FOR

IN THE SUPREME COURT OF SAMOA

HELD AT APIA

C.P. 89/96

BETWEEN: DORIS BETHAM MASSEURS of Wellington, New Zealand

Plaintiff

A N D: PELETI HALL of Aleisa, Planter

Defendant

A N D: ISABELLA BETHAM of Papakura, Auckland, New Zealand and presently of Aleisa, Widow

Third Party

Counsel: K M Sapolu for plaintiff
T S Apa for defendant
R Drake for third party

Hearing: 23 & 24 June 1998

Judgment: 15 July 1998

JUDGMENT OF SAPOLU, CJ

In order to facilitate understanding of the complex circumstances of this case, I will deal first with the historical background of the case and establish the legal status of each of the main personalities. I will then deal with the case relating to the third

party, and then with the case relating to the defendant, and then with the case relating to the plaintiff. In this way, understanding of the issues involved would be facilitated.

Historical background and legal status of Montgomery Betham and the parties:

On 24 September 1937, His Majesty the King of England, through the Acting Administrator of Western Samoa, granted a lease of approximately 50 acres of then Crown land at Aleisa to one Montgomery Betham as lessee at a specified rent for a term of 33 years commencing on 1 April 1937 and ending on 31 March 1970. The lease also contained a right of renewal clause for a further term of 33 years. Montgomery Betham built a European style house on the land and lived with his family on the land. He also set up on the land a plantation which included coconuts, cocoa, bananas, taros, taamu and vegetables. Montgomery Betham's second eldest son Ronnie, was the husband of the third party in this case. His youngest daughter, Doris, is the present plaintiff. The present defendant is the brother of the third party.

When the term of the lease expired on 31 March 1970, Montgomery Betham, as lessee, and his family continued to live and work their plantation on the land without paying rent. By that time the land, the subject of the lease, had become government land and had been brought by statute under the jurisdiction of the Land Board which is the statutory body that is now responsible for leasing out government land. By letter dated 3 October 1975, the secretary of the Land Board wrote to Montgomery Betham informing him that the lease had expired on 31 March 1970 and that the Land Board was willing to renew the lease to him for a further term of 33 years. Montgomery Betham was also requested in the same letter to notify the secretary of the Land Board before 14 November 1975 if he wished to renew the lease

for a further term of 33 years. There is no evidence that Montgomery Betham responded to that letter. Then on 17 April 1978, the secretary of the Land Board despatched another letter to Montgomery Betham informing him again that the Land Board had agreed to renew the lease to him for another term of 33 years, and, if that was acceptable to him, for his solicitor to prepare a draft renewed lease for the Attorney-General's approval. The same letter informed Montgomery Betham of his unpaid rental arrears up to 31 December 1976. Again there is no evidence to show that there was any response by Montgomery Betham to that letter. Then Montgomery Betham passed away about 21 September 1982 and was buried on the leasehold property.

At the time of his death, Montgomery Betham did not have a will. He died intestate. For some unexplained reason, letters of administration were not taken out in respect of Montgomery Betham's estate until 26 August 1997 when his daughter the plaintiff was granted letters of administration and appointed administratrix of her deceased father's estate.

It will be necessary at this junction of the narrative to determine the status of Montgomery Betham in relation to the lease up to the time of his death. That would assist in resolving some of the crucial issues raised in this case. To recapitulate briefly on what has already been said, the lease granted to Montgomery Betham in 1937 expired on 31 March 1970. It was not until 3 October 1975 that the secretary of the Land Board wrote to Montgomery Betham informing him that the lease had expired on 31 March 1970 and that the Land Board was willing to renew the lease to him for another term of 33 years. From the expiry of the lease to the time of the letter

of 3 October 1975, Montgomery Betham did not pay any more rent. It is, thus, clear that during the duration of the lease from 1 April 1937 to 31 March 1970, Montgomery Betham was in occupation of the land as a lessee. But from the expiry of the lease on 31 March 1970 to the letter of 3 October 1975, Montgomery Betham was continuing to occupy and live on the land, not as a lessee, but as a tenant at sufferance. That is because the lease had expired and he was continuing to live on the land without the assent or dissent of the Land Board which by that time had become the lessor of government land by statute.

