Masima v Hon. Tu'ilakepa

Privy Council, Nuku'alofa
(Judicial members : Morling, Burchett & Tompkins JJ)
Appeal 4/94

20 February & 28 April 1995

Hereditary titles and estates - time limitation - claim
Land - time limitation - claim - hereditary titles and estates
Limitation - time to claim - when runs from - hereditary titles and estates
Tofi'a - time limitation - when time runs

In the Land Court the appellant (plaintiff below) challenged the right of the respondent (defendant below) to succeed to the hereditary title (Tu'ilakepa) and to the four hereditary estates. This challenge was on the basis of a claim that when his father died in 1935 he was the eldest legitimate heir and that his elder brother should not have succeeded (in 1937) an he was born out of wedlock. An alternative claim was made that the present holder, recognised in 1992, lawfully could not succeed because he was the descendant of the immediately preceding title holder's third sister. An application to strike out both claims as time barred succeeded in the Land Court; and on appeal

Held:

1. The second claim was not time barred (i.e. caught by the 10 year limitation period in s.170 Land Act) in that although the immediately previous title holder died in 1977 the present title-holder was not appointed until 1992 and the appellants right of action accrued to him on that appointment.
2. The first claim was time barred (i.e. caught by s.170 Land Act) given the wording of s.170 and that that wording should not be read down to say it did not apply to an action concerning a dispute as to title to land.
3. Lack of knowledge and mistake as grounds for postponing the commencement of the limitation period were rejected. Legislative amendment of s.170 would be required to allow such; and in any event, on the facts the appellant with exercise of due diligence could have ascertained the true facts about the claim of born out of wedlock before the expiration of the limitation period.
4. The appeal was allowed to the extent of permitting the second claim to continue.

Cases Considered : Australian National Airlines v Newman (1987) 162 C.L.R.466
Halafihi v Kalaniuvalu (1945) 2 Tongan LR 149
Murray v Eliza Jane Holdings (1993) 6 P.R.N.Z. 251

Mount Albert B.C. v Johnson [1979] N.Z. L.R. 234
Pirelli Cable v Oscar Faber [1983] 1 All ER 65

Statutes considered : Land Act s 170
Fair Trading Act 1986 (N.Z.) s.43
Limitation Act 1980 (UK) s.32

Counsel for appellant : Ms Tu'ilotolava
Counsel for respondent : Mr Niu

Judgment

This is an appeal from a decision of Dalgety J sitting as judge of the Land Court. Proceedings have been brought in that Court by the appellant for the purpose of establishing what he asserts to be his rightful claim to be heir to the title of Tu'ilakepa and therefore to the hereditary estates of Talasiu, Ofu, Okoa and Vasivasi.

He brings his claim on two alternative bases. First he asserts that at the time of the death of his father, Siosaia Tupou, he was his eldest legitimate son and therefore should have been recognized as the heir. He claims that his elder brother Tevita wrongly succeeded to the title upon their father's death in 1937 because it was not then appreciated that Tevita was born out of wedlock. He further claims that he did not become aware of this fact until 1992. It will be convenient to refer to this basis of claim as "the first action".

The second and alternative basis of the appellant's claim is that, accepting that Tevita was born in wedlock and rightfully succeeded to the title, he is nevertheless entitled according to the laws of devolution of hereditary estates to be recognized as the legal heir because the male line of Tevita has ended. He accepts that upon Tevita's death his son Fonomanu succeeded to the title and hereditary estates, but he claims that because Fonomanu died without leaving a legitimate heir, he (the appellant) is the rightful heir. He asserts that the respondent, who was recognized in 1992 by His Majesty as the rightful heir, is a descendant of Fonomanu's third sister and therefore under the laws of devolution has no claim to be the rightful heir. We shall refer to this alternative claim as "the second action".

Both claims are denied by the respondent, who has also counter-claimed seeking an order for rectification of the relevant entry in the Register of Marriages relating to Siosaia Tupou's marriage so as to record it as having occurred on 24 May 1901. It is common ground that Tevita was born on 4 May 1902.

In his Amended Defence the respondent has pleaded, inter alia, that the appellant's claims are barred by reason of the provisions of s.170 of the Land Act. This plea was set down to be argued as a preliminary point by Dalgety J. He upheld the point and dismissed both actions with costs.

