Kalaniuvalu Fotofili v Free Wesleyan Church & Minister of Lands

Land Court, Nuku'alofa
Ward CJ
Land Case 640/93

11, 12, 13, 24 April, 12 May 1995

Land - lease - parties - breach - estoppel
Lease - sublease - fiduciaries - consent
Fiduciary - duties - full disclosure
Estoppel - land - lease - part performed

The plaintiff, as a noble and holder of certain hereditary estates, held lands over which the first defendant was granted leases for a church school and an agricultural site. In 1989-90 it became necessary to extend the runway at Fua'amotu airport and the land affected included some of the land leased to the first defendant, which area was then sub-leased by the first defendant to the Minister of Civil Aviation. The plaintiff knew nothing of the sub-lease but knew of the extension of the runway and the affect on his land. There were three matters to be determined in the action:-

(i) whether or not the plaintiff was a party to the lease and could sue on it, as he was doing, to claim a breach of the lease by the first defendant sufficient to allow him to cancel the lease and evict the first defendant;

(ii) whether the lease was null and void ab initio because the church was not a legal entity and was not capable, therefore, of entering into a lease;

(iii) whether the church had breached the terms of the lease by granting the sub-lease for a purpose other than religious or educational activities and benefitting thereby.

Held:

(1) The intention of the Constitution and the Land Act was to recognise the estate holder's right to grant leases, but to supervise and control the manner of granting leases, the nature of the leases granted and the collection of rents the Crown is placed in the position of a fiduciary office. The Land Act gives the Crown powers and duties to be exercised for the benefit of the estate holder. Thus the plaintiff, as the beneficiary of the lease, had locus standi and the right to sue.

(2) The first defendant (church) is an unincorporated body and, by its own constitution, any leases should be signed by the trustees. The lease in question here was not signed by the trustees and was entered in breach of the constitution. The general rule is that an unincorporated body (such as the first defendant) cannot enter into contractual obligations and cannot sue or be sued.

Here s. 17 of the Land Act clearly was intended to give the bodies named in that section ("religious bodies, charitable and social organisations")the power to enter a lease, whether such a body was incorporated or not.

(3) Further the plaintiff was estopped from denying the validity of the lease on the above ground. The lease named the church as lessor; the application for lease, naming the church, was signed by the plaintiff; the lease was part-performed; the church had used the land, the plaintiff had accepted the rent from and through the second defendant; all parties had accepted the lease as valid and acted accordingly.

(4) (Obiter) The failure by the first defendant to observe it's constitution may give rise to a right of action by its members against the church authorities but that does not give the other contracting party a right to avoid an agreement otherwise lawful.

(5) As to the two related breaches of the terms of lease alleged, which were (a) the granting of the sub-lease to civil aviation and (b) the change from the original purpose by the change of the use of the land and the receipt of rent; a change of use for other than the original purpose could only be done with the prior consent of Cabinet; there was a change of use here; prior consent of Cabinet was required; the plaintiff asserted there was no such consent and the burden of proving that was on him; he had not demonstrated a failure to obtain Cabinet's prior consent.

(6) As to the alternative contention for the plaintiff that as the Minister of Lands was the plaintiff's fiduciary and was also a r mber of Cabinet, he was therefore in a situation of a conflict of interest and as no fully informed consent of the beneficiary (the plaintiff) had been obtained by prior full disclosure, therefore no consent existed in law, the Court rejected that in that, first, there was no conflict of interests because when it came to the grant of a lease the control was taken out of the Minister's hands, by the Land Act, and given to Cabinet; and second the burden of proof again being on the plaintiff (of showing that the Minister of Lands sat as an integral member of Cabinet when considering the matters) the contention was totally unsupported by evidence.

(7) The plaintiff must fail; but would pay only half costs as the defendants had substantially extended the hearing by denying his standing.

[Note: An appeal was taken by the plaintiff from this judgment - it was wholly unsuccessful and the judgment in the Court of Appeal is reported immediately following.]

