IN THE SUPREME COURT OF TONGA

CIVIL JURISDICTION

NUKU'ALOFA REGISTRY **CV 285 of 2006**

BETWEEN : ANZ BANKING GROUP LIMITED

\- **Plaintiff**

AND : KOLOLIANA 'OTUANGU NAUFAHU

\- **Defendant**

BEFORE THE HON. CHIEF JUSTICE

Mrs P. Tupou for the Plaintiff.

Mrs Taufateau for the Defendant.

DECISION

1. The Writ and Statement of Claim seeking judgment in the sum of $88,613.29, being unrepaid advances, was filed on 7 April 2006.

2. On 23 May 2006 judgment was entered in the amount claimed, plus costs to be taxed if not agreed, in default of defence.

3. No defence has ever been filed and there was no appeal against the Order of 23 May.

4. On 29 May 2006 a charging order was applied for supported by an affidavit by one Luseane Manu, legal secretary, who averred that, on the basis of "conversations with the Ministry of Lands" the Defendant has a "beneficial interest as lessee in Lease No.7653".

5. On 1 June 2009 a charging order nisi was made. Apparently the application was dealt with without a hearing under the provisions of RSC O 13 Rule 4(1)(e).

6. On 11 September 2009 and again on 10 November 2009 Mrs Taufateau filed submissions challenging the Court's power to make a charging order in respect of the lease. It was suggested:

   (a) that with the passage of the Civil Law (Amendment) Act 2003 the UK Charging Order Act 1979 (which was the sole source of the Court's powers to impose such charges – see *Davisco Pineapple Industries Company Ltd v Vakavelo* [2003] Tonga LR 34, 35 at 70) such orders are no longer available in Tonga; and
   (b) In any event the charging of a lease prior to an order for its' sale were matters within the exclusive jurisdiction of the Land Court.

7. On 16 March 2010, after counsel for both parties were heard, an order absolute was made. I can find no reasons for the Decision on the file. There has been no appeal against the order.

8. This is an application for an order for the sale of the charged lease.

9. On 14 April 2011 Mrs Tupou told me that Mrs Taufateau had "refused to accept service of the application". I asked Mrs Tupou to remind Mrs Taufateau that she was solicitor on the record and as such was obliged to accept service. On 10 May 2011 Mrs Taufateau again failed to appear. On 23 May 2011 she appeared. She told me that following the making of the order absolute she had advised her client to appeal. She had then heard that the Defendant had paid something to the Plaintiff and thought the matter was "all over". She had not since received further instructions.

10. It is, with respect, wholly unsatisfactory for counsel's representation or withdrawal to be handled in this way. The Court and the other parties need to know who is representing whom; this is why the issue is dealt with in Order 43 of the Supreme Court Rules 2007. Once litigation has commenced it is no longer a private matter between counsel and client. Until the provisions for withdrawal are complied with, counsel on the record will continue to be regarded as representing their party.

11. Mrs Taufateau told me that she wished to withdraw but had not been put in funds to file a notice. I gave her leave to withdraw, effective from the date of the filing of the Order 43 Rule (1) notice, filing fee to be waived.

12. In my opinion the submissions made by Mrs Taufateau in relation to the Court's powers to grant a charging order over a lease have

considerable force. While it is true that Lord Brandon (in *Roberts Petroleum v Bernard Kenny Ltd* [1982] 1 All ER 685, referred to in *Davisco*) said, at 690, C :

> "the first principle is that a Judgment Creditor is in general entitled to enforce a money judgment which he has lawfully obtained against a judgment debtor by all or any of the means of execution prescribed by the relevant rules of court"

I do not believe that this is authority for a proposition that the Rules (in our case RSC O.34) can themselves alone authorise the exercise of such powers.

13. That the Rules of Court must be made pursuant to powers conferred by statute is especially clear in Order 50 of the English Rules of the Supreme Court (1988 White Book) which reads:

> "I (1) the power to make a charging order under Section 1 of the Charging Orders Act 1979 …. shall be exercisable by the Court".

In *Davisco* (Supra) the Court held that the submission that a charging order is a statutory, not an equitable remedy was "clearly correct".

14. As already pointed out, neither the charging order nisi not the order absolute was the subject of appeal. The Chief Justice has no authority to set aside an order made by a puisne judge after a hearing inter partes even if the correctness of the order is doubted.

15. In the circumstances of this case I decline to grant the order for sale sought by the Plaintiff. This will enable either party to take the matter to the Court of Appeal where the important question of the Supreme Court's power to charge, following the passage of the 2003 Act, can be further considered.

M.D. Scott

DATED: 25 May 2011. **CHIEF JUSTICE**