

- [3] The plaintiff says, although it is not accepted by the first defendant, that he allowed the first defendant and her mother live on the land on the condition that upon the death of the mother the first defendant would vacate. In any event, the first defendant and her family have lived on the land since 1978 to the present and in addition some of the property has been leased to the second defendant (more properly Asia Pacific Trading Company Limited) as a restaurant and living quarters and the first defendant allows others to sell produce and crops from the land.
- [4] The first defendant's mother died in 2007. The plaintiff took steps to have the first defendant removed from the land. In December 2007 Mr. Laki Niu was engaged and he wrote to the first defendant giving her and her husband 14 days to vacate. There followed some correspondence between lawyers but the effect of that was that the first defendant agreed to vacate by the end of March 2008.
- [5] On 25 February 2008 the plaintiff's registration was cancelled because he was a citizen of the United States. The plaintiff says this was orchestrated by the first defendant using deceptive means to obtain his passport but the first defendant denies any involvement. I am unable to resolve that particular dispute on this application.
- [6] The first defendant was aware that the plaintiff's registration was cancelled because she did not vacate the land and applications have been made for registration of the land by her son and then by her grandson. The first defendant says that she understood that the Minister had made a decision to subdivide the land and grant at least part of it to her grandson and a survey fee was paid for this purpose.
- [7] Late last year there were a number of developments. First, the plaintiff re-applied for admission as a Tongan subject and this was granted.

Secondly, the plaintiff commenced an ill-considered action against the first defendant to evict her from the land despite the cancellation of his grant. The action was withdrawn. Thirdly, the plaintiff reapplied for his land and it was granted to him on 19 December 2016.

- [8] Having been issued with a new deed of grant for the land the plaintiff served demands dated 20 January 2017 upon the first defendant and second defendant to vacate the land which they have refused to do. This action was commenced on 3 February 2017 but it was not until 14 February 2017 that the application for interim relief was filed.

The legal principles

- [9] When deciding whether to allow an application for an interim injunction the Court should follow the approach set out in *American Cyanamid Company v Ethicon Limited* [1975] AC 396 and *Klissers Farmhouse Bakeries v Harvest Bakeries Ltd* [1985] 2 NZLR 129 (CA) as follows:

[9.1] Is there a serious question to be tried?

[9.2] Does the balance of convenience favour the granting of the injunction?

[9.3] Does the overall justice of the case favour the granting of the injunction?

- [10] As a general rule the purpose of an interim injunction is to maintain the status quo pending the hearing of an action. Furthermore, the Court will not grant an injunction in circumstances where damages would provide an applicant with an adequate remedy. However, whether or not to grant an

injunction is always a matter for the Court to determine in its discretion and in consideration of all the circumstances of the case

Is there an arguable case?

- [11] The plaintiff is the registered holder and *prima facie* has the best title to and the right to possess the land. Demand has been made for the defendants to leave the land and they have failed to do so. In those circumstances the plaintiff has satisfied me that he has an arguable case.
- [12] I should note however that on the information available to me there are a number of arguable defences likely to be raised by the defendants and the first defendant will certainly challenge the plaintiff's grant as unlawful. At this early stage I am unable to make any meaningful assessment of the relative merits of the parties' cases.

The balance of convenience

- [13] The real issue is where does the balance of convenience lie? The plaintiff does not intend to live on the land. He wants the land for his sons who presently reside in the United States. He argues that the balance of convenience favours granting the application for four reasons. I will deal with each in turn.
- [14] First, the plaintiff argues that there will be no harm done to the defendants if they are evicted from the land pending the trial. This is clearly incorrect. If I were to order the eviction of the defendants they would be removed from their homes and their livelihoods. The first defendant has lived on the land for almost 40 years and says she has

spent large sums filling the land and building a home and a restaurant on the land for the benefit of her and her family. The second defendant is a company but the owners say they have invested over \$70,000 in establishing the business which will be lost if they are evicted. The defendants would both suffer significant harm if I made the orders sought.

- [15] The plaintiff argues that he has been kept from his land by the first defendant for many years. This is incorrect. He demanded that the first defendant vacate at the end of 2007 but his title was very soon thereafter cancelled. Between February 2008 and December 2016 he had no right to the land and took no steps to regain his Tongan citizenship or registration of his land.
- [16] Thirdly, the plaintiff says that the defendant caused his registration to be cancelled by deceit and equity should not come to the assistance of a person who does not have clean hands. As I have said, I am unable to determine how the plaintiff's registration came to be cancelled and what (if any) involvement the first defendant had in that. Furthermore, it is not the first defendant who seeks the assistance of equity, it is the plaintiff.
- [17] Fourthly, the plaintiff says the defendants will have the option of removing their buildings from the land if an injunction is granted. I do not know whether that is even possible but that will be of cold comfort to the defendants who will suffer extreme dislocation of their lives and significant financial losses in any event and might have no use for the buildings without the land.

[18] In contrast to the position of the defendants I cannot see that the plaintiff will suffer any hardship should I refuse this application. There can be no doubt that the balance of convenience favours the defendants.

Overall justice

[19] The overall justice of this case supports refusing the application. Mr. Corbett appropriately conceded that the genesis of the application is the plaintiff's frustration at having had his registration cancelled by what he regards as the first defendant's deceit. That is not a sufficient reason for this Court to inflict substantial and unnecessary harm on the defendants.

Result

[20] The application for injunction is refused. Mr. Corbett made the best of what was a quite hopeless application. However, the plaintiff should not have pursued the application and should pay costs. The first and second defendants are awarded costs to be fixed by the Registrar if not agreed.

[21] The defendants should file their statements of defense as soon as possible. The Registrar is to organize a first case management conference on a suitable date after 9 March 2017.

NUKU'ALOFA: 24 February 2017.

**N. 'Inafo
24/02/2017**




**O.G. Paulsen
PRESIDENT**