In ***vol 1 Land Law by Hinde Mc Morland and Sim (1978)***, it is stated at para 5.023 :

> "What is called a tenancy at sufferance arises where a tenant who originally "entered under a valid tenancy holds over after his tenancy has come to an end "without any statutory right to do so and without the landlord's assent or "dissent...
>
> "A tenancy at sufferance can arise only by operation of law. It cannot be "created by express agreement because it presupposes that there has been no "agreement between the landlord and the tenant. Strictly speaking it is not a "tenancy at all, since there is no tenure between the parties, but it has to be "called a tenancy, apparently for no better reason than that it usually arises "between parties who were originally landlord and tenant."

This description of what constitutes a tenancy at sufferance fits in with the situation which was existing between the Land Board and Montgomery Betham from the expiry of the lease in 1970 to the time of the letter of 3 October 1975 from the secretary of the Land Board. Thus, Montgomery Betham became a tenant at sufferance on the land from 1970 to 1975.

However, after the letter of 3 October 1975, Montgomery Betham, in my view, ceased to be a tenant at sufferance on the land because that letter demonstrated a willingness on the part of the Land Board to allow Montgomery Betham to continue in occupation of the land even though no rent had been paid up to the time of that letter. With that willingness on the part of the Land Board, I infer that the continuing occupation of the land by Montgomery Betham after the letter of 3 October 1975 was with the implied consent or assent of the Land Board. That being so, Montgomery Betham became a tenant at will on the land as from the letter of 1975. Any doubt in that respect would be removed by the second letter which was despatched on 17 April 1978 by the secretary of the Land Board to Montgomery Betham again informing him that the Land Board had agreed to renew his lease for a further term of 33 years, and, if that was acceptable to him, for his solicitor to prepare a draft renewed lease for the Attorney-General's approval. That letter clearly further shows that the Land Board was willing to allow Montgomery Betham to continue to remain on the land since its letter of 3 October 1975 even though no rent had been paid during that period. I am therefore satisfied that since the letter of 1975, the relationship between the Land Board and Montgomery Betham was one of a tenancy at will, and, therefore, Montgomery Betham was a tenant at will and was no longer a tenant at sufferance on the land as from that time.

In ***vol 1 Land Law by Hinde Mc Morland and Sim (1978)*** it is stated at para 5.021 :

> "A tenancy at will may be created either expressly or by implication, but it is "unusual for such a tenancy to be expressly created".

Further on in para 5.021 it is there stated :

> "*[The] commonest situations in which tenancies at will are implied by the "common law are where a tenant whose lease has expired 'holds over' with "the permission of the landlord without having yet paid rent on a periodic "basis*, where an intending tenant has been let into possession during "negotiations for a lease, and where a purchaser has been let into possession of "property before completion of his purchase and is not entitled to possession "by virtue of the contract". (italics mine)

In para 5.033 of the same text book, it is there stated :

> "A tenant at sufferance differs from a tenant at will because his so-called "tenancy exists without the consent of the landlord; but he is not a trespasser "because his original entry on the property was lawful".

Then further on in para 5.033, it is there stated :

> "A tenancy at sufferance becomes a tenancy at will if the landlord consents to "it".

Applying these statements of legal principles to the circumstances of this case, I am of the view that the relationship between the Land Board and Montgomery Betham ceased to be a tenancy at sufferance and became a tenancy at will when by letter of 3 October 1975 from the secretary of the Land Board, the Land Board consented to Montgomery Betham continuing to occupy the land even though no rent had yet been paid since the expiry of the lease in 1970. Thus, from 1975 onwards, Montgomery Betham was a tenant at will.

Now one of the events that determines a tenancy at will is the death of either party to such a tenancy. Thus, when Montgomery Betham died on 21 September 1982 his tenancy at will with the Land Board was immediately determined and therefore could not have formed part of his estate and be vested in the plaintiff as administratrix of his estate under section 14 of the Administration Act 1975 when letters of administration were granted to her in 1997.

