IN THE LAND COURT OF TONGA
NUKU'ALOFA REGISTRY

LA 25 of 2019

BETWEEN:

KISIONE FAKAFANUA Plaintiff

-and-

NISHI TRADING LIMITED Defendant

JUDGMENT

BEFORE: LORD CHIEF JUSTICE WHITTEN QC
Land Assessor: Mr F. Tu'ifua
Appearances: Mrs A. Mailangi for the Plaintiff
Mrs D. Stephenson KC for the Defendant
Trial: 15, 16, 22 August 2022
Judgment: 31 August 2022

Claim

1. In this proceeding, in its final form, the Plaintiff claims damages for trespass to land. The trespass is admitted. The trial was thus concerned solely with an assessment of damages.

Background

2. In 2008, as part of a 'family arrangement', Lord Fakafanua 'gave' his uncle, the Plaintiff, a tax allotment from the nobles' estate in Ma'ufanga known as "A Pulu". The allotment was divided into two lots: 29 and 29A, each 4 acres.

3. On 16 October 2008 and 5 November 2008, Lord Fakafanua and the Plaintiff executed applications for lease in respect of the two lots. The terms of each prospective lease included periods of 50 years, rent of $2,000 per annum and the purpose was stated to be 'residential and commercial'.

4. In 2017, the Minister of Lands signed both applications.

5. Between 2008 and 2019, the Plaintiff subdivided lot 29 into two parcels. The eastern half was further subdivided into 10 plots of about 30 poles each and given to others. The western section of 2 acres is being quarried by the Plaintiff. That is the land the subject of this proceeding.

6. In January 2019, the Plaintiff submitted a fresh application for lease of the land the subject of this proceeding. As at the date hereof, none of the applications for lease have been approved by Cabinet nor has any interest in the allotments been registered in favour of the Plaintiff.

7. The western boundary of the Plaintiff's subject allotment abuts the eastern boundary of land leased by the Defendant. That land was an old quarry, known as 'Pili Quarry', which the Defendant acquired in 2011. The quarry had already been fully excavated up to the boundary line, and as such, it was not possible to conduct further quarry operations at the site. Since then, the Defendant has used the quarry as a site for rock crushing.

8. Between 2016 and August 2021 (including the earlier stages of this proceeding commenced on 31 October 2019), the Plaintiff made demands on the Defendant for compensation ranging from $104,457 to over $500,000 for alleged unlawful extraction of coral rocks from the Plaintiff's land. However, a survey by the Minister of Lands and Natural Resources ("***the Ministry***") in July 2021 identified that there had been no extraction of material by the Defendant from the Plaintiff's land. As a result, the Plaintiff abandoned his original claim.

9. A further survey report by the Ministry dated 24 August 2021 identified that a waste dump (to the south) and parts of structures (within and along the western edge of a slender triangular section to the north) on the Defendant's land encroached into the Plaintiff's land. The encroachments covered a total area of 252.3m^2. The area is at the foot of a steep and heavily vegetated cliff face some 12 to 15 metres to the top of the western side of the Plaintiff's land. The encroaching structures included the eave line of the roof of a guard house, part of a bathroom, a shed and a concrete umu pit used by the Defendant's workers to cook food. The Defendant also used parts of the encroachment area behind the structures for storing refuse and seemingly disused items (e.g. an old mattress and sheets of roofing iron[1]). According to the Ministry report, the Defendant's staff also used the area 'for accessing between facilities'.

10. On 31 March 2022, the Chief Executive Officer of the Ministry advised that the total area of the Defendant's physical encroachments was 130.7m^2.

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[1] E.g. CB 161, 162.

11. By his Third Further Statement of Claim, filed on 20 April 2022, the Plaintiff claims:

    (a) damages of $15,300 for the total encroachment area;

    (b) $5,000 for a section of purported boundary fence he says was unlawfully removed by the Defendant's workers sometime between August 2016 and September 2018; and

    (c) 'exemplary damages' of $5,000 for emotional distress 'by being deprived of the benefit [of accessing or utilizing] the encroachment area'.

