IN THE SUPREME COURT OF TONGA
PROBATE DIVISION
NUKU'ALOFA REGISTRY PA 15/2012

IN THE MATTER OF an application for letters of administration of the estate of Filimone Kata Fie'eiki deceased.

Mrs P. Tupou for the Plaintiff

'A. Kefu (Solicitor General) for the Respondent

RULING

[1] On 23 July 2012 Fine Fie'eiki applied for grant of letters of administration to her in respect of her late husband Filimone Kata Fie'eiki who died intestate on 30 June 2010.

[2] According to the affidavit in support, the deceased was survived by his widow and four children, now aged 48, 45, 44 and 41, all apparently resident in the United States of America.

[3] The notice required by Supreme Court (Probate and Administration) Rule GS16/64; GS51/65 was placed on 20 May 2011 and, according to the Applicant, no claims on the estate have been received. All four children have consented to letters being granted to their mother.

[4] According to the applicant, the only asset of the estate is a sub-lease at Kolomotu'a, Tongatapu a copy of which is annexed to the application and which she values at T$3450.00. Based on this valuation the Supreme Court registry assessed the duty payable at T$83.

[5] Section 3 of the Probate and Administration Act [Cap 16] requires:

> "The Court [to] ascertain the value of the property of the deceased as correctly as the circumstances allow."

[6] When I asked the Chief Registrar how the valuation of the sub-lease had been calculated I was informed that for many years the practice of the Registry has been to value leases by multiplying the annual rent payable by the lessee by the number of years remaining of the lease. In the present case, the lease expires in October 2040 while the rent is T$50 per annum. By my calculation, applying the current approach, the correct figure is T$1900.00 (or, as suggested by the Solicitor General T$2000.00) not T$3450, however nothing turns on the different calculation, it is the approach which gives me concern.

[7] I invited both counsel to file written submissions and I am grateful for submissions filed on 21 August and 1 October. Unfortunately I do not find myself in agreement with either of the arguments advanced. In view of what was accepted as being an important issue raised I decided to deliver the present ruling.

Valuation in general

[8] Although the Court has a duty to value the property, it has not been supplied with any means to enable it to do so. Where the property consists entirely of money it has no realistic alternative to accepting the correctness of the applicant's supporting affidavit. The same applies when the estate includes chattels. There is no reasonable alternative to accepting the applicant's evaluation of their worth. This may be compared with, for example, England where the Commissioner of Inland Revenue may require personal representatives to deliver their account "in such form and contain such particulars as may be prescribed by the Commissioners" for Capital Transfer Tax Assessment purposes (see generally, Halsbury 4th Edition vol. 19 paragraphs 850 at ed. Seq). Where an interest in land is included, either the interest must be valued (whether by the applicant or independently) or a formula must be applied. It is this latter course which has hitherto been followed.

[9] In my opinion the formula which has been applied (number of years remaining multiplied by the annual rent) is plainly incorrect since it confuses the value of the estate to the lessee with the value of the lease to the lessor. Assuming, for example, that the figure of T$2000 is the correct calculation, that sum represents the total sum (disregarding interest) that the *lessor* will earn from the lease in the years remaining before its expires. The value to the *lessee* (ie the estate) is not at all the same thing. It is the amount which could be raised by the lessee by dealing with the land in any of the ways which are not prohibited by the terms of the lease including, relevantly, mortgage.

[10] The copy of the sub-lease filed with the application reveals that in 1995 it was mortgaged to the ANZ Bank for T$50,000., that the sum secured has been increased four times and that it currently stands at T$105,000.00 (interest and repayments disregarded). In my opinion, it is clear that advances of this size will only have been agreed to by the Bank if, having valued the land, the Bank was satisfied that the land offered sufficient security for the sum advanced.

[11] On the papers before me I am satisfied (a) that the wrong formula for valuing the land has been applied by the Supreme Court Registry and (b) that at least in 1995/1996 the sub-lease was worth far more than T$2000 or T$3,450.

Valuation of this estate

[12] Unfortunately I was not told how much was presently owed to the Bank. No evidence of any repayments was placed before me. The Solicitor General submitted that since the deceased died with the mortgage still unredeemed, all the estate comprises is debt. While it seems likely that the sum still owed is large, it is not in my view clear that the estate is insolvent.

[13] The consequence of the execution of the mortgage was, as provided by Section 96 of the Land Act, that the land was transferred to the mortgagee Bank as security for the debt. After such a transfer, all that the mortgagor retains is the equity of redemption, the right to redeem the mortgage and to have the land transferred back to him without encumbrance.

[14] Where, as in this case, it appears that the mortgager died without having redeemed the mortgage, then the equity of redemption and the right to redeem devolves on the mortgager's personal representatives and is exercisable by them until by assent or conveyance the equity becomes vested in the devisee or other persons entitled.

[15] Without knowing the amount owed under the mortgage and the real market value of the sub-lease following redemption, it is not possible to know whether this estate is in fact insolvent.

[16] In her submissions, Mrs. Tupou suggested that in applying for letters of administration, the applicant:

> "is merely exercising a step in law to protect the said land for the heirs".

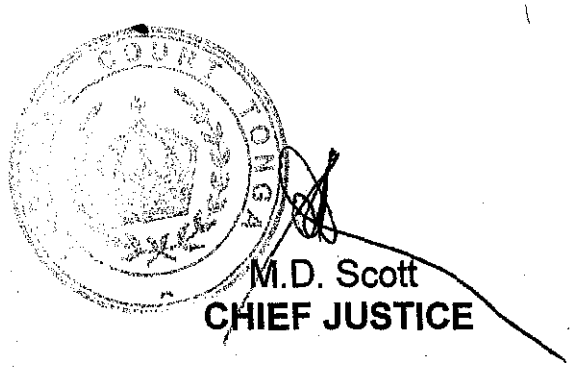
She further suggests that:

> "the course of justice would lay heavily on a widow's shoulders should the Court commence requiring commercial valuation of land upon application for letters of administration".

While I accept that one function of applying for letters of administration is formally to identify those entitled to a share into a state, I do not accept that by rejecting the current formula for assessing the value of leases the court is requiring the value of the land to be determined for commercial purposes. Unfortunately, the

Court was not provided with a copy of the original Crown lease and is therefore unable to discover what restrictive covenants it may contain and which continue to apply to the sub-lease. It appears however, that until now the land has only been used as the site for a family home.

[17] In future, when an estate includes a leasehold interest, some realistic attempt to calculate the value of the interest must be made. In the present case it is the value, if any, of the equity of redemption that should be ascertained. In view of the fact that it appears that the estate may be almost, if not entirely, insolvent I will allow the letters as sought to issue.



M.D. Scott
CHIEF JUSTICE

DATED: 15 October 2012.

N. Tu'uholoaki
11/10/2012