

KEIL (ARNULF AND LAURA) v NONUMALO (FAIGA)

Supreme Court Apia  
McAlevey J  
17, 20 May, 4, 5 July and 25 August 1983

LAND LAW - agreement for exchange of land - Conveyance to complete the exchange transaction.

HELD: The Courts discretion was exercised to grant specific performance and order completion of the land exchange between the parties.

LEGISLATION:

- Property Law Act 1952 - S 3, 10
- Land Transfer Act 1952
- The Existing Laws Adjustment Ordinance 1961 - S 4
- The Samoa Land Registration Order 1920 - S 8
- Survey Ordinance 1961 - S 5, 7
- Land Survey Regulations 1939 - Regulation 127

R T Faai'uaso for Plaintiff  
R Drake for Defendant

Cur adv vult

This dispute originated from apparent consensus between the Plaintiffs and the Defendant in 1982. The Defendant owns land at Pesega fronting Vaitele Street. At the rear of this land is land owned by the Plaintiffs. There is a small Samoan style house on the Plaintiffs land. The Plaintiffs landholding included an access strip to Vaitele Street on the East of the Defendant's boundary. The Defendant wished this access strip to be transferred to his western boundary. The reason for this was that he owned an adjoining section to the East and he wished to amalgamate his holdings and erect a building.

An agreement was reached between the parties. This finding is made on the evidence and the pleadings. Paragraph 5 of the statement of claim "That the Plaintiffs and the Defendant agreed that the said access way would be transferred to the Western side". The parties initially agreed to share the survey costs but Mr Keil later changed his mind about this and made this clear before he signed a scheme plan. The Defendant was informed of this before work commenced.

One can then appreciate the Defendants contention that the Plaintiffs should have known where the proposed boundary was. The drain was also on their land and they must have known of it. For the boundary of the access way to join the boundary of the Plaintiffs land at the rear the drain is necessarily included in the access way.

The manner in which this agreement was documented has been challenged by counsel for the Plaintiffs.

A scheme plan was signed by Mr Keil and by the Defendant. Subsequently a subdivision plan was deposited. The subdivision plan now shows the Plaintiffs land as including a strip leading to Vaitele Street on the Western side of the Defendants property. The scheme plan was the only document signed by Mr Keil. This plan does not take the form of a deed.

Section 10 of the Property Law Act 1952 provides that an exchange of land shall not be valid unless made by deed. Section 3(3) of the Act provides that Section 10 does not apply to land or instruments under the Land Transfer Act 1952. Land Transfer Act is not part of the law of Western Samoa.

The Existing Laws Adjustment Ordinance 1961 directs that statutory provisions shall be read with the necessary modifications to make them applicable to the conditions of Western Samoa (Section 4). The Samoa Land Registration Order 1920 instituted what is in effect a deeds registration system and this is the legislation which stands in place of the Land Transfer Act as far as transfers of interest in land are concerned. The Court must look to that legislation in this context.

It is submitted for the Defendant that a conveyance was not necessary as the areas of land in the possession of both parties remained the same. Although the areas may have remained identical it is not the same land. The agreement was in effect for the transfer and exchange of land.

Under the Survey Ordinance 1961 a scheme plan of a proposed subdivision is to be submitted before a subdivision plan may be deposited. The purpose of this legislation is to prevent a person disposing of part only of his land without complying with the necessary formalities.

Section 5(1):

"Where any land is subdivided into allotments for the purposes of any disposition of land and any such allotment has an area of less than 5 acres, a scheme plan showing the proposed subdivision shall ..... be ..... submitted ..... for ..... approval."

Section 7(3):

"Until a plan of subdivision has been deposited, it shall not be lawful for any person to sell any land comprised therein."

Section 8 SLRO provides:

"No instrument of title shall in any manner affect the legal title to land in Samoa until and unless such instrument is registered in the Land Register in accordance with this Order."

The term "instrument of title" is to include any "conveyance" (section 4), "Conveyance" is defined in Strouds Judicial Dictionary 3rd edition Volume 1, at p.604 as an "instrument conveying from one person to another person an interest in land".

The approved scheme plan and the deposited subdivision plan have not transferred any interest in land. That is not the purpose of such plan in terms of the Survey Ordinance. They open the way for disposition of the land. There is no existent instrument of title to be registered in the Land Register. The documentation has not transferred an interest in land between the parties. A conveyance is necessary to transfer an interest in land. The scheme plan and the deposited plan are not instruments of title. Regulation 127 of the Land Survey Regulations 1939 permits a plan of survey to be signed by the owner of the land or his agent. Mr Keil signed the scheme plan but not his wife.

