

See file & beyond

19/01/18

**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 : 21 July 2017 and 20 November 2017

Date of Ruling: 18 January 2018

Counsel : Mrs. P Tupou for the plaintiff

Mrs. P Taufaeteau for the defendant

RULING

The application

- [1] This is an application by the defendant (Mrs. Latu) to discharge an injunction granted in favor of the plaintiff (ANZ).
- [2] ANZ has a registered mortgage over a town allotment Ma'ufanga. It says that it took possession of the allotment following default by the mortgagor. Mrs. Latu then occupied the allotment. ANZ applied for an interim injunction requiring Mrs. Latu to immediately vacate the allotment. When the application came before me Mrs. Latu's Counsel did not appear. I granted ANZ the injunction. Mrs. Latu

applies to discharge the injunction on the grounds that there were good reasons why her Counsel did not appear at the hearing and that the injunction should not have been granted.

The course of the application

- [3] The course of this application has not run smoothly. The application has come before the Court many times and been adjourned to allow the parties to explore settlement but without success. The hearing of the application was concluded on 20 November 2017 and I reserved my decision pending receipt of some information from the ANZ, most notably a power of attorney pursuant to which ANZ says that its mortgage was executed on behalf of the mortgagor. It was not until 4 January 2018 that Mrs. Tupou emailed the Registrar that the power of attorney could not be found. I was not advised of that until 15 January 2018.

The role of Counsel

- [4] Mrs. Taufaeteau has sworn an affidavit in support of the application. She also appeared as Counsel in support of it. Whilst no objection was taken to her doing so I remind law practitioners that they should not act as Counsel and as a witness in the same cause. Mrs. Taufaeteau put herself in an obvious position of conflict and she should have advised Mrs. Latu to instruct other Counsel to argue this application.

The court's powers

- [5] Mrs. Taufaeteau deposes in her affidavit that she made an error as to the date upon which the injunction application was to be heard.

She says that her error was contributed to by a medical condition and family commitments. Upon learning that the application had been heard she wrote to the Court immediately asking it to reconsider the application. She was told to file an application and she did that promptly.

- [6] The application does not identify any rule or principle of law pursuant to which the Court might set aside the injunction. I am satisfied that the Court has an inherent power to do so (*Apex Insurance Brokers Ltd v Finau* [2012] Tonga LR 112, 119-120 particularly at [54]). It is worth noting the Court of Appeal's acceptance in *Apex* of what is stated in *Halsbury's Laws of England* (4th Ed) Vol 37 at [14]:

In sum it may be said that the inherent jurisdiction of the court is a virile and viable doctrine, and has been defined as....a residual source of powers, which the Court may draw upon as necessary whenever it is just or equitable to do so, in particularto do justice between the parties and secure a fair trial between them.

- [7] Mrs. Latu was not represented at the hearing through no fault of her own. She gave Mrs. Taufaeteau instructions to oppose the injunction. It was because of Mrs. Taufaeteau's neglect alone that Mrs. Latu was not represented. I consider that Mrs. Taufaeteau's failure to appear has been explained.
- [8] I must now turn to the primary consideration which is the merits of Mrs. Latu's case that the injunction should never have been granted. I will begin with the facts.

The facts

- [9] On 23 May 1994 Vili Lavakei'aho was registered as the holder of a town allotment at Ma'ufanga being the land contained in deed of grant 334/28. Mr. Lavakei'aho was the father of Mrs. Latu. Mr. Lavakei'aho became a citizen of the United States of America on 7 March 2000.
- [10] In August 2005 ANZ entered into a term loan agreement with Mrs. Latu and her husband pursuant to which ANZ agreed to advance to Mr. & Mrs. Latu TOP\$200,000 on the security of, *inter alia*, a registered mortgage over Mr. Lavakei'aho's town allotment. The original term loan agreement has been lost. An unsigned copy of the term loan agreement has been produced. It appears that Mr. Lavakei'aho was not a party to the term loan agreement as borrower or guarantor.
- [11] ANZ's mortgage over Mr. Lavakei'aho's town allotment was registered on 26 January 2006. Copies of the application for mortgage and memorandum of mortgage are before me. They have been signed by Mr. Latu 'as power of attorney for Viliami Lavakei'aho'. The power of attorney cannot be found by the ANZ or the Ministry of Lands.
- [12] On a date that is not certain, but in around 2007, Mr. Lavakei'aho died in the United States.
- [13] Mrs. & Mrs. Latu defaulted under the term loan agreement. In 2008 ANZ commenced an action against them in the Supreme Court to recover the debt. On 27 February 2014 judgment in default of defence was obtained against Mr. Latu for TOP\$281,974.33 along

with interest and costs. Judgment has not been obtained against Mrs. Latu.

[14] On 7 September 2016 ANZ issued a notice under section 109 of the Land Act of its intention to take possession of Mr. Lavakei'aho's town allotment under its mortgage. The notice was served upon Lose Taukapo and Anne Marie Tu'aefe who were living on the allotment with Mrs. Latu's permission. They moved off the allotment after ANZ commenced an action against them.

[15] Mrs. Latu, who ordinarily resides in the United States, was aware of the steps being taken by ANZ. She travelled to Tonga and occupied the allotment.

The legal principles

[16] In 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:

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

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

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

Is there a serious question to be tried?

[17] In my earlier ruling of 13 July 2017 I found that ANZ had established a serious question to be tried that it was entitled to possession of

the allotment. Since then I have had the benefit of further information and legal submissions of Counsel. Mrs. Taufaeteau took a scatter gun approach pursuing matters which did not advance Mrs. Latu's cause. However, she also identified issues that have assumed significance in my reconsideration of this case.

- [18] First, ANZ has not been able to produce the power of attorney in reliance upon which Mr. Latu purported to sign the application for mortgage and the memorandum of mortgage. There is a question as to Mr. Latu's authority to execute those documents on Mr. Lavakei'aho's behalf, particularly in circumstances where Mr. Latu personally benefited from the loan. There is no explanation for the ANZ's inability to produce the power of attorney which is particularly surprising given the requirement that powers of attorney affecting mortgages must be registered (section 107(1)(h) of Land Act).
- [19] Secondly, there is an issue whether there has ever been monies owing by Mr. Lavakei'aho to ANZ secured by the mortgage. The mortgage purports to secure payment of monies owing by Mr. Lavakei'aho to ANZ. ANZ says monies are owing to it under the term loan agreement but Mr. Lavakei'aho was not a party to the term loan agreement and there does not appear to be any other basis upon which it can be said that he is answerable for any monies owing by Mr. & Mrs. Latu under it.
- [20] Thirdly, there is a difficult question as to the effect of Mr. Lavakei'aho becoming a citizen of the United States. Under section 4 of the Nationality Act (prior to its amendment in 2007) Mr. Lavakei'aho ceased to be a Tongan subject entitled to hold a tax or town allotment (*Ministry of Lands v Kulitapa* [1974-1980] Tonga LR

101; *Pahulu v Mottini and anor* [1996] Tonga LR 253; *Taufa v Tahaafe anor* [2015] Tonga LR 104).

[21] The effect of section 4 was described in *Pahulu* at 256 as follows:

It seems to me that the plain effect of section 4 of the Act is to bring to an end any rights enjoyed by a Tongan subject by reason of his being a Tongan subject prior to his acquiring another nationality. Section 4 'deems' him to be no longer a Tongan subject by operation of law without any other act taking place. It is an Act designed to have quite profound consequences including the preservation of liability with the destruction of rights.

[22] I acknowledge that in my ruling of 13 July 2017 I expressed the view that the fact of Mr. Lavakei'aho becoming a foreign subject should not affect the validity of ANZ's registered mortgage. I now accept that it is arguable that my analysis was incorrect. The alternative view is that upon Mr. Lavakei'aho becoming a citizen of the United States he lost any right to hold his town allotment and that he could not confer on ANZ any interest (by mortgage or otherwise) over the allotment.

[23] Fourthly, there are a range of technical matters which might be raised in defence of ANZ's claim. These include whether the section 109 notice was served upon the Minister of Lands, whether the memorandum of mortgage has been signed correct for the purposes of the Land Act (section 103(5) of the Land Act) and whether the mortgage was granted for a valid purpose (section 100(1)(iii) of the Land Act).

[24] ANZ may well in due course be able to provide satisfactory responses to all of these matters but at this early stage and with what is presently before me my assessment is that ANZ has an arguable but certainly not a strong case.

Balance of convenience

[25] The question of where the balance of convenience lies is also more complex than I appreciated without the benefit of Counsel's submissions. My assessment is that the balance of convenience is evenly balanced.

[26] ANZ says that it has buyer which it might lose if it does not get early possession of the allotment and that the value of its security is reducing over time. These are valid concerns but the argument that there is a need for an urgent injunction loses much of its force when one considers that ANZ first issued proceedings against Mr. & Mrs. Latu in 2008 but did not move to take possession of the land until 2016. Whilst there is nothing to suggest that Mrs. Latu has suffered prejudice it must nonetheless be acknowledged that there has been a long delay in the ANZ taking steps to enforce its mortgage. ANZ has also provided an undertaking as to damages, which is an important matter in its favour.

[27] Mrs. Latu will be removed from the allotment without her defence being heard should the injunction stand. In the ordinary case this would be a major factor telling against the granting an interim injunction but it is not so here as Mrs. Latu is ordinarily resident in the United States and she has occupied the land to frustrate ANZ. However, that is not an end of the matter as Mrs. Latu asserts

ownership of buildings on the allotment and wishes to claim the allotment due to her family connection with it. It may well be that damages will not be adequate compensation for losses that she may suffer if the injunction stands.

Overall justice

[28] I was previously of the view that Mrs. Latu did not appear to have any defence to ANZ's claim or any right to be on the allotment. That was a significant factor in my assessment that the overall justice of the case favoured ANZ. For the reasons I have given I have had cause to reassess my view as to the existence of a defence to ANZ's claim. In addition, the interests of the parties can be best advanced by strict timetabling and an early hearing date which I am in a position to give them. I am satisfied that the overall justice of the case requires that the injunction be discharged.

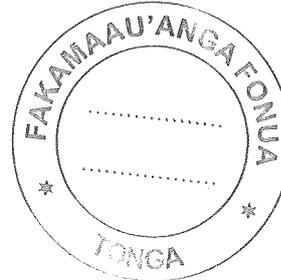
Result

[29] The orders made on 13 July 2017 granting ANZ an injunction requiring Mrs. Latu to vacate the town allotment at Ma'ufanga contained in deed of grant 334/28 (along with an order for costs) are discharged.

[30] Costs on this application are reserved.

[31] This action is to be called before me for timetabling at **9am on 2 February 2018.**

NUKU'ALOFA: 18 January 2017



O.G. Paulsen
**O.G. Paulsen
PRESIDENT**