Again with reference to ***vol 1 Land Law by Hinde Mc Morland and Sim (1978)***, it is stated in para 5.021 :

> "The relationship created by a tenancy at will is personal to the landlord and "the tenant, and it has been suggested that it is 'not a species of estate but a "'mere relationship of tenure unaccompanied by any estate'. The consequence "of this personal relationship is that a tenancy at will is determined if either "party dies or assigns his interest in the land".

In the case of ***Wheeler v Mercer [1956] 3 All ER 631***, Viscount Simonds in the House of Lords said at p.634-635 :

> "A tenancy at will, though called a tenancy, is unlike any other tenancy except "a tenancy at sufferance to which it is next of kin. It has been properly "described as a personal relation between the landlord and his tenant. It is "determined by the death of either of them".

So it is clear that a tenancy at will may be determined by the death of either party to it and, therefore, the relationship of tenancy at will between the Land Board and Montgomery Betham was immediately determined upon the death of Montgomery Betham.

Given that the tenancy at will was determined upon Montgomery Betham's death, such a tenancy could not have formed part of Montgomery Betham's estate at the time of his death and be vested in his administratrix upon the grant of letters of administration to her. As it has already been pointed out in ***vol 1 Land Law by Hinde Mc Morland and Sim (1978)*** at para 5.021 :

> "[A tenancy at will] is not a species of estate but a mere relationship of tenure "unaccompanied by any estate".

Now at the time of Montgomery Betham's death, two of his daughters and his son Ronnie, the husband of the third party, were still living on the land at Aleisa. After Montgomery Betham's death, his son Ronnie and his wife, the third party, together with their children continued to live on the land. Sometime in 1983, Ronnie requested the defendant, the brother of his wife, to come on to the land and assist him on the land. The defendant then moved onto the land with his wife. Then in 1987, Ronnie went to New Zealand for medical treatment together with his wife while the defendant continued to live on the land. Ronnie returned to Samoa for two or three visits. In one of those visits he paid to the Lands, Survey and Environment Department in September 1992 the sum of $106.25 for his deceased father's rental arrears for the period from the expiry of the lease in 1970 to 31 December 1976. Ronnie then passed away on 10 January 1995 in New Zealand and is buried in New Zealand .

It is important at this junction to be clear about the status of Ronnie and the third party in relation to the land. Neither of them was a lessee or tenant on the land

at the time of Montgomery Betham's death. Ronnie Betham and his wife, the third party, could not have continued to remain on the land after the death of Montgomery Betham under any form of lease because the lease to Montgomery Betham had expired and was never renewed. In the circumstances, the only basis upon which they could have continued to remain and live on the land was by way of a licence. Such a licence would have to be a bare licence which can arise by implication.

Given that Ronnie and his wife, the third party, were bare licensees, the defendant whom they brought onto the land to live and assist them could not have lived on the land on a stronger legal basis. In my view, the defendant's occupation of the land must also have been on the basis of a bare licence.

Now, in 1995, the plaintiff came to Samoa after her brother Ronnie passed away early that year. She went to the Lands, Survey and Environment Department where she was given a bill for her deceased father's rental arrears of about $3,500 for the period from 1977 to 1983. She paid that amount and on 23 November 1995 a deed of lease was executed between the Land Board as lessor and the plaintiff as lessee "for Montgomery Betham estate". This deed of lease was executed before letters of administration were granted to the plaintiff as administratrix in 1997. Under that deed of lease, the legal status of the plaintiff is clearly that of lessee.

Now, I do not think that the payment made by Ronnie in 1992 for his deceased father's rental arrears for the period from the expiry of the lease to Montgomery Betham in 1970 to 31 December 1976 would alter the view I have already expressed that a tenancy at sufferance existed between the Land Board and Montgomery Betham

during that time and that Montgomery Betham was then a tenant at sufferance on the land. That tenancy at sufferance became a tenancy at will as from the letter of 3 October 1975. It would be too late for the payment made by Ronnie in 1992 to unravel or alter the legal status of the situation that had existed between the expiry of the lease in 1970 and the year 1976. Likewise, it would also be too late for the payment made by the plaintiff in 1995 for her deceased father's rental arrears for the period from 1977 to 1983 to effect any change in the legal status of the situation that had existed between the Land Board and Montgomery Betham from 1977 to 1983. As already pointed out, from 1975 to the time of Montgomery Betham's death in 1982, he was a tenant at will on the land. The tenancy at will was determined upon his death. The payment made by the plaintiff in 1995 was too late to have any effect on the legal status of the situation as it then existed from 1977 to 1983.