12. By June 2022, the Defendant had voluntarily removed the physical encroachments.

13. The Plaintiff's claim for the encroachment is based on a valuation report by Viliula Mafi dated 18 March 2022. Mr Mafi opined that the rental value of the total encroachment area of 252.3m^2, over the past 11 years, is $15,300. His calculations were based on an approach and assumptions which included:

    (a) the valuation was based on an 'open market value' (as defined by the Australian Securities Commission) being the price at which the property might reasonably be expected to be sold at the date of valuation;

    (b) the encroachment area was being leased to the Plaintiff on an annual basis;

    (c) the area was to be valued at its 'highest and best use';

    (d) the area was to be valued as a quarry site;

    (e) the remaining volume of rock available to be quarried from the Plaintiff's land was calculated as the product of the 2 acre area multiplied by the depth to the level of the encroachment area (which is the same level as the Defendant's site), less the volume that had already been removed;

    (f) the estimated life of the quarry was 10 years;

    (g) an average of 13.867m^3 of rock to be excavated per annum;

    (h) a capitalization rate of 7.5%;

    (i) which produced a capital value of $885,240;

    (j) pro-rated over the encroachment area equalled a value of $27,750;

(k) of which 5% p.a. represented the rental value ($1,387.50 p.a.);

(l) multiplied by 11 years of occupation by the Defendant equals (rounded up) $15,300.

14. The Defendant pleaded that any damages for the encroachment should be calculated based on the rental of $2,000 p.a. agreed between the Plaintiff and Lord Fakafanua for the whole of Lot 29 which comes to $62.34 p.a..[2]

15. Mrs Stephenson submitted, in summary, that:

(a) although the Plaintiff as a person in lawful possession of the land is entitled to protect his right to possession of it, his licence to occupy it does not imbue him with legal or proprietary rights which entitle him to pecuniary relief in respect of the land;[3]

(b) there were a number of problems with Mr Mafi's assumptions (discussed further below);

(c) the period should only run from when the Plaintiff became aware of the encroachment which was when the Ministry issued its report in July 2021; and

(d) taking all those matters into account, the Plaintiff was only entitled to nominal damages.

16. An action for trespass to land protects lawful possession, not title as such: *Niu and ors v Tapealava and anor* [2013] TOCA 2 at [20]. The rights under the law of Tonga of those in lawful possession of an allotment without a documentary title were recognized in *Tafa v Viau* [2006] Tonga L.R. 125 (LC) and 287 (CA). It is not necessary for the Plaintiff to prove that his possession is lawful: *Kalaisi v Tu'i'onetoa* [2018] TOCA 5.[4]

17. At common law, if the Plaintiff proves trespass, he is entitled to recover nominal damages, even if he has not suffered any actual loss. If the trespass has caused the Plaintiff actual damage, he is entitled to receive such an amount as will compensate him for his loss. Where the Defendant has made use of the Plaintiff's

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[2] In his brief of evidence, Mr Minoru Nishi, director of the Defendant, extrapolated from the same information a value for the 130.7m^2 of $31.36 p.a. over 11 years making a total of $344.96.

[3] Referring to *Niu v. Tapaelava* [2013] TOCA 2 and *Tafa v. Viau* [2006] Tonga L.R. 125.

[4] Citing Todd (ed) The Law of Torts in New Zealand, 7 ed (2016) at 9.2.04.

land, the Plaintiff is entitled to receive by way of damages such sum as should reasonably be paid for that use: *Piliu v Satini* [2004] Tonga LR 115.[5]

18. The Plaintiff's claim here, whilst not described as such, is in fact a claim for mesne profits. Mesne profits are to compensate for the damage suffered by the wrongful interference with the Plaintiff's right to possession of the land. The Plaintiff may recover the amount of the open market value of the premises for the period of occupation: *Fifita v Fie'eiki (No. 2)* [1995] Tonga LR 187.

