

Majesty the King and the sub lessees of the balance of the land under registered sublease Book 1, Folio 92 from the defendant.

- [3] When this claim was filed the plaintiffs applied for an interim injunction to evict the defendant from the land. When that application came on for hearing before me on 28 July 2016, and without any opposition from the defendant's Counsel, I set the case down for trial on an urgent basis on 9 and 12 September 2016. Due to the availability of an early hearing date the plaintiffs did not pursue the application for injunction. There was no mention at that time that the defendant might seek to join third parties. The present application was not filed until 16 August 2016. If granted it will delay the trial.
- [4] The defendant seeks to join the Minister of Lands and one Fine Fie'eiki as third parties.

The facts

- [5] Whilst bearing in mind that at this stage I can make no definitive findings, for the purposes of this application only the relevant facts are summarized in the following paragraphs.
- [6] The land which is the subject of the plaintiffs' lease and sublease were part of a town allotment owned by the defendant's father. It appears from the pleadings that the defendant only opposes the plaintiffs' claim for possession of the land subject to the sublease.
- [7] The defendant's father subdivided his town allotment and both the defendant and his older brother were granted leases of portions of the land. In the defendant's case, he was granted a lease of 14 perches of land for 70 years.

- [8] In 1990 the defendant granted the sublease of his land to Filimone Fie'eiki for 50 years. He says that he was to be paid TOP\$100,000 for the sublease but that sum was not paid.
- [9] In 2014 (and possibly earlier in 2008 also) the defendant wrote to the Minister of Lands asking that the sublease be cancelled, but this was never done. The defendant pleads in his amended statement of defence that there was no cancellation of the sublease.
- [10] Filimone Fie'eiki died and the sublease was in due course transferred to his widow and the administrator of his estate, Fine Fie'eiki. She in turn assigned the sublease to the plaintiffs.
- [11] Having acquired the sublease the plaintiffs discovered that the land was occupied by relatives of the defendant and upon achieving their removal from the land (in proceedings under LA 9 of 2016) the land was then occupied by the defendant leading to this proceeding.

The defendant's defences

- [12] It appears from the pleadings that the defendant opposes the plaintiffs' claim for possession of the land on the following grounds:

[12.1] That he terminated the sublease by taking possession of the land due to Filimone Fie'eiki's failure to pay the agreed sum of TOP\$100,000 to purchase the sublease and because of the non-payment of any rent by Filimone Fie'eiki since 1990/1991;

[12.2] That Filimone Fie'eiki breached a covenant in the sublease that he would not abandon, neglect or fail to use the land for any "periods of altogether 3 years" so that the sublease "should be terminated"; and

[12.3] That the claim is time barred by reason of section 170 Land Act as he has been in occupation of the land since 1990/1991.

Order 10

[13] Order 10. Rule 1 Supreme Court Rules provides:

O.10 Rule 1. Leave required to serve third party notice

Where a defendant who has filed a defence:

(a) claims against a person not already a party to the action any contribution or indemnity; or

(b) claims against such person relief which is substantially the same as that claimed by the plaintiff; or

(c) requires that any issue arising in the action be determined also as it affects such person;

that defendant may apply for leave to issue a third party notice.

[14] Order 10 Rule 3 provides:

O.10 Rule 3. Effect of third party notice

If the Court grants leave to issue a third party notice these rules shall apply as if the third party notice were a writ issued by the defendant and by the third party were defendant to that writ.

- [15] The objects of the third party procedure are to prevent multiplicity of actions by enabling the Court to settle disputes between all parties in one action and to prevent the same question from being tried twice with the possibility of different results.
- [16] It is implicit from the fact that a defendant must apply to the Court to issue a third party notice and from the words "If the Court grants leave" in O.10 Rule 3 that the Court has a discretion whether to make an order for the issue of a third party notice taking into account all the relevant circumstances of the case.
- [17] Whilst in exercise of its powers the Court will always regard the requirements of justice as the principle consideration there is also a need to strike a balance between the interests of the parties. By way of example, any unreasonable delay in the defendant making application to issue a third party notice may be a relevant consideration. Also relevant will be the extent to which the plaintiff is necessarily involved in the issues between the defendant and the proposed third party (*Chatsworth Investments Ltd v Amoco (U.K.) Ltd* [1967] 2 All ER 622).

