IN THE SUPREME COURT OF TONGA
CIVIL JURISDICTION
NUKU'ALOFA REGISTRY

CV 115 of 2012
[AC 6 of 2011]
[AC 16 of 2011]

BETWEEN : COMMERCIAL FACTORS LIMITED
- Plaintiff

AND : THE EXECUTORS (or alternatively the Administrator) of the Estate of Dr. SAM LIN WANG
- First Defendant

AND : HELEN CHEN WANG
- Second Defendant

AND : FUND MANAGEMENT LIMITED & TOURIST SERVICES HA'APAI LIMITED
- First Intervener

AND : CHRISTINE M. 'UTA'ATU (as Court appointed receiver of the First & Second Defendants)
- Second Intervener

R. Harrison QC for the Plaintiff
No appearance by the Defendants
L.M.Niu SC for the First Intervener
R.Stephenson for the Second Intervener

JUDGMENT

[1] On 13 February 2003 the First Intervener (FML/TSH) obtained judgment against Dr. Sam Lin Wang in the Land Court (LA 11/2002). The amount awarded was US$225,000 plus interest. On 6 August 2003 FML/TSH lodged a caveat over lease No.5404 held by Dr. Wang. On 18 May 2004 the Land Court ordered that the lease be sold to satisfy the judgment debt.

[2] On February 2009 the right to enforce the judgment lapsed by virtue of RSC O 29 r1. On 18 May 2010, Dr Wang died.

[3] In July 2010 this action CV 115/10 was commenced. On 16 July 2010 Ford CJ appointed Dr Wang's wife, the Second Defendant, to represent the late Dr Wang "in relation to *this* proceeding" (emphasis added). The Defendants were also restrained by injunction from dealing with Lease 5404. On 14 January 2011 I gave Summary Judgment to the Plaintiff (CFL) in the Tongan Pa'anga equivalent of NZ$5,731,135.56. A copy of the order issued by the Court on 8 April 2011 is at tab 5 of the bench book prepared by CFL. It will be noted that the order is incorrectly intituled. The action was in the Supreme Court, not the Court of Appeal, the number of the action is CV 115 of 2010, not CV 06 of 2011 and CFL is the Plaintiff, not the Respondent. It will also be seen that in addition to entering judgment against the executors of Dr Wang and his wife, the Court appointed Christine 'Uta'atu as receiver to enforce the award.

[4] On 4 April 2011 FML/TSH filed an application for leave to appeal out of time and a notice of appeal against the orders of 16 July 2010 and 14 January 2011. The only ground of appeal was that the Supreme Court lacked jurisdiction to make orders in respect of lease 5404, that being a matter within exclusive jurisdiction of the Land Court. The appeal was numbered AC 06 of 2011.

[5] On 27 May 2011 FMH/TSH filed an application in LA 11/02 for the extension of the caveat lodged in August (or September) 2003.

[6] On 15 June 2011 the receiver appointed by the Court in CV 115/2010 applied in the Land Court (LA 13/2011) for the removal of FML/TSH's caveat and, with the agreement of counsel, the application to extend and the application to remove were heard concurrently. On 20 August 2011, having heard Mr Stephenson for the receiver and Mr Niu for FMH/TSH I ordered the removal of the caveat on the ground that the caveators had not established that they had a caveatable interest. A copy of my Decision is at tab 6 of the bench book. It will be noted that although the Decision was delivered in LA 13/2011, paragraph 16 of the Decision made it clear that it also disposed of the application in LA 11/2002. It may also be recorded that the fact that the means of enforcing the Judgment in LA 11/2002 had lapsed was not brought to the attention of the Court.

[7] On 26 August 2011 FML/TSH appealed against the Decision in LA13/2011. The appeal is numbered AC 16 of 2011. The grounds of appeal were that the Court erred in holding that FML/TSH had no

caveatable interest. The Appellants sought orders first, that the decision of the Land Court be set aside and secondly, that the caveat lodged by FMH/TSH "not be removed until the interest of the caveators, which interest has been adjudged by the Land Court in this case on February 2003 has been satisfied".

