

# **APPENDIX 24**

*(FAKALAH I 24)*

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Mr. Hans Schmeiser,  
Neiafu,  
Vava'u.

Dear Hans,

## Re: Legality of Tenancy Agreement

In Tonga, a tenancy is an interest which the owner of premises (that is a house or building) lets to another person for a period at a rent agreed between them. During the tenancy, the other person (that is, the tenant) occupies and uses the premises and pays the rent to the owner (that is, the landlord).

The essence of a tenancy in Tonga is that there are premises (building or house) and that they are the lawful property of the landlord and they are situated upon land which is lawfully held by the landlord, either by way of town or tax allotment.

There is no legislation in Tonga which provides for tenancy and so in accordance with the Civil Law Act of Tonga (Chapter 25), English common law and equity apply except when they would conflict with Tongan legislation. Hence the application in Tonga of the English common law with regard to tenancy, except where a Tongan law applies.

In English law, a tenancy applies equally to a house or building as it does to vacant, open land. In Tonga, a tenancy can only apply to a building or house of the owner of the land, and not to vacant, open land, because of the provisions of the Land Act (Chapter 132). Section 13 of that Act provides:

"13. Any landholder who enters or attempts to enter into any agreement for profit or benefit relating to the use or occupation of his holding or a part thereof other than in the manner prescribed by this Act or as approved in writing by the Minister shall be liable on conviction to a fine not exceeding \$200 or to imprisonment for any period not exceeding 12 months or both."

The words "the use or occupation of his holding or a part thereof" mean the use of the vacant, open land of his holding. When he has built a house or building on his land, it is that house or building that he is letting on tenancy.

As the above section provides "other than in the manner prescribed by this Act", that means the application for grant of a lease and sub-lease and permit as provided in the Land Act.

The words "or approved in writing by the Minister" allow the Minister to approve the tenancy of vacant, open land for farming for short periods for example the growing of commercial crops like yams, manioke, squash pumpkin, etc for say one to three years.

It is therefore unlawful and contrary to section 13 (as quoted above) for a landholder to make an agreement granting a tenant a tenancy of a building or house which he, that tenant, has built on his holding, or, as you have in your tenancy agreement, of a building or house which the tenant will build on the landlord's holding, unless the building or house is the lawful property of the landholder, that is, the landlord. If that building or house remains the property of the tenant then the agreement will be in breach of section 13 and will therefore be unlawful.

In your case, the tenant will build the building or house at his own costs but that upon completion, the building shall become the property of the Landlord and which will then be let to the Tenant on the tenancy agreed.

The tenancy agreement which I have drafted and given to you may properly be said to consist of two parts:

1. The agreement for the construction of the building, and
2. The tenancy of the building.

Both parts are valid and binding upon both parties.

Under the first part, the landlord is obliged to let the tenant enter upon the land and build the building, and the tenant is obliged, within a reasonable time and provided he pays the sums specified in the agreement, to construct the building in a proper a professional manner at his own costs which he then occupies under the second part of the agreement.

Neither party can terminate or vary the terms of the tenancy without the consent of the other.

If a tenant fails to comply with his obligation to build the house or to pay the sums specified in the agreement, the landlord may properly terminate the agreement and retain the sums already paid to him and evict the tenant from the house.

On the other hand, if the landlord fails to allow the tenant to enter or he (the landlord) lets his land to another person, either by way of another tenancy or by way of lease (as provided in the Act), he will be in breach of the agreement and may properly be stopped from doing so by order of injunction of the Court.

I am therefore of no doubt that the tenancy agreement in the terms which I have drafted is legally binding and in accordance with laws of Tonga.

Yours Faithfully,



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Laki M. Niu  
Barrister & Solicitor

LMN/pt