Stututes considered:

Constitution, clauses104, 105, 106, 108, 110, 114
Land Act, ss. 17, 18, 19, 31, 33, 124, 141, 152

Counsel for plaintiff: Mr Edwards
Counsel for first defendant: Mr Fa
Counsel for second defendant: Mr Taumoepeau

Judgment

The plaintiff is a noble and holder of hereditary estates including Toloa. In 1925, the first defendant was granted a lease over 661 acres in order to establish a church school. The lease started on 12 April 1925 and the school, Tupou College, has been built. In 1970 the lease was renewed to run until 2010. In 1989-90 it became necessary to extend the runway of Fua'amotu Airport and the land affected included 159 acres of the land leased to the first defendant and that area was subleased by the first defendant to the Minister of Civil Aviation.

Actions have been instituted in both the Supreme Court and this Court but, as the Supreme Court case will depend to a substantial extent on the vailidity of the lease, this case has been listed for hearing first. When the trial date was fixed, the Court ordered that the parties should file an agreed statement of facts with the Court prior to the hearing. That has been ignored. Had it been done the Court's work and costs of the trial for the parties would have been reduced. It is unfortunate counsel show such an attitude to Court orders. This neglect could have resulted in the trial being further adjourned. However, in view of the importance of the case to the parties and my impending departure from Tonga, I have agreed to continue with the hearing.

Shortly before the expiry of the original lease an application for a new lease was made on 12 December 1969. It was signed by Rev. Gooderham, President of the Free Wesleyan Church of Tonga, as applicant and the plaintiff as land holder. It was signed for the Minister of Lands.

Although the application was in a standard form, it omits the portion, required by Schedule IX of the Act, in which is stated the purpose for which the land leased is to be used. The Cabinet approval dated 15 January 1970 describes leases 1400D of 120 acres and 139 (the predecessor of lease 2381) of 661 acres as "School and agricultural sites respectively".

The lease number 2831 was expressed, in accordance with the form of lease in Schedule IX of the Land Act, to between the King as Lessor and the Siasi Fe'esiliana Tau'ataina 'o Tonga as Lessee. It was signed on 8 November 1972 by the Minister for Lands and a Cabinet Minister in accordance with clause 110 of the Constitution and section 124 of the Land Act, and President of the Conference of the Methodist Church of Tonga, Sione Havea, for the lessee. It was registered in the Register of Leases on the same day and was stated to run from 13 April 1970 to 12 April 2010.

On 11 April 1989 the 159 acres needed for the airport extension were subleased, the agreement being between the Free Wesleyan Church of Tonga as lessor and the Ministry of Civil Aviation as lessee. It ran from that day to 10 April 2010.

Curiously, the application to sublease signed by the Minister of Civil Aviation as applicant and Sione Havea and David Mills for the Free Wesleyan Church of Tonga as grantor was dated 11 April 1989 but the lease was not registered in the Register of Sub-leases until 30 July 1993, a few weeks before the first claim was filed in this Court.

The plaintiff complains that, prior to the sublease, he was told nothing by the Church of their intention to grant a sublease nor by the Ministry of its intention to seek one. At the same time he clearly had knowledge of the intention to extend the runway and that it affected this land. On 25 November 1988 the Secretary of Civil Aviation wrote telling him of the project to extend and asking him to "grant an easy passage for the application for the (sub) lease or any other way the land can be made available for the Department

so they can start with their project." Confirmation of the extent of the runway and the proposed starting date for construction was written on 15 December 1988. The plaintiff wrote on 9 May 1989 to the Acting Minister for Lands referring to the letter from the Secretary of Civil Aviation. He expressed anxiety that the Church may approach the Government directly and pointed out that the lease was for a school not for business. By that time the sublease had been signed.

That letter evoked no reply and the plaintiff tells the Court he was neither asked to approve the sublease nor asked by either party to the sublease whether he had consented and, in fact, never did consent. I accept that is correct.

