

IN THE COURT OF APPEAL OF TONGA
APPELLANT JURISDICTION
NUKU'ALOFA REGISTRY

AC 22 of 2018
[AM 15 of 2018]

BETWEEN : DEXING CONSTRUCTION CO. LTD

- Appellant

AND : TANIELA MAFILE'O FUA

- Respondent

Coram : Handley J
Blanchard J
Randerson J

Counsel : Mr. D. Corbett for Appellant
Mr. W. C. Edwards SC for Respondent

Hearing : 10 April 2019

Date of Judgment : 17 April 2019

JUDGMENT OF THE COURT

Introduction

- [1] This appeal relates to the rental payable under a sublease of land at Tofoa, Tongatapu. The appellant Dexing Construction contends that the rental was agreed with the respondent, Mr. Fua, to be \$500 per annum. To the contrary, Mr. Fua contends there was no such agreement and that the rental payable was correctly stated in the registered sublease to be \$1500 per annum.
- [2] Dexing Construction was successful in the Magistrate's Court in resisting a claim by Mr. Fua for arrears of rent totalling \$3,000. The Magistrate found there was an understanding between the parties that the rent was to be only \$500 per annum. However, on appeal to the Supreme Court, Niu J allowed Mr. Fua's appeal from the Magistrate's decision. He ruled that evidence of a verbal agreement to contradict or vary the terms of the registered sublease was not admissible by virtue of s 79 of the Evidence Act. Dexing Construction now appeals against the decision of the Supreme Court and seeks leave to adduce further evidence it has obtained since the hearing in the Supreme Court.

The New Evidence

- [3] On 5 December 2018, counsel for Dexing Construction requested the Ministry of Lands to provide a copy of the application to register the disputed sublease. A copy of the application was then made available signed by or on behalf of both Dexing Construction and Mr. Fua. It clearly shows that the annual rental for the sublease was to be \$500 and provides substantial support for Dexing Construction's contention. Since the application is in writing signed by both parties it would also overcome any difficulty arising from s 79 of the Evidence Act.

- [4] Order 8, Rule 1 (3) of the Court of Appeal Rules provides that, except in respect of matters arising since trial, further evidence on questions of fact may not be received without leave and then, only on special grounds. The usual principles upon which further evidence may be admitted are well established : *Ladd v Marshall* [1954] 1 WLR 1489; *Cocker v Cocker* (2002) TLR 1. The Court will consider whether the evidence is fresh in the sense that it could not with reasonable diligence have been discovered prior to trial; whether the evidence is cogent; and whether it is credible. These principles are guidelines, the ultimate question being whether there are special grounds in the overall interests of justice to admit it : *Rainbow Trading Co Ltd v Lin Maolin* [2007] TLR 120, 125.
- [5] We are satisfied special grounds exist and that it is proper to admit the evidence. While, strictly speaking, the evidence is not fresh, it is directly relevant to the issue to be determined, has a high level of cogency and cannot be controverted. A special feature is that the document is signed by both parties to this litigation. We also take into account that the correct rental under the sub-lease is an issue with long term consequences for the parties.

Further background

- [6] Mr. Fua has a registered Lease No. 8074 from the Crown of land totalling 1.233 hectares. The lease is for a term of 50 years from 23 August 2011 with an annual rent of \$1500.
- [7] The sublease from Mr. Fua to Dexing Construction was registered on 14 January 2013 for a term of 30 years from that date, for an annual rent of \$1500. The sublease was for only part of the land comprising 1960m² which Niu J found was 15.89% of the area of the Head Lease.
- [8] According to Dexing Construction, only \$500 per annum was paid after the registration of the sublease and was accepted by Mr. Fua without complaint but Mr. Fua disputes this. Dexing says that in 2017, the Ministry of Lands required the rent

under the sublease to be paid directly to the Land Office and \$1500 was paid in that year. Mr. Fua's claim for arrears of rent amounting to \$3000 was made in the Magistrate's Court on 24 November 2017.

Supreme Court judgment

- [9] In allowing Mr. Fua's appeal from the decision of the Magistrate, the Supreme Court's essential reasoning was that the Court was bound to apply the terms of the registered sublease. It had been validly registered; the Deed of Sublease was a written agreement of the parties and could not be varied by parole evidence by virtue of s 79 of the Evidence Act. As well, the Supreme Court Judge found that only the Land Court had authority to adjudicate any dispute over the terms of a lease of land. Judgment was entered against the appellant for \$3000.

Counsel's submissions

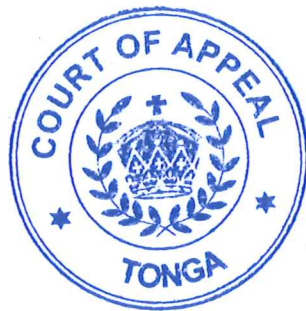
- [10] Counsel for the appellant submits that the new evidence combined with the payment of rental at the \$500 per annum rate supports the contention there was an agreement to pay rent under the sub-lease at that rate. He accepted the proposition raised by this Court that this evidence, if accepted, would support a claim for rectification on the ground that the written terms of the registered sub-lease did not reflect the underlying terms of the agreement between the parties.
- [11] For Mr. Fua, Mr. Edwards SC submitted first that the notice of appeal did not state the grounds of appeal with adequate particulars. We do not accept that submission. The notice of appeal relies primarily on the ground that new evidence has come to light warranting an order setting aside the judgment in the Supreme Court. The notice of appeal provides adequate particulars in that respect.
- [12] Mr. Edwards' second submission was that the additional evidence ought not to be admitted but we have already rejected that submission and admitted the evidence for the reasons given. In particular we do not accept counsel's submission that the

additional evidence is unlikely to have any decisive effect on the judgment because it is conflict with the registered lease. A court of equity may grant rectification where a written document executed by the parties does not correctly reflect the underlying agreement. The additional evidence is particularly relevant to the appellant's contention that the underlying agreement was for rental of \$500 per annum.

- [13] We observe that rental under the sub-lease at the lower rate of \$500 per annum is consistent with the fact that the sub-lease was for a substantially smaller area than the head-lease. However, we acknowledge Mr. Edwards' submission that the Land Court will necessarily receive all relevant evidence bearing on the issue of rectification, a remedy not lightly granted.

Conclusions

- [14] We are satisfied that the proper course is to admit into evidence the application for registration and adjourn this appeal part-heard to enable the appellant to pursue a claim for rectification of the registered sub-lease. Any such claim will need to be pursued in the Land Court with the Minister of Lands joined as an additional party.
- [15] A stay of execution of the judgment entered in the Supreme Court has been granted in the Supreme Court but ongoing rental must be paid at the rate of \$1500 per annum until further order.
- [16] Leave is granted for either party.
- [17] Costs are reserved.



J. Handley

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Handley J

J. Blanchard

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Blanchard J

A. Randerson J

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Randerson J