

BETWEEN: KOLOLIA OPRA MAKA
Plaintiff

AND: FOLOLA KAINGA
First Defendant

AND: VAONUKUNUKA ELECTRONICS
LIMITED
Second Defendant

BEFORE THE HON MR JUSTICE SHUSTER
MR S J STANTON FOR THE PLAINTIFF
MS D STEPHENSON FOR THE FIRST DEFENDANT
HEARING DATES 6th 7th JULY 2008
SUBMISSIONS 31ST OCTOBER 21ST SEPTEMBER 14TH OCTOBER 2009
JUDGMENT 17th DECEMBER 2009

JUDGMENT

1. BACKGROUND

By this suit, commenced on the 13th February 2008 the plaintiff seeks to remove the first defendant (the defendant) as the occupier of the shop premises, situated on the plaintiff's land, at the intersection of Taufua'ahau Road and Laifone Road, Nuku'alofa. The plaintiff seeks vacant possession of the land and of the building on which the store referred to in the judgment of the Land Court in case LA 01-05 - is located.

The first defendant filed a defence and a counterclaim, on the 1st April 2008. The plaintiff filed her reply and defence to the counterclaim on the 9th May 2008. The second defendant's have taken no part in these proceedings the Company has never filed a defence.

The defendant has occupied the shop premises since 1998/1999 - pursuant to an oral agreement made between the plaintiff's late husband and the defendant and her late husband. Both the plaintiff and defendant's husbands are deceased.

Exhibits were tendered by consent. The court studied the written submissions supplied by counsel and has had sight of the relevant case law recently submitted. This Court apologises for not being able to deliver its judgment on Friday 11th December 2009 as it had previously indicated - this was because the Court was hearing another matter which had been reassigned and which trial overran its allotted time.

2. PRIOR LITIGATION CASES

Both parties accept the plaintiff previously sought to remove the defendant from her occupation of the premises on two separate occasions as detailed in cases number CV474 - 02 and LA 01 - 05.

[a] Case CV 474/02 – July 2002

In the first case CV 474/02 the plaintiff claimed \$4,800 in rental arrears from the defendant, together with an order restraining the defendant from occupying or carrying on a business from the shop located on the plaintiff's premises. However CV474/02 was settled, by consent. Court records reveal a consent order was made on 13th December 02. The defendant paid the full rental arrears due and owing, and as a result of the payment the plaintiff agreed not to remove the defendant from her occupation of the shop and, the oral arrangement continued as before.

[b] Case Number LA 01/05 – January 2005

In the second case the plaintiff filed a claim in the Land Court for an order to evict the defendant from her land. The matter was heard by Webster CJ and Land Assessor George Blake on the 05 October 05. In case LA 01/05, the plaintiff claimed an oral agreement

between herself and the defendant and the defendant's husband as follows – the defendant and her husband would continue to occupy the shop building, until the plaintiff and her husband wanted the defendant to vacate the land, at which point the building constructed by the defendant and her husband - would remain fast on the land. **THAT IS THEORY 1**

Conversely, the defendant said the agreement was this - that she and her husband would build a store on the land, and they would remain there as long as they liked; until the defendant herself felt that they had had enough, at which point the store would become the property of **the plaintiff's husband**. [now deceased] **THAT IS THEORY 2**

It was left by the parties - to the Land Court - to determine the terms of the agreement based on the evidence presented by both the plaintiff and defendant, on which evidence the Land court would ultimately accept.

The defendant says the following points are relevant and arise from the judgment in LA 01/05: The Land Court accepted the structure erected on the property by the defendant and her husband was a **permanent building**. The Land Court accepted the structure had been built at a cost of \$30,000 which had been paid for - by the defendant.

In case LA01/05 the Land Court rejected the plaintiff's claim that the structure was only intended to be a temporary structure. The Land Court said the plaintiff provided no evidence to the court - that when the plaintiff and her husband saw the building that they remonstrated with the defendant, or that they said the building was to be one only, of a **temporary structure**.

The Land Court found the plaintiff's claim that the agreement - that the defendant and her husband could occupy the building - until the plaintiff and her husband wanted her to vacate the land, and that the building structure would remain - *to be a very "implausible and an unlikely arrangement for any business person - to accept"* **I also agree**. The defendant argued the trial judge specifically noted the defendant's evidence "*Why would*

the defendant construct a \$30,000.00 building - if the plaintiff's husband could evict them at any time?"

