

**COLLIN TEKAHA -V- ATTORNERGY-GENERAL (REPRESENTING THE COMMISSIONER OF LANDS) AND KEITHIE SAUNDERS (REPRESENTING THE GROUP KNOWN AS THE HONIARA BEAUTIFICATION COMMITTEE)**

**High Court of Solomon Islands  
(Palmer C.J.)**

**Civil Case Number 197 of 2004**

**Hearing: 18<sup>th</sup> June 2004**

**Judgment: 21<sup>st</sup> June 2004**

*Mrs. Tongrarutu for the Plaintiff*

*Mr. Moshinsky QC and Mr. Waleanisia for the First and Second Defendants*

**Palmer CJ:** This is an application by inter partes summons filed 26<sup>th</sup> May 2004 for an interlocutory order restraining the Second Defendant from carrying out any further landscaping, building construction or disturbance to the property known as Fixed-Term Estate 191-011-93 or Lot No. 1403/111/H situated on a portion of land commonly known as the Rove Market until further order of this Court.

In order to be entitled to come to court for interlocutory orders, Plaintiff is required to establish a number of matters. First, that there are serious issues to be tried. On this issue, Plaintiff's claim is based essentially on a written agreement for the sale and purchase of the property referred to as Lot 1403/111/H from the Commissioner of Lands. See annexure "CT10" annexed to the affidavit of Collin Tekaha filed 24<sup>th</sup> May 2004 which described the offer of a fixed-term estate over the said lot number for a period of 50 years at a price of \$5,700.00. The price was paid on 1<sup>st</sup> October 2002 and grant instrument executed in favour of the Plaintiff on 9<sup>th</sup> October 2002 ("**the Grant Instrument**"). That grant instrument however has never been registered. The Plaintiff therefore has no proprietary right over the said land. What he has is an agreement which creates no legal interest in the property only an equitable interest.

He comes to court on the basis that the second Defendant had embarked on major landscaping and related activities on the same land which the Plaintiff alleges had been offered to him as a fixed-term estate and which he had purchased. He says he has other plans for that piece of land (hereinafter referred to as "**the Rove Market Land**") and doesn't want the work being undertaken by the Second Defendant obviously with the blessing of the Commissioner of Lands ("the Commissioner") from continuing.

The Defendants say there are no serious issues to be tried. Three grounds have been advanced in support of this contention: (i) mistake, (ii) Trespass and (iii) Specific Performance and Injunction.

**(i) Mistake:** The Defendants say that Lot 1403/111/H referred to in the agreement for sale referred to a different land located at Wind Valley Settlement and the fixed-term estate in parcel number 191-011-82 which was the property referred to in the Grant Instrument was another separate property owned by another person. The Defendants say there was a mutual mistake and so no meeting of the minds as to the property to be transferred. On or about 15<sup>th</sup> June 2004 the Commissioner rescinded the agreement on the grounds of mistake.

The subject matter of the agreement: On 23<sup>rd</sup> May 2002, the Commissioner responded to the application of the Plaintiff for extension of his fixed-term estate in parcel 191-011-66 to include the Rove Market Land. In his response the then Acting Commissioner of Lands granted approval for the extension. However when the offer was made by letter dated 26<sup>th</sup> September 2002, it referred to a completely different property, Lot 1403/111/H. And when the grant instrument was made a further different property was mentioned.

Although the earlier correspondences revealed a common understanding between the parties by the time it came to the execution of actual documents there was a clear mis-connection in the description of the subject matter earlier described. The offer of sale of a fixed-term estate in Lot 1403/111/H referred to a completely different property and the execution of the Grant Instrument also referred to a further different property. The Defendants say there is a mistake in the description of the subject matter which renders the agreement void. Mrs. Tongarutu says there is no such mistake as to the identity of the property and that the contract is binding in any event.

I think it is arguable whether the mistake in this case renders the agreement void or whether it is binding in any event. If the mistake renders the agreement void, that is the end of the matter regarding question of specific performance and damages. If however it does not render the agreement void, it still raises the question whether specific performance can be considered? The question whether specific performance can be considered in the circumstances is complicated further by the fact that the Commissioner had elected to rescind the agreement. Again whether he is entitled to do that will be dependent on the question whether there is a mistake. But even if there is no mistake the question remains whether the court would be prepared to order specific performance to the agreement or simply allow a claim for damages for breach of contract?

Whatever the outcome I accept there is at least an arguable case in so far as it relates to the fact whether the contract is void for mistake or not and if not, the question essentially of whether an order for specific performance would be appropriate in the circumstances or damages for breach. These are matters which can be determined at trial if the matter reaches trial stage.

However, for purposes of determining whether that is sufficient to grant an interim injunction at this point of time, I am not satisfied that has been made out.

**(ii) Trespass:** A claim for trespass to land is a direct interference with the possession of another's land without lawful justification. It is about directly entering upon land or remaining upon land in the possession of the plaintiff without lawful justification for doing so<sup>1</sup>. Thus only a person in exclusive possession of the land can sue. Possession connotes occupation or physical control.

The crucial point to bear in mind about the Rove Market Land is that it is registered land. The title vests in the Commissioner of Lands. Section 117(1) of the Land and Titles Act (cap. 133) ("**the Act**") provides that a registered interest in land cannot be created otherwise than in accordance with the Act. Section 109(b) of the Act specifies that:

*"Subject to the provisions of this Act -*

*(a) (not relevant)*

*(b) the registration of a person as the owner of a fixed-term estate shall vest in that person the fixed-term described in the grant thereof, together with all implied and express rights and subject to the all implied an express obligations, liabilities and incidents of that estate;*

*(c) (not relevant)"*

Section 113(1) in turn provides what those rights entail:

*"A fixed-term estate in land consists of the right to occupy, use and enjoy for a period of time fixed and certain at the time of the grant thereof, the land and its produce, subject to the payment of any rent and the performance of any obligations for the time being incident to the estate...."*

What these provisions ultimately reflect is that in order for the Plaintiff to be able to pursue an action for trespass he has to demonstrate that he has a registered interest

<sup>1</sup> Law of Torts in the South Pacific by Stephen Ofei at page 216

over the said land. In so far as he cannot show that, his claim for trespass raises no serious issue and cannot be sustained at the outset.

**(iii) Specific Performance and Injunction:**

The submission of learned Counsel for the Defendants under this ground relates to the application of section 18 of the Crown Proceedings Act [cap. 8] which forbids the granting of any order for specific performance or injunction against the Crown. However the court may make an order declaratory of the rights of the parties.

In so far as the relief sought is for specific performance as against the first Defendant, section 18(1) of the Crown Proceedings Act prohibits that and cannot be made.

In so far as the second defendant is concerned regarding restraining orders, even assuming that the serious issue before this court warrants a consideration of the issue of an interlocutory order against them, when it comes to the question of adequacy of damages, the Plaintiff's application must fail as damages is an adequate remedy whichever way the case is looked at. If assuming that the Plaintiff should win his case at the end of the day, there is no evidence to suggest that he cannot be compensated for his damages.

**Discretionary nature of the order:** Even assuming that the Plaintiff amends his writ and claim in favour of a declaration of his rights over the said property, and even assuming he wins his case at the end of the day, the remedy of specific performance is discretionary. The court will have to take all factors into account, including the fact that the Commissioner by letter dated 15<sup>th</sup> June 2004 had sought to rescind the agreement and offered to refund the expenses in purchase of the land. When all those factors are taken into account, the balance of justice in this case is not weighted in favour of the issue of an injunction.

**ORDERS OF THE COURT:**

**Application for injunction denied.**

**THE COURT**

Mr Moshinsky QC: I ask for costs.

Mrs Tongarutu: I ask for costs to be in cause.

Court: Costs follow the event - (the Defendants have been successful in resisting the application for interim injunction and to that extent have been inconvenienced and incurred costs and therefore entitled to their costs).

**THE COURT**