

## WESTERN SAMOA TRUST ESTATES CORPORATION

v

FAISAOVALE (LENIU)

Supreme Court Apia

28 April; 16 June; 7, 15 July; 9 August 1977

Nicholson CJ

PROPERTY LAW (Adverse possession) - Claim by registered owner for recovery of land - Counterclaim by occupant claiming possessory title - Limitation Act 1975 s 9(2) - Occupation of 145 out of 1,144 acres in block held not to constitute basis for claim to the whole where no sufficient evidence of an animus possidendi in regard to the whole exists: Robinson v Attorney-General [1955] NZLR 1230 applied - Period of undisturbed possession must be by claimant as individual - Claim to freehold cannot be established on the basis of Samoan customary communal holding - Burden on claimant to prove registered owner effectively dispossessed, or has discontinued possession for requisite period of time - Failure to discharge burden.

ACTION for recovery of land and counterclaim for possessory title.

Judgment for plaintiff with costs.

Order made for recovery of land and injunction granted restraining defendant from trespassing.

Mrs Drake for plaintiff.

Enari for defendant.

Cur adv vult

NICHOLSON CJ. This is a claim for recovery of land and a counterclaim for a possessory title to this same land.

The land in question according to the evidence adduced by the plaintiff is part of a Court Grant number 984 of the Supreme Court of Western Samoa to one Frank Cornwall, dated 12 May, 1897. Thereafter after a succession of title holders, the land comprised in Court Grant 984 was acquired by certain German companies. Consequent upon the occupation of Western Samoa by New Zealand troops in 1914, the terms of the Treaty of Versailles 1919 and the New Zealand Reparation Estates Order 1920 deprived the German companies of their title, the land then vesting in the Crown by way of war reparations.

Under the provisions of the Samoa Amendment Act (No. 2) 1956 (N.Z.) the Western Samoa Trust Estates Corporation was brought into being. Section 24 of that Act provided for the assets of the Crown governed by the various New Zealand Reparation Estates Orders culminating in the Order of 1947 to become the property of the Corporation. That provision took effect on 1st April, 1957 (S.R. 1957/60), although the mechanics perfecting its title were delayed until 1959. In 1961 the Corporation was reconstituted as the body it is today by the Western Samoa Trust Estates Corporation Ordinance 1961, but effectively, it may be said that the plaintiff Corporation became the owner of the land in Court Grant 984 on 1st April, 1957.

Officers of the Lands and Survey Department have given evidence that they have found the defendant is occupying part of Court Grant 984 to the extent of approximately 145 acres, where he has plantations. This area adjoins an area cultivated by the plaintiff and comprises two blocks marked A and B on the plan Exhibit 6. Court Grant 984 consists of a total area of 1,144 acres.

Tupuola Nu'uausala, a Plantation Manager employed by the plaintiff, has told the Court he is familiar with the area, which is known as Vaipapa Plantation, having worked there from 1946 to 1960. He recalled a survey team being sent to check all boundary marks of the plaintiff's land bordering on customary land in 1958 or 1959, and they were found to consist of concrete blocks and some iron pegs. He said there were taro patches on the plaintiff's land in the area in question then, but these were abandoned by the Satapuala people after the survey, and no further cultivation occurred. He said he first met the defendant in 1972 or 1973, by which time he was General Manager of the plaintiff, when the defendant wrote to the Corporation claiming the land. Tupuola said he then personally went to supervise the erection of a fence which the defendant was obstructing. The defendant persisted in his obstruction and the matter was referred to the Court. He described the defendant's cultivation as less than one acre of taros which looked from two to three months old. He said the land had previously been bush land.

Nu'u Teofilo, a retired surveyor of the Lands and Survey Department with nearly forty years' experience, said that he did a check of all boundary marks of the plaintiff's land in 1958. He described them as of cement and some of iron or steel. They lay along the boundary lines fixed in German times. In 1975, or thereabouts, he went back there, I gather to redefine the boundary, and was obstructed by the defendant. He showed the defendant the markers and the defendant allowed him to continue. At that time Nu'u says he saw month old taros in about a quarter of an acre of cultivation.

Peter Colin Benfell, a survey technician of the Lands and Survey Department, told of being obstructed in boundary redefinition work by the defendant in July, 1976 when he was about to begin subdivision work on the plaintiff's land. He described the plantation of the defendant as mainly taros with a few young coconut trees and two or three small fales. He said there was no evidence of lengthy settlement. The area generally he termed as having the appearance of secondary growth bush, with trees twenty to thirty feet high.