The defendant says the Land Court, found the oral agreement between the plaintiff's husband and the defendant and her husband – in 1998/1999 was as follows-

- *That the defendant and her husband could build a store on the corner of the plaintiff's allotment and could remain there, until they had had enough of running their business there, when the building would become the property of the plaintiff's husband.*
- *The Land Court also found at that time, the defendant had not [as of then] had enough of running her business, which she conducted from the building: – so the plaintiff's claim was dismissed.*
- *The defendant has also said that - interestingly the decision of the Land Court in case LA 01/05 - was never appealed.*

3. MATTERS NOT IN DISPUTE.

The defendant by her counsel, states she does not dispute the plaintiff is the legal owner of the allotment on which the shop is situated. According to the evidence [and counsels submissions] the defendant also accepts she is simply a licensee of the building, with permission to occupy the building, until such time her license is terminated - in accordance with the original terms of the license agreement made between her, the plaintiff and their respective husbands [now deceased] covering such an agreement - as endorsed by the Land Court back in 2005.

The defendant readily accepts these facts were made quite clear in the Judgment of Webster CJ. The defendant accepts, she holds a mere licence to occupy the land and that she is able to engage in a business. A Court would further say that she could only engage

in a legal business.

The defendant readily acknowledges since entering into the agreement with the plaintiff's husband in 1998/1999, she has not been consistent in making agreed payments of rent to the plaintiff on time, however the defendant testified all rental arrears had eventually been paid to the plaintiff - or her counsel.

The defendant also says the plaintiff continued to accept her late rental payments, and as such the defendant argues the oral arrangement to occupy the shop premises has continued, and she argues that agreement still remains in force.

The plaintiff also conceded in her evidence, that the defendant is currently up to date with her rental payments - as of the date of hearing.

4. THE NATURE OF THE DEFENDANT'S - BUSINESS

The plaintiff argued - the defendant accepts it was made clear to her in the judgment in case LA01/05 that the defendant has a license to operate her business in a building, constructed and financed by the defendant [and her husband] and, that she only has a license to use that building - with the added caveat - **until she had had enough of running the business** when at which point then the building would become the property of the plaintiff's husband - [who is now deceased]

On the other hand, the plaintiff says the defendant had no right to lease the shop premises as a landlord - to any other person or persons who were or might be invited to occupy or rent the premises - **either as tenants or as sub-tenants** - the plaintiff says, this is because the defendant, had and she could have - no interest in the land as per the decision of the Land Court in LA01/05.

The plaintiff produced evidence to this court - of a Rental Agreement which was signed, dated and witnessed on the 20th February 2007. The said Rental Agreement was made

between the defendant FOLOLA KAINGA as “the Landlord” and Mr. HUANG WEN JIE who is described in the document as “the Tenant.”

The agreement states the tenancy was due to come into effect sometime in May 2007 and the Rental Agreement EXHIBITA- was admitted in evidence by consent. The plaintiff argues the terms of any agreement to rent out the shop premises – more especially when looking at paragraph 4 - of the agreement – THAT the Agreement

- Indicates the said tenancy would provide **exclusive** use of the premises, to the tenant - Mr. Huang Wen Jie for a period of two-years, and
- As a result of this signed tenancy agreement, the plaintiff says the defendant has given up her possession of the shop for at least two-years, thus
- The plaintiff argued - the oral licence previously made in 1998/1999 could be terminated, by the plaintiff upon her giving the defendant
- Proper written notice of termination of the agreement.

The plaintiff says A FORMAL NOTICE TO TERMINATE the oral agreement, was served on the defendant, on or about the 8th February 2008 [EXHIBIT C]

DEFENDANTS ARGUMENTS

However the defendant argued, there was no determination in case LA01/05 as to the permitted nature, or any restriction put on the type of business which could be run from the building on the plaintiffs land which had been imposed or, agreed to by the Land Court.

The defendant argues - in the absence of any such determination in this regard or, of any evidence of an agreement between the parties - as to the type of business which the defendant herself could engage in; then a reasonable inference must be that the defendant could run any type of business from the building, provided the business itself was a

lawful business.

