

RULING

[1] This is an application for restraining orders in the nature of injunctions to prevent the defendants, their servants or agents from entering, occupying, planting and growing crops on the plaintiff's allotment at Ha'akame. The application also seeks the removal from the land of the defendants' plants, coconuts and firewood. The application is opposed by the defendants.

The facts

- [2] The plaintiff is a widow who is resident in the United States but has an allotment at Ha'akame. She says that the allotment is under the care of her eldest son who resides at Ha'akame and is the heir to the land.
- [3] The defendants are members, supporters or are associated with the Halatoamui Tongan Kava Club. They are growing tutu plants on the land to help the funding of scholarships for students of the Ha'akame village. They say that a large number of plants have been planted on the allotment (around 12,000) and that they will be ready for the first harvest in October 2016 and for a second harvest in December 2016, although I note in submissions Mr. Tu'utafavia suggested that the plants might be harvested sooner than this. It is said that the value of each plant is around TOP\$3.00.
- [4] The evidence for the plaintiff is that in November 2015 the defendants, as well as other people who were found working on the allotment,

were asked to leave and some of them did, but the defendants have refused to leave and continue working the land.

[5] The defendants say that they have been given permission to be on the land by one Sione Tahitu'a 'Otukolo who they say has since 2000 been given the care and control of the land by the plaintiff. Mr. 'Otukolo has filed an affidavit in which he asserts that he was first given possession of the land by the plaintiff in the 1990s so that his daughter and her husband could farm the land and that from the year 2000 until today he has been leasing the land from the plaintiff for \$1,000 per annum. Most recently he says that in 2015 he spoke to the plaintiff on the telephone and said that he had the rent which the plaintiff was to collect from him but she has not done so. He says also that he gave permission to the Halatoamui Tongan Kava club to use the land to raise funds for scholarships at Ha'akame and to grow hiapo and tutu on the land.

[6] For her part the plaintiff acknowledges that Mr. 'Otukolo had the use of her land until 2013 and says that in 2015 he contacted her and asked her to again use the land and was told that he could not do so. She says that the defendants are unlawfully growing crops on her land and that Mr. 'Otukolo is acting fraudulently in claiming that he has a right to the use of the land.

The principles

[7] I adopt the approach in *Klissers Farmhouse Bakeries Ltd v Harvest Bakeries Ltd* [1985] 2 NZLR 140 (CA). The purpose of an interlocutory

injunction is to maintain the status quo until the rights of the parties can be determined at the hearing. A plaintiff must show that there is a serious question to be tried (in the sense that the plaintiff has made out a prima facie case) and that the balance of convenience favours the granting of the injunction. The Court must look at the impact on the parties of a granting or the refusal of an order. Finally, an assessment of the overall justice of the case is required.

- [8] If it can be shown that a plaintiff will be adequately compensated in damages and will suffer no irreparable injury if the injunction is not granted that is an important factor against the making of an order. However, the grant of an interim injunction involves the exercise of a discretion and the approach that I have outlined cannot be taken as suggesting a rigid or mechanical approach.
- [9] I also note what Lord Diplock said in *American Cyanamid Co v Ethicon Ltd* [1975] AC 396 at 406-407:

...where the legal rights of the parties depend upon facts that are in dispute between them, the evidence available to the court at the hearing for an application for an interlocutory injunction is incomplete...

It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations.

The threshold

- [10] The plaintiff has satisfied me that the threshold question, of whether there is a serious question to be tried, is satisfied. The plaintiff is the owner of the land and *prima facie* entitled to possession of it. The defendants are denying the plaintiff, or her agents, from using the land. I understand the plaintiff's son and heir intends to plant manioke and other crops on the land, but cannot do so at the present time.
- [11] The defendants' only basis for claiming a right to use the land is through Mr. 'Otukolo and his evidence that he was granted permission by the plaintiff to use the land is vehemently disputed by the plaintiff. I am not able to finally resolve the dispute on an application of this sort. That question can only be resolved at a full hearing.
- [12] Where does the balance of convenience lie? I now turn to consider the competing submissions on that issue.