19. I am satisfied (and it was never seriously challenged in the latter phase of the proceeding after Lord Fakafanua provided an affidavit confirming he had given the land to the Plaintiff to do with as he wished) that, at all material times, the Plaintiff was in lawful possession of the subject land. As the trespass has been admitted, the Plaintiff is entitled to nominal damages. The issue is whether he has proven any actual loss in order to warrant a higher award. For that, he relies on Mr Mafi's rent valuation.

20. For the reasons which follow, I do not consider Mr Mafi's valuation to be sound or reliable evidence of any loss suffered by the Plaintiff's or an appropriate basis for calculating compensation above nominal damages.

21. First, while the concept of highest and best use applies in the Tongan system of land tenure, the concept is defined as the most profitable *legal* use to which a parcel of land may be put: *Havea v Kingdom of Tonga* [2000] Tonga LR 31.[6] Here, the Plaintiff admitted that he does not have, and has never had, Government permission to use his land as a quarry. As the Ministry's August 2021 report recorded,[7] and the Plaintiff confirmed, he applied for a quarry permit in 2008, but one has never been granted. Mr Mafi was not aware of that when he prepared his valuation. In evidence, the Plaintiff referred to an issue in relation to certain environmental requirements. At one point, he said that he had been told by one Ministry official that those requirements did not apply because his land is less than one hectare.[8] Later, he said he had been told by another official that he did need environmental permission. Those officials were not called to give

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[5] Citing *Dehn v Attorney-General* [1988] 2 NZLR 564, 583.
[6] As referred to by Mrs Mailangi in her submissions.
[7] Section 5.4.
[8] 2.47 acres.

evidence and, as such, the Plaintiff's assertions were hearsay.

22. The *Land (Quarry) Regulations* provide that no person shall allow his tax allotment to be used as a quarry; and that quarrying on and removal from a tax allotment of stone of any description is prohibited.

23. Section 3 of the *Minerals Act* deems all minerals to be the property of the Crown. Section 4 vests in Cabinet entire control over the exploration, prospecting, working and winning of all minerals below any land in the Kingdom. Section 8 empowers the Minister of Lands, with the consent of Cabinet, to grant mining leases which provide, inter alia, for the reservation of the rents and royalties to be paid to the Minister.

24. Section 6 of the *Environmental Impact Assessment Act* requires all 'major projects' to be supported by an appropriate environmental impact assessment, conducted in accordance with the Act. Section 2 defines 'major project' as any development activity listed in the Schedule or determined by the Minister under the Act. The major projects listed in the Schedule include, relevantly, (k) mining, being an activity that disturbs the surface of the land in excess of one hectare, and (q) the removal of trees (including mangroves) or natural vegetation of any area in excess of half a hectare.

25. That statutory framework and the Plaintiff's evidence would suggest, as more than arguable, that the Plaintiff's use of the subject land as a quarry has been unlawful.

26. Second, the volume of rock material calculated by Mr Mafi was measured to the depth or level of the encroachment area adjoining the Defendant's land. As Mr Minoru Nishi testified, when the Defendant acquired its leasehold, the old quarry could not be excavated any further. That evidence went unchallenged. It follows that the level of the encroachment could also not be excavated further. Mr Mafi agreed with that assumption. As a consequence, the value of the rocks available to be extracted, processed and sold from the levels above cannot apply to the encroachment area. That realisation alone undermines the principle assumption of Mr Mafi's valuation.

27. Third, there was no evidence that the Plaintiff has ever attempted, or that he intends in the future, to quarry his land down to the level of the encroachment

area and/or to the boundary with the Defendant's land. In fact, the Plaintiff gave evidence that it was not possible to get access to the encroachment area with any excavation equipment. Moreover, he said that access to the area from his side was very difficult as it required traversing the steep, vegetated cliff face. He was more easily able to access the boundary area from the Defendant's property but that, of course, required the Defendant's permission. In circumstances, where the Plaintiff has, for most of the last five or six years, been alleging unlawful extraction against the Defendant and demanding hundreds of thousands of pa'anga (since abandoned), it is not surprising that that permission has not always been forthcoming. As for the future, the Plaintiff said he was considering a number of options for the western fringe of his land, including construction of a venue to take advantage of the elevated views.

