

Finau v Finau, Teta Ltd and Minister of Lands, Respondents

Privy Council
Appeal No.8/1988

24 February 1989

Land - bona fide purchaser for value - constructive notice of trust

10 In 1973 Teta Ltd purchased a lease of land in Nuku'alofa from 'Amelia Finau who was the registered proprietor but held it on a statutory trust for herself and the appellant. Sitini Finau brought proceedings claiming half share in the lease on the ground that the sale to Teta Ltd was unlawful; and on appeal the Privy Council remitted the case to the Land Court to determine whether Teta Ltd was bona fide purchaser for value of the lease. The Land Court held that the company was a bona fide purchaser for value, but Sitini Finau appealed to the Privy Council.

HELD:

20 Upholding the appeal.

- (i) That it is for the purchaser to show that he had no actual or constructive notice of the trust, and he will be held to have constructive notice of such equitable interests as would have come to his notice if he had made such enquiries as a reasonable and prudent purchaser would make;
- (ii) The statements made to the directors of the company were such as to cause a reasonable and prudent purchaser to make further enquiries, so the company had constructive notice of the trust and was therefore not a bona fide purchaser for value.

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Counsel for appellant : Mr Niu
Counsel for first and second respondent : Mr Paasi
Counsel for Minister of Lands : Mrs Taumoepeau

Judgment

This case concerns the land in lease 2318A having an area of 33.8p. and situated on the corner of Wellington and Railway Roads in Nuku'alofa.

For a term of years up to 1956 the lease was held by one Viliami Finau and on his death in that year his children Kisina and Tupou succeeded to his estate in equal shares. Letters of administration were granted to Kisina who became registered as the leasee under lease 2318A. Kisina died in 1971 and his daughter 'Amelia Finau, the First Respondent, became the registered proprietor. Both Kisina and 'Amelia held the lease as statutory trustees in favour of themselves and Tupou (and on Tupou's death, for her beneficiaries).

In 1973, with Cabinet approval, 'Amelia sold the lease to Teta Limited for \$10,000. She now has none of the money, nor has she accounted to the executors of the estate of Tupou for any part of it.

The Appellant, who is the beneficiary of Tupou, issued proceedings as long ago as 1974 claiming his half share in the lease on the ground that the sale to Teta was unlawful and ought to be set aside. The matter came before the Land Court in 1975 and the sale was held illegal. Teta appealed to the Privy Council which in the course of its judgment said:-

"In the result we hold that Kisina Finau and 'Amelia Finau were properly registered as respective holders of the legal estate of the interests registered in their names and that when the transfer to Appellant took place, Appellant was entitled to treat 'Amelia Finau as the holder of the legal estate in lease No.2318A and was not bound to enquire into the terms upon which Kisina Finau or 'Amelia Finau held such interest under their respective grants of administration. The only question to be determined was whether or not Appellant acted bona fide and for valuable consideration without notice of any trust when it dealt with 'Amelia Finau as the registered holder of Lease No.2138A. This question, we understand from counsel, was not dealt with by the Chief Justice who took the view that it was irrelevant. It must be determined."

The Privy Council then remitted the case to the Land Court to determine the question referred to in the passage cited and to give such judgment as may be proper.

The case came before the Land Court again in May 1988 when Martin J. held that Teta was a bona fide purchaser for value and without notice of any prior claims.

This is an appeal against that decision.

The shareholders and directors of Teta are Sione Mate Lemoto, his father Semisi and his brother Sione 'Na'a Lemoto. It appears that all negotiations concerning the purchase of the lease were carried out between 'Amelia and Sione Mate Lemoto, even before Kisina's death, and he was the only member of the company to give evidence. He deposed that for some five years before the lease was purchased he rented a shop on the land in question paying rent to 'Amelia. The decision to purchase the lease was made at about the time 'Amelia had the right to sell and he therefore inquired at the Land Registry to see how many years the lease had to run and to ensure that 'Amelia was the registered holder, which she was. Sione claimed that he had no knowledge of any conflicting interests. There is some force in Martin J's comment that Sione and his father are businessmen and "if they had known of any adverse claims they would have known that they were buying trouble". It would certainly not have been prudent business more

particularly when there was \$15,780 at stake, which is what Teta paid for the lease and the shop building.

We are satisfied on the evidence that Teta was a bona fide purchaser for value and that the purchase was not a sham. It was a genuine buyer and it was accepted in the earlier proceedings that \$10,000 was paid by Teta for the lease. Mr Niu argued that Teta lacked bona fides because of certain irregularities in the payment of stamp duty. In our opinion the state of the evidence is such that it is impossible to determine whether there were in fact any irregularities, but even if there were they are not relevant to this inquiry.

90 It is "notice" which is the crucial issue in this case, and that may be actual notice, such as where a purchaser subjectively knows of the equitable interest, or constructive notice, which exists where knowledge of the equitable interest would have come to the purchaser if he had made the inquiries a prudent purchaser would make.

The matters raised by the Appellant as being relevant to either actual or constructive notice were first a discussion between Semisi Lemoto and the Appellant in about 1971 concerning the possible purchase of a cinema owned by the Appellant.