The balance of convenience

- [13] For the plaintiff, Mr. Edwards focused on what his client regards as the weakness of the defendants' case. He noted that there was no affidavit from any of the defendants asserting their right to use the land. There is only an affidavit of Mr. 'Otukolo which Mr. Edwards invited me to disregard as being totally implausible. He noted the vagueness of Mr. 'Otukolo's evidence and said it was not worthy of taking the care to trial because the defendants' position was frivolous. He also noted that when the dispute first arose the defendants did not

assert that they had been granted the right to use the land by Mr. 'Otukolo and continued to plant their crops knowing the land owner did not want them on the land. I do not think this final submission is correct because it is quite clear some crops were planted before the defendants were told to leave the land.

- [14] I raised with Mr. Edwards the possibility of the Court making an order granting the injunction subject to a condition that the plaintiff give an undertaking to maintain the crops pending the hearing. The application was adjourned for a week to allow Mr. Edwards and the plaintiff to consider that proposal. On 2 March 2016 an affidavit was filed in which Mr. Sione Pikula (the plaintiff's heir) states that he is reluctant to be responsible for maintaining and cleaning the crops pending the hearing because of the cost and labour involved in that, because the defendants are not maintaining the crops and because of the possibility that such expense and effort would be wasted should the crops be damaged by the defendants at the end of the case.
- [15] For the defendants, Mr. Tu'utafavia objected to the form of the plaintiff's affidavits but it is not necessary for me to say any more about that.
- [16] Mr. Tu'utafaiva submitted that the balance of convenience must favour the defendants as if the plaintiff is ultimately successful an award of damages will be a sufficient remedy. He also noted that the plaintiff has failed to show that she will suffer any specific loss should the orders sought be refused whereas the defendants will suffer a substantial harm in the loss of their crops which are of significant value.

[17] He also points out that should the Court make the orders sought it will mean that the substantive proceeding will effectively be determined without the defendants having had the benefit of a full hearing.

[18] There is considerable force in Mr. Tu'utafavia's submissions in my view. In addition to the points he makes I note that the plaintiff has also failed to provide any evidence of her ability to support her undertaking as to damages which I consider is essential in such cases.

[19] I have formed the clear view that the balance of convenience favours the defendants.

The overall justice of the case

[20] I have considered the overall justice of the case. Under this heading I have had regard, as best I can at this early stage, to the respective merits of the parties' cases. As I have noted earlier, it appears the case will be determined upon a resolution of disputed factual matters but, that said, the defendants case faces obvious problems. Whilst Mr. 'Otukolo says that the plaintiff told him he could use the land there appears to be little to corroborate his evidence. There is nothing in writing recording the alleged agreement, no payment of rent was made and there is no suggestion that anyone else was privy to the discussion which he said occurred (and the plaintiff denies).

[21] Another factor that is relevant to the overall justice of the case is that the Court is able to provide the plaintiff with a very early hearing date. Whilst Mr. Edwards initially suggested that the plaintiff might find it

difficult to travel to Tonga he has requested that the case be set down for hearing and dates are available on 20 and 21 April 2016.

[22] Having found that the balance of convenience supports the defendants and being able to provide a very early hearing date to finally determine the action I have come to the view that the overall justice of the case supports refusing the application.

Result

[23] The application for injunction is refused and costs are reserved.

[24] I make the following timetable directions:

[24.1] The case will be heard on 20 and 21 April 2016.

[24.2] The plaintiff's briefs of evidence are to be exchanged by 29 March 2016.

[24.3] The defendants' briefs of evidence are to be exchanged by 6 April 2016.

[24.4] Counsel are to confer and file a common bundle of documents by no later than 6 April 2016.

NUKU'ALOFA: 4 March 2016



A handwritten signature in black ink, appearing to read "O.G. Paulsen".

**O.G. Paulsen
President**