The defendant gave evidence that he is aged 53, and that a plantation in this general area was started by his father and grandfather. He began the plantation in question in 1953 or 1954, although he had been cultivating in the general area since 1941. As I understand his evidence, he lays claim to a very large area as he marked it in pencil on the plan Exhibit 8, which takes in the whole of Court Grant 984, a portion of an adjoining Court Grant 224, also the property of the plaintiff, and part of another Court Grant 894, as well as certain Samoan customary land. Although his claim is based technically upon adverse possession in terms of the Limitation Act 1975, he really lays claim to this very large area as Samoan customary land which he says was never alienated by his forefathers. Moreover, he alleges that the plaintiff's surveyors have at some time moved the boundary pegs and on the occasion of a Court inspection of the property he pointed out the remains of a concrete slab, well inside the area now cultivated by the plaintiff as an original corner peg position. I will refer to this aspect later. The defendant further testified that cases had been taken in the Land and Titles Court by his family to enforce their claims against other Samoans. The boundaries of this traditional land were never measured. He said his father was alive, aged between 78 and 80.

Palau Peteru, his father, was called. He claimed to be well over 90, and to have a clear recollection of Frank Cornwall, who took up the original Grant. He denies any alienation of the land comprised in the Grant to Cornwall and confirms the defendant's account of cultivating in the area for many years. He has been blind about seven or eight years. His cultivations included part of the area marked as lot 30 on Exhibit 8,

which I apprehend was part of Court Grant 894. This area, he says, is partly in the area now farmed actively by the plaintiff. He recalled preventing the erection of a fence by the plaintiff, but could not recall when this occurred. He said the surveyor Nu'u and Tupuola were present on that day.

One Lio, who worked as a labourer for plaintiff from 1947 to 1974, gave evidence of the boundary fences being moved and of fence building being stopped by the defendant about ten years ago when Tupuola was supervising the work. One Sola told of adjusting his plantation because of the plaintiff's new fence erection. He described his plantation as having its western boundary with the plaintiff land in the vicinity of the defendant's plantation. I infer from this that he occupies an area immediately to the north of the area marked B on Exhibit 6. He says he accepted the plaintiff's demand to move. He did not say when this occurred.

The defendant also called other members of his village to give evidence of the areas they occupy, some within the plaintiff's boundary and one outside it. Finally, he called the Registrar of the Land and Titles Court, who acknowledged that in 1950 a complaint by defendant's father and another person in respect of land called "Letalie" had been made to the Court protesting at a third person's building of a dwelling on the land. The defendant alleges that this is the same land as is now in dispute. He adduces this evidence to support his contention that his family has always occupied the land and had taken cases on it to the Land and Titles Court. In fact, the Registrar testified that no proceedings were filed in respect of that land.

The trend of the defendant's pleadings and evidence is such that I feel it incumbent upon me to making a finding first of all as to whether the plaintiff has any title to the disputed lands. I conclude from the evidence adduced before me that the plaintiff is in fact the registered proprietor of the land in dispute, and that in spite of denials by the defendant and his father that the land was alienated to Frank Cornwall, I am satisfied the plaintiff has title, subject to any findings I may make as to any possessory title by the defendant.

The evidence I have heard about the shifting of fences I consider of no moment. From my inspection, I could see that the plaintiff is clearly in occupation of the land within the completed fencing and has been for some time, and Mr Benfell's evidence satisfied me those boundaries are correctly marked. The remains of a concrete post base pointed out by the defendant at the scene within the plaintiff's cultivated area I consider has no relevance to his present claim.

I turn now to the main basis of the defendant's argument, *viz.*, that the provisions of the Limitation Act 1975 operate so as to prevent the plaintiff claiming recovery of the land at this stage. As I understand the argument, the claim applies not just to the 145 acre plantation area occupied by the defendant, but to the whole of Court Grant 984 and beyond. Again, the defendant does not appear to be claiming merely for himself but for other members of his extended family as well as if the land were Samoan customary land rather than freehold.