[8] On 24 September 2011 FML/TSH filed an application to intervene in AC 06 of 2011. A copy of the application is on tab 12. As the application discloses, the sole ground upon which intervention was sought was to argue:

> "Whether or not the receiver, Christine 'Uta'atu was validly appointed by the Supreme (Court) on or about 8/4/2011 for and on behalf of the Respondent".

[9] Both appeals AC 06 of 2011 and AC 16 of 2011 were heard in the September session of the Court of Appeal and judgments were delivered one after the other on 16 December 2011. A copy of the first judgment is at tab 7 while the second is tab 8. It should be noted that AC 06 of 2011 is wrongly numbered AC 16 of 2010 and LA 13 of 2011 is wrongly numbered LA 13 of 2010.

[10] In AC 16 of 2011 the Court of Appeal followed a decision of the New South Wales Court of Appeal, *Trocone v Alperti* (1994) 6 BPR 13.291. The Court held that although Tonga does not have a Torrens system, a loan agreement authorizing creditors to protect their

interest by lodging a caveat over property held by the debtor implies the grant of an equitable interest in the land. Accordingly:

> "The appeal is allowed with costs to the appellants. The proceedings are referred back to the Supreme Court for reconsideration in the light of this Judgment".

[11] Two important points must here be made. First, (as recognized by Mr Niu in paragraph 55 of his written submissions filed on 14/12/12) neither of the orders sought by the Appellants was actually made; the Court did not order a stay on the removal of the caveat, it simply referred the matter back for reconsideration. Secondly, the matter was "referred back" to the *Supreme Court* whereas this was in fact an appeal from the *Land Court.*

[12] In AC 06 of 2011, the Court of Appeal ruled first, that the Supreme Court does have power to appoint a receiver and secondly, that the Supreme Court has the jurisdiction to appoint a receiver to dispose of a lease since such an order "does not raise or resolve any legal controversy or dispute about land or interests in land". (As to the first, it may as a matter of interest be noted that the power of the Supreme Court to appoint a receiver has now been embodied in statute – Supreme Court (Amendment) Act 2012 – Section 2).

[13] Although the grounds of appeal in AC 06 of 2011 were not upheld, the Court of Appeal allowed the appeal to the extent that it referred back to the Supreme Court:

"The interlocutory order (or orders) appointing the receiver...to consider whether it is appropriate to make a further interlocutory order for the sharing, as the Court sees fit, of the proceeds of the sale by the receiver".

[14] The "proceeds of sale by the receiver", it should be explained, arose as fully set out in the affidavit of Christine 'Uta'atu (who opposes this application by the First Intervener) filed on 27 June 2012 (tab 23). The following points emerge from the affidavit:

(i) After her appointment as receiver on 8 April 2011, a list of the assets of the First and Second Defendants was prepared, including the Hotel and lease 5404;

(ii) The assets were advertised for sale in New Zealand and Tonga In May and June 2011;

(iii) CFL was the only bidder and the amount offered was exactly the same amount as that awarded in its favour on 8 April 2011;

(iv) After taking legal advice, it was agreed to accept CFL's offer by way of set off against the sum owed under the Judgment debt;

(v) As a preliminary step towards applying for Cabinet's approval for the transfer of lease 5404 to CFL, application was made to remove the caveat lodged by FML/TSH in 2003;

(vi) The caveat was removed on 28 August 2011;

(vii) On 22 August the agreement for the sale and purchase of the hotel and the lease to CFL was entered into;

(viii) On 22 August application was made to Cabinet for its consent to the transfer of the lease to CFL;

(ix) On 25 August, in reliance on the order of 22 August, the caveat was removed by the Minister of Lands;

(x) On 26 August Cabinet agreed to the transfer of the lease;

(xi) On 12 September 2011 the transfer of the lease 5404 to CFL was registered.

