount of \$114 which clearly corresponded with the period during which the Defendant was in occupation.
- (c) Similarly, of the total amount for electricity for the period from 5 October 2021 to 4 November 2021, of \$4,794.89, the Plaintiff only claimed the opening balance amount of \$4,432.54 which clearly corresponded with the period the Defendant was in occupation and had not paid successive accounts for previous months.

52. Those adjustments reduced the Plaintiff's total claim to \$37,954.08.

Provisional stay

53. In light of the unusual circumstances of this case, and in order to provide a final safeguard for Mr Paea, orders for a provisional stay of enforcement of the judgment and leave to apply with in a limited time to set aside the judgment were made as set out below.

Result

- 54. There is judgment for the Plaintiff against the Defendant on the claim.
- 55. The Defendant is to pay the Plaintiff the sum of \$37,954.08.
- 56. The Defendant's counterclaim is otherwise dismissed.
- 57. The Defendant is to pay the Plaintiff's costs of the proceeding to be taxed in default of agreement.
- 58. Enforcement of these Orders is stayed until 4 pm on 16 December 2022.

¹⁰ \$379, \$100, \$96, \$150, \$132.

¹¹ Pages 11 to 16.

59. The Defendant has liberty to apply to set aside these Orders provided that any such application must be:

(a) filed and served by 4pm on 16 December 2022; and

(b) accompanied by affidavit material containing:

(i) the reason/s the Defendant failed to comply with direction number 1 made on 24 November 2022 requiring him to file, inter alia, any affidavit/s in support of his counterclaim by 1 December 2022;

(ii) the name of the medical officer who issued the medical certificate on 7 December 2022; and

(iii) all proposed evidence in support of the counterclaim as required by the directions made on 24 November 2022.

60. Should the Defendant not file an application to set aside these Orders in accordance with the preceding paragraph, the judgment shall become final and the file will be closed.

61. Should the Defendant file an application to set aside these Orders in accordance with paragraph 59 above, the stay of enforcement of these Orders shall continue until the application is heard and determined, or further Order.

NUKU'ALOFA
8 December 2022



A handwritten signature in blue ink, appearing to read "M. H. Whitten".

M. H. Whitten KC
LORD CHIEF JUSTICE