It is also apparent from the evidence called for the first defendant that the Church was very unhappy about the loss of land they would suffer. The school and church authorities wrote in strong terms to the Government. The former President of the Church said that he spoke to the plaintiff offering to take 200 acres of land on the northern side of the runway in place of the land required for the airstrip. I accept such a conversation took place but nothing came of it and subsequently the Church entered into the sublease. The same witness was the signatory of the sublease and told the Court, and I accept it is true, that, at the time he agreed to the lease, he assumed and believed the Government would act properly and lawfully.

I pause to add that part of the plaintiff's claim was that the land was not resumed by the Crown under section 141 of the Land Act. The Crown do not dispute that and it is clear on the evidence that the land was obtained by means of the sublease. As a result of the airport extension, the first defendant was given a substantial sum of compensation for trees removed. That is the subject of the Supreme Court action.

The plaintiff's case in this Court is that the use of the land for purposes other than a school are breaches of the lease sufficient to allow him to cancel it and evict the first defendant and also that the lease is null and void ab initio because the church was not a legal entity and therefore had no power to enter the agreement.

The defendants dispute these contentions and, in addition urge that, as the original lease was between the King and the Church, the plaintiff is a stranger to it and has no rights sue on it.

There are thus three matters for determination:

1. Whether or not the plaintiff is a party to the lease and can sue on it.
2. Whether the Church is a legal entity capable of entering into a lease
3. Whether the Chuirch has breached the terms of the lease by granting the sublease for a purpose other than religious or education activities and benefitting thereby.

The first question is the standing of tne plaintiff in this action.

The defence case is a denial of the two allegations in the claim that the lease is a nullity because of lack of contractual capacity of the Church or that it may be cancelled because of breach of the agreement by the Church. However the defendants have raised the preliminary assertain that the plaintiff is a stranger to the lease and has no locus standi.

The terms of the Deed of Lease are plain and described in the agreement between His Majesty as lessor and the church as lessee. Nowhere on the document is there any mention of the plaintiff or reference to the estate holder in general. The fundamental rule is that a contract can only impose obligations or confer rights on the parties to it.

The defendants case is, simply stated, that the document speaks for itself and is

based on the unique nature of the land law in Tonga. By the Consitution and the Land Act, all land in Tonga is the property of the King and he may grant estates to the nobles to become their hereditary estates. As such, the nobles have a life interest only. The King is the only person with property in the land and all leases are in his name. The plaintiff, as the holder rather than the owner of the estate, cannot be a party to the lease.

The plaintiff argues that, although the Act gives powers to the Crown and the Minister to grant leases and to set the form of lease with the King as lessor, the provisions of the the Act as a whole clearly see the land holder as the true lessor. The effect is to place the King and the Minister acting on his behalf, in a fiduciary relationship to the estate holder. As the beneficiary, the plaintiff has an interest in the contract and may sue on it.

All parties agree the Land Act is a unique code and the whole Land Law of Tonga is expressed there and in Part III of the Constitution. It is correct, as the first defendant asserts, that the land is owned by the Crown but the terms of the Act give considerable proprietory rights to the estate holders. Clause 104 of the Constitution vests land in the King but it also clearly gives a right to the holders to lease it in accordance with the Consitution. Clause 105 directs that Cabinet shall determine the term for which leases shall be granted subject to consent of the Privy Council in certain circumstances and Clause 106 provides that the form of leases must be sanctioned by the Privy Council. Clause 110 requires all leases to be signed by the King himself or the Minister of Lands and a Cabinet Minister. Clause 114 requires the consent of Cabinet to leases of less than 100 years.

Those provisions do not prevent the estate holder from leasing land but clearly impose a duty on the Crown or the Minister of Lands acting on its behalf and on Cabinet to oversee the form and nature of the lease.

The Land Act follows this but its terms as a whole are protective and clearly envisage the actions of the Crown and the Minister, in relation to leases, as being for the benefit of the estate holder and requiring his initial consent. This places him in the position of a beneficiary.

Before a lease is granted the consent of the estate holder is required (section 124 and Schedule IX). it is he, not the King, who is empowered by section 33 to lease land on his estate subject to the provisions of the Act and, by section 31, he shall receive 90% of the rent from such leases. One of the duties of the Minister under section 19 is to collect the rents and pay them to the estate holder after deducting 10%.