The defendant gave evidence, after the death of her husband; she had regularly arranged to rent part of the shop premises to third parties. The defendant said she did this to ensure that rent would be paid to the plaintiff – more especially after the destruction, caused during the 16/11 riots.

The defendant in her evidence listed four parties, who over the period from 2003 to 2006, with whom she claimed she had shared / rented the shop. The defendant said in her evidence - that at all material times, the plaintiff was made fully aware of the arrangements. The defendant also said in her evidence the plaintiff was happy with the arrangement.

In support of her proposition, the defendant argues - at the same time as the plaintiff issued court proceedings in LA 01/05 to evict the defendant, – and because the defendant testified the plaintiff was well aware that other people running a money transfer business from the shop – then the defendant argued surely if the plaintiff genuinely objected to such an arrangement, then why had the plaintiff not raised her objection - as a substantive ground for the termination of the oral agreement in the Land case LA01/05

I would tend to agree - this court must ask itself - why not. I would also comment further- because Nukualofa is such a small town in area - it might be reasonable to assume the plaintiff would not have known what the plaintiff's land was being used for. On the other hand would she as a prudent landlord, not have visited or passed by the premises from time to time- more especially during troubled times - post 16/11? I have heard no evidence to that effect.

5. NOVEMBER 16, 2006

The defendant gave evidence the shop building on the plaintiff's land, had been badly

damaged and had been looted during the riots of 16 November 2006. The defendant testified the shop was closed as a direct result of serious riot damage, by the officials from the various Government authorities.

Clearly if that proposition is true, then defendant should not be held to be at fault by this court for the authorities' action closing down damaged business premises, even for a protracted period and a contract would or might possibly have been frustrated.

The defendant also told the court, that she had no insurance to cover the premises at the time of the riots in 16/11 and she testified because the shop was so extensively damaged and, looted that she just could not afford to carry out the necessary repairs.

The defendant said early in 2007, she was approached by a Chinese man who offered to repair the shop - in exchange for rented space in her shop. The defendant told the court she accepted that offer, and the store was repaired by the man. The defendant told him the man could move in, in exchange for the work which she said he had carried out. The defendant described there was a storeroom inside the shop where she kept her personal belongings, and from where she said she ran her keke business.

Further the defendant testified; since the repairs to the shop premises in 2007 the defendant said she has continually remained in physical occupation of the shop premises - using only one room - in which she told the court she kept her personal items and she cooked, and from where she testified she sold keke.

No photographic evidence was provided to the court evidencing the defendants cooking establishment or, photographs of her running the keke business and no customer[s] testified on her behalf. Also I heard no evidence the defendant spoke to the plaintiff of the events of 16/11 and visa versa.

6. THE DEFENDANT'S CONTINUED PHYSICAL PRESENCE IN THE SHOP?

This case turns upon whether the defendant did in fact continually occupy the plaintiff's shop premises, or not, and upon whether the defendant has actually given up her occupation of the shop premises? The defendant testified that she does still maintain a business at the premises, and she told the court in her evidence she maintains the small room at the back of her shop and sells her keke.

The defendant quite forcefully told this court, that she has never given up the premises - at all. On the other hand the plaintiff says - the Court must take a very careful look at Exhibit 2 - [document 3] signed by Mr. Jie and Mrs. Huang. The plaintiff says this document is clear evidence which indicates the terms of the written agreement with the first defendant - and those terms are as follows:-

TERMS DOCUMENT 3

".....To solely operate my own business in the whole shop or premises located at your land property at the corner of Taufu'ahau and Laifole Roads.

During the times of my possession and honouring of our agreements Mrs Folola Kainga has never come back and - operate any business of her own in the same building.

I operated my own business and I was the sole operator within the business.

We never shared any portion of the building with Mrs Folola Kainga during our tenancy period. All Mrs Folola Kainga wanted is for us to pay her the monthly rental of \$1,000.00 to \$1,200.00 Pa'anga.

The plaintiff says in her opinion - this court needs no further evidence - other than the evidence of what the second defendant had written down, and that is evidence which the plaintiff said was admitted by consent, it was also evidence admitted without

objection, and evidence which was not cross-examined upon - in these proceedings.