28. Fourth, section 5.4 of the Ministry report noted the risk of rock fall from the Plaintiff's land which could damage the Defendant's structures below. The author referred to the need for the Defendant's structures to set back at least two metres from the boundary because the 'location is already a quarry zone'. That, of course, assumes that the Plaintiff is lawfully entitled to quarry his land in that zone. For the reasons stated above, any such entitlement is doubtful at best.

29. Fifth, there was no evidence of the Plaintiff ever attempting to use the encroachment area for any other purpose or being interfered from doing so by reason of the Defendant's structures or other use of the area.

30. Sixth, even though the Defendant has made some use of the encroachment, it has not used (nor could it use) that land as a quarry. Therefore, Mr Mafi's valuation of the area as a quarry, from the Defendant's perspective, is inapposite. He also conceded that he did not take into account that, if the area was to be valued as a quarry notionally rented by the Defendant, then the Defendant would be entitled to any revenue generated from rocks extracted, processed and sold, which, here, was not possible. There was therefore no evidence of the value, if any, to the Defendant for the actual use made of the encroachment area, which was largely for storage.

31. Seventh, by his own admission, this was Mr Mafi's first valuation of an encroachment. His approach as well as number of assertions about certain assumptions being in accordance with world standards or practices was

unsupported by any authority. An expert relying on authoritative or widely accepted standards or practices is required to reference them.

32. For those reasons, I am not satisfied that the Plaintiff has proven any actual loss, or a reliable value for any loss to the Plaintiff or benefit to the Defendant, by reason of the encroachment.

33. I do not regard the Defendant's reference to the rent agreed to be paid as between Lord Fakafanua and the Plaintiff in their applications for lease to be determinative, although I have taken it into account as some evidence of what the Plaintiff considered to be a reasonable rental value for the allotment.

34. I am also not persuaded that any assessment of damages should be calculated from 2011 when the Defendant established its operation at Pili Quarry. If compensation is primarily aimed at any interference with the Plaintiff's possession or use of his land, then it follows that any loss or detriment to the Plaintiff could only occur, firstly, when the Plaintiff became aware of the encroachment, and secondly, when any intention or attempt by the Plaintiff to use his land was prevented or interfered with by the Defendant's trespass. That approach or perspective must however be balanced with the approach to damages based on the benefit to the Defendant.

35. Taking all those considerations into account, I consider that a reasonable amount for damages for the encroachment claim to be $1,000.

Fence claim

36. Veikoso Taukei gave evidence that in August 2016, he and others were employed by the Plaintiff to erect a fence along part of the boundary with the Defendant's property. They did so using 'about 11 iron posts',[9] concrete and over 500 metres of barbed wire to create five strands. In September 2018, he inspected the area and found the fence gone with only three of the posts left lying on the ground.[10] The Plaintiff confirmed that evidence.

37. During his cross-examination, Veikoso identified the relevant section of fence as running from the northeast corner of the Defendant's guard house (where a

[9] Although, during his cross-examination, he said 12.
[10] Although, during his cross-examination, he said two.

boundary peg is still visible[11]), in a north easterly direction to the next turn in the Plaintiff's property. He estimated the length at 'over 100 metres'. An aerial photograph of the section was included in the Ministry's report on the encroachment.[12] Veikoso confirmed the section as shown on that photograph. A scale on the photograph showed the length to be approximately 50 metres. I consider that length to also be more consistent with only using 11 or 12 posts. Otherwise, the spans of wire between those posts over a distance of more than 100 metres would have been in the order of 10 metres each which would be unlikely to produce an effective fence.

38. Veikoso said that he no longer had receipts for the costs of constructing the fence. Notwithstanding the Plaintiff's claim of $5,000 for the fence, Veikoso estimated the costs of materials for the concrete footings which (although not stated in his brief of evidence) totalled $1,450, steel posts at $2,500 and barbed wire at $250. Veikoso also estimated the labour to have involved five workers over two months which cost about $2,500. Those estimates were not directly challenged.