The present application

- [18] I understand that the defendant relies only upon O.10 Rule 1(c) in support of his application; that is the defendant contends that there are issues arising in the action between him and the plaintiffs which also affect and should be decided between him and the proposed third parties.
- [19] As far as the application to join the Minister is concerned, the first argument advanced by Mr. Pouono for the defendant is that there is an issue that needs to be determined whether the Minister received a request from the

defendant to cancel the sublease before the sublease was purchased by the plaintiffs and, if so, what was his reply. He did not refer me to any provision in the Land Act or in the terms of the sublease that gave the Minister the power to cancel the sublease and in his latest amended statement of defence the defendant acknowledges that the sublease was not in fact cancelled (paragraph 8).

[20] Whilst I can readily understand that the defendant may have an interest in knowing why nothing was done to cancel the sublease (assuming for present purposes that such power existed) that is not an issue which arises in or can have any bearing upon the determination of the action between the plaintiffs and the defendant.

[21] The second argument advanced by Mr. Pouono for the defendant relies on the terms of the sublease that provides:

And it is agreed if at the expiration of twenty one (21) days from the day the rent becomes due by the said Filimone Fei'eiki his heirs or representatives under this deed the said rent is not paid it shall be lawful for the said Sione Malakai 'Uhi or his successors to take possession of all or any part of the land hereby leased and to sell by auction any house or building or improvement or anything which may be on the land to the amount of rent owing by the said Filimone Fei'eiki his heirs or representatives together with the expense of such seizure and sale.

[22] As I have noted, the defendant alleges he took possession of the land subject to the sublease due to the non-payment of the \$TOP100,000 Filimone Fei'eiki agreed to pay for the sublease and the non-payment of rent. He also argues that Filimone Fei'eiki breached a covenant in the sublease and the sublease should be cancelled for that reason. As the defendant does not seek any

substantive relief from the Court this additional allegation does not advance the defendant's position for present purposes.

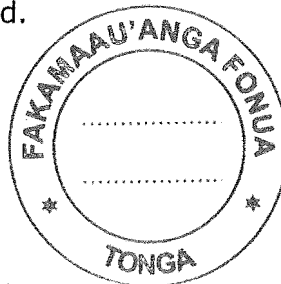
- [23] Mr. Pouono submits that the Court must determine whether the taking of possession of the land amounted to a termination of the sublease. I agree that is an issue for determination in this action but it is an issue only between the plaintiffs and the defendant. It does not affect the Minister nor is it necessary for the Minister to be party to the action for the defendant to advance this argument in defence of the plaintiffs' claim.
- [24] As far as Fine Fie'eiki is concerned, Mr. Pouono submitted that the issue that arises is whether she had a right to sell the sublease when she was not in possession of the sublease. Again I accept that this issue is raised in the pleadings as between the plaintiffs and the defendant but Mr. Pouono put nothing before me to suggest that the resolution of the issue will in any way affect the interests of Fine Fie'eiki.
- [25] The defendant's dispute with Fine Fie'eiki is that she sold the sublease without making payment of TOP\$100,000 to the defendant (paragraphs 3, 10 and 13 of the defendant's affidavit). The defendant may commence an action to recover that sum if he wishes, although with the death of Filimone Fie'eiki and the passage of 26 years the difficulties such a claim will face appear formidable.
- [26] Leaving those matters aside, the issues that arise in any action that the defendant might bring to recover the money are very different and have little to do with any issue that arises in the action between the plaintiffs and the defendant in this action. For that reason the application to issue a third party notice against Filimone Fie'eiki should not be allowed.

The justice of the case

- [27] There is a further reason why I consider that this application should be refused and that is that it is not in the interests of justice.
- [28] As noted earlier, the plaintiffs did not pursue their application for injunction on the basis that the trial would proceed on 9 and 12 September 2016. The defendant's Counsel did not raise any issues about that course of action, did not object to the setting down of this action on those dates or raise the possibility that application might be made to join third parties.
- [29] The plaintiffs reside overseas and have made arrangements for at least the first named plaintiff to be here in Tonga for the hearing to give evidence. They also have plans to immediately develop the land and are incurring holding costs in respect of money borrowed to purchase the lease and sublease and develop the land.
- [30] It would, in those circumstances, be unjust to order the joinder of third parties when that will inevitably delay the hearing for a period of months and almost certainly until well into the New Year given the Court's commitments.

Result

- [31] The application by the defendant to join third parties is dismissed. The costs of this application are reserved.



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

O.G. Paulsen
PRESIDENT

NUKU'ALOFA: 7 September 2016