I will deal now with the case for the third party.

Third Party's case:

The third party's evidence was essentially that she was the second wife of the late Ronnie, and that she started to live with Ronnie as husband and wife on the disputed land in 1969 while her father-in-law Montgomery Betham was still alive. She testified that Ronnie and herself worked hard to assist her father-in-law Montgomery Betham with the family's plantation. They planted crops including coconuts, cocoa, bananas, taros and vegetables. Ronnie became his father's right hand as his other brothers had migrated to New Zealand. Montgomery Betham's mortgage to the Development Bank on the leasehold was also being paid by Ronnie

and herself, but there was still an outstanding balance by the time Ronnie passed away.

The third party also testified that she and her husband had made improvements to the family's homestead by adding a concrete floor to the family home and then supplying from New Zealand 70 sheets of roofing iron for the family house after the two cyclones in 1990 and 1991. She also said when Montgomery Betham was alive he told Ronnie that the lease was to be passed on to him. However there was never any formal assignment of the lease to Ronnie. It is also not clear when Montgomery Betham made such a statement to Ronnie, that is, whether it was before or after the expiry of the lease in 1970. If after the expiry of the lease then Montgomery Betham had no lease to pass on to anyone.

Then about 21 September 1982 Montgomery Betham passed away. In 1983 Ronnie and herself requested the defendant to come to live on the land and to assist them with the plantation. In 1987 Ronnie and the third party left for New Zealand as Ronnie required medical treatment. Ronnie passed away in New Zealand about 10 January 1985 and is buried in New Zealand.

Now, essentially what the third party is saying is that the lease which the Land Board has granted to the plaintiff is not valid and must, therefore, be set aside. Secondly, the third party says that she must be declared as sole successor to the original lessee, Montgomery Betham. It is unfortunate that the Land Board, which is the lessor of the lease granted to the plaintiff, was not cited as a party to these proceedings by the third party as she is challenging the validity of the new lease. Be

that as it may, I will deal now with the grounds upon which the third party claims that the new lease is not valid.

The first ground is that the original lease which was granted to Montgomery Betham was still in existence and had not been terminated by the time the new lease was granted by the Land Board to the plaintiff. It was argued that the new lease to the plaintiff could not be granted while the original lease to Montgomery Betham was still in existence. In my view, this ground is totally misconceived. In the first place, the original lease to Montgomery Betham expired in 1970. So that original lease could not have been in existence at the time the new lease was granted to the plaintiff "for Montgomery Betham estate" in 1995.

I have also explained that from the expiry of the original lease in 1970 to the year 1975, the existing relationship between the Land Board and Montgomery Betham was one of a tenancy at sufferance because Montgomery Betham was holding over after the expiry of his original lease without paying any rent and without the assent or dissent of the Land Board as lessor. That tenancy at sufferance ceased in1975 when the Land Board consented to Montgomery Betham continuing to occupy the land. From that time until he passed away in 1982, the relationship between Montgomery Betham and the Land Board was one of tenancy at will because during that time Montgomery Betham was living on the land with the consent of the Land Board. However, that tenancy at will was determined upon the death of Montgomery Betham and did not form part of his estate. There was, therefore, no existing lease between the Land Board and Montgomery Betham or his estate at the time the new lease was granted by the Land Board to the plaintiff in 1995. It other words, there was no

existing lease on the land to prevent the Land Board from granting the new lease to the plaintiff.

The third party and her late husband were only licensees on the land from the time of Montgomery Betham's death. The husband has passed away, so he is no longer a licensee on the land. The third party, herself, has been living in New Zealand since she went there with her husband in 1987. It is, therefore, highly doubtful whether she is still a licensee on the land as she no longer lives on the land. Be that as it may, I am of the view that the position of the third party cannot prevail over the jurisdiction of the Land Board, as statutory lessor of government lands, to grant the new lease to the plaintiff.

