

SALE'IMOA PLANTATION LIMITED v ATOA (JOE) (No. 2)

Supreme Court Apia
Bremner J
9 August, 13 August 1985

LAND LAW - procedure to lapse a caveat - registration when prevented by caveat, invalid.

HELD: The Plaintiff, registered as proprietor of lands on which the Defendant's caveat has not been lapsed, are not proprietors and have no standing to bring these proceedings to effect the removal of the Defendant's caveat.

CASES CITED:

- Mall Finance & Investment Co Ltd v Slater [1976] 2NZLR p.685, 688 & 689
- Catchpole v Bourke [1974] 1NZLR p.620

LETISLATION:

- Samoa Land Registration Amendment Order 1921; Ss 10, 11, 12
- Western Samoa Civil Procedure Rules; Rs 10, 11, 12, 52, 61
- New Zealand Land Transfer Act; Ss 142, 143
- Samoa Land Registration Order 1920; Ss 8, 10

T K Enari for Applicant
A S Epati and Driscoll for Defendant
L R Va'ai for trustees & mortgagees

Cur adv vult

On the 24th June 1985 there was filed by Saleimoa Plantation (the Company) an Application for an Order that the Registrar of Lands remove a caveat against what I will call the Plantation owned by one Douglas Atoa, now deceased. On the 11th July 1985 a Motion to strike out that application was filed by one Joe Atoa. Then followed an order of this Court that the application be served on the Registrar of Lands, the trustees of the Douglas Atoa estate, the Inland Revenue Dept, National Provident Fund and the Development Bank of Western Samoa. I note that the trustees of the Douglas Atoa estate, the National Provident Fund and the Development Bank are represented. There is no representation of

the Registrar of Lands despite the allegations that he has neglected his duty under the Samoan Lands Ordinance. There is no appearance on behalf of the Inland Revenue Dept. The order for service was made under Rule 188 by the Supreme Court Rules and by that Rule all parties to be served become parties to the proceedings.

By Will dated the 4th May 1978 Douglas Atoa the owner of the Saleimoa Plantation appointed Messrs Drake & Jackson, solicitors Apia to be his trustees. When Douglas Atoa died a charge was registered against the titles of the Plantation by the Inland Revenue Dept for unpaid taxes and on the 22nd February 1983 a caveat was entered by Joe Atoa in respect of his interest in his fathers estate. On the 7th November 1984 a conveyance of the Plantation from the trustees of the Douglas Atoa Estate to Saleimoa Plantation Ltd was registered. The following day three mortgages were registered, the registration of the mortgages being signed by the Registrar of Lands. No transmission to the executors has been registered although the trustees say in para. 11 of the affidavit of the 9th August 1985 that the transmission has been lodged with the Lands & Survey Dept. I am informed from the bar that the probate is yet to be released by the Inland Revenue Dept. The caveat is still in existence and no notice had been given as is required by section 12 of the Samoa Land Registration Amendment Order 1921. That section requires notices of documents lodged for registration where there is a caveat, to be given to the caveator and sets out provision for lapse of the caveat. How the Registrar of Lands purported to register the conveyance and mortgages in this situation, leaves me at a complete loss.

The Notice of Motion to strike out the application sets out three grounds. Firstly the applicant has no standing in law to bring the proceedings, secondly the facts upon which the application is based are in dispute and thirdly the proper procedure to determine the said issue is by way of proper pleadings and a full hearing.

I wish to deal with the second and third matters together, namely that there are facts that are in dispute and that the proper procedure to determine the issue should be followed. Reliance is placed on two decisions of the New Zealand Court of Appeal and in particular the case of Mall Finance & Investment Co Ltd v Slater [1976] 2NZLR p.685 and in particular pages 688 & 689. At page 688 the President of the Court of Appeal said that:

"in his view the proper course of action then to be taken is for Mrs Slater to issue a writ in the Supreme Court claiming a declaration as to the validity of the mortgage and any other relief that she may be advised to claim. This course will carry with it the advantage of proper pleadings and

also the advantage to the trial judge of being able to deal with the matter on the basis of viva voce evidence."

Mr Justice Cooke says at page 688:

"that usually the whole dispute will then appropriately be determined in an action with pleadings clearly defining the issues and on oral evidence."

The same view was expressed in the case of Catchpole v Bourke [1974] 1NZLR at page 620. I have on a number of occasions cautioned the use of authorities from other jurisdictions without checking the basis of which those decisions are made, with the Western Samoa legislation. The simple fact is that the judge in the two cases which I have cited made the statements on the basis of the Code of Civil Procedure of the then Supreme Court of New Zealand which is completely different from the Supreme Court Code of Western Samoa. In brief, actions are commenced in the Supreme Court of New Zealand by a writ of summons. In the cases cited they were commenced by notice of motion and they were expected to be determined on the affidavits. The authorities on caveats in the New Zealand Courts refer to a summary procedure of the hearing but where there is a dispute as to the facts that procedure should not be adopted.

Rule 10 of the Western Samoa Civil Procedure Rule requires that every civil proceeding in the Supreme Court shall be instituted either by way of action or by way of motion in accordance with the Rules. Rules 11 and 12 are as follows:

"11. Actions - The following proceedings shall be instituted by way of action:

- (a) Every proceeding for the recovery of debt or damages
- (b) Every proceeding for the recovery of land or chattels
- (c) Every proceedings for an order for specific performance

12. Other civil proceedings - Except where otherwise provided by any Act or by any Rules made thereunder or by any order of the Court, all other civil proceedings shall be commenced by way of motion."

It follows that as the relief sought is not within Rule 11 that the proceedings which are before the court are in the appropriate form. There is no equivalent rule in Western Samoa to Rule 172 of the New Zealand Code of Civil Procedure. That Rule is as to the mode of giving evidence and that evidence is to be oral evidence given in Court, affidavit evidence in certain circumstances can be used. Rule 61 of the Western Samoa Rules is as follows:

"In any civil proceedings in the Supreme Court evidence may be taken either orally or by affidavit, but subject to the provisions of Rule 58 in actions and other proceedings inter partes such affidavits shall not be admissible without the leave of the Court."

I emphasize in any civil proceeding. Rule 52 relates to witness summons and provides that in proceedings, which includes proceedings by way of motion, a summons may issue to any person to give evidence in that proceeding or to produce any document. I also draw to counsels attention that there is no provision in the Code or anywhere else for this Court to give a declaratory judgment as was envisaged in the Slater case. For those reasons I find that the application to remove the caveat would be fully and properly heard by the procedure which has been adopted. The notice of motion to strike out on those grounds must fail.

Turning to the argument that the Saleimoa Plantation has no standing to bring the action. It is said that sections 142 and 143 of the New Zealand Land Transfer Act are the same as sections 10, 11 and 12 of the Samoa Land Registration Amendment Order 1921 and that the methods for the removal of caveats as set out in Hinde on Land Law Vol. 1 from pages 258 onwards, should be followed. Once again, the provisions of the New Zealand Land Transfer Act are not the same as the provisions of the Samoa Land Registration Order of 1920 or the Amendment Order 1921. The argument in support of the motion to strike out is that the transfer to Saleimoa Plantation is void ab initio in that it was registered, or purported to be registered contrary to the Samoa Land Registration Order of 1920. Section 8 of that Order provides that no instrument of title shall in any manner affect the legal title to Land in Samoa until and unless such instrument is registered in accordance with the Order. Section 10 of the 1921 Amendment provides - that so long as a caveat remains in force the Registrar shall not register any instrument affecting the estate or interest protected by such caveat. At the date of registration or purported registration of the conveyance, the caveat was still in existence and the Act applied. The Registrar could not therefore register the conveyance. The purported registration is in my view ineffective. I am in no doubt that the purported registration is indeed contrary to section 10 and is of no effect.

The question thus arises. The registration being invalid has Saleimoa Plantation Ltd such interest as would enable it to initiate proceedings to remove the caveat? It is submitted on behalf of the Saleimoa Plantation that the law on striking out of a statement of claim is quite clear and that such statement of claim should not be struck out unless there is no possibility of the action succeeding. With respect I think the issue here is more fundamental than that, it is whether there is any right to bring the proceedings at all. There can be no doubt that

Saleimoa Plantation Ltd has an equitable interest in the Plantation under an agreement for sale which was entered into between the trustees of the Douglas Atoa estate and the Company. I have held previously that such an interest is sufficient for the Company to bring an action in trespass.

It may well be that the trustees of the Estate at present are holding the Plantation as a trustee for the purchasers Saleimoa Plantation Ltd. The caveat affects the interest of the registered proprietor, that is, Douglas Atoa, and his interest of course, can only be dealt with through his trustees. The trustees in the execution of their trust have decided to sell the plantation. There is no doubt in my mind whatsoever that they (the trustees) have a right to bring proceedings to require Joe Atoa to show cause why the caveat should not be removed. Counsel for the Saleimoa Plantation Ltd says that if the trustees have that right to bring such an action transferees from them have the same right. With respect I do not agree with that proposition. On the basis of the register (the purported registration being invalid) the only person who has the right to bring the action for the removal of the caveat are the trustees.

I am in no doubt that Saleimoa Plantation Ltd can bring proceedings against the Registrar of Lands requiring him to issue notices which he has failed to do under section 12 of the Samoa Land Amendment Ordinance. It may well be, and this is arguable, that Saleimoa Plantation Ltd itself can issue the notices under section 12 of the Amendment Ordinance. It may be that Saleimoa Plantation Ltd could bring proceedings against the Trustees of the Douglas Atoa Estate requiring them to take steps to have the caveat removed. I issue a word of caution, the lapsing of caveats after notices have been given is different in Western Samoa than it is under the Land Transfer Act in New Zealand. For those reasons therefore, while certain proceedings can be brought by Saleimoa Plantation Ltd, the present application for the removal of the caveat is not one of them. I hold that Saleimoa Plantation Ltd has no standing to bring these proceedings. That being the case the notice of motion to strike out succeeds on the first ground and the application by Saleimoa Plantation Ltd to remove the caveat is accordingly struck out. The question of costs will be reserved.