Fie'eiki v 'Ilavalu & others (No.2)

Land Court, Nuku'alofa
Hampton CJ

2, 3, 4 & 12 April 1996

Land - estoppel - shield or sword
Estoppel - shield or sword - Evidence Act
Evidence - estoppel - rule of evidence

In this action, related to the other actions earlier reported in this volume, the plaintiffs sought a declaration that the first and second defendants were estopped from leasing the land in question to anyone but themselves and that the lease to the third defendant, granted by the fourth defendant, should be cancelled.

Held:

1. There was never any certain and concluded agreement or arrangement with (or even promise by) the first and second defendants in relation to the plaintiffs being able to lease the land.
2. But there was an agreement by the plaintiffs with the husband of the third defendant to vacate the land.
3. There were no promises, representations or misrepresentations made by the first and second defendants to the plaintiffs so there was no foundation for the relief sought whether in the form of specific performance or a declaration of estoppel (and doubted that estoppel - a shield not a sword - could be the foundation for such a claim in these circumstances).
4. (obiter) The only estoppel here (and as a defence) is that the plaintiffs, by their conduct towards the third defendant, are estopped from denying the third defendant's right to lease the land.
5. S.103 Evidence Act makes it clear that, in Tonga, estoppel is a rule of evidence and cannot generate a right to relief where there would otherwise be none.
6. The claims were dismissed.

Cases considered : OG Sanft & Sons v Tonga Tourist Co [1981 - 88] Tonga LR 26

Statutes considered : Evidence Act s.103

Counsel for plaintiffs : Mr Veikoso & Mr 'Etika
Counsel for first, second and third defendants : Mr Kaufusi
Counsel for fourth defendant : Ms Bloomfield

Judgment

This action in the Land Court, for this court to exercise its claimed equitable jurisdiction and to grant a declaration - (and indeed order specific performance - although not sought in the statement of claim) - that the First and Second Defendants are estopped from leasing to anyone else other than the Plaintiffs an one acre area of land at 'Alaivahamama'o By Pass Road, Kolofo'ou, (lot 1 plan 6306) and consequently cancelling the 50 year lease of the said land, granted by the Fourth Defendant to the Third Defendant (by Deed of Lease of 17 February 1995, to which the First and Second Defendants consented) is inextricably connected to two other actions -Land Court action No.L778/95 and Supreme Court civil action No. C788/95.

L.788/95 was an action by the Third Defendant here against the Plaintiffs here for (inter alia)possession of the said land; and C.788/95 was a claim by the Third Defendant against the Plaintiffs for damages for mesne profits arising from the claimed unauthorised occupancy of the land by the Plaintiffs.

On 24 November 1995 Judgment in both of those actions was given by me against the present Plaintiffs, in favour of the present Third Defendant and orders made (inter alia) on L.778/95 for the Third Defendant to have possession on the land and on C.788/95 for damages for mesne profits to be assessed (as was subsequently done, in the sum of $686.64, on 14 December 95).

Amongst evidence heard on 24 November 1995 was evidence from each of the present Plaintiffs. That evidence, which was, and is, significant, is to be found summarised in my oral judgment of 24 November 1995 - pages 17-21, incl., of the Defendants' production here.

I refer in particular to the evidence set out and summarised on pages 18 and 19 of the production (pages 2 and 3 of the judgment). Nothing in any of the evidence I have heard over the 4 days of this current trial in any way makes me resile from or alter the findings of fact set out in my earlier judgment. Indeed, the evidence I have heard here only reinforces those findings. I incorporate, by reference, those earlier findings in this judgment. There was preliminary argument from the Defendants that this claim should be struck out because of the earlier finding and on the basis that promissory estoppel in these circumstances could not found a cause of action as pleaded. I decided to hear all the evidence rather than make any ruling on that preliminary argument. I now rule on this matter on the merits or demerits of the evidence.

For a number of reasons, the more significant of which I will mention shortly, I find both the Plaintiffs to be unsatisfactory and indeed unreliable witnesses. Whenever the evidence of one or both of the Plaintiffs conflicts with the evidence of the First Defendant or of Tevita Misa Fifita I reject the evidence of the Plaintiff(s) and accept that of Mrs 'Ilavalu and/or Mr Fifita (and I will comment now that, the fact that he, Mr Fifita, was in Court during the hearing of the rest of the evidence, no order for exclusion having been sought or made, does not affect the view I have as to his credibility. In any event if there was such an order excluding I would have made, in all probability, an order exempting this witness as he was effectively in the position of a party).

The Plaintiff Fine Fie'eiki in her evidence in chief described, as a considerable part of the reason for the "understanding" (her word) that she and her husband would be able to lease this land from the First Defendant, the giving by them to the First Defendant and her son of many gifts of goods and moneys. She described in that regard, the funding of

the son's (the Second Defendant) return trip back from New Zealand in the early 1980s. In fact, as revealed in cross examination (and confirmed by the First Defendant in her evidence), the ticket from New Zealand, although paid for by Mrs Fie'eiki, was not used (which was always the intention) and the ticket sent back to Fine Fie'eiki and a full refund received by her. I regard that as evidence which was misleading - and deliberately misleading - of the Court.

Leaving aside the type and extent of the alleged gifts of goods for the time being (eg. can giving of ice creams and soft drinks to a school boy from time to time - as the Second Defendant was in the early 1980s - be seen as a foundation for, and part of the consideration for, a commercial transaction over a valuable piece of land? I think not) - the attitude displayed by this Plaintiff (Fine) reveals something of the state of mind of both her and her husband - that because of what they claimed they had given to the family of the First Defendant over the years (and selectively recorded by them as I will come to) they were (and should be) entitled to this one acre of land whether the First and Second Defendant agreed to it or not. It was a "fait accompli" in their minds - and that is how they tended to act in relation to it - as I find eg. building structures on it (warehouse, pigsty) when permission had not been given for that by the First Defendant (who had, and still has, the widow's interest in the land - she had given permission only for a temporary timber rack on the land), running stock (of various sorts) on it without consent, cropping it without consent and so on. Indeed it is interesting to note, and it is indicative of the attitude of the Plaintiffs, that the pigs were allowed to run, not just in the one acre, but throughout the whole block (a tax allotment of 8 acres 1 rood). The Plaintiffs seemed to have adopted an attitude of trying to consolidate themselves on, entrench themselves in, this land without any proper consent; and as I have noted in my earlier judgment, ingnored the other 1 acre piece of land which they were legitimately leasing from the First Defendant (on the same tax allotment, but near the lagoon and not on the main By Pass road), and concentrated on working on and consolidating themselves on this other piece by the road.

It may be somewhat of a by-wind but I will deal with it whilst stock, and particularly pigs, are in my mind. Initially, on 13 September 1995 an interim injunction was made at the suit of the Third Defendant preventing the Plaintiffs from entering or working on the land (on L.778/95). At the Plaintiffs' request on 20 September 1995 that injunction was varied to allow the Plaintiffs, inter alia, to "enter the said land for the purposes of feeding their pigs".

That variation was allowed on the basis of Affidavit evidence (of 15 September 1995) from the male Plaintiff to the effect that the pigs were in a sty on the land and had to be fed or they would starve ("we have pigs on the land and are at risk of dying in hunger"). On this issue again this Court was misled by the Plaintiffs. In evidence here it was first claimed by Fine Fie'eiki that the pigsty was not on the land (1 acre) in question but on the rest of the 8 acres. That change of position should also be contrasted with para.8 of the Statement of Claim here ("also had a pigsty there ...." i.e. on the 1 acre block in question). The other Plaintiff, Filimone Fie'eiki, later said the pigsty was part on, part off the block of land in question, and a view which the Court was asked to take, and did, helpfully, showed that that was probably so. But what is disturbing is that first the Court should have been wrongly informed as I have described; secondly that, as the Plaintiff, Fine's own evidence showed, the pigs were loose in the 8 acres, so were not penned up and did not have to be fed on the 1 acre area in question anyhow; thirdly that on the view

it was immediately apparent that the back of the fenced pigsty area, even if the pigs were still contained in it, was well off the 1 acre of land in contention and was freely and easily available off a well-formed vehicle track (again not on the 1 acre block) - the pigs could easily be fed, if contained in the pigsty, without going anywhere near the 1 acre area in question - so in seeking the variation of injunction this Court was again misled by the Plaintiffs. Indeed in cross examination the Plaintiff, Fine, said specifically, they had to go through the 1 acre to feed the pigs. That is not so and was not so.

All these things combine to undermine the credibility of the Plaintiffs.

Still dealing with pigs - Fine Fie'eiki claimed that part of the gifts to the First and Second Defendants was a pig given to the Second Defendant for a funeral. In cross-examination, after a long pause, she claimed the pig was part of the gifts given in exchange for the land; although, as she conceded, she did not tell the Second Defendant (or indeed, I interpolate, the First Defendant) that. What she said was (and this type of reply and attitude is in common with the other Plaintiff) that it was her understanding (and I stress that was the word she and her husband both used often) that everything given by them to theFirst and/or Second Defendant was affiliated to or attached to the land in question. As I say - a "fait accompli" in their minds - but in no one else's - certainly not the First and Second Defendant's.

In general Fine claimed that it was she, as the relative of the First Defendant, who did the talking to the First (and Second) Defendant(s) about this land. Filimone puts it the other way around - he did the talking. Fine says the original discussion were between her and the first 2 Defendants. Filimone said at the start of his evidence in chief that the initial "agreement" was between him and those 2 Defendants. Later, when asked by the Court as to the age of the son he said the "agreement" was just between him and the First Defendant. Still later he said, in cross examination, that in fact it was 4 persons : i.e. he, his wife, and the First and Second Defendants. Destructive of credibility.

Having already touched on Filimone I will continue with some other matters and reasons that make his evidence unsatisfactory and unreliable and as to why I reject it if it is in conflict with other evidence, from or on behalf of the Defendants.

In his evidence he claimed that he recorded all the gifts and expenses in relation to the 1 ac. land in question and he produced, as verification, two account books, Exhs. H and I. Exh H (at page 136-137) contained details of the amounts claimed to have been spent on building the warehouse, timber shed and fences plus cash paid by the Plaintiffs to the First Defendant allegedly for the "agreement" to lease the land in question. The fact that all figures are entirely round figures (ie all in exact $1000s) raised suspicions. Building costs are never so exact. It turned out these "records" were made in this book, Exh H, much later. The figures for the claimed, building costs are on p. 136. On p. 137 are other moneys paid to the First Defendant, it was claimed, including a claimed payment of $9000 "other expenses paid after 1983". That was how it was put in evidence in chief by Filimone. Yet on scrutiny, and in answers to the Court, it became apparent that this $9000 had nothing to do at all with the land in question. That was the amount the Plaintiffs claim they paid to the First Defendant for the lease of the other land near the lagoon. Again there was an attempt to mislead this Court.

The other book, Exh I, was alleged to contain details of gifts and so on, given on credit from the Plaintiffs' store. Pages 5 and 20 it was said showed that the First Defendant owed exactly $1700 (and the Plaintiffs claimed that she knew this was for the lease of the

land in question - it was said in effect that no rent was paid for this land for over a decade because in some way the First Defendant and the Second Defendant were getting all these other benefits). P.25 it was said showed the Second Defendant owed $1784.96. Again when put under scrutiny by the Court pp.5 and 20 did not show what was claimed - at the very most generous view the figures came to some approx $470 (if that) and even if added (as the Plaintiff Filimone then claimed) to another $514.15 from p.137, Exh H, it only came to some $980 approx. Again an attempt to mislead the Court. Then if p.25 was scrutinised the $1784.96 was not to be seen. Again a misleading. Mr 'Etika in closing, realistically I say, suggested his clients' evidence in relation to these book and moneys was "not so reliable". I could not agree more.

Filimone's evidence was changeable, in various other respects. As pleaded (para.5 of the Statement of Claim) it was alleged the first 2 Defendants "agreed" for the Plaintiffs to lease and develop the land in question in 1980. In evidence in chief Filimone said 1981; later in cross examination be said 1982.

I do not intend going on with this catalogue. Save to mention this, as also being destructive of the credibility of the Plaintiffs and as well showing that the Plaintiffs well knew there was never any certain and concluded agreement (or even any promise) by the First (and Second) Defendants in relation to this land in question. The letters, Exhs 3/4 and 5/6 of January and June 1995. The first (Exhs 3,4) of 19 January 1995, written by Tevita Misa Fifita to the Plaintiffs purports to "confirm our agreement that you will move ..... by 31st July 1995". The Plaintiffs maintain now there was no such agreement; that this was a complete fiction by Mr Fifita. I do not find that that is so; there was an agreement and the six months was Filimone's suggestion in fact. Indeed that evidence of the Plaintiffs is in direct conflict with what was said by them before me in evidence on 24 November 1995. I refer to my judgment at mid page 2 (para.5) (p.18 of Defendant's production). Such an agreement with Mr Fifita was then accepted. (In this hearing I put that discrepancy to Mr Fie'eiki. He agreed that he had accepted that in this earlier evidence that there was an agreement to vacate, but that he now resiled from that).

And the fact that the Plaintiffs accepted there was in fact such an agreement to vacate is borne out very emphatically by the next letter (Exh. 5, 6) written by Filimone on 28 June 1995 and excusing the inability to move out in time (still a month to go as at the date of the letter) and seeking Mr Fifita's agreement to an extension until end of October 1995. That is further reinforced by their failure for some 8-9 months, and until their hands were forced in effect, to take legal advice and try and advance the claim they now do. One would have thought they would have been very active from at least January 1995 on. They are, I find, commercially astute; and they claim they knew they had legal rights to the land.

I find there was never any concluded agreement to lease, or to agree to lease, or any promise to lease this area of land in contention from the First and Second Defendants. Both the Plaintiffs well knew that I find. The thought of being able to gain and retain a valuable (commercially) piece of land overcame all else. The subsequent actions and letters of 1995 demonstrate the lack of agreement and/or promise very well. There was no contract or agreement, there were no promises or representations or misrepresentations made by the First and Second Defendants to the Plaintiffs. Any misleading has been, I find, by the Plaintiffs. There is, my view, nothing of any sort which would found any claim for relief by the Plaintiffs whether in the form of specific performance or in the nature of some declaration of estoppel (if estoppel can in fact be the foundation for a claim in such

circumstances - a sword and not merely a shield - which I doubt). There was, as I will find when I come to it no intent to create legal relations, and none were created in my view.

The Plaintiffs have greatly exaggerated what occurred - have tried to convert the daily meetings and conversations and transactions of a family into a commercial agreement entirely advantageous to them. They have had the use of one acre of land for over a decade for no rent and they can count themselves fortunate in that - particularly as they themselves see (and saw) it as so valuable. That, of course, is the very reason that they have tried to consolidate themselves on the land.

The exaggeration is seen e.g. in para. 12 of the Statement of Claim when it is claimed that they, the Plaintiffs, have spent over $85,000 on the land. (I give the Plaintiffs the benefit of some doubt in relation to that because the pleading says they have "entertained a loss of over $85,000 given to the First Defendants not including gift and goods presented to them as consideration for the lease promised" - if that is taken literally that is wildly untrue - excluding gifts and goods there is nothing; if gifts are taken as excludig monetary gifts there is something but it is a very very small something indeed - and $85,000 is still right out of sight). If I allow into the reckoning everything the Plaintiffs say they have expended on the land in question and on the First and Second Defendants then it comes (at the most generous) to only something like $45,500 (and I am very doubtful of a lot of that content). Wild exaggeration; destructive of credibility.

In fact, without being exhaustive, the accounts in evidence of both Plaintiffs are full of generalities as to the claimed "agreement" or "promise". Fine described it as an understanding; she spoke of it as being conditional on the Second Defendant coming of age and the First Defendant then surrendering the 1 acre and they then leasing it from the Second Defendant (I note the Second Defendant came of age a long time ago now - if that was in fact the agreement why was it not carried out, attempted to be carried out, if necessary enforced through the Court by the Plaintiffs?). She claimed in effect that there was no term of years settled though, no rental, no time when these events would occur. It was put to her that the First Defendant never consented to the arrangement to lease. She replied that "she (the First Defendant) at no time said she did not want us to lease the land". The corollary is obvious. And then later when the same matter was put again to her she replied: "No, she (First Defendant) didn't consent to me leasing the land". She was also pressed on what consideration there was for this claimed agreement to lease the land. She repeated that it was just an understanding; "based on an understanding"; and that there was no amount fixed to be paid to the First and Second Defendants for the lease. That of course can be contrasted with the agreement reached over the 1 acre lagoon site - there was a fixed consideration, a rental, a term, and a written agreement. When pressed as to why they did not enter into similar arrangements with the land in question Fine said (and I paraphase) that that was because the First Defendant never came to them to make, or offer, an arrangement with the land in question; asked why they did not then approach her the reply was that (and again I paraphase) every time they tried to talk to her "she would stop us - she gave us permission to build but would stop us leasing it". Fine before this court claimed the "understanding" with the First Defendant was based, not on family matters, but on business matters. (Filimone in effect said the same). It is extraordinary that if that was so then these people, of business acumen, did not tie the First and Second Defendants down in any way. (Again, in passing I note a change in stance from the hearing of 24 November last (see p.2 of my judgment) - where the Plaintiffs accepted the "understanding"

as based on family rather than commercial ties).

In re-examination Fine was asked whether at any time the First Defendant said she consented to lease the land. The answer was, as I noted it, an unequivocal "No". At best, in re-examination, it come to a claim that at some indefinite time in the future the First Defendant would surrender the piece of land (but for no fixed amount or consideration) for her son to possibly lease to them long term (even the letter from the Second Defendant, Exh A, of November 1993, does not accord with that).

Filimone claimed an agreement. I have already commented on the changing years and the changing numbers involved in his evidence. He spoke of having faith and belief in the First Defendant as the reason for his "understanding" that there was an arrangement with the First Defendant. Not very commercially certain (or astute) to rely on such only, one would have thought. He claims that both the First and Second Defendants knew of the arrangement because every time they asked for help he helped them. One is left with the impression that this was indeed one way; when he did something for them he would make note of it (without telling them - the First and Second Defendants) as being part of the consideration for the lease.

In referring to the letter Exh A Filimone agreed that that consent of the Second Defendant was only to a 15 year lease permit, which was not what he wanted and which he claimed had been agreed to i.e. a 50 year lease. The First Defendant never consented to such a 15 year lease permit - that is clear on all accounts including Filimone's. So Exh. A helps the Plaintiffs not at all. In fact it goes against them. It simply shows there was never a meeting of minds on this at all, between the interested parties.

Filimone accepts there was no "cost" (ie consideration) agreed on. When asked what proof he could point to the claimed arrangement he pointed to Exh A. Yet he accepted that was very different to the claimed arrangement; and that on receipt of Exh A he did not then go and complain to either First or Second Defendant or seek legal advice and remedy. He did nothing.

Filimone agreed there was no arrangement for rent to be paid for very valuable (to him and commercially) land. In answer to Ms Bloomfield he agreed that there was no contract or written agreement and added that it was "just negotiations". That, to me, says a great deal. He accepted to Ms Bloomfield that he did not take any steps at all from January 1995 through until September 1995. Yet it was apparent the land had been leased to another. No complaint was made, at all, to the Minister of Lands; no complaint made even to the First Defendant (significantly I find); no legal advice sought.

In re-examination Filimone said he went to the First Defendant many times asking for a long term lease and for her to surrender the land. He did not go on to state the obvious - which I find is the position - he kept going back to ask because she kept saying no. The other interesting matter from re-examination was this; asked about the figure in the books (Exhs. H and I) Filimone said that he would help the First Defendant's family from time to time and that "when they wanted money and I thought it should be recorded, I recorded it ...." (The emphasis is mine but the selectivity was his). The First Defendant said, and I accept this, that she had no knowledge of any such recording.

I find there is no basis to the Plaintiffs claims. I reject their evidence. They chose not to develop the piece of land they had a lease permit for 15 years on (lagoon site); they wanted, they say, a secure site; they chose not to use the lagoon site because their security of tenure was not good enough to make it worth developing; yet they chose to develop a

site (without consent) where they had no security to tenure at all in the belief that they, through using the family ties, could cement themselves onto it. The First Defendant did not consent to them building the warehouse or the pigsty, but let it go and did not evict them, I find, on the basis of the family ties and of the family loyalty. Such does not amount to a promise though, nor to an agreement. She was silent - turned away because of blood. Silence in the circumstances here cannot be a promise.

I find that the Plaiantiffs were in fact told of the offer of the long term lease to the Third Defendant before the Fifitas even applied for the lease, as alleged by both the First Defendant and Mr Fifita, in late '94 and turned down any suggestion they take it themselves. Filomone, I find, in fact as well, told Tevita Fifita that he had no agreement for this land. I find the First and Second Defendants were free to negotiate with and lease to the Third Defendant, through the Fourth Defendant. There was nothing unlawful in this as Mr 'Etika suggested.

There is no basis for any of the relief sought against any of the Defendants. The First Defendant says, and I accept that this is so, that she received no money for the land, that there was no promise or representation (let alone agreement) made by her about the land to or with the Plaintiffs; that she regarded the position, because of her widow's interest, as being that she had the care and control over the land only and had no authority over it. In effect the authority would rest in the heir, her son, the Second Defendant, on her death or on surrender. So she could not, would not and did not give any promise or enter into any understanding about the land. There was never any legal relationship or intent to create such between the Plaintiffs and the First and Second Defendants. There was no binding representation or promise even. There was certainly no fraud. There is no basis for relief.

The only surrender, and agreement or promise of such, I find was in late 1994 and on into early 1995 in relation to the Third Defendant, through Mr Fifita. That was certain and clear and complete. The Fifitas then acted on it and made various arrangements including, as I find, an agreement made with the Plaintiffs to vacate and go by the end of July 1995. The other events followed as can be found summarised in the judgments of 24 November 1995 and 14 December 1995 as already referred to. Those events, and the Plaintiffs' subsequent conduct indicate their attitude towards this land (I refer to pp. 3 & 4 of the judgment of 24 November 1995 in particular).

It may well be that there is some force to what Mr Kaufusi says i.e. that the only estoppel here (and as a defence I add) is that the Plaintiffs by their conduct towards, particularly, the Third Defendant, are estoppel from denying the Third Defendant's right to lease the land. I also express the view that I believe Ms Bloomfield is right when she makes the submissions that this claim must fail first on the well established basis of the doctrine promissory estoppel as discussed in the cases she referred to and secondly on the basis, as laid down in the O.G.Sanft & Sons Case [1981-1988] Tonga LR 26 at 34 et seq. I mean no disrespect to any of the legal submissions, particularly the interesting ones of Mr 'Etika, but, given the history of this matter, I have preferred to hear all the evidence and make findings of facts which are determinative entirely in any event even if promissory estoppel and the rules of equity were to fully apply. I also add, in passing, that S.103 of the Evidence Act (cap 15) seems to make it quite clear that in Tonga estoppel is a "rule of evidence" (and not therefore the subject of learned controversy, and varying discussions and judgments as has taken place in other common law jurisdictions), but that

conclusion from s.103, that estoppel is a rule of evidence drives me to the view that as such, such a rule cannot generate a right to relief where there would otherwise be none. But as I have said the facts as I have found and expressed them determine this matter on any view of the law- whether as argued for the Plaintiffs or for the Defendants here. There is no right of relief here.

I also add that I have consulted the learned Land Court Assessor as to Tongan custom and usage. As advised by him no such matters enter into or intrude on these events and facts as I have found them.

410 The claims by the Plaintiffs are all dismissed. There will be judgment in favour of each of the Defendants against the Plaintiffs. Costs as agreed, or if not, as taxed, will follow the event i.e. Costs against the Plaintiffs jointly and severally in favour of the Defendants.