The next ground of the third party's claim, which is closely allied to the first ground, is that because Montgomery Betham died intestate, his son Ronnie the late husband of the third party, acquired an interest in his father's estate which included the leasehold, by virtue of the rules of succession in the case of an intestacy. As Ronnie also died intestate, it was argued that the third party would acquire an interest in the leasehold at Aleisa through the estate of Ronnie by operation of the law of succession in an intestacy. The flaw in this argument is that it is founded on the false assumption that the original lease to Montgomery Betham became part of his estate when he died. No such thing happened. So neither Ronnie nor the third party acquired an interest in any leasehold by reason of the rules of succession in the case of an intestacy.

The third ground for claiming the new lease to be invalid is that it is alleged to be in contravention of sections 29, 30 and 31 of the Lands, Survey and Environment Act 1989. Section 29 provides that the Land Board may alienate government land under the Act either after calling for applications or without competition. The word "alienate" in this context includes disposing of government land by way of a lease. Section 30 and its provisions relate to alienation of government land after calling for applications. Section 31 and its detailed provisions relate to the alienation of government land without competition. The question of which of these two provisions, section 30 or section 31, applies to a particular case must depend on the facts of each case. The difficulty here is that on the evidence before the Court, I am not able to say which of the two provisions, if any, applies to this case. One cannot conclude with any sufficient degree of confidence whether any of the relevant provisions of the Act has been contravened or not.

The fourth ground was that the plaintiff did not have the authority of the other beneficiaries of Montgomery Betham's estate to enter into the new lease with the Land Board "for Montgomery Betham estate". Here again it appears to me from the evidence that there is still this assumption that the original lease to Montgomery Betham is still part of his estate, but as I have already explained that lease does not form part of Montgomery Betham's estate. The Land Board as lessor was at liberty to grant a new lease to the plaintiff if it wanted to. The addition of the words "for Montgomery Betham estate" after the name of the plaintiff as lessee in the lease would not affect the validity of the lease. Those words were added on because the plaintiff, according to her own testimony which I accept, took out this new lease due to her desire to keep the land at Aleisa within her family for her brothers, sisters and

the children of Ronnie rather than for herself alone. She also wanted the land to remain with her family because her father Montgomery Betham is buried on the land, her family's homestead is still on the land, and her family had all lived and grown up on this land. Perhaps the use of the words "for Montgomery Betham estate" in the new lease is not an accurate description of what the plaintiff had in mind but it does manifest an intention to keep the land within the family rather than for the plaintiff alone. The misdescription could always be rectified by the parties to the lease to reflect their real intentions.

I am also somewhat concerned about the expressed desire of the third party to transfer or assign the lease to herself and her children to the exclusion of her late husband's brothers and sisters. She also wants her brother, the defendant, to continue to occupy the land by himself. It must be clear by now that there is no existing lease which can be transferred or assigned to the third party. If it is the original lease to Montgomery Betham that she has in mind, then no such lease is still in existence. Her wish to be declared sole successor to the original lessee, that is assuming the original lease is still in existence as part of Montgomery Betham's estate, cannot override the clear provisions of the Administration Act 1975 regarding the rules of succession in the case of an intestacy for Montgomery Betham died intestate. It would also seem odd for the third party to be declared sole successor to Montgomery Betham's estate and for her brother, the defendant, to live by himself on the land at least for the time being when Montgomery Betham has several surviving children. There was also evidence from the plaintiff that all of Montgomery Betham's children had helped their father with their plantation on this land when they were young and while their father was alive. Even though the plaintiff in later years left for New Zealand, she said she

remitted money at times to her parents in Samoa to help them. The claim by the third party to have the lease to Montgomery Betham transferred or assigned to her and for her to be declared the sole successor to Montgomery Betham must fail.

Finally, that part of the third party's claim which seeks to rely on proprietary estoppel is not sustained by the evidence and I need not deal with it.

I turn now to the case for the defendant.