I consider that to take advantage of the provisions of the Limitation Act 1975 the defendant must accept that he is to be treated as an individual occupier and not as a family member. He may press his own claim but nobody else's. After all, Section 4 of the Limitation Act 1975 provides that the Act shall not apply to Samoan customary land. Manifestly, it is inappropriate then that a claimant by adverse possession should attempt to press his claim of freehold land on the basis of Samoan customary communal holding of land by numbers of persons, of which he is one. Moreover, I would reject out of hand any argument that his occupation of 145 acres out of a block of 1,144 acres in Court Grant 984 (to say nothing of his claims beyond that), in any way can give him possessory title to the entire block and I say this with due regard to the observations of F.B. Adams J. in Robinson v. Attorney-General [1955] N.Z.L.R. 1230 to the effect that partial occupation of a block may constitute adverse possession of the whole if such partial user sufficiently evidences an animus possidendi in regard to the whole. I can find nothing in the evidence to suggest such an animus on the part of the defendant. I infer in the absence of further evidence that the 145 acres marked on

the plan Exhibit 6 is probably the fullest extent of his personal occupation. I am not concerned with what other members of his family may be occupying. I therefore confine the defendant's claim to a possessory title to the two areas marked on Exhibit 6 comprising a total of approximately 145 acres.

The Court inspected portions of the area in question. It bears little or no resemblance to a plantation in the normal sense of the word. A relatively new post and wire fence of obviously short life expectancy surrounds the 25 acre block, but I could see little cultivation in it. The larger block comprises bushland as far as I could see. I accept the assessment of Mr Benfell that it is secondary growth bush but the defendant does not claim to have ever cleared all the land of bush and the plaintiff's witnesses were not questioned as to whether the plaintiff had ever done any clearing in the land. However Mr Benfell marked out the area as defendant's plantation, and no explanation has been given to the Court as to the basis for his definition of the area. I conclude, therefore, that somewhere at intervals in this area are indications of cultivation, which justify the definition, though I could see little, myself.

To establish a claim of adverse possession, the defendant has the burden of proving on the balance of probabilities that he has been in possession for twelve years or more since the right of action accrued to the plaintiff to the extent that the plaintiff has been effectively dispossessed, or has effectively discontinued possession for a similar period.

I find it difficult to accept the defendant's statement that he personally has been in possession of this plantation area since 1953 or 1954. To begin with Mr Benfell's evidence, which I accept, is that there is no sign of lengthy occupation of the land. There are only patches of taro, which are plants of short life, and young coconut trees, and two or three small fales. If he had been cultivating this area since 1953 or 1954 I would have expected evidence of trees of plantation varieties in a mature state, at the least. Moreover, the sparse nature of the cultivation that is there does not suggest continuous occupation, but rather an intermittent and casual use of the land.

In any event, I am not satisfied that the plaintiff has discontinued possession, or been effectively dispossessed by the defendant for the period of twelve years since it acquired the right of action. In 1958, a check of the boundaries was done by Nu'u presumably at the plaintiff's behest. Tupuola says that at that time there was a request by adjoining owners for a European surveyor, but he does not mention any claim to title for the general area then. The defence witness Lio mentions fencing work being done on the property by the plaintiff approximately ten years ago, *i.e.*, 1967, when the defendant stopped this work. Again in 1972, or 1973, Tupuola says fence erection work was attempted, but stopped by the defendant. Again in about 1975, boundary redefinition work by Nu'u was obstructed by the defendant, who then said the land belonged to his father and his grandfather. In July, 1976 boundary redefinition and subdivision work was attempted, and again in March, 1977.

The account of all of these incidents is certainly not consistent with the plaintiff discontinuing possession, nor of its dispossession by the defendant, but rather suggests a continuing assertion of possession and ownership by the plaintiff. Moreover, it seems that the defendant only figures in these incidents from 1967 onwards, and as late as 1975 his claim was on behalf of his forebears, including his father who is still alive, and not in his own name. The evidence suggests that his father figured in the 1958 incident, and in a complaint to the Land and Titles Court in 1950. There is no evidence that the defendant has somehow succeeded to his father's claims during the latter's lifetime. I conclude that the defendant has failed to discharge the burden upon him of proving twelve years' adverse possession of the land. There will therefore be an order for recovery of the land against the defendant and an injunction will issue to prevent the defendant from trespassing upon the land. The defendant's counterclaim is dismissed. The defendant will pay costs on the claim and counterclaim as fixed by the Registrar.