

SUPREME COURT OF NAURU

[CIVIL JURISDICTION]

Civil Suit No. 12/2016

Between: Randwick Capelle

PLAINTIFFS

And: Randy Remus Capelle

RESPONDENT

Before: Judge R. VAAI

APPEARANCES:

Appearing for the Plaintiff: V.Clodumar

Appearing for the Respondent: P. Ekwona

Date of Hearing: 25/7/18

Date of Judgment: 3/08/18

Introduction

1. This case is concerned with a dispute between two brothers over a piece of land (the land) identified as portion 158 in Boe District. The defendant brother owns one quarter 25% of the land.
2. The plaintiff is not a land owner of portion 158 but own land right next to portion 158. He has a house on his land and wanted to build a garage attached to his house. He accordingly requested the landowners of portion 158 if he could build his garage on part of portion 158 right next to his house.
The plaintiff obtained the written consent of 75% of the other landowners to construct. The defendant refused to sign.
3. The defendant objected and attempted to stop the construction when the plaintiff commenced to build the garage. On the 1st June 2016 the plaintiff obtained an interim injunction to restrain the defendant from interfering with the construction of the garage.
4. The defendants application to lift the interim injunction was denied by written ruling dated 20th September 2016.
5. By his amending originating summons the plaintiff sought the following relief:
 - (a) a declaration that he has acquired a license from the majority of the landowners to use part of the land to build his garage.
 - (b) a permanent injunction against the defendant.

Statement of Defence.

6. It is alleged that the plaintiff's statement of claim failed to disclose a reasonable cause of action. Secondly the defendant contended that the plaintiff has not demonstrated that he had acquired an interest over the land either as an interest in legal estate or acquired an equitable interest.
7. The defendant also alleged that the plaintiff has no standing to bring the action against the defendant who owns majority share in the land.
8. The plaintiff is alleged to have mislead other landowners to obtain their signatures making them believe he was building a house.
Other landowners also signed on behalf of others who were overseas and did not therefore consent.

Does the plaintiff have standing

9. The plaintiff says he is an implied licensee with the right to use the land for a garage only. He is not seeking to acquire any interest on the land.
10. Traditionally, the view was that a licensee could not sue in trespass because he or she did not have exclusive possessions of the land.
But doubts have been expressed whether that traditional view is true today.
11. In the Law of Torts in New Zealand 1997 2nd ed it is stated in paragraph 8. 4. 3 at pp 469 – 470:

"The traditional view was that a licensee could not sue in trespass because he or she did not have exclusive possession of the land. But that view if it was ever right, certainly cannot be sustained today.

It remains the case that a bare licensee cannot sue in trespass, because he or she has no intention to possess the land and does not exercise control over it to the exclusion of others.

But other licensees have such possession of the land or part of it that it would be absurd to deny their interest in preserving such possession."

It is therefore not every case that a licensee cannot sue in trespass. It depends on the circumstances of each case.

12. In Dutton v. Manchester Airport plc (1) the respondent airport company proposed to build a second runway at Manchester airport. It needed to fell trees in nearby wood owned by a trust. The trust granted the licence to occupy the wood to carry out the tree felling works. To prevent the respondent from felling the trees, the appellants trespassed, set up camp and occupied the woods.

The respondent sued for possession.

The District court judge granted possession. On appeal to the High Court the appeal was declined. By a majority of two to one the Court of Appeal also declined the appeal.

Law LJ who delivered the leading judgment acknowledged that under the old law the respondent as licensee would not have the protection of the law. After quoting from the judgement of Blackburn J in Allan v. Overseers of Liverpool Inman v. Assessment Committee of Westderby Union(2) which held that a lodger in a boarding house, although he has exclusive use of the room, could not bring ejectment or trespass action, he said at page 688:

"As one might expect this is wholly in line with the old law. But I think there is a logical mistake in the notion that because ejectment was only available to estate owners possession cannot be available to licensees who do not enjoy defacto possession"

He later went on to say:

"I would hold that the court today has ample power to grant a remedy to a licensee which will protect but not exceed his legal, rights granted under the licence."

(1) (1999) 2 All ER 675 (CA.)

(2) (1874) LR 9 QR 180

13. The judgement of Blackburn J is also referred to in The Law of Torts in NZ at pp 469-470:

“While there is authority that a lodger in a house, although he has the exclusive use of the room in the house cannot bring an action in trespass, it is submitted that each case must turn on its facts, and that a lodger with power under his or her licence to bar access to the rooms could maintain an action in trespass with respect to unauthorized entries into the rooms.”

“Indeed it would be extraordinary if a lodger, (say a student at University hostel) could not seek redress to prevent repeated entries by another lodger. The licensor would probably have no interest in bringing an action, and in any event it is the lodger not the licensor, who has suffered the real harm. “

14. The plaintiff in this case has been granted permission to use free of charge and for a specific purpose a small part of the land for his garage.

The grant does not create an interest or estate in the land – it is only a right to enter and occupy.

Although it does not give the plaintiff the right to exclusive possession it does not seem to be critical to his right to institute proceedings against the defendant who has clearly obstructed with his licence to enter and occupy.

15. I accordingly rule that the plaintiff has standing to bring the action against the defendant.

75% Consent and the Majority rule

16. Counsel for the defendant in his oral submissions discussed and criticized the majority rule concerning the landowner's written consent which is required by those who wish to use, work or deal with the land. On a number of occasions he emphasized the custom of discussion, mediation and reconciliation which played an important role in Nauru society which therefore makes consent form unnecessary.

17. Unfortunately as he developed his argument he tended to contradict himself and the submissions become confusing and difficult to follow and understand.

18. He did emphasise however that the plaintiff should never have been allowed to initiate these proceedings and obtain an interim injunction against his brother without consulting and liaising with the brother.

The interim injunction however was granted in June 2016 and there has been no attempts of reconciliation or negotiation but several incidents of intimidation and confrontational conduct by the defendant.

19. It is plainly apparent that the defendant wants the plaintiff to dismantle the garage.

20. The majority rule as counsels agree has been in existence since the Housing Scheme was introduced under the Nauru Housing Act 1957. If all landowners were required to give their written consent the Housing Scheme would have been a failure.

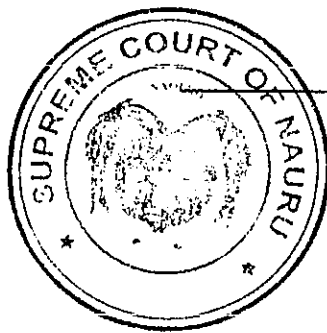
The consent form was accordingly drafted giving permission to use the land only but not to create or grant interests in the land.

It is a modification of the English common law which requires all land the owners of a particular land to consent. Accordingly it has been termed as customary law.

RESULTS

- (I) The injunction continues.
- (II) Defendants to pay the plaintiff cost.
- (III) Cost to be taxed by the registrar if not agreed to.

Dated this 3rd day of August 2018




Judge Rapi Vaai

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- (5) (2017) NRSC 35.
 - (6) (2012) NRSC 13