IN THE SUPREME COURT OF WESTERN SAMOA

HELD AT APIA

C.P. 98/93

BETWEEN: MAPUSUA PELENATO of Apia, Businessman

Plaintiff

A N D: FAALOGO VAITUSI c/- Porters, National Hospital, Motootua

Defendant

Counsel: T.K. Enari for plaintiff
I.S. Kamu for defendant

Hearing: 4th August 1994

Judgment: 10th August 1994

JUDGMENT OF SAPOLU, CJ

The facts of this case may be stated as follows. The plaintiff and his wife had a shop at the New Market. They encountered some problems with their shop in that location. So the plaintiff's wife approached the Government for the use of a piece of Government land on the Reclaimed Area in the centre of Apia for the purpose of building a shop. She was directed to make an application to the Land Board which was the statutory body responsible for Government lands but is now superseded by the Environment Board. For convenience the word Board will hereinafter be used. She accordingly wrote out a letter of application and sent it to the Board. Her application was accepted by the Board and a licence was granted in her name and she was allotted a piece of land on the Reclaimed Area to build a shop. The shop that was built really belonged to her and her husband, the plaintiff. The rent was $120 per month. It appears from the evidence

given by a representative of the Board that the reason for granting a licence instead of a lease in this case was because Government had plans for what was to be done on the Reclaimed Area and therefore the Board did not want to enter into any long term agreement with any person in respect of the Reclaimed Area or permit any person to construct thereon any permanent building.

Now it is not clear from the evidence whether the plaintiff and his wife used the shop after it was built, and if so, for how long. But in 1991 the defendant met and requested the plaintiff for a space for him to set up a shop. The plaintiff consulted his wife and it was agreed to rent the shop to the defendant on a monthly tenancy at the rent of $400 per month. The defendant moved into the shop in October 1991. It appears that someone else had also rented the shop before the defendant did. But it is not clear from the evidence when that person rented the shop, for how long did he rent the shop, and why he was permitted to rent the shop. In May 1992, the defendant gave up possession of the shop. He says the shop was sub-leased to him. He also accepts that at that time he owed the plaintiff the sums of $1,600 for unpaid rent and $624 for an outstanding electricity bill. The plaintiff now claims those amounts from the defendant plus interest at 8% per annum from May 1991 to date of judgment.

The defence put forward by the defendant to the claim is that the sub-lease from the plaintiff to the defendant is unlawful or illegal as it contravenes section 54(1) of the Lands and Environment Act 1989. Therefore the plaintiff cannot call on the assistance of the Court to enforce that sub-lease. Section 54(1) in effect says that no lessee of Government land may sub-lease the same land without the consent of the Environment Board.

The plaintiff's wife had admitted in evidence that no consent was obtained from the Board for the tenancy granted to the defendant as she is ignorant of such a consent requirement.

To me, the first difficulty with the defence put forward by the defendant is that neither the plaintiff nor his wife is a lessee so that section 54(1) does not apply to either of them. The plaintiff was not a party to the licence granted by the Board to his wife. He is a total stranger to that arrangement. As for his wife, she was a licensee and not a lessee. The Board, was a licensor and not a lessor. So not being lessees, the prohibition in section 54(1) does not apply to the plaintiff and his wife. It follows that the sub-lease alleged by the defendant is not illegal on the ground of contravening section 54(1) of the Lands and Environment Act 1989.

The second difficulty with the defendant's defence, is that, once it is accepted from the evidence for the defence that what was granted to the plaintiff's wife was a licence and not a lease, then it follows that what was granted by the plaintiff to the defendant cannot be a sub-lease. A sub-lease presupposes that there is a head lease but there is no head-lease here. What appears clear to me is that what was granted by the plaintiff to the defendant was a fresh tenancy agreement instead of a sub-lease. That being so, that is added reason for the non-application of the prohibition in section 54(1) to this case. The reason is that while that prohibition expressly applies to a sub-lease granted by a lessee, it does not apply to a fresh tenancy agreement granted by a non-lessee.

I have also considered whether the tenancy agreement between the plaintiff and the defendant may be illegal at common law on the ground of

public policy. After considering the categories of contracts which may properly be termed as illegal at common law on the ground of public policy, I have come to the view that the tenancy agreement in this case does not come within any of those categories. There appears to have been some suggestion from the evidence that the plaintiff was using Government land for undue financial gain contrary to the purpose for which the licence was granted to his wife. Whilst that may be so, it must be shown that the tenancy agreement was made for the purpose of defrauding the revenue in order to make the tenancy agreement an illegal contract. If it had been established that the tenancy agreement was made by the plaintiff for such an unlawful purpose, the maxim ex turpi causa non oritur actio would have applied to this case. The plaintiff will therefore be precluded from suing on the tenancy agreement for the Court will not lend its assistance to a plaintiff who knowingly enters into an agreement aimed at defrauding the revenue : Alexander v Rayson [1936] 1 K.B 169.