I am satisfied the intention of the Act was to recognise the estate holder's right to grant leases but to supervise and control the manner of granting leases, the nature of the leases granted and the collection of the rents the Crown is placed in the position of a fiduciary office. The Act gives it powers and duties that are to be exercised for the benefit of the estate holder.

Thus the plaintiff, as the beneficiary of the lease, has the right to sue on it and has locus standi.

The second matter is the capacity of the Church to enter a lease agreement in the way it did.

Although the cross examination of the first defendant's witnesses ranged over a number of ancillary aspects, the case of the plaintiff as pleaded is that the lessee in the lease is the Siasi Uesiliana Tau'ataina 'o Tonga which is an unincorporated body. As that is not a legal entity is cannot enter into a lease and the provisions of section 17 of the Land

Act do not apply for the same reason.

Section 17 as far as is relevant reads "Religious bodies, charitable and social organisations may subject to the provision of this Act hold land upon lease." The conditions are set out in section 18.

It is undisputed that the Church is an unincorporated body and, by its own Constitution, leases or grants of land should be signed by the trustees. Lease number 2831 was not so signed and was therefore entered in breach of its Constitution.

The first defendant makes the point that, if the plaintiff is correct in his assertion, then he cannot, for the same reason, sue the Church as he has. If the lease could only be entered by the trustees on behalf of the Church, they are the only bodies that may be sued.

The general rule is that an unincorporated body such as a Church cannot enter into contractual obligations and cannot sue or be sued. The plaintiff contends that, as a result of this rule, the intention of section 17 must have been to allow religious organisations to hold land on lease only if it was an incorporated body.

I do not accept that is the intention of the section. Section 17 gives the right to religious organisations to hold land upon lease. Section 18 sets conditions that must apply. If the intention was to exclude unincorporated bodies, the section would have been unnecessary. Apart from section 17, the Act is silent about other bodies whether incorporated or not. Clearly they are bound by the normal rules of contractual capacity. The express mention of the associations in section 17 must have been intended to confer a special status and excluding in that context the general rule.

The rule that an unincorporated body may not sue or be sued may be varied by express or implied statutory provisions. It is note worthy that section 17 does not give the right to hold land or lease to all unincorporated bodies. It refers specifically to religious bodies and social or charitable organisations. The wording is plain and I consider the intention was to give the bodies named in section 17 the power to enter a lease whether incorporated or not.

Even if I am wrong in that interpretation, I would consider the plaintiff is now estopped from denying the validity of the lease on this ground. The lease names the Church as lessor and the application for the lease naming the Church was signed by the plaintiff also. Since then the lease has been part performed. The Church has had the use of the land and the plaintiff has accepted the rent from the Ministry. Indeed it has been suggested on his behalf that a substantial sum has been paid to him as rent in advance. It is clear the parties have accepted the lease is valid and acted accordingly. It would be inequitable if the plaintiff was able now to deny the capacity of one party.

That makes it unnecessary to go further but I would add that, had I agreed with the plaintiff's submission, I would have needed further argument that this would necessarily render the lease a nullity.

That it was not signed according to the Church's own Constitution is undisputed but the question for the Court is whether or not the Church as an unincorporated body had the capacity to enter such an agreement. The failure to observe its Constitution may give rise to a right of action by the members against the Church authorities but I do not consider it gives the other contracting party a right to avoid agreement if it is otherwise lawful.

The third matter for determination forms the main thrust of the plaintiff's case. It is that the first defendant has breached the term of the lease and it should therefore be cancelled under section 18. Two breaches are claimed, the granting of the sublease to

the Ministry of Civil Aviation, and the change from the original purpose by the change of use of the land and the receipt of rent.

Clause 108 of the Constitution imposes conditions on the use of town land let to religious bodies. Those terms were extended by the Land Act to cover such leases of all land.

