Land Case No. 4/72

MELE M. FIFITA -v- MINISTER OF LANDS AND NOBLE FAKAFONUA

Land Court. Roberts J., Hon. Luani, Assessor, Nuku'alofa, 28th July and 4th August, 1972.

Town allotment in excess of statutory area ..... Life interest ..... Neglect ..... Excess area small ..... Application of s. 49 ..... Ministers authority to cancel registration.

The plaintiff acquired a life estate in a town allotment on the death of her father in 1965. Plaintiff did not occupy the allotment and in 1970, the Minister of Lands cancelled the registration on the grounds that the area was 2 perches in excess of the maximum provided by s. 49.

Held: (1) That the Minister has full authority and control of the register,

(2) that s. 49 is so clear and unambiguous that the Section must be strictly applied and that the terms "null and void" therein do not permit of separation of the good from the bad, the rule in **Doe d. Thompson -v- Pitcher (1815) 6 Taunt,** as cited by Chitty on contracts 22 Edn, Vol. I being applied. Verdict for the defendants.

Tevita Siale Taufa for the Plaintiff.

The Crown Solicitor (Mr J. Fraser) for the Defendants.

ROBERTS, J: The town allotment in question is known as Haesilakolo at Ma'ufanga on the estate of Noble Fakafanua, the second defendant. This allotment was granted to Soane Matekikehau, the father of the plaintiff, and registered in his name on 7.6.38. Soane Matekikehau died on 21.6.65 and the allotment was transferred to his eldest unmarried daughter, the plaintiff on 21.4.66. On 4.8.70 the Minister of Lands wrote to the plaintiff informing her that he had cancelled the transfer with effect from that date owing to the fact that the said allotment exceeded the statutory area. The area of the allotment is 1r. 24., two perches in excess of the maximum area permitted by the Act in Section 49 but only 1½ perches in excess when the proviso to the section is taken into account. It was argued on behalf of plaintiff that (1) The Minister of Lands has no lawful right to cancel a registration, that such action can only be taken by order of the Land Court and (2) that the plaintiff should be given the area of the said allotment not in excess of the statutory area.

Section 49 provides that the grant of an allotment in excess of the statutory area—after 1927, the coming into force of the Act—is unlawful and any such grant shall be null and void. The Section does not say null and void in relation only to the excess. The Court is not entitled to read words into an Act of Parliament i.e. to put

words into the Act unless it is absolutely necessary to give the language sense and meaning in its context. If the Act had intended that such a grant should be null and void only in relation to the excess it would have said so. The provision must therefore be interpreted to mean that the grant—subject to the proviso in the Section—is void in toto. The question to be considered next is the powers of the Minister of Lands in relation to a null and void grant that he may have made in terms of Section 49.

May he treat the grant as a nullity, as never having been made and deal with the land as if the grant had never been made? May he do this without recourse to the Land Court for a Declaratory Judgment?

It has been submitted by the Crown Solicitor on behalf of the Minister that as Section 19(5) provides that the Minister shall act as Registrar-General of all land titles he has full power and authority to register or remove from the register or amend the register in relation to titles to Land. The Minister certainly has full authority and control of the register. It would appear, therefore, that where the Minister has made a grant, since the coming into force of the 1927 Act, in excess of the statutory area he may on his own authority cancel the registration or Title Deed pursuant to the grant.

With regard to the powers of the Minister to sub-divide an area of land which has been granted as an allotment in excess of the legal area contrary to the Act, he may, of course, take any action in relation to the area pursuant to the Land Act as if no grant had been made.

Before taking any action with regard to such a grant the Minister may if he wishes apply to the Court for an order in the form of a declaratory judgment, or any aggrieved party may have recourse to the Court as provided in Section 128.

Grants may, however, be illegal in that they are contrary to the provisions of the Act without being expressly stated to be void and null and void; for example a grant to a person contrary to the provisions of Section 43 and 50. Chitty on Contracts 22nd Edn, Vol. I in para, 890 cites English cases which make a distinction between an agreement or deed made contrary to the provisions of a Statute which expressly provides that such an agreement shall be null and void and an agreement or deed not so expressly provided to be null and void but nevertheless contravening the provisions of a statute.