Dalgety J was of the opinion that both the appellant's actions were caught by s.170 of the Land Act. The section provides as follows:

> "No person shall bring in the Court any action but within 10 years after the time at which the right to bring such action shall have first accrued to some person through whom he claims, or if such right shall not have accrued to any person through whom he claims then within 10 years next after the time at which the right to bring such action shall have first accrued to the person bringing the same."

The learned trial judge thought there were two possible dates when the appellant's right to bring his first action accrued. He identified these dates as being in 1935, when Tevita succeeded his father or in 1971 when Tevita died. Tevita did not succeed to the title until 1937, but nothing turns on this.

His Honour rejected an argument that s. 170 should not be applied so as to bar the appellant's action because he did not become aware of any grounds for asserting Tevita's illegitimacy until 1992. Accordingly, he found that the appellant's first action was time-barred, it having been commenced in June 1993.

His Honour described the appellant's second cause of action as being a claim that "in 1971 he (i.e. the appellant) and not Fonomanu was the rightful heir." As more than

ten years had expired since this claim accrued in 1971, he held that this claim was also time - barred.

Counsel for the appellant Ms. Tu'ilotolava submitted that His Honour misconceived the nature of the claim made by the appellant in the second action. He dismissed that action on the basis that time ran from 1971 when Fonomanu succeeded to the title. In her submission the period of limitation in respect of this action commenced in September 1992 when the title was bestowed on the respondent.

With respect to His Honour, we think Ms. Tu'ilotolava's submission on this point is correct. It is not disputed in the second action that Fonomanu was entitled to succeed to the title and hereditary estates. The point at issue in that action is whether the appellant or the respondent is entitled to inherit the title and estates consequent upon Fonomanu's death. It is common ground that although Fonomanu died in 1977 the present title holder (the respondent) was not appointed until September 1992. In these circumstances we do not think it can be said that the appellant's right to bring the second action accrued to him until the appointment was made. Until it was made it cannot have been known with certainly who would be appointed heir, and the appellant could not have had any cause of action against the respondent.

It follows in our opinion that the second action was not time-barred and should not have been dismissed. Indeed, this was virtually conceded by counsel for the respondent.

However, the position so far as the first action is concerned is not nearly so clear. In that action the appellant claims that he, not Tevita, was entitled to inherit the title upon their father's death in 1935. The effect of s.170 of the Land Act is that the action must be brought "within 10 years next after the time at which the right to bring such action shall have first accrued to" the appellant.

Hence, the crucial question is - when did the appellant first have the right to bring his first action, the basis of which is that he was entitled to succeed to the title in 1937? In our opinion, the answer to that question must be that he had such a right upon Tevita assuming the title in 1937 following his father's death two years earlier. It follows that his first action must be held to be time-barred unless it can be said that time did not commence to run until 1992 when he first discovered (as he alleges) that Tevita was born out of wedlock and thus had no right of inheritance in 1937.

Ms. Tu'ilotolava presented a most able argument in support of her submission that the first action was not time-barred. She argued that, like other limitation provisions, s.170 should be strictly construed because it operates to deprive citizens of the right to prosecute claims otherwise available to them. For this proposition she relied on authorities such as Australian National Airlines Commission v Newman (1987) 162 C.L.R. 466. We have no difficulty in accepting the proposition, but it cannot be applied to give the words of s.170 a meaning they cannot bear.

Ms. Tu'ilotolava further submitted that the reference in s. 170 to the accrual of a right to bring an action is a reference to an action in tort or contract or to enforce an equitable right, and not to an action concerning a dispute as to title to land. We do not think there is any ground for reading down the words of s. 170 in this way, particularly as the section is contained in an Act which deals so comprehensively with matters of title. It is not contained in a general statute of limitations. Disputes as to title are the very sort of matters to which s. 170 is directed.

Ms. Tu'ilotolava also submitted that if Tevita did wrongly inherit the title in 1937,

it was a continuing breach of the laws of inheritance and of Clause 111 of the Constitution for Tevita's succession to continue to be recognised as valid. But even if this be the case, it does not remove the necessity of bringing an action within the time limit prescribed by s. 170, which speaks of the time at which the right to bring an action "first" accrues.

Our attention was drawn in argument to differences in the wording of s. 170 from similar legislation in other countries. We recognise that such differences exist and we agree that decisions given in other jurisdictions on other limitation provisions should not be applied too readily to the construction of s. 170. Nevertheless, we think they are of assistance in considering what we think is Ms. Tu'ilotolava's strongest argument, namely, that time did not commence to run against the appellant until 1992 when he first ascertained that Tevita was born out of wedlock.