Defendant's case:

The defendant, as already pointed out, is the brother of the third party. He said that he first came onto the land at Aleisa in 1969 when he was 17 years of age. He assisted his sister, the third party, and her husband, Ronnie, with the cultivation, development and maintenance of the leasehold to Montgomery Betham. He left the land in 1976 when he had a job as a motor mechanic with the Public Works Department. This part of the defendant's evidence is inconsistent with the evidence given by the third party that the defendant only came onto the land in 1983.

The defendant further said that while he was working as a motor mechanic for the Public Works Department, Ronnie came to him three times in1983 and requested him to come and assist him in the development and maintenance of the land. So he resigned from his job and went and lived on the land. Then in 1987, Ronnie and his wife went to New Zealand as Ronnie required medical treatment. The defendant continued on the land as caretaker. He is still in occupation of the land.

For his remuneration, the defendant said that Ronnie told him that any income he earned from the crops he planted on the land were his to keep plus any reasonable costs for reclaiming and clearing any forest land which was part of the leasehold. The defendant also testified that he reclaimed and cleared 20 acres of forest land. This 20 acres is part of the 50 acres that was originally leased to Montgomery Betham. He also said that he planted cocoa, coconuts, bananas, taros and taamu on the land and he earned more than $100 a week from the land and the crops which he sold as he pleased. That money the defendant kept for himself. What the defendant is now claiming is compensation from the plaintiff for the 20 acres of forest land that he had reclaimed and cleared and for the crops he has planted on the land. He said he would leave the land when the compensation claimed is paid to him.

Now I am satisfied that in November 1995 the defendant was asked by the Land Board to vacate the land. In May 1996 the plaintiff also filed a motion for an injunction against the defendant for him to vacate the land. The defendant was aware of that motion for an injunction as it was served on him.

I will deal now with the defendant's claim for compensation. Dealing first with the claim for $20,000 for the reclamation and clearance of 20 acres of forest land at $1,000 an acre, I am of the view that claim cannot succeed. The 20 acres that were cleared were cleared for the use and benefit of the defendant himself. Any labour expended by the defendant in clearing that part of the land was labour expended for his own personal benefit. The crops which he planted on that 20 acres were planted for the use and consumption of the defendant and his own immediate family. The plaintiff derived no benefit at all from the clearance of this 20 acres or from the crops

that were planted on it. The plaintiff also did not instruct, encourage or acquiesce in the defendant clearing the land. It appears it was the defendant who on his own freewill cleared the 20 acres to plant crops for himself. The evidence also does not explain when the crops which are still growing on the 20 acres were planted, that is, whether it was before or after the Land Board served on the defendant an eviction notice in 1995 and when the plaintiff commenced these proceedings in 1996. The defendant also did not pay any rent for his use of this 20 acres of the land or any other part of the land. The plaintiff has also taken out the new lease which she wants to be for her brothers, sisters, and the children of her late brother Ronnie. So it is not clear whether the plaintiff would be allocated any part of this 20 acres. I also do not feel confident about the defendant's testimony that Ronnie told him he could claim reasonable costs for any forest land he cleared. The reason is that from 1987 when Ronnie left for New Zealand until he died in 1995 the defendant appears never to have made any claim for compensation to Ronnie for clearing this 20 acres. In any event, if it is true that Ronnie told the defendant he could claim reasonable costs for clearing any land, that was a representation made by Ronnie and not the plaintiff. This claim against the plaintiff for compensation in respect of the 20 acres the defendant said he reclaimed from the forest must be denied.

In respect of the claim for compensation relating to crops, the defendant's claim against the plaintiff relates to crops that were planted before the commencement of these proceedings and those crops that were planted after the commencement of these proceedings in 1996. I am of the clear view that the defendant is not entitled to compensation for the crops which he planted after the commencement of these proceedings in 1996 or after the eviction notice from the Land Board in 1995. The

defendant was given an eviction notice in November 1995 by the Land Board. Then in May 1996 he was served with a motion for an injunction by the plaintiff. So in November 1995 and May 1996 the Land Board as lessor and the plaintiff as lessee were asserting their rights to the disputed land in clear and unmistakeable terms. For the defendant to continue to plant and grow crops or vegetables on the land after those clear assertions of rights to the land was a gamble he was taking at his own risk. I say that because if it turns out that the plaintiff is successful in her proceedings, then it would not be just or equitable to require the plaintiff to compensate the defendant for crops which were planted by the defendant after the plaintiff had asserted her rights to the land. Likewise, the plaintiff should not be required to pay compensation for any crops or vegetables which were planted after the Land Board had asserted its rights to the land. Accordingly, the claim for compensation for crops planted after the eviction notice and the commencement of these proceedings must also be denied.