100 The Appellant acquired the cinema in this way. In 1957 Kisina and Tupou Finau entered into a deed whereby certain assets in the estate of Viliami Finau were divided between them. A general store, which is the one Teta rented and subsequently purchased, became Kisina's property and a cinema owned by the estate became the property of Tupou. The deed provided that "adjustment to meet the difference in value of the two businesses should be made" for it appears that the shop was more valuable than the cinema. Over the year prior to Teta's purchase Tupou received part of the rent from the general store by way of adjustment of value.

The Appellant told Semisi that the cinema was not for sale although it appears that shortly thereafter he sold it to one Fotokalafi Vea. The Appellant and his mother retained the sale proceeds which they were entitled to do.

110 Semisi did not give evidence but Sione Lemoto said Teta had never considered buying the cinema and that he was quite unaware of any connection between the lease in question and the cinema. According to Mr Niu the cinema and the shop are both on the land sold to Teta and as Semisi was aware the Appellant had an interest in the cinema he should have realised that the Appellant also had an interest in the lease purchased by Teta.

The Trial Judge concluded that the cinema was on a separate lease so that Semisi's knowledge of the Appellant's interest in it was irrelevant. In fact both the shop and cinema were on the land sold to Teta so that Semisi's knowledge was certainly relevant and made some further inquiry prudent, particularly as Sione was aware that there was "some trouble" between the two branches of the family.

120 The second matter raised by the Appellant bearing on "notice" was a discussion said to have taken place some time before Kisina's death in 1971 at which it is alleged Kisina, his wife, Semisi Lemoto and his wife and Vika Kioa, younger sister of Amelia, were present.

Vika gave evidence of this. She said that at that time Kisina had a stroke and found difficulty in speaking so Vika acted as his interpreter. She said that at Kisina's request she explained the position regarding the estate and the shares in it although she had no idea why this was done. This is her evidence on the matter (in the Tongan version of the evidence):

130 "I explained there was no "will" of Viliami Finau but it was government decision that

Kisina Finau administer the Estate and share it equally with Tupou. There was a store and also leasehold land to be divided."

and in cross examination:-

"It was discussed that the cinema and the plot it stood on go to Tupou and Sitini. And the store and the Land it occupy go to Kisina and his children. The lease for the store plot was in Kisina's name and so was the lease for cinema-plot. I do not know the lease for the cinema but all the lease were in the name of Kisina."

and in the answer to a question from the Court-

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"In that discussion our father wanted me to explain the situation regarding our home. He was proud of giving property to his sister and I told Semisi and his wife that he gave the cinema to Tupou and her son. I told them it was government decision that Tupou should share int he lease but because she was female the lease will remain in Kisina's name but they will share any money from any sale of the lease."

On this evidence the Trial Judge had this to say:-

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"Semisi did not give evidence, so Vika's evidence is uncontradicted. But his conversation took place during the 1960's. It is very difficult to recall in detail what was said some 20 years ago, as is indicated by Vika's own evidence. Standing on its own, this evidence is insufficient to show that Semisi knew of the other claims." In a case such as this it is for the purchaser to show that he had no notice actual, or constructive and he will be held to have constructive notice of such equitable interest as would have come to his notice if he had made such equitable interests as would have come to his notice if he had made such inquiries as a reasonable and prudent purchaser would make.

Vika's evidence was uncontradicted and does not stand alone and whatever version one accepts it was in our opinion enough to make a reasonable and prudent purchaser make further inquiries.

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It is no answer to say, as Teta's Counsel did in the lower Court, that Semisi's knowledge could be discounted because he was not involved in the dealings with 'Amelia. Semisi was a shareholder and director who must surely have been involved in the decision to buy the lease and his knowledge must be imputed to the company. Furthermore, Sione's assertion that he never ever discussed the lease with Semisi, his father, is not helpful to Teta's cause, and indeed is difficult to believe.

The third piece of evidence bearing on notice also came from Vika and is referred to in the judgment thus:-

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"The cinema plot was sold by Tupou and the Plaintiff and they kept the money in part satisfaction of their share. There was an agreement within the family that Kisina would pay certain sums to them over a period, because the shop (which he had kept) was worth more than the cinema and it was necessary to even up the shares. TETA occupied the shop and paid rent to Kisina via 'Amelia. At some stage after they began to occupy it the Plaintiff asked for some more money towards his share, Vika was sent to ask Sione Mate Lemoto for the rent to be paid early. Apparently this was not unusual. She said "I asked if the rent could be paid so that we could give money to Tiki (the Plaintiff) "as part of his mother's share".

It appears that this incident occurred in 1967 or 1968, before the sale of the lease to Teta.

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The Trial Judge thought it would be unlikely that Vika would have been so precise

in the request for early payment. He accepted Sione's evidence that he often paid rent early on request and that there was no need to give a reason. That may well be so but here Vika gave evidence of a particular incident which went unanswered.

We therefore conclude on the evidence that Teta was not a bona fide purchaser without notice. Apart from the evidence it seems inconceivable that the Lemoto's could have had the relationship they did with the two families over some years before the sale and be wholly unaware of dealings between the families that might warrant inquiry. The evidence clearly establishes constructive if not actual notice.

190 The appeal is therefore allowed. We can take the matter no further than that. The case is therefore remitted to the Supreme Court so that final judgment can be entered. The form this takes will depend on Counsel's submissions on the issue and may require the hearing of further evidence.

The Appellant is awarded costs on this appeal to be fixed by the Registrar.