The plaintiff says the court – must carefully study Exhibit 2 she says the document is a clear admission – and it is an admission - which totally contradicted the first defendant’s evidence concerning her “**proposed involvement**” in either running her *keke* business from the store, or, that the document itself readily contradicts the defendant’s assertion of her being in constant occupation of the shop premises - as she asserted in court, and she has done throughout these proceedings.

7. THE ORAL EVIDENCE OF ANGELA KAINGA

The defendant’s daughter in law Angela Kainga from New Zealand, gave evidence concerning the contents of a half- hour telephone conversation which she said she had with the plaintiff, she said the conversation took place sometime in March 2007.

- Angela Kainga’s testimony was this – The witness said the following matters were discussed, sometime in March 2007 on the telephone:
- Angela was familiar with the disputed Land case between the parties in January 2006 - she told the court she was aware of the defendant’s history and of her problem making rental payments to the plaintiff on time.
- Angela told the Court, she wanted to help the defendant make sure the rent for the shop would be paid regularly. She said she spoke to the plaintiff by phone sometime in March 2007 just after she had returned to New Zealand from a holiday in Tonga.
- Angela agreed the defendant owed the plaintiff - \$10,000 TOP in rental arrears and that was in March 2007.
- The witness said she told the plaintiff, on the phone that the full amount of the rental arrears had been paid into court in October 2006 - just over 5 months before the alleged phone conversation between the plaintiff and the witness.
- The witness said the plaintiff told her she was unaware the defendant had paid

the rental arrears – Angela told the court the plaintiff was pleased or / rather that she seemed pleased in receiving this information.

- The witness said the plaintiff asked her if there were any Chinese people renting the store she confirmed Chinese people were in fact renting the store –
- They were renting the store because the defendant had no money and she needed the Chinese persons to rent the store for the defendant get her business up and running again - post the events of 16/11.
- Angela said she told the plaintiff that the defendant still wished to continue running her business from the store.
- The witness said the plaintiff told her - she was pleased the rental arrears had been paid – she further testified the plaintiff said so long as the defendant paid her rent on time in the future - then the plaintiff had no problem with the arrangement with the Chinese people.

On the other hand, when Angela was cross-examined - concerning the substance of the alleged telephone conversation, the defendant pointed out the witness responded with only single word denials. Of significant importance the defendant argued – was the fact the plaintiff denied that any such conversation with Angela Kainga had taken place?

Angela Kainga admitted also in evidence she assisted in the completion of a Rental Agreement [EXHIBIT A]- made between FOLOLA KAINGA and HUANG WEN JIE and that she signed the document as a witness on the 20th February 2007 and her handwriting is shown on that documentation.

FINDING OF FACT. It would be logical for this court to assume, in hard times the plaintiff would need to chase up the issue of non - payment of outstanding rent - hence the need for the plaintiff to constantly bring the defendant to task – by using the court system as her proper means of redress.

8. ALLEGED MEETING ON JUNE 15, 2007

The defendant said in evidence in June 2007, she received a summons from the plaintiff claiming payment of back rent outstanding on the shop. The defendant gave detailed testimony about a meeting which the defendant said took place on 15 June 2007 between herself and the plaintiff.

The defendant said her meeting with the plaintiff took place in front of the Magistrate's Court at Fasi on 15 June 2007. She told the court the plaintiff suggesting they go to the plaintiff's lawyer's office – Lesina Tonga - to make arrangements for the rent arrears to be paid rather than go back into court. In other words the defendant said the two parties agreed to settle the matter amicably.

The defendant told the Court they agreed the defendant would make a partial payment of \$3,500 that day, with the balance owed to be paid in two equal sums of \$2,000 in July and in August. The defendant told the court they went together to the defendant's bank (Mbf Bank) to withdraw cash which was paid directly to the plaintiff's lawyer - and a receipt was issued covering that payment (Defendant's exhibit B) – **I fully accept that evidence.**

Following the defendant's payment of \$3,500 on 15 June 2007, the defendant gave a detailed account of a meeting which she said took place between the plaintiff and the defendant in the park opposite the Dateline Hotel in Nuku'alofa. During the meeting, the defendant said - the following matters were discussed:

- The plaintiff and the defendant talked about the Defendant's business - and in particular they discussed the shop and its use.
- The plaintiff told the defendant - the plaintiff had heard there were Chinese people renting the shop and she specifically asked the defendant "How is the Chinese business?"