39. The Plaintiff did not plead or adduce any direct evidence that the Defendant or its workers removed the fence. Veikoso's brief of evidence contained hearsay statements to that effect,[13] which I have not acted on, nor did Mrs Mailangi suggest I should.

40. Mr Nishi said he had no knowledge of whether the Defendant's workers removed the fence. He judiciously avoided denying the proposition. Then again, he said that it is his younger brother who manages the quarry whereas Mr Nishi only visits it from time to time. The younger brother was not called to give evidence nor was his absence explained.

41. On that basis, I consider it more likely than not that the Defendant's workers, being the only persons with ready access to the area, removed the Plaintiff's fence. There had been a number of heated disagreements between the parties about the boundary during that time and the Plaintiff was making serious demands on the Defendant (wrongly, as it turned out) for compensation. The Defendant had a motive at the time for removing the fence. However, it turned

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[11] Court book 161.
[12] CB 155.
[13] [9]

out that there was a very good reason for that.

42. Other recent photographs in evidence showed one of the steel posts with a concrete footing lying on the ground[14] in the encroachment area and another in situ.[15] The latter post was marked on the Ministry's photographs as "false boundary claim" because it was about 10 metres north of the corner of the guard's quarters and 7.25 metres north-north-east of the actual boundary, that is, inside the Defendant's property. A further survey map prepared by Warren Vea of the Ministry of Lands in consultation with counsel for both parties at the time,[16] shows that the line of the subject fence from the false boundary post to the upper northeast corner of the Plaintiff's property[17] was all inside the Defendant's property. That deduction was not challenged by counsel for the Plaintiff. Therefore, the Defendant was within its rights to remove the unlawful fence as a trespass to its land. Upon that finding, Mrs Stephenson submitted that the Plaintiff had failed to prove a claim for damages in respect of the fence.

43. However, that is not the end of the matter. Although the Defendant was entitled to remove any trespassing fence on its property, it was not entitled to retain or dispose of the Plaintiff's fencing materials. The evidence was not clear as to exactly what happened to them other than the two steel posts referred to above. The evidence of the Plaintiff and Veikoso that the fence was all but missing, would suggest, again on the balance of probabilities, that the Defendant and its workers took the materials away. The Defendant ought to have given the Plaintiff an opportunity to remove the fence himself, and take the materials away; failing which, the Defendant should have placed the materials on the Plaintiff's property. The Defendant would then have a valid claim against the Plaintiff for the cost of removal work. Even though the Plaintiff did not put his claim in this regard (even in the alternative) with any such legal precision, I do not perceive any prejudice to the Defendant in having this matter determined once and for all on the basis of an effective conversion of the Plaintiff's property.

44. The only evidence about the nature of the materials was from Veikoso. He

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[14] CB 184.
[15] CB 157, 160.
[16] CB 107. Mrs Tupou KC (as Her Honour then was) was then acting for the Plaintiff.
[17] Assuming it was erected in a straight line and there was no evidence to the contrary.

described the steel posts as about four metres in length with a greater wall thickness than 'normal' steel posts sold in Tonga. The available photographs of the two remaining posts provide some support for that.

45. The claim for labour was wasted when the fence was erected in the wrong location.

46. All up then and applying some discount for the vagaries of estimates without objective supporting evidence, I consider a reasonable allowance for the materials for the fence lost by reason of the Defendant's conversion of them to be $1,500.

Emotional distress claim

47. This head of the Plaintiff's claim conflated exemplary damages with damages for emotional distress.

48. As Mrs Mailangi submitted, there are a number of categories of circumstance or conduct which may attract an award of exemplary damages. They include where the Defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the Plaintiff. They also extend to cases in which the Defendant is seeking to gain some object (e.g property) at the expense of the Plaintiff: *Kingdom of Tonga v Mokofisi* [1990] Tonga LR 58.[18]

49. Here, however, there was no evidence that the Defendant's conduct was calculated by it to make a profit or to gain the benefit of the encroachment area at the expense of the Plaintiff. At best, my impression of Mr Nishi's evidence is that the encroachment was largely unwitting. Further, the use to which the Defendant put the area could hardly be regarded as being at the expense of the Plaintiff. As explained above, the encroachment area was, from the Plaintiff's perspective, largely inaccessible and unusable for any quarrying operation. The claim for exemplary damages is therefore refused.