In respect of the crops that were planted before the commencement of these proceedings, the defendant claims for 332 cocoa plants at $150 each, 33 coconut trees at $118 each, 7 mandarin trees at $100 each and 1,200 banana plants for $15 each. However, the valuation report prepared and produced for the defendant by the witness Ieti Ngg Cho who is an agricultural economist and a trained valuer for plantations, shows inconsistencies between the information upon which the valuation report is based, and what is claimed in the defendant's testimony and counterclaim in relation to the crops which were planted before the commencement of these proceedings.

According to Mr Ngg Cho, he was only required to prepare a valuation report for the defendant the day before he was to testify in this case. As a result he did not

have time to do a proper count or inspection of the crops. He, therefore, had to rely on information given by the defendant to him for the preparation of his valuation report. However, there are inconsistencies between what is contained in the valuation report and what is claimed by the defendant in his testimony and his counterclaim. I turn to these inconsistencies now.

In the first place, the defendant in his testimony and counterclaim seeks compensation for 332 cocoa plants at $150 each, 33 coconut trees at $118 each, 7 mandarin trees at $100 each, and 1,200 bananas for $15 each. These are the crops which the defendant claims he had planted on the land before the commencement of these proceedings. However, it appears from the valuation report that the only crops that were planted by the defendant before the commencement of these proceedings would be the 332 cocoa trees stated to be four years old and the seven mandarin trees stated to be fifteen years old. The coconuts and the bananas, as the valuation report shows, would have been planted after the commencement of these proceedings in May 1996, and certainly after the defendant was served with an eviction notice by the Land Board in November 1995.

As for the 332 cocoa trees, the total compensation sought in the counterclaim is $49,800; the total amount shown in the valuation report for these cocoa trees is $7,145.76. For the seven mandarin trees the total amount sought in the counterclaim is $700; the total amount shown in the valuation report for these mandarin trees is $1,500. Given these discrepancies between the evidence by the defendant and the evidence by the valuer, I am left in real doubt as to the true valuation for the cocoa and mandarin trees. In any event, I do not consider that any compensation should be

awarded for the mandarin trees even if I were to accept that the defendant planted those trees and the valuation given by Mr Ngg Cho for those trees. A mandarin tree does not take much labour to plant or grow. These mandarin trees have also been growing on the land for fifteen years. The defendant must have reaped the fruits of those trees over the years without paying any rent for his use of the land for those trees. The mandarin trees are also quite old now and must have grown in 1983 when Ronnie was still on the land.

As for the claim for compensation of the 332 cocoa trees, the basis for the defendant's claim for $49,800 for those trees is not clear. It is substantially different from the valuation of $7,145 given by the valuer who has had training in making valuations of plantations. I have had real difficulty trying to reconcile these two valuations. Counsel for the defendant, himself, told the Court he had not had time to study the valuer's report. The defendant himself did not explain how he came to the individual valuations for the different crops sought in his counterclaim. The result of this is that I am not satisfied on the balance of probabilities as to the real value of the cocoa trees.

But even if I were able to ascertain with a sufficient degree of confidence the real value of the cocoa trees, I am confident it would be no where near the total figure claimed by the defendant. Some deduction must also be allowed for these factors. The first is that the defendant has had the use and occupation of this land since 1987 without paying rent. The monies he earned from the land were kept for himself. Secondly, the land had been under cultivation by the Betham family since 1937 up to the time the defendant was left by himself and his wife on the land in 1987. In 1987

there was already a plantation of cocoa, coconuts, taamu, taros, bananas, mandarins and vegetables on the land. There is no evidence as to what happened to those crops and vegetables after Ronnie and his wife left for New Zealand in 1987 and only the defendant and his wife remained on the land. However, the only reasonable inference to be drawn on the basis of the evidence is that the defendant and his wife had the free use of the fruits and produce from the plantation of the Betham family for themselves.