[15] It has already been seen that FML/TSH's appeal against the removal of the caveat was not filed until 26 August 2011. According to paragraph 21 of the receiver's affidavit, the notice of appeal was not served upon her until 16 September 2011. She avers:

> "The steps taken to complete registration of the transfer of lease 5404 to CFL ...were undertaken prior to any notice of appeal of the Land Court's decision regarding the removal of FML's caveat being served upon me".

The receiver also averred that no application for a stay of the Land Court's decision of 20 August 2011 was applied for either to the Land Court or to the Court of Appeal. Inspection of the files reveals this to be a correct statement of fact.

[16] As I see it, the first question that must be answered is what exactly is now before this Court?

[17] In the first paragraph of page 9 of his written submissions dated 20 December 2012, Dr Harrison suggested that "the strong likelihood ... is that the Court of Appeal's naming of the Supreme Court in the

reference back [in AC16 of 2011] was in error". This submission was made in answer to paragraphs 55 to 62 of Mr Niu's submission filed on 14 December 2012 in which, without any evidential basis at all, Mr Niu suggested a number of factors which "it would be fair to say the Court of Appeal would have considered". Dr Harrison's suggested that Mr Niu's arguments on that point "were far- fetched" and I agree.

[18] One of the problems faced by a lower Court when dealing with a matter remitted to it arises when counsel suggest that the appellate court erred. Apart from obvious clerical errors (such as those already noted) the Supreme Court should not find that the Court of Appeal has fallen into error. As it happens, I am inclined to share Dr Harrison's view that the wording "referred back" rather than "referred to" suggests that the wrong court was named. Fortunately, however, because of the position taken by Mr Niu, it is not necessary for the dilemma to be resolved.

[19] In April 2012 Mr Niu prepared a memorandum (tab 20, page 167) in which he states that following the Court of Appeal's judgments, FML/TSH "filed an application in January 2012 seeking formal orders of the Land Court reinstating the caveat on lease 5404 and for cancelling the purported transfer of the lease to CFL (which had been effected upon removal of the said caveat) ... that filing was made in error due to the ignorance of counsel of the Court of Appeal in [AC 6 of 2011]". As already noted, the Judgment in AC 6 of 2011 was delivered on the same occasion as the Judgment in AC 16 of 2011. A thorough search of the file in LA 13 of 2011 has not yielded any

reference to or copy of any application filed after the delivery of the decision of 8 April 2011.

[20] In paragraphs 10 to 16 of his memorandum Mr Niu explained why there was "no need for Land Case LA 11 of 2002 and LA13/2011 to proceed". He stated:

> "FML/TSH are agreeable to participating in the "further investigation by the Supreme Court" and in the need to consider whether it is appropriate to make a further interlocutory order for sharing as the Court sees fit out of the proceeds of sale by the receiver without further proceedings in the Land Court".
>
> "Such investigations and considerations must of course take into account the Judgment of the Court of Appeal concerning the caveat of FML/TSH. Accordingly FML/TSH hereby withdraw their application filed in LA 13 of 2011 in January 2012".

[21] Given Mr Niu's position and in the absence of any suggestion by either counsel that I refer the question back to the Court of Appeal for clarification under Section 3 of the Act, I proceed on the basis that the reference to the Supreme Court was what the Court of Appeal actually intended and that no further order of the Land Court is sought. If the remission back is exclusively to the Supreme Court then, save that the Court of Appeal's orders in AC 16 of 2011 are

respectfully noted by this Court, no orders in respect of the caveat removed by the Land Court can, for obvious jurisdictional reasons, be made.

[22] In November 2012 Mr Niu filed an application to vary paragraph 4 of the Order made on April 2012 (tab 17). This is the substantive application which is now before this Court and which is made pursuant to the reference back to this Court by the Court of Appeal in AC 06 of 2011.

[23] In paragraph 4 of his application, Mr Niu states:

"The Court of Appeal has directed the Court to investigate and consider whether a sharing of the proceeds of sale can be done as this Court sees fit, in these circumstances".

[24] Under RSC O13 r7 "a person who was not served with a copy of an application notice before an order was made under the Order but claims to have been adversely affected thereby may apply to have the order set aside or varied". The application filed on 13 November 2012 is, it seems, in character a very late application made under the provisions of the Rule. It is not an application given sanction by the Court of Appeal.