Where the statute does not enact that an agreement shall be wholly void separation is permissible, as follows:—

> "Where you cannot sever the illegal from the legal part of convenant, the contract is altogether void; but where you can sever them, whether the illegality be created by the statute or by the common law you may reject the bad part and retain the good."

This doctrine of severance may be of no practical importance in relation to the Land Act. It does mean, however, according to the English Common Law interpretation, that the Minister may not sever the good from the bad i.e. uphold a grant, declared to be null and void by Section49, by reducing the grant to the statutory area.

Where the grant made is merely contrary to the provisions of the Act but not specifically declared to be null and void the Minister may, where practicable, sever the good from the bad to, at his option.

In all cases the Minister may cancel the grant or he may apply to the Court for an order, at his option, subject always to the right of any other party claiming to be interested to apply to the Court under Section 128.

The third submission by plaintiff constitutes a claim in equity based on long possession by the father for well over ten years—in fact for 27 years, and possession by the plaintiff for over 4 years. On behalf of plaintiff it has also been argued that the cancellation should have been made within the 10 years statutory limitation. It is clear that the limitation does not apply in view of the definite wording of Section 49 as such a grant is void ad initio and no period of possession can give a legal title. The Court therefore will now consider only the equitable claim of plaintiff.

It is submitted on behalf of the defendants that as equity follows the lawequity cannot be applied contrary to a statutory provision. It has also been submitted on behalf of the defendants that the Court may apply the English rules of equity only subject to the Civil Act (Cap. 14) namely, only so far as no other provision has been, or may hereafter be made by or under any Act or Ordinance in force in the Kingdom.

The application of the rule that "Equity follows the law" in this case must certainly mean that equity could never override the statutory limitation of area. Not only is this the basis of the principle of equity following the law but it is also the law of Tonga in the Civil Law Act relating to the application of equity.

The interpretation, quoted in this judgment, of Section 49 in relation to its application is a common law interpretation. The principle that Equity follows the law has been ennuciated in loading English text books on Equity as follows:—

> "Where a rule, either of the common or the statute law, is direct, and governs the case with all its circumstances, or the particular point, a Court of equity is as much bound by it as a Court of Law, and can as little justify a departure from it. It is only when there is some important circumstance disregarded by the common law rules that equity interferes." There is also the equitable principle that Equity will not suffer a wrong to be without a remedy. Although Section 49 makes it clear that any grants referred to in the section

shall be null and void no provision has been made in the section to grants which may be found many years later to exceed the statutory area by an area very slightly in excess of the amount allowed in the proviso."

Such a grant may be due entirely to a mistake in survey measurement. The grantee may in good faith and with the best of intentions improve and develop the area without knowing, or without having any reason to know, that the grant may according to Section 49, be declared a nullity. In the case of a town allotment he may build and establish a business only to lose his home and livelihood because of a mistake in survey of only a few square yards. The section has made no provision for this in the way of compensation or adjustment. This Court holds therefore that it is not precluded from consideration of the application of Equity in the present case. In view of the statutory provision, however, there would have to be a real wrong amounting to a hardship before equity might intervene The small area—a matter of only $1\frac{1}{2}$ perches (approx. 45 sq yds) must be considered and also the period of occupation by plaintiff or her father and any development or improvement undertaken by him or by plaintiff: The nature of the occupation however, has apparently been one of neglect. Plaintiff has not lived on the allotment since 1942 when she was an infant, has never occupied the allotment since it was transferred to her in 1966, and her father left the allotment in 1965. There was an agreement by plaintiff's father—without consent of the Minister—that other persons were allowed to occupy the allotment for 5 years. They left in 1969. If plaintiff had occupied the allotment and developed and built upon it and was dependant upon it for her residence or livelihood such a cancellation would impose a real hardship upon her but this is not the case. For the reasons stated the Court will not make the order as sought by plaintiff and thus finds for the defendants.

Editor's Note: The plaintiff appealed to the Privy Council. On 12.2.74 the Privy Council (Marsack, A.C.J.) allowed the appeal but remitted the case to the Land Court to the discretion of the Judge to consider further the allegation of abondonment of the allotment by plaintiff/appellant. (See p. 45).