

**Free Church of Tonga (and the Trustee thereof) v  
Constitutional Free Church of Tonga**

Court of Appeal  
Roper, Ryan & Morling, JJ.  
Appeal Nos. 18 & 19/1991

25 March, 1992

*Trust - church - split - which branch should hold land and buildings - true successor;  
Church lands - ownership of on split  
Procedure - correct forum - Supreme Court or Land Court*

The Land Court had been asked by two competing unincorporated religious bodies to decide which had the right to succeed to the beneficial interest in two areas of land, with church buildings thereon. That Court held that the respondent church was closest to the original Free Church of Tonga; was closest therefore to the original trust; and was entitled to the beneficial interests in, and rights to, the land and buildings of the original church; and dismissed the appellants' claims. On appeal to the Court of Appeal.

HELD:

That the appellants' had not convinced the Court that the Land Court's judgment was erroneous (although noting that it was arguable that the Supreme Court and not the Land Court, was the proper forum for this dispute, but the end result would have been the same).

Cases considered : Manu v Watkins (1924) 2 Tongan LR 136  
Craigdallie v Aikman (1813) 1 Dow (HL) 16  
General Assembly of Free Church of Scotland v Lord Overton  
[1904] AC 515  
(11L Sc)

Counsel for Appellants : Mr Vaipulu  
Counsel for Respondents : Mr Edwards

**Judgment**

In April and June 1991 the Land Court sitting at Nuku'alofa and Neiafu, Vava'u and presided over by Mr Justice Webster sitting with an assessor dismissed an action by the Appellants in respect of the beneficial interest in 2 church properties at Falaleu, Neiafu, Vava'u and Kotu, Ha'apai and held that the Second Respondent or the First Respondent was entitled to lease 4178 at Falaleu.

After having filed the original notice of appeal, the Appellants pursuant to a direction of Martin CJ dated 15th July 1991 added a number of further grounds, some of which were deleted at the hearing. The grounds now left are as follows:

- 50 "1. The Learned Judge misdirected himself in holding ..... that this is a church dispute for the following reasons:-
  - C. The cases of SETALEKI MANU and ORS -v- WATKINS and ORS (II Tongan LR 8 & 136) and GENERAL ASSEMBLY OF FREE CHURCH OF SCOTLAND -v- LORD OVERTON (H.L.) [1904] A.C. 515 were wrongly applied by the Learned Judge in this case as their facts are different and distinguishable from this case. In the above cases it was a question of amalgamation whereas in this case it was a question of secession. It is the Trust. Furthermore in the Scottish case there was a fundamental change of the doctrines while in this case, there is no such change.
  - D. The Court ought to have considered who is the lessee under Lease No:4178 and purported equitable Lease No.3667.
2. The jurisdiction of the Land Court is defined in Section 149 of Cap 132 the Land Act and it is clearly confined to boundaries of land, disputes over land and appointment of Trustees. The case should be confined to legal interest and beneficial interest over land and in particular who is the lessee.
- 70 3. The Appellants were surprised that the Learned Judge in his judgment of 6th June 1991 put much emphasis on the Church Litigation between 1978 and 1984, the Constitutions of the Churches and the original purposes of the Trust which were not facts in issues in this case (according to the Pleadings) and by doing so deviated himself from considering the real issue namely the Leases No.4178 and No.3667, legal and equitable titles thereunder.
4. The Learned Judge erred in holding that the First Appellant ceased to exist in 1924 because:
  - (a) This was not declared by the Privy Council in its decision.
  - 80 (b) It violates the freedom of Religion Provision in the Constitution of Tonga, section of Part 1, Declaration of Rights.
  - (c) No evidence put before the court to that effect.
  - (d) Even if the Learned Judge was right in putting emphasis on the original purpose of the Trusts, the Appellants have in its possession the minute of the meeting of the Conference of the Free Church of Tonga in 1925 which showed that the First Appellant at present time still adhere to the original purpose of the Trust ie. (the constitution)."

At the hearing Mr Vaipulu for the Appellants confined his argument to the question  
90 whether, the Appellant Church or the Respondent Church was the true successor to the

original Free Church of Tonga, notwithstanding that the amended notice of appeal to a significant degree attacked the jurisdiction of the Land Court or the lack thereof in deciding the matter. We have of course considered all of the grounds of appeal advanced in the amended notice.

Both the First Appellant and Respondent are unincorporated religious bodies. Pursuant to the documentary evidence produced the government at least takes the view that the land in dispute is held by the Free Church of Tonga as lessee. The Free Church of Tonga was established in 1885 following a serious dispute about a large amount of money which had been collected by the members of the church and sent overseas. In 1924 there was a dispute between members of the Free Church. That dispute was resolved in a case reported in 1924 2 TLR 136 (PC) in Manu & Ors -v- Watkins & Ors. In that case it was held that freedom from all association or connection with any other religious body or society was not an essential or fundamental principle of the 1885 Free Church and that the minority had no right to the property. It was also held that in law the original 1885 Free Church had become fused with the Free Wesleyan Church in 1924 and had ceased to exist as a separate body, and that the minority members who continued on as a separate church as the 1924 Free Church were legally and entirely a new and different body with no legal link to the original 1885 Free Church.