"18. (1) Religious bodies, charitable and social organisations holding land on lease shall not have the right to use such land for any other than the original purposes of the body or organisation declared at the time of the making of the lease, or to transfer or sub-let such land, without the prior consent of Cabinet.

(2) If any such body or organisation contravenes the provsision of this section the Minister may with the consent of the Cabinet institute proceedings in the Land Court against such body or organisation claiming therein the cancellation of its lease and on proof of the contravention of this section by such body or organisation the Court shall order such lease to be delivered up to be cancelled and upon cancellation of the lease the lands therein specified if situate in an hereditary estate (tofi'a) or town allotment ('api kolo) shall revert to the holder and if situate elsewhere shall revert to the Crown."

The plaintiff contends that the head lease was granted to the Church for the purpose of Tupou College and the subsequent grant of the sublease by the first defendant knowing the proposed use of the land was different from the original purpose was a breach.

As has been stated already, the application for renewal of the lease did not, as it should have done, include any statement of the purpose for which the lease was sought. The deed of lease itself does not. The consent given by Cabinet however, clearly refers to the purpose of the two original leases as "School and agricultural sites".

On the evidence in general, it is clear the purpose of the first defendant was always and still is to hold the land for that purpose. Indeed the evidence of the principal of the College and the President of the Church at the time was that they were most concerned that land to be taken would no longer be available for the school's use. I find as a fact that the use of the land under the sublease was a change from the original purpose for which the renewed lease was granted.

Thus, by the terms of section 18 both change and the granting of the sublease required the prior consent of Cabinet.

In his written submission, the plaintiff puts his case in two ways. The first argument is:

> "In subleasing the land the first defendant is fully aware that the new purpose of that sublease is totally different from that to which it had agreed with the plaintiff. The agreement between the plaintiff and the first defendant cannot be varied by consent of the second defendant only.
>
> In the actual deed of lease the power thereunder is limited to approval by Cabinet for the sublease. In other words Cabinet's consent to the sublease can be given provided the plaintiff and first defendant are in agreement as to the variation of the purpose.
>
> Under s. 18(1) Land Act, Cabinet's consent for the sublease must be based on the agreement between the plaintiff and the first defendant (in the same way that Cabinet approval was given to the application to lease by the parties.)
>
> This is a matter of contract between the parties and it is submitted that the

consent of the plaintiff to vary their agreements is essential as a condition pre-requisite as to the approval by Cabinet for change."

I cannot accept that contention. The lease itself, following accurately the requirements of section 18(1), contains the clause,

> "And the lessee further covenants for himself, his heirs and representatives that he will not grant a sublease of, or transfer this lease without the consent of Cabinet beforehand obtained."

The sublease is an agreement between the Church and the Ministry of Civil Aviation. There is no suggestion the plaintiff is a party and his consent is not needed. By section 124 all applications, leases and subleases, shall be in the forms prescribed in Schedule IX. The application form, Form 1, requires the signature of the grantor. In relation to a sublease that is the lessee of the head lease as is shown by the wording of the proviso to subsection (2). What is needed is the prior consent of Cabinet.

Although the Registrar of Lands told the Court he had a copy of Cabinet's consent to the sublease, the documents produced were the application by the intending parties to the Minister of Lands dated 11 April 1989 and the submission by the Minsiter to Cabinet for its approval dated 1 May 1989. The actual sublease itself was drawn up on 11 April 1989 prior to the submission to Cabinet. The plaintiff does not rely on this aspect. His case is that there was no true consent given. He submits:

> "Both defendants rely on consent being given by Cabinet. Neither called evidence on this point. In the absence of clear proof from the defendants on this points, the plaintiff's contention of no consent should succeed."

I disagree. The plaintiff contends the sublease is in breach of section 18(1) because of lack of consent. As the party asserting, the burden is on him. He must prove the invalidity at least prima facie and the burden is not on the defendants to prove its validity unless and until the plaintiff has discharged his burden. No written consent has been produced. The Registrar of Lands thought there was consent but could not produce it. Apart from that, there is no direct evidence either way. The Court has before it an apparently valid sublease and has evidence it has been treated as valid by the parties to it for some years. It has been registered, albeit very recently, which is further evidence of its validity based, presumably until the contrary is proved, on compliance with the requirements of the law.