50. The Plaintiff gave evidence that he had 'suffered a great deal of emotional distress in knowing that the Defendant was encroaching on his allotment and depriving him of the benefit of access and to utilise the encroachment area'. Mrs

[18] Referring to *Rookes v Barnard* [1964] 1 All ER 367.

Mailangi characterised this claim as including 'distress in watching someone doing what they want with one's property'.

51. On the basis of the Plaintiff's evidence during cross-examination, Mrs Stephenson submitted that this head of claim should be rejected because:

    (a) the alleged emotional distress is inconsistent with the location and extent of the encroachment area;

    (b) the claim was not supported by any independent medical evidence;

    (c) the Plaintiff admitted that he suffers from long-term underlying medical conditions which are likely to be the cause of, or at least major contributors to, any emotional distress alleged;

    (d) during the course of an application by the Plaintiff for an injunction early in the proceeding, he deposed to being affected physically and mentally by allegations that he (and his company, Faua Development Ltd) had a history of substantial unpaid debts, and in respect of which, he had been suffering emotional distress from more than 20 years;[19]

    (e) the various demands by the Plaintiff's lawyers since 2016 never mentioned any encroachment by the Defendant in terms of the instant claim and is consistent with the Plaintiff not being aware of the encroachment until it was identified in the Ministry report issued in August 2021.

52. I agree. On the evidence, I am not satisfied that the Plaintiff has established any causal connection between the Defendant's tort and any emotional distress over and above that which he has been suffering for many years and for unrelated reasons. Accordingly, this claim also fails.

Result

53. There is judgment for the Plaintiff in the sum of $2,500.

54. On the issue of costs, Mrs Stephenson submitted (based on the Defendant's challenges to the Plaintiff's proof of loss, or lack of it) that if the Plaintiff was unsuccessful in his claim for damages, it would be appropriate to make no order as to costs.

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[19] Plaintiff's affidavit sworn herein on 26 May 2020.

55. Mrs Mailangi did not include any submissions on costs. I proceed on the assumption that the Plaintiff would expect costs to follow the event. The question though becomes, what is the event?

56. The Plaintiff has succeeded on liability but has enjoyed very limited success on quantum. In fact, the amount ordered represents less than 10% of that claimed.

57. In *Nishi v Nishi* [2021] TOSC 79, I referred to *'Utu'atu & anor v Naufahu & anor* [2013] Tonga LR 64. There, a claim of $132,000 resulted in judgment for only $300. The Court of Appeal substituted what had been the usual order for costs following the event with no order as to costs of the trial. The other authorities referred to that *Nishi* decision explained the circumstances in which the Court's broad discretion may include determining costs on an issues basis by, for instance, fixing a certain proportion of a party's costs to be paid by another party.[20]

58. I also take into account that on 25 August 2021, the Plaintiff was ordered to pay the Defendant's costs thrown away by the fundamental amendments to the Plaintiff's transmogrifying it from a substantial claim for unlawful extraction to a far more modest claim for trespass.

59. In all the circumstances, I consider it appropriate to order that the Defendant pay one third of the Plaintiff's costs of the proceeding from 26 August 2021. Further, pursuant to paragraph 10 of Practice Direction No.1 of 2022, in default of agreement, those costs are to be taxed in accordance with Scale A of the said practice direction.

NUKU'ALOFA
31 August 2022

SUPREME COURT TONGA

M. H. Whitten QC
LORD CHIEF JUSTICE

[20] *Re Elgindata (No. 2)* (1993) 1 All ER 232; *Investec Bank (Australia) Limited v Glodale Pty Ltd & ors* [2009] VSCA 113.