As the Learned Judge in the Land Court found, for four generations the 1924 Church has had as its President a member of the Fonua family. One of those leaders, Lelea, was suspended by the Supreme Court from holding office as President and his son Semisi Fonua was in turn elected President in 1984 and is the current President.

There have been many disputes centred around the Fonua family in the 1924 Free Church. In 1987 a new constitution was set up establishing or re-establishing the Respondent Church. The name of the Church was the Free Constitutional Church of Tonga which is apparently the same as the Constitutional Free Church of Tonga which is a Respondent to this appeal. Clause 1 of the 1987 Constitution provides "that the Church has no interest in the Free Church of Tonga where the Fonua Family hold the Presidency, or the Divided Church, or any other church in the world, but only the Free Constitution Church alone, stands on its own and does not take instruction from any other religious body".

A significant part of Mr Vaipulu's submission was based on the submission that the Free Church of Tonga was not involved with any other church and stood away from any other church contacts. He placed great stress on the point that the Respondent church was a member of the Council of Churches and submitted that in consequence it had departed from the terms of the original purpose of the trust set out in the 1924 constitution.

The Learned Judge in his decision referred to Craigdallie v Aikman (1813) 1 Dow 1 (HL), 16 which was cited with approved by Lord Chancellor Halsbury in the leading Scottish case General Assembly of Free Church of Scotland v Lord Overtoun [1904] AC 515 (HL). Lord Halsbury said at (p.617):

"The principles for decision thus propounded have been recognised and acted upon ever since, and it would seem that it may be laid down that no question of the majority of persons can affect the question, but the original purposes of the trust must be the guide."

"Under these circumstances it would seem to reduce the question in dispute

to an examination of the evidence as to what is the difference between them, if any, and if that difference does or does not accord with original purpose of the trust; but in examining this question one has to bear in mind, not what we or any other Court might think of the importance of the difference, but what the donors of the trust fund thought about it, or what we are constrained to infer would be their view of it, if it were possible to consult them."

With the last passage Mr Vaipulu agreed and accepted that Webster J in applying that dicta applied it correctly to the circumstances of this case.

160 Mr Edwards for the Respondents submitted that the submission of the Appellants was anchored on the one provision of non-association, that the Appellant Church which followed it was more pure than the Respondent which did not. He said however that such a submission was not founded on fact, law or constitution.

We must say that Mr Vaipulu did not really depart from that basic submission in his own submissions to the court, notwithstanding that the grounds for appeal were much wider. It may be arguable that the correct forum for this particular dispute was not the Land Court but the Supreme Court, however, we have reached the conclusion that the end result would have been the same had the dispute been before the Supreme Court.

170 As Mr Edwards laid emphasis on the summary of the judgment given by the Learned Judge, we think it is useful to quote from parts of that summary. In the second paragraph on page 1, Webster J said:

"The land, money and building for these 2 churches in Falaleu, Neiafu, Vava'u and Kotu, Ha'apai were given to the Free Church on trust for the purpose of having church building for worship. This is very clear from the original constitution of the Free Church and the whole circumstances."

180 "What the law says is that the land and building must therefore continue to be used for the purposes for which they were originally given. So when there has been a split in the church, as there has been here, the Court has to look at which part of the church is carrying on the original purposes of the Free Church."

"Here both the present Free Church and the Constitutional Free Church share the same faith and doctrine and now - according to the constitution which they each use at present - their only difference are in matters of church government - how the church is organised and run and controlled."

He went on to say that it was clear from the evidence, and with this we agree, that :-

190 "It is very clear that without a doubt it is a Constitutional Free Church which is closest to the original Free Church."

He drew the distinction between the management of both churches and that insofar as the present Free Church was concerned the evidence established that the President has very much more power than was ever the case with the original Free Church where the power rested with the annual conference.

He went on to say that:

"When the Free Church amended their constitution in 1984, what they did was to make constitutional the whole position and practices which has been found by the Supreme Court to be unconstitutional. In doing so they inevitably moved further away from the original Free Church."

His basic judgment was that, in law, it is the Constitutional Free Church, the Respondent in the appeal, which has the beneficial interests in and rights to the land and building of the original Free Church, and he accordingly dismissed the Plaintiff actions.

We are unable to say that the Appellants have convinced us that the reasons advanced by the Learned Judge in the Land Court were erroneous. Accordingly we dismiss the appeal with costs. We note that costs were to be agreed upon or taxed and would imagine given the appeal proceedings before the Court that the costs position has not been in any way resolved. We do not propose to interfere with his award but award the Respondents in this court the total sum of \$1,000 costs.