The first defendant called Sione Havea who was President of the Church at that time. He described his fruitless attempts to arrange with the plaintiff to have an alternative site on the northern side of the airstrip and the subsequent alternative remedy of a sublease. He told the Court he received the documents to sign when they had all gone through Cabinet and that he trusted Civil Aviation and the Minister of Lands to do it properly.

Such evidence is indirect but all points prima facie to proper consent having been given.

The date of the application suggests the consent was given after the sublease was signed but, on balance, in view of the lack of direct evidence and the apparent regularity of the sublease, I am not satisfied the plaintiff has demonstrated a failure to obtain Cabinet's prior consent in accordance with section 18.

The second basis of the plaintiff's claim as expressed in his written submission is that no consent existed in Law:

> "Under the law concerning Fiduciaries no consent can be given by Cabinet

unless the Minister of Lands who is the plaintiff's fiduciary has first obtained the consent of the plaintiff.

It has already been submitted that the second defendant stands in a fiduciary relationship with the plaintiff. As a fiduciary there is a clear conflict of situation (interest?) where the Minister of Lands acts as a Fiduciary of the plaintiff for the purpose of the lease and then the Minister sits as an integral member of Cabinet after recommending to Cabinet that consent be given either to the change of use or to the sublease .....

It is submitted in the present case where the Minister is acting as representative of the plaintiff and as a member of the Cabinet, that Cabinet could not give consent if informed consent was not first given by the plaintiff. This did not happen yet consent was still granted."

The plaintiff is correct that the general rule that a fiduciary does not obtain the consent of the beneficiary before he acts is modified in a situation where there is a conflict of interest. In such cases, the fiduciary may still act if he is serving the beneficiaries' interest but he must not take any action without the fully informed consent of the beneficiary obtained by full disclosure. There is no suggestion here that the beneficiary was informed of the intention to negotiate a sublease.

The Court must consider first if this was a situation where the Minister of Lands representing the Crown was in postion where his duty to the beneficiary and his own interests conflicted. If he did, as there was no informed consent, he would be in breach of his duty.

With respect to counsel's careful argument, the plaintiff is, first, confusing the roles of Minister and of Cabinet and, second, basing his submission on a conclusion totally unsupported by evidence, namely that the Minsiter of Lands sat as an integral member of Cabinet when it was considering his submissions.

The burden, as I have said, is on the plaintiff, and the second part is sufficient to negate his claim.

In fact, I am satisfied he is wrong on the first point also. Section 19 of the Land Act clearly makes the Minister of Lands the representative of the Crown in all matters concerning land. I have already found that, when granting a lease, he is the fiduciary of the land holder and therefore represents his interests. The Land Act places statutory controls on some of his actions including the requirement that, for a lease of up to 99 years, he requires the consent of Cabinet.

I consider the Act distinguishes the two in order to separate the roles they play. The intention was to place the Minister in a fiduciary position to the land holders when he represents the Crown as land owner. Thus, where any control or check is needed it is taken out of his hands and given to Cabinet.

The requirement under section 124(4) that a lease is to be signed by a Cabinet Minister in addition to the lessee and the Minister of Lands for the lessor is evidence of this separation of roles.

On the evidence before me, I am not staisfied there was a situation of conflict of interest and so the Minister did not require the informed consent of the plaintiff to the sublease in order to give his consent and was entitiled to act as he considered best in the interest of the beneficiary.

The orders sought by the plaintiff are refused with the exception of paragraph (c) of

the prayer which relates to part of the claim in the Supreme Court and must be tried there.

The plaintiff having failed in his claims should pay the defendants' costs. However, a substantial part of the hearing was occasioned by the denial by both defendants of the plaintiff's locus standi. On that, the plaintiff succeeded and I shall order the plaintiff to pay half of the first defendants' taxed costs. By section 152 there can be no order for costs in relation to the second defendant.