It is true that the defendant was left on the land to look after the plantation in the absence of Ronnie Betham who had to go to New Zealand for medical treatment. But it is clear from the evidence that this was a mutually beneficial relationship because the defendant had the free use of the produce from the plantation that was already there when Ronnie left. The defendant also did not pay any rent. Any crops and vegetables which he, himself, planted and cultivated were for his own use and benefit. The money he earned from the land was also kept for his own use. When the Betham's home on the land was damaged during the Ofa and Val cyclones in 1990 and 1991, it was Ronnie who sent the roof tops and 70 sheets of corrugated iron from New Zealand for the repair of the family home.

Because of the substantial number of the bananas for which compensation is claimed, I wish to add something to this part of the defendant's claim. The evidence of the valuer was that these bananas were planted two years ago. That must have been soon after the plaintiff commenced proceedings in May 1996. But even if allowance is made for any error as to the exact time these bananas were planted, then certainly they must have been planted after the defendant was served with an eviction notice by

the Land Board in November 1995, the same month that the Land Board granted the new lease to the plaintiff. Banana crops also take about twelve months to bear bunches. Those bunches must already have been harvested well before now.

I come now to the case for the plaintiff.

Plaintiff's case:

The evidence by the plaintiff is that after her brother Ronnie died in Auckland, New Zealand, in January 1995, her family, with the defendant and the third party being present, met in Auckland and decided that the defendant would continue to live on the land at Aleisa until the plaintiff's family were ready for it. Then later in 1995 the plaintiff came to Samoa and on 23 November 1995 a deed of lease of the land was executed and granted by the Land Board to the plaintiff for the Montgomery Betham estate. What the plaintiff had in mind for taking out this new lease was for the land to remain within her family as her father is buried on the land and her family's homestead is still on the land. And as already pointed out, the plaintiff's purpose in taking out the lease was to keep the land within her family for her brothers and sisters including the children of her late brother Ronnie.

It has also been pointed out that there was no lease which formed part of the Montgomery Betham estate at the time of his death because at that time Montgomery Betham was only a tenant at will. The tenancy at will went to the grave with Montgomery Betham. It is therefore inapt to speak of a lease forming part of the Montgomery Betham estate in 1995. What was left after Montgomery Betham's death was a licence by which his son Ronnie continued to occupy the land. The defendant

then occupied the land in 1987 by himself and his wife when Ronnie Betham and the third party went to New Zealand. The status of the defendant has been that of licencee. All this means that in 1995 there was no existing lease on the land to prevent the Land Board from granting the new lease which it granted to the plaintiff. I hold that the lease to the plaintiff is valid.

I hope, however, that as the plaintiff has taken this new lease from the Land Board for her brothers, sisters, and the children of her late brother Ronnie, steps would be taken to reflect that in clear terms in the lease. Further steps could then be taken, if so desired, to subdivide the leasehold amongst the plaintiff and members of her immediate family. The part of the leasehold to be given to the third party's children could, in turn, be given by them to the defendant to occupy and look after if they wish to do so. The reason being that the third party and her children are now all living in New Zealand and it is not known when any of them would return to Samoa again to live. These, however, are only suggestions that the parties may wish to consider.

Conclusion:

Judgment is given for the plaintiff. The counterclaims by the defendant and third party are dismissed. The defendant is given three months to use his crops and vegetables and to vacate the land. Any of his crops or vegetables he can remove from the land may be removed. But crops like cocoa, coconuts and mandarins which cannot be removed without destruction are to remain on the land. The defendant may also remove any house or other structure he has erected on the land within this same period of three months.

Counsel for the plaintiff to file memorandum as to costs within 10 days. Counsel for the defendant and the third party will then have 10 days to file memoranda in reply.

T F M Sapolu
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CHIEF JUSTICE

Solicitors:
K M Sapolu, Tamaligi, for plaintiff
Apa & Associates, Apia, for defendant
Drake & Co, Apia, for third party