The form a conveyance is to take is not specified by statute or regulation. The Court takes the view that a conveyance should be by deed. This is the traditional form and there are obvious dangers in departing from the strict requirements of a deed especially in regard to the subject matter of land.

The scheme plan is in sufficient form for the purposes of the Land Survey Regulations but not so as to constitute an instrument of title under the Samoa Land Registration Order.

Here there was an oral agreement between the parties. The Plaintiffs have purported to terminate this agreement. It is difficult to see on what grounds they may do so. Even if the Plaintiffs precise knowledge of the boundary was acquired after the agreement. This factor would only be of assistance if the Defendant either knew or must be taken to have known of their mistake and the Court does not make such a finding.

An oral agreement relating to land may be enforced in certain circumstances under the head of specific performance. Such a prayer is not raised in specific form in the Defendants pleadings but they do contain a prayer for general relief as do the

Plaintiffs pleadings. Here there was certainty of agreement, identical areas of land would be exchanged. The Defendant has now built over at least part of the land comprising the old access way in reliance upon the agreement and part performance of the contract is thus relevant.

Specific performance is an equitable remedy and the principles on which the Court should make its decision are discussed in Halsburys Laws of England 3rd edition Volume 36.

"The discretion of the Court to grant specific performance is not exercised if the contract is not equal and fair."  
(page 299).

Here the parties may not have had equal knowledge at the time that the contract was entered into. This however must be viewed in the light of the Defendants allegation that the Plaintiff should have known the location of the boundary.

"In some cases a Plaintiff is not granted specific performance except on certain terms imposed to avoid hardships which would otherwise result to the defendant."  
(page 302).

The Plaintiffs exchanged a negotiable access way for one which was non negotiable unless certain work was carried out. Save for the evidence of Mr Keil that he was mistaken as to the boundary it is difficult to appreciate why the Plaintiffs entered into such an agreement. Weight must then be given such evidence by the Court.

In applying the law the Court again recollects the evidence and sentiment of Mr Keil that if the Defendant sealed the new access way it "would be Ok with me".

The Defendant has counterclaimed seeking damages. His building is to be a commercial venture providing both shopping and accommodation facilities and he has obtained in writing expressions of interest from prospective tenants. His claim is based on the delay in completing the building and is in the total sum of \$19,022.06.

An interim injunction restraining the Defendant from constructing a building was granted on the 29th of September 1982. The Plaintiffs provided the usual undertaking as to damages and the Defendant was to have the right to apply upon 7 days notice to rescind the order.

An application to rescind the order was filed on the 1st of November 1982 and by consent the injunction was rescinded on the 9th of November.

The Defendants counterclaim is for \$11,222.06 being increased costs and wages and \$7,800.00 being one months loss of rental income. Evidence was given by the Defendant that the builders workmen could not start again as soon as the injunction was rescinded because they were working on other jobs. He also gave evidence that certain work had to be done again due to the delay and that the boxing on the beams was damaged and took \$1,000 worth of material. The builder did not give evidence and it is difficult to appreciate how the claim for \$11,222.06 is made up.

The claim for \$7,800.00 is based upon the Defendants hopes of rental income for one month. His expectations as to initial rental income may be accurate, conservative or optimistic. It would have been possible for the Defendant to have applied to the Court earlier to rescind the injunction.

The Court is satisfied that the Defendant has suffered some financial loss by reason of the delay and that the Plaintiffs must honour their undertaking as to damages. it is not possible to calculate this amount with any hope of accuracy but the Court is also satisfied that the amount of such loss has not been great.

In considering what is a proper judgment the Court has had regard to the equitable principles mentioned earlier and the fact that the Defendant has suffered a small loss.

This decision shall constitute an instrument of title pursuant to the Samoa Land Registration Order subject to the conditions hereinafter mentioned. The Court makes a conditional order for specific performance of the oral agreement as follows:

That the Registrar shall attend to such formalities as are necessary to effect the intended conveyances shown on Deposited Plan 4582 so that the Plaintiffs own the strip of land detailed on the plan on the Western boundary of the Defendants land detailed on the plan and so that the Defendant owns the balance of the land fronting Vaitele Street, subject to the Defendant paying two thirds of the costs of sealing the open drain and making the access way negotiable for a vehicle. The object of the works is that the access way should be made negotiable. In order for this to be done it is clear that the drain should be sealed. It may not be necessary to seal the remainder of the driveway in order to make it negotiable. It may be that a fill of some sort will provide a less expensive and practical solution.

The Registrar shall implement this order on receiving a memorandum signed by both counsel certifying that there are no outstanding matters.

If neither party wishes to initiate any matter