[25] As already pointed out in paragraph 14 above, by the time the Court of Appeal referred this matter back to this Court, the receiver had already fully complied with the orders of 8 April; the lease had been

sold and transferred to CFL. Furthermore, by reason of the set off agreed, there were no proceeds of sale as such ever in the receiver's hands.

[26] There was considerable discussion by counsel in their written submissions (Dr Harrison – 27 November – paragraphs 30 to 44; Mr Niu 14 December 2012 paragraphs 42 et seq) about whether the Court of Appeal had or had not made a number of erroneous assumptions before referring AC 06 of 2011 back to this Court. I respectfully repeat the remarks I have already made about the Supreme Court having difficulty finding that the Court of Appeal has erred. Whether or not in fact the Court did make some erroneous assumptions, I have, in my view, to decide whether any further order can or should be made in CV 115 of 2010 in the light of the facts as they are now conceded to be, not as the Court of Appeal may or may not have been under the impression that they were.

[27] Paragraph 4(i) of the proposed variation would require the receiver to take possession of the Defendant's property including the Hotel and lease 5402. Now, however, that the lease and the hotel have been sold to CFL, they are no longer the property of the Defendants. Paragraph 4(ii) requires that after taking possession of the properties, they be advertised for sale and the proceeds divided between CFL and FML/TSH. The receiver was appointed to "enforce and recover the foregoing Judgments and orders ... in favor of the Plaintiff [CFL]". There never has been any application for the appointment of Christine 'Uta'atu as a receiver to enforce a judgment in favor of

CFL/TSH which, as has already been pointed out, lapsed in February 2009. As a matter of fact, there are not and never have been any actual proceeds of sale in the hands of the receiver available to be shared.

[28] The "variations" to the orders of 8 April which are being sought are in my view not variations at all but replacements. The Court of Appeal did not set aside the orders made on 8 April but suggested that "further interlocutory order" might be appropriate. This means further to the original orders made, not in substitution for or contradiction to them.

[29] The two principal arguments advanced by Mr Niu in favour of further orders are first, that the Land Court's order of 18 May 2004 (LA11/02) for the sale of lease 5402 in favour of FML/TSH is in conflict with the Supreme Court's order on CV 115 of 2010 that the lease be sold in favour of CFL and secondly, that FML/TSH has been denied procedural fairness.

[30] Since I have no record of what the Court of Appeal was told by counsel (as has been seen, neither of these matters was included in the issues in respect to which Mr Niu was given leave to intervene) I do not know on what basis these arguments appear to have found some favour with the Court. Having regard however to the materials before me, I am satisfied that the arguments are unsustainable.

[31] The order of 18 May 2004 lapsed in February 2009 by operation of RSC O29 r1. Furthermore, Dr Wang died on 18 May 2010. Until executors or administrators are appointed on behalf of a deceased defendant in an action, no further step in that action can be taken by the Plaintiff (*Duke v Davis* [1893] 2 QB 260). The appointment made by Ford CJ on 16 July 2010 was in respect of CV 115 of 2010, not in respect of LA11/2002. Until an application was filed on 17 May 2012 (tab 15) to enforce the Judgment in LA 11 of 2002, the judgment remained unenforceable. Whether this affected the caveat is open to discussion. The application to revive the judgment was made over six months after the Court of Appeal was led to observe "FM & TSH have obtained Judgment and secured an order". I find it hard to accept that the Court would have expressed itself in those terms had it known that the Order of 18 May was unenforceable. If it was unenforceable then it was not in conflict with any other order.

[32] "Neither can I find any procedural unfairness. There is, so far as I am aware, no general rule requiring Plaintiffs to alert either previous litigants, possibly somehow connected with the subject matter of a fresh claim, or the public at large that a fresh action had been commenced. There is no duty upon the Court to search through its own files or, as in this case, the files of other Courts to see whether there have been previous proceedings which might possibly impinge upon the new action. Furthermore, in the present case, Mr. Hutchinson admitted that FML/TSH was aware that CFL were contemplating issuing proceedings of their own against the Defendants without involving FML/TSH. As already seen, following

the making of the April 2011 Order, the Defendant's property was widely advertised for sale both in New Zealand and in Tonga. Despite this, there was no application by FML/TSH to intervene in the proceedings to seek a stay, as was open to them under RSC O13 r7, at any time prior to the receiver's duties being completely discharged.