- The defendant testified that Chinese people were in fact renting the shop;
- The plaintiff asked the defendant how much rent the Chinese people were paying and the defendant confirmed a payment of \$1,000 per month;
- The defendant said the plaintiff asked the defendant to ask the Chinese people to pay the outstanding amount of \$4,000 the balance of the rental arrears owed by the defendant - to the plaintiff;
- The defendant said she refused the plaintiff's request to ask the Chinese people to pay \$4,000 because they had already paid money in kind to fix the store after the 16/11 riots;
- The defendant said - the plaintiff told the defendant so long as the rent was being paid, then the plaintiff was very happy.
- The defendant told the Court she and the plaintiff left the meeting in a happy mood - and she said they were glad to have resolved their differences.

On the other hand - the plaintiff denies the existence of - these alleged conversations. The plaintiff says her proposition concerning the non payment of the rent and disobedience to the terms and obligations of agreements is evidenced by:-

- [1] The issuance of court proceedings in February 2008, which the plaintiff says was in order to remove the defendant from the premises, and
- [2] That in fact legal process was issued by the plaintiff in February – 2008 in order to remove the defendant.

FINDING OF FACT - This court fully accepts that a face to face - meeting between the plaintiff and the defendant took place outside the Dateline Hotel on the 15th June 2007 but the evidence of what they discussed is and was – completely contradictory.

9. QUESTIONS FOR DETERMINATION

The defendant says two critical questions for determination in the present case are:

- (a) Did the plaintiff know of, and agree to the arrangement between the defendant and the second defendant, thus waiving her right to rely on that arrangement to terminate the license – and is the plaintiff now estopped from evicting the defendant from the shop?
- (b) Has the defendant, by entering into an arrangement with the second defendant and by permitting the second defendant to occupy the shop, evinced an intention that she has had enough of running her business from the shop, thus terminating her license to occupy the shop - within the terms of the oral agreement - found by the Land court in 2006?

With respect to the first question, the defendant says - the plaintiff was fully aware of, and she agreed to the arrangements made between the defendant and the second defendant - regarding the second defendant's occupation of the shop.

The defendant says the plaintiff asked about and was advised of the arrangements with the second defendant on two separate and distinct occasions – the first was - via the telephone conversation with the defendant's daughter in law Angela in March 2007:- and secondly; during the defendant's meeting with the plaintiff, at the Dateline Hotel - Park on 15th June 2007.

*According to the defendant's evidence – the plaintiff indicated she was happy with, and that she agreed to the arrangements with the Chinese tenant on both occasions.

The defendant argued that it was reasonable to believe that the plaintiff would have been happy with the arrangement given that it was likely to ensure that the plaintiff would receive regular rental payments - as a result of the arrangement on time and in the sum of \$1,000.00 PA each calendar month.

The plaintiff argues the first defendant's arrangement with the second defendant - amounted to a variation of the terms of the oral agreement between the plaintiff and

the defendant - to allow her to continue to occupy the shop premises.

The defendant argues she was entitled to rely on that variation and, the plaintiff, having been advised of and she had accepted that arrangement for a period of nine months, then the defendant says the plaintiff is estopped from using it as a basis to terminate the defendant's license to occupy the shop - in these present proceedings.

The defendant argues if the plaintiff was unhappy with the arrangements between the first and the second defendant - regarding the sub rental of the shop, why did she not remonstrate with Angela and the defendant when they first advised her of the arrangements? However the contrary argument is that the Rental Agreement dated 20th February 2007 does not use the word [or words] - sub- lease.

Just as Chief Justice Webster noted in LA 01/05 - the plaintiff did not remonstrate with the defendant when the defendant built a permanent building rather than the temporary one in 1999. The defendant argues the plaintiff did not object to the arrangement with her Chinese tenants when she was told about it by both the defendant and by her witness Angela Kainga.

The defendant argued the plaintiff fully agreed to the arrangement, and she allowed it to happen because it meant that the plaintiff would receive her rental payments on time. The defendants said she thought it did not matter to the plaintiff at that time how the defendant was going to be able to make the rental payments, so long as those payments were being made and were being made on time. The defendant argued strongly that receiving her rent - was the plaintiff's sole concern at that material time.