In this case there is no fraud on the revenue because the Board, was paid the rent it charged pursuant to the licence granted to the plaintiff's wife. There is no evidence that a different rent would have been charged if the Board had known that the plaintiff or his wife was going to grant a tenancy of their shop to the defendant. The Board has also not been deprived of any revenue due to it because of the tenancy granted by the plaintiff to the defendant. As to the question about the plaintiff making an undue financial gain out of the tenancy agreement, it is not to be overlooked that the licence was granted for the purpose of a shop to be built on land situated in the centre of Apia. It is needless to say that the primary purpose of such a shop is to make money which is financial gain. As to the point about the higher rent paid by the defendant to the

plaintiff as compared to the lower rent charged by the Board to the plaintiff's wife, it is to be noted that the rent charged by the Board is rent for a vacant piece of land. The rent charged by the plaintiff to the defendant covers the use and occupation of the shop built on that land by the plaintiff and his wife. For these reasons, I have come to the view that the tenancy agreement in this case is not an illegal contract for the purpose of defrauding the revenue.

This brings me to the question whether the plaintiff who had no title in the land can bring this action to recover rent from the defendant under the tenancy agreement he entered into with the defendant as well as electricity expenses. At first sight, it may appear that as the plaintiff had no title to the land, he could not grant a tenancy of that land to the defendant. The tenancy he granted to the defendant must therefore be void as he had no title in the land. It follows that the plaintiff cannot sue on a tenancy agreement that is void. Whilst that may be the position at first sight, the true legal position is different. I will refer now to some of the authorities that illustrate the true legal position.

In 1 Hinde Sim and McMorland : Land Law, para 5026 it is there stated :

> "It is a fundamental proposition in English law that a tenant "cannot dispute his landlord's title, and, conversely, that "a landlord cannot dispute his tenant's title, as, for "example, by alleging his own want of title to create the "tenancy. Each is estopped from denying the other's title. "The doctrine operates not only in the case of tenancies "created by deed, but has been extended by analogy to "tenancies created by writing or orally, and it applies to "all types of tenancy, including periodic tenancies, tenancies "at will and at sufferance".

In Industrial Properties v AEI Ltd [1977] 2 All E.R 293 at 301, Lord Denning MR had this to say about this very point :

> "If a landlord lets a tenant into possession under a lease, "then, so long as the tenant remains in possession undis- "turbed by any adverse claim - then the tenant cannot "dispute the landlord's title. Suppose the tenant (not "having been disturbed) goes out of possession and the "landlord sues the tenant on the covenant for rent or for "breach of covenant to repair or to yield up in repair. "The tenant cannot say to the landlord : 'You are not "'the true owner of the property'. Likewise, if the land- "lord, on the tenant's holding over, sues him for posses- "sion or for use and occupation or mesne profits, the "tenant cannot defend himself by saying : 'The property "'does not belong to you, but to another'".

Again in 1 Hinde Sim and McMorland : Land Law, para 5027, it is stated :

> "Occassionally a person without any legal estate or title "purports to lease land to another. It is clear that in "such a case the purported grant cannot pass any estate "to the tenant; but, even if both parties know that the "soi-distant landlord has no title they and their "successors in title are estopped from denying the exis- "tence of the tenancy. In this way there arises what is "known as a tenancy by estopple, which as between the "parties who are estopped, possesses the elements of a "true tenancy. Thus the covenants contained in the pur- "ported lease are mutually enforceable between the "parties and their successors in title".

Applying these authorities to the present case, it is clear that what we have here is a tenancy by estopple. The plaintiff as landlord had no legal estate or title in the land. The land belongs to the Government. His wife is only a licensee of the land. His connection to the land is that the shop built on it belongs to him and his wife. That is the shop over which he granted a tenancy to the defendant. In these circumstances the law says there is a tenancy by estopple and the defendant as tenant is estopped from denying the existence of the tenancy. The

plaintiff as landlord may bring an action to enforce any covenant of the tenancy during the currency of the tenancy. As it appears from **Industrial Properties v AEI Ltd**, the plaintiff as landlord may also bring such an action even after the defendant as tenant has gone out of possession of the demised premises. That is what the plaintiff has done here. He is suing the defendant for unpaid rent due under the tenancy agreement even though the tenant has gone out of possession of the demised premises.

There is one other matter. It is not clear from the evidence whether payment of electricity expenses by the tenant is a covenant of the tenancy agreement. However the defendant has consented to that part of the claim

As to the claim for interest, there is no evidence in support of that claim and no submissions were directed to that question. I therefore disallow the interest claim.

In all then, judgment is given for the plaintiff in the sum of $2,224 which is the total amount of unpaid rent and outstanding electricity expenses. Costs are also awarded to the plaintiff to be fixed by the Registrar.

T F M Sapolu

CHIEF JUSTICE