[33] It will be seen from the affidavits that FML/TSH's case, put broadly, is that it was bamboozled by CFL, that understandings were breached and unfair advantage taken. But whether or not the parties have dealt unfairly with each other is not the question now before the Court. It is notorious that business is not always conducted according to the highest ethical principles. Mr. Niu's insistence on the injustice of the outcome achieved by CFL is in my respectful opinion misplaced. The question is not whether CFL has been guilty of rather sharp practice, but whether its' conduct may give rise to a cause of action against it by FML/TSH. If that is considered to be the case then the remedy is obvious.

[34] In paragraph 9 of his memorandum, previously referred to, Mr. Niu confirms that:

"FML/TSH wish to be parties in this Civil Case 115 of 2010"

and he seems to be under the impression that the right to intervene given to him by the Court of Appeal following his limited application also already referred to can be regarded as a general leave to

become a party in CV115/2010 with all the rights that flow there from. I do not agree.

[35] No application has ever been made by FML/TSH to intervene in CV115 of 2010. There is no inherent power for the Court to allow an intervener to become a party beyond the scope laid out by the rules for a Defendant to be added (*Corporate Affairs Commission v Bradley etc* [1974] 1NSWLR 391). The rules for joining parties provide the only source of jurisdiction for a non party to intervene in a proceeding (*Re great Eastern Cleaning Services Pty Ltd* [1978] 2NSWLR 278).

[36] The Court has no jurisdiction to add a party against the will of the Plaintiff unless the party seeking to be added is at least able to show some *legal* right enforceable by him against one of the parties to the action or some *legal* duty enforceable against him by one of the parties to the action which will be affected by the result of the action (*Amon v Raphael Tuck & Sons Ltd* [1956] 1 All ER 273).

[37] Our own rule for adding parties is RSC O9 r2(b) and by reference to the English Rule O15 rr6 & 8 and paragraph 15/6/11 of the White Book 1988 and the new Civil Procedure Rules 19 PD-001 and 19 PD-002 (brought into consideration by operation of our own RSC O2 rr3 & 4) it will be understood that an application by an intervener to be joined should be supported by evidence showing the purposed intervener's interest in the action and the proposed Statement of Claim. FML/TSH's intervention in AC 6 of 2011 (tab12) was for the sole purpose of arguing that the appointment of the receiver was not

authorized. That argument failed. There has never been any other application for intervention or amended application for intervention filed. Mr. Niu, with very great industry and commitment, has placed an abundance of material before the Court with the intention of demonstrating that his clients have been unjustly dealt with. In my opinion, however, he has failed to show that "some legal right enforceable against" CFL was affected by the earlier orders of this Court.

[38] The remaining matters which I believe need to be dealt with are the applications for leave to enforce the judgment of the Land Court dated 13 February 2003 in LA 11 of 2002 (filed on 17 May 2012) and the application to enforce orders for costs made by the Land Court and the Court of Appeal on dates unknown, again in LA 11 of 2002. I decline to deal with these two applications, first because they are within the jurisdiction of the Land Court, not this Court, and secondly, because they were not the subject of referral to this Court by the Court of Appeal. If pursued, the applications will have to be renewed in the Land Court.

Result:

1. The reference to this Court by the Court of Appeal in AC 16 of 2011 is respectfully acknowledged and noted but no further order will be made.

2. The reference to this Court by the Court of Appeal in AC 6 of 2011 is respectfully acknowledged. In all the circumstances it is not found appropriate to amend or add to the orders of the Court made on 8 April 2011.

M.D. Scott

DATED: 25 January 2013. **CHIEF JUSTICE**

H.Ngalu
10/01/2013