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**IN THE LAND COURT OF TONGA
NUKU'ALOFA REGISTRY**

LA 26 of 2017

**BETWEEN: AUSTRALIAN AND NEW ZEALAND BANKING GROUP
LIMITED**

Plaintiff

MALIA LATU

Defendant

Hearing : 12 July 2017

Date of Ruling: 13 July 2017

Counsel : Mrs. P Tupou for the plaintiff

Mrs. P Taufateau for the defendant (no appearance)

Reasons for ruling granting injunction

The application

- [1] The plaintiff is a bank and it has applied for an interim injunction requiring the defendant to immediately vacate a town allotment that she is occupying at Ma'ufanga.
- [2] When the application came before me on 12 July 2017 there was no appearance by Counsel for the defendant and no explanation for that. She was aware of the hearing date and has filed papers on behalf of the defendant in opposition to the application.

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- [3] Having heard from Mrs. Tupou I granted the injunction and indicated I would issue brief reasons. These are my reasons.

A short background

- [4] The plaintiff has a registered mortgage over the town allotment at Ma'ufanga in Deed of Grant Tohi 333 Folio 28. This was the town allotment of Vili Lavakei'aho. He was the defendant's father but he has died. The mortgage was provided as security for repayment of a loan by the plaintiff to the defendant and her husband under a loan agreement of 30 August 2005.
- [5] The loan has been in default for some years. The plaintiff took steps to take possession of the land as mortgagee. In related proceedings under LA 11 of 2017 the plaintiff sought possession of the land from Lose Taukapo and Anne Marie Tu'aefe. They were living on the land and said that the defendant had given them permission. They removed themselves after the action was commenced.
- [6] The defendant was aware of the steps being taken by the plaintiff. She travelled to Tonga from the United States (where I understand she resides) and she has now occupied the allotment herself. She clearly wishes to obstruct the plaintiff's efforts to obtain possession of the land as mortgagee.

The legal principles

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

- [7.1] Is there a serious question to be tried?
- [7.2] Does the balance of convenience favour the granting of the injunction?
- [7.3] Does the overall justice of the case favour the granting of the injunction?

Is there an arguable case?

- [8] The plaintiff has satisfied me that that it has an arguable case. I am satisfied that the plaintiff granted a loan on the security of a registered mortgage over the allotment, that it made advances to the defendant and her husband on the security of the mortgage, that there has been a default under the loan agreement, that it has served the required notice under section 109 of the Land Act and that the default has not been remedied.
- [9] The defendant has said in her affidavit that Vili Lavakei'aho was naturalised as an American citizen in 2000 and that the mortgage is therefore void. The allotment was registered to Vili Lavakei'aho well before he became an American citizen, no steps were taken to cancel his registration and there is nothing to suggest that the plaintiff was aware when taking the mortgage of any circumstances which might impugne his title. There can be no challenge to the mortgage on this basis in my view.
- [10] There is no other basis upon which the defendant can seriously argue that she has a defence to the plaintiff's claim. In so far as the defendant claims to have possessions on the land that are not security for the plaintiff's loan she is entitled to remove them.

The balance of convenience

- [11] The plaintiff is owed a large sum of \$281,974.33 with interest at the rate of 16.5% from 11 November 2008. It has been attempting to obtain possession of the land since September 2017. I accept that the defendant has been obstructing it.
- [12] Most importantly (and the reason for this application) the plaintiff says that it has a customer who is prepared to lease the allotment from which it could recover the debt but due to the steps taken by the defendant it is at risk of losing that opportunity.
- [13] The defendant raises the plaintiff's delay in taking steps to enforce the mortgage. There is nothing to suggest that the defendant has been prejudiced by the delay.
- [14] Other factors which suggest the balance of convenience favours the plaintiff are that the defendant is ordinarily resident in the United States and there is no suggestion that she has nowhere else to go if she is required to move from the land. Also the plaintiff has given an undertaking as to damages which it can clearly meet if it turns out that the injunction should not have been granted.
- [15] The balance of convenience therefore favours the plaintiff.

Overall justice

- [16] The plaintiff is seeking a mandatory order. The Courts have traditionally been cautious before granting them. The position has developed and today there is no reason why a mandatory order should not be made in appropriate cases. The Court's role is simply to consider how the legitimate interests of the parties may be best protected pending the hearing.

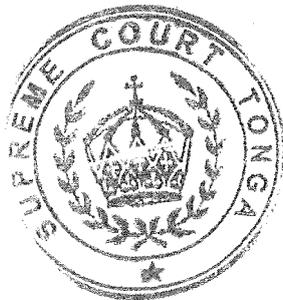
[17] I would in the usual case be reluctant to remove by injunction a defendant who has been residing on land in good faith before she has had a full opportunity to have her defence heard. This is not such a case. The defendant occupied the land so as to frustrate the plaintiff in the exercise of its legal remedies. She has no arguable defence to the plaintiff's claim. I cannot see on what is before me that the defendant has any reason whatsoever to be on the land.

[18] The overall justice also favours granting the injunction.

Result

[19] The application for injunction is granted. The defendant, her agents, employees, and invitees are to immediately vacate the town allotment at Ma'ufanga being all the land in deed of grant 334/28 (s/plan 6090 Lot 130). The defendant is to remove from the land her possessions and belongings upon service of this order. The plaintiff is entitled to costs to be fixed by the Registrar.

NUKU'ALOFA: 13 July 2017



A handwritten signature in black ink, appearing to be "O.G. Paulsen", written in a cursive style.

O.G. Paulsen
PRESIDENT