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

AC 8 of 2018
[LA 24 of 2016]

BETWEEN: SIOSIFA MOSA'ATI UHI

\- Appellant

AND: KINGDOM OF TONGA

\- Respondent

Coram : Handley J
Blanchard J
Randerson J

Counsel : Mrs F. Vaihu for the Appellant
Mr. S. Sisifa SC for the Respondent

Date of Hearing: 8 April 2019
Date of Judgment: 17 April 2019

JUDGMENT OF THE COURT

[1] The appellant is the holder of a tax allotment of 2.104 hectares known as Makamaka at Fua'amotu. In 2012 he was approached by the then Chief Executive Officer of the Ministry of Infrastructure to lease the allotment to the Kingdom to enable it to be quarried for high grade coral rock for use as road base. The appellant agreed to do this.

[2] On 16 March 2012 Cabinet approved a lease of the allotment to the Kingdom for 20 years. The lease was registered on 10 May 2013. It is not in evidence presumably because it was in the prescribed form and contained nothing of relevance.

[3] On 29 June 2012 the appellant entered into a Quarry Agreement with the Kingdom. This provided in cl 5 for the Government to use the land as a quarry and in cl 7 that it should pay the appellant a royalty of TOP$2 per tonne of "extracted rock materials [from] the tax allotment."

[4] On 6 November 2013 the Ministry of Infrastructure representing the Kingdom entered into an agreement with Petani Quarry (the Company) for the quarrying of coral rock from a combined site comprising the land leased from the appellant and the adjoining 'Ahononou Quarry held by the Kingdom. The agreement was for a term of 5 years.

[5] Clause 12 required the Company to remove the overburden and weathered rock, as did cl 33(a). Clause 13 referred to the processing and storage of "rock material, sand, and other products".

[6] Clause 14 provided that "Sales of other products (sand, concrete products) will be at prices determined by the Company", cl 22 referred to the production of "sand and other products", and cl 26 (ii) and (iii)(a) referred to "other products sold."

[7] Clause 32 required the Company to pay royalties in respect of "the rock and sand extracted from the quarry site at the rates specified in Annex B at TOP$10 per cubic metre up to 15,000 cubic metres a year, and at TOP$25 per cubic metre if production exceeded that figure.

[8] Clause 32 contemplated the payment of royalties on "sand extracted", but cl 33 (a) only provided for royalties to be paid on "solid rock extracted".

[9] Disputes arose between the appellant and the Kingdom which led to legal proceedings in the Land Court against the Kingdom and the Company. During the hearing before the Lord President the parties were able to resolve all issues other than the damages to be awarded for the removal and disposal by sale or otherwise of the overburden comprising topsoil, gravel and weathered rock.

[10] On 27 March 2018 the appellant and the Kingdom agreed on a number of matters which further narrowed the issues the Lord President was required to resolve. The agreement was as follows:

(a) The only issue that remains for determination by the Court is the amount of compensation that should be paid by the [*Kingdom*] to [*Mr. Uhi*] for the removal of 'overburden' from [*Mr. Uhi's*] land.

(b) The total volume of the overburden (from which all coral rock has been extracted) is 29,328m^3 with a mass of 49,858 tonnes.

(c) The quarry agreement between the parties did not contemplate the removal of the overburden and does not fix the compensation that is payable to [*Mr. Uhi*] for its removal.

(d) That the removal of the overburden was a trespass for which the [*Kingdom*] is liable and the compensation payable to [*Mr. Uhi*] is to be determined accordingly.

[11] The parties' agreement could not bind the Lord President or this Court on questions of law.

[12] The Quarry Agreement did not refer to the overburden or its removal but, with respect, it cannot be said that this was not "contemplated" by the Agreement. The Kingdom could only obtain access to the rock and extract it if it first removed the overburden. It is therefore necessary to imply a term in the Quarry Agreement permitting the Kingdom to remove the overburden to give the agreement business efficiency as it would not work otherwise.

[13] This was recognised in *Ramsay v Blair* (1876) 1 App Case 701, 703 where Lord Chelmsford said:

> "... upon a grant or reservation of minerals prima facie it must be presumed that the minerals are to be enjoyed, and therefore that a power to get them must also be granted, or reserved as a necessary incident"

[14] Therefore the Quarry Agreement did, by necessary implication, "contemplate" the removal of the over burden, and its removal from above the valuable rock was not a trespass.

[15] However royalty was not payable on the sale of the overburden and the Kingdom was not entitled to dispose of it, or to authorize the Company to do so. It could be moved elsewhere on or off the site as long as it was available to the appellant at the end of the lease.

[16] A mineral lease such as the Quarry Agreement is unusual as it involves a sale of part of the land to the lessee, as Lord Cairns explained in *Gowan v Christie* (1873) LR Sc & Div 273 at 283:

> " ... although we speak of a mineral lease or a lease of mines, the contract is not

> really a lease at all … what we call a mineral lease is really when properly considered, a sale out and out of a portion of land with a liberty to go into and under the land and to get certain things there and to take them away, just as if he had bought so much of the soil"

[17] The Quarry Agreement was not a sale of the overburden and although its severance and removal was not a trespass, its disposal was wrongful, and a conversion injurious to the appellant's reversionary interest. He was entitled to have the overburden available to him at the expiration of the lease to the Kingdom in 2033.

[18] The right of a reversioner to maintain an action in tort for an injury to the property which damaged the reversion has long been recognised: MacSwinney "The law of Mines, Quarries and Minerals 5th ed 1922 at p 319 wrote:

> "… the benefit of a remedy may not be confined to the immediate … possessor. The reversioner on a lease has been held entitled to maintain [an] action on the case against a trespasser for digging coal in the lessor's land"

The right of a reversioner in these circumstances was recognised by this Court in *Lord Nuku v Lord Luani* (A/C 6 of 2017, 6 September 2017) at [23].

[19] Where title to the real property is divided between a landlord and a tenant the title to the severed material must reflect the division in the realty from which the material was severed where the tenant has not purchased the severed material in return for a royalty.

[20] The parties called evidence of the value of the overburden but the expert called for the appellant did not provide market prices for the soil, clay, or gravel removed and sold and the Lord President held that the witness called by the Kingdom was not qualified to give expert evidence.

[21] However the Kingdom was prepared to pay TOP$2 per tonne for the overburden removed and at one stage the appellant said in his evidence that he would be happy with that figure. The Lord President adopted this figure and, given the parties' agreement on the tonnage removed, awarded the appellant TOP$99,716.

[22] The appellant sought additional damages but the evidence did not support such an award. The appellant's entitlement was to the present value in 2018 of the overburden in 2033 and there was no evidence of that present value. The award has not been shown to be inadequate and it cannot be disturbed.

[23] The Lord President ordered the Kingdom to pay 80% of the appellant's costs. The appellant challenged this order and sought an order that the Kingdom pay 100% of his costs.

[24] Costs are in the direction of the Court and in view of the other issues which the appellant raised and his limited success on the damage issue the order for costs made by the Lord President has not been shown to be outside the range of a second exercise of his judicial direction.

[25] The appeal fails and is dismissed with costs.

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Handley J

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Blanchard J

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Randerson J