The defendant's counsel, argued the plaintiff has attempted to block the defendant's defence of waiver and estoppel on the basis that it has not been pleaded and thus is inadmissible paragraph 36 of the plaintiff's submissions - filed on 14 September 2009. This is incorrect the defence say, because the defence was specifically pleaded in detail in response to the plaintiff's request for further particulars and they were filed

with the Court on 23 May 2008.

They argue, if the Court accepts the evidence of the defendant and her witness Angela that the plaintiff was aware of, and, that she agreed to, the arrangements with the second defendant, then that is fatal to the plaintiff's case - since no further consideration of the matter is required and the plaintiff's claim must fail.

Furthermore, if it was accepted that the plaintiff was aware of and the plaintiff agreed to the arrangements between the defendant and the second defendant, then the plaintiff's letter of 8 February 2008 to the second defendant - by which she procured the second defendant's vacation of the shop premises amounts to a direct, deliberate and a wilful interference with the defendant's contract with the second defendant, as pleaded in the counterclaim, for which the plaintiff is clearly liable.

If it is not accepted that the plaintiff knew about and agreed to the defendant's arrangements with the second defendant, then the question becomes - has the defendant, by permitting the second defendant to occupy the shop, evinced an intention that she has had enough of running her business from the shop, thus terminating her license to occupy the shop - within the terms of the oral agreement as found by the Land Court in 2006?

The defendant says the answer to this question turns on the nature of the defendant's business - and if it was genuine. The defendant gave evidence --since 2003, she has had various people renting space in the shop and that the plaintiff has been fully aware of such arrangements. The plaintiff says that by entering into a "lease in writing" with the second defendant, the defendant has (i) attempted to grant an interest in the plaintiff's land to which she is not entitled and (ii) in doing so has breached the terms of the oral agreement as found by the Land Court in 2006.

The defendant argued with respect, the plaintiff's arguments in this regard were specious and ill-founded. The defendant, as licensee of the shop, cannot possibly pass

on any legal interest in the plaintiff's land since she had no legal interest in the land herself. As such, the arrangement between the defendant and the second defendant is clearly a sub-license- since it was simply not possible, in law, for it to be a lease.

So it follows - was the sub-licence to the second defendant a part of the defendant's business? For the period from 2003 to the present, the defendant had granted sub-licenses to at least four parties by allowing them to share the shop. The defendant says this arrangement has been accepted by the plaintiff over this time **and** in the many claims that have been filed by the plaintiff against the defendant for eviction of the defendant for non payment of rental arrears, and **not once** has the plaintiff pleaded or raised an objection to the defendant's sub-license arrangements with any third parties.

The defendant says it is, and it has clearly been evident for a period of six years, a normal part of the defendant's business operations was to sub-license the shop premises to third parties and once again, the defendant says the plaintiff has had full knowledge and has acquiesced to such arrangements to secure payment of rent.

Finally, the defendant questions the plaintiff's motives in bringing the present action and they say these motives must be questioned. The defendant testified that the plaintiff attempted to buy the defendant out of the shop for the sum of \$30,000 in November 2007.

When the defendant refused the monetary offer, the plaintiff has proceeded to develop the site and she now wants out of her previous arrangement with the defendant.

The defendant says it's common knowledge the plaintiff committed herself to a hotel development in 2008 in order that the hotel would be finished in time for HM the King's coronation in August and they say that is clearly why the plaintiff attempted, in November 2007, to buy the defendant out of the shop for \$30,000 which the defendant also says is coincidentally the same precise figure accepted by the Land Court in January 2006 as the price for construction costs - of the shop.

Simply put, the defendant says, a better deal has come along for the plaintiff and, a result, the plaintiff is now asking this Court to release the plaintiff from her prior agreement with the defendant - even though she has no legal basis to do so.

The defendant asks the simple question, if the proposed hotel development project on the plaintiff's land had not eventuated, would the plaintiff have issued these proceedings they say the answer in all likelihood, would be an emphatic - no.

10. ANALYSIS

On the evidence:-

- This court accepts the oral agreement between the two parties to be as follows: - the defendant - accepted that it was made patently clear to her in the judgment of the Land Court in case LA01/05 - that the defendant had a license to operate a business within the shop constructed and financed by the defendant and her husband at their own expense some years ago.
- This court accepts the building constructed on the plaintiff's land, was as the Land Court said - a permanent building and fixture, and that it was constructed for the sum of \$30,000.00 PA which was not an insignificant sum of money at that time.
- This court recognises the defendant's shop was repaired, post 16/11 as a necessity to continue in business and that the renovation has ultimately benefitted both parties to this case.
- This court accepts the plaintiff has readily accepted all late rental payments and that the plaintiff directly benefitted from the rent paid by the defendant over a period of at least six years – even in a sluggish economy.
- This court recognises the problems encountered by all sides during the period

around 16/11, with the destruction of the premises and also during the downturn in the world's economic climate.

- This court accepts the evidence that in breach of her oral agreement to operate her own business on the shop premises - the defendant entered into a Rental Agreement between herself- Fola Kainga as the landlord, and Mr. Huang Wen Jie as the tenant; as evidenced by a written Rental Agreement dated 20th February 2007 and the court recognises that Rental Agreement was signed in the presence of Angela Kainga and Bin Huang who both signed as witnesses.
- The term[s] of the Rental Agreement made between Fola Kainga as the landlord, and Mr. Huang Wen Jie as the tenant - was the rental was for a period of two years from May 2007.
- This court particularly notes -clause four of the said Rental agreement which granted exclusive use to the Tenant Huang WEN JIE. The rental document stands in evidence on its own. Clause three of the agreement indicates that there is no legal impediment whatsoever to the Landlord renting the property to the tenant, when in fact there was such an impediment.
- This court accepts the plaintiff's argument- that the defendant had no right to lease the premises as a landlord to any other people – who were or may be invited to occupy the premises – to rent either as tenants or as sub-tenants - because the defendant could have no interest in the land, and that evidence indicates the defendant did in fact create a Rental Agreement on the 20th February 2007.
- This court accepts the defendant fully knew she only had a license to use the building premises until she had had enough of running that business and the agreement was that when that time occurred, – then the building would become the property of the plaintiff's husband – who is now deceased.

- This court accepts the defendant's argument - that there was no determination made in case LA01/05 as to the permitted nature, and it also accepts that no restriction was placed upon the type of business being / or, to be run from the building on the plaintiff's land, which had been imposed on it, or which had been agreed to by the Land Court, or indeed the parties - by mutual consent.
- This court does accept the defendant's proposition when she said in the absence of any such determination - in this regard or, of any evidence of an agreement between the parties - as to the type of business in which the defendant herself could engage in, then a reasonable inference must be that the defendant could run any type of business from that building - provided the business itself was in fact a lawful business and it was lawfully run.
- This court also accepts the plaintiff's assertion, that the defendant in this case has not proved to this court's complete satisfaction that she has consistently over the past number of years run a business and, in particular this court says the defendant has not proved to this court's satisfaction that she has run a keke business from the plaintiff's premises, more especially during the short tenancy period of Huang Wen Jie from his occupation in 2007, as she said she had.
- In this court's view a simple photograph could or should have been produced to the court showing photographs of the exterior of the premises, its interior, and or the defendant should have brought customers to court to testify as to the existence of that keke business at the material time. I question why the defendant did not ask the court for a site visit to the locus in quo? Why did the plaintiff not do likewise, the court is not entitled to go on a visit to a locus in quo unless it is asked.
- I have merely the defendant's assertion that she does in fact operate a food business and that she has remained in occupation of the premises throughout and I cannot on the evidence before me be certain that she was.

- In answer to the defendant when she says the two critical questions for determination in the present case are: Did the plaintiff know of, and did she agree to the arrangement between the defendant and the second defendant, thus waiving her right to rely on that arrangement to terminate the license – and is the plaintiff now estopped from evicting the defendant from the shop?
- The answer to this question must be, that this court may conclude the plaintiff must have know the nature of the usage of the shop premises at all material times - as any prudent landlord would, more especially so in a very small tight knit community in Nuku'alofa but I heard no evidence to that effect.
- Secondly, has the defendant, by entering into an arrangement with the second defendant, and by her permitting the second defendant to occupy the shop, and accepting rent has she evinced an intention that she has had enough of running her business from the shop, thus terminating her license to occupy the shop - within the terms of the oral agreement - found by the Land court in 2006?
- This court's answer to the second question upon hearing all the evidence in this case - MUST be an emphatic yes. This court fully believes the defendant has evinced an intention to give up the premises by her entering into a rental agreement when she should not.

CONCLUSION

From the evidence put before me it is clear that sometime in 1998 / 1999 an oral agreement was made between these parties, and as a result of that oral agreement, the defendant built a quite substantial property on the plaintiff land, from which the defendant operated her own business venture, for a number of years.

At a point in time a dispute arose which required two court determinations, as has

been freely discussed above.

The Land court case - LA01/05 determined the terms of the oral agreement between the parties – as discussed above.

I have to say post the Land court's decision - I do not know why the parties did not take further legal advice, then agree to meet together and to formally put into writing and agree on the terms and conditions of a subsequent agreement. In my view, this would have been what any reasonable and prudent man would have done, and it would have been a much better way of conducting any form of business arrangement for any prudent business person as these parties no doubt are and produce certainty.

This court fully accepts the defendant paid rent to the plaintiff in this case, and that albeit on certain occasions the defendant admitted she has been late in making her rental payments, but the evidence also revealed the late rental payments were always accepted by the plaintiff.

It is also clear that both parties for a long time, have secretly wanted to either; terminate the oral agreement of 1998 /1999 or, to substantially alter that oral agreement - each for their own benefit, I say this because there have been two court cases in the past, where the plaintiff sought to remove the defendant, for the reasons explained above.

It is also clear the plaintiff and defendant's oral agreement made in 1989 / 1999 made between the parties [and their respective husbands now deceased] benefitted each of the parties for many years – and the agreement benefitted them, until the events of 16/11 **and** until the subsequent downturn in both Tonga, and the world's economy.

It is clear to the court, that the plaintiff collected and has pocketed a quite substantial amount of rent for her property - as is her right, from the defendant's use of the property which had been constructed and had been developed by the defendant over

the past years - at a not insignificant cost of \$30,000.00 PA.

The defendant came over to me - as a person who I have no doubt has worked extremely hard to support herself, and her family, and a person who has served her community - as a shopkeeper day in and day out, even through the more difficult and traumatic times, such as the events of 16/11 and the economic downturn.

It was also made very clear to the parties by the Land Court that the defendant and her late husband had built a substantial and a permanent property from which to operate her business, and it appears to this court the arrangement worked well until the plaintiff received a better offer - in that she has literally jumped at the chance of constructing a hotel on that property and, the plaintiff clearly for that reason - wanted to move or to evict the defendant - She even offering the plaintiff \$30,000.00 to move that offer was declined. That indicates to me the defendant did not want to give up her business, or alternatively the defendant wanted more than \$30,000.00 to move.

It is also clear to me the defendant post 16/11 wanted and she needed in order to survive - to install Mr HUANG WEN JIE in exclusive and peaceable possession of the property, as "the tenant" for two years - evidenced per the signed rental Agreement dated 20th February 2007.

Thus with that signed Rental agreement before it, the court the court must conclude the defendant has willingly given up all her rights under the oral agreement made in 1998/1999 because she cannot enter into that type of agreement, and she should not have done that - particularly as a landlord.

Further on all the evidence before me, I just simply do not believe the defendant ran a keke business from the premises. I say this because of [1] terms of the purported Rental Agreement dated 20th February 2007 - and [2] because of the evidence of Mr HUANG JIE

Accordingly - I find for the plaintiff in this case.

- The defendant, by permitting the second defendant to occupy the shop as a tenant, evinced an intention that she has had enough of running her business, thus allowing the plaintiff to formally terminate the defendant's license to occupy the shop which was done in writing.
- The defendant has 28 days to vacate the premises -from today
- The building will revert to the plaintiff's **husband** as per the terms of the oral agreement, and that net gain may be subject to any death duties and / or taxes.
- I will hear the parties on the issue of costs as I have in mind ordering each party to pay its own costs.
- I should also like to say both the plaintiff and the defendant in this case should have in my view mediated a settlement to this case a long time ago.

SHUSTER J
JUDGE OF THE SUPREME COURT