We now turn to consider that argument. We must observe that, on the facts of the present case, the argument is singularly lacking in merit. It is difficult to imagine that the appellant, with reasonable diligence, could not have discerned the fact (if it is indeed a fact) of his brother's illegitimacy many years ago, and certainly within 10 years of his father's death in 1935. Moreover the effect of the argument, if successful, would be to show that two of the appellant's three sisters (possibly now deceased) were also born out of wedlock. Nevertheless, if the argument is valid it cannot be defeated by any unfortunate consequences it may have for other members of the appellant's family.

Ms. Tu'ilotolava submitted that the focus of s. 170 is on the time when a plaintiff becomes aware, or ought reasonably to become aware, of the facts which give rise to his claim, as distinct from the time when these facts occur. For this proposition Murray v Eliza Jane Holdings Ltd (1993) 6 PRNZ 251 was relied upon. It can be discerned from that the legislation there under consideration (s. 43(5) fo the Fair Trading Act 1986 (N.Z.) which is in pari materia with s. 170) looks to a conduct in breach of the Act giving rise to a claim rather than the resulting loss to the plaintiff. We do not think the decision assists the appellant's argument. We do not detect in the language of s. 170 anything to suggest that the focus of the section is on a plaintiff's knowledge of facts as distinct from the existence of those facts.

It was submitted, in the alternative, that if it be held that the words of s. 170 prevent an action being brought after 10 years has expired since the occurrence of the facts giving rise to the action, this Court should hold that it has an inherent jurisdiction to postpone the expiry date in appropriate cases. It was put that it was this inherent jurisdiction which was the basis of the decision in Halafihi v Kalaniuvalu (1945) 2 Tongan LR. 149, per Thomson C.J., to the effect that the commencement of the limitation period under the equivalent of s. 170 of the Land Act was postponed until an infant claimant reached the age of majority. But that decision rests on the principle that a limitation period cannot run against a claimant until such time as he is legally able to commence proceedings. Since an infant cannot commence court proceedings of his own volition, time cannot run against him. Other decisions to the effect that fraud may postpone the commencement of a limitation period rest on special and well settled principles that the courts will not permit a person guilty of fraud to profit from his own fraud.

It was submitted that it was appropriate for the Court to recognize lack of knowledge and mistake as additional grounds for postponing the commencement of a limitation period. We were referred to comparable legislation elsewhere, e.g. s.32 of the Limitation Act 1980 (U.K.) which provides that in some cases time does not run against a plaintiff

until he has discerned or could with reasonable diligence have discerned a mistake which has led him not to commence proceedings. It was said that in the present case it was the appellant's mistaken belief until 1992 that Tevita was born in wedlock that caused him to be ignorant of his right to bring proceedings within the period prescribed by s.170.

We think there are two answers to this argument. First, it was apparently assumed in other jurisdiction that legislative amendment of provisions broadly equivalent to s.170 was required to allow of mistake as a circumstance postponing commencement of a limitation period. There has been no similar amendment to s.170. Secondly, on the facts of the present case as they appear in the Statement of Claim, there is no basis for a finding that with the exercise of reasonable diligence the appellant could not have ascertained the true facts about Tevita's legitimacy (whatever they actually were) before the expiration of the limitation period.

Finally, we should refer to another argument based, by analogy, on cases dealing with the question when time begins to run under a limitation statute where a defendant's negligent conduct has caused damage which is not discerned by the plaintiff until long after the occurrence of the damage. In other jurisdictions different views are held on this question: see for example Mount Albert Borough v Johnson [1979] NZLR 234 and Pirelli General Cable Works Ltd v Oscar Faber & Partners [1983] 1 All ER 65. We think there is no real comparability between such cases and title and inheritance cases where the relevant facts are matters of public record.

It follows that, in our opinion, the appellant's first action is time-barred and was properly dismissed. However, as we have already stated his second action ought not ot have been dismissed. Accordingly, the appeal should be p rmitted to the extent that the second action should be allowed to continue. This will be achieved if the following orders are made:

1. Appeal allowed;
2. Orders made by Dalgety J. set aside;
3. In lieu of orders made by Dalgety J:
   (i) Paras 1 to 11 inclusive of the Statement of Claim struck out;
   (ii) All parties pay their own costs of the proceedings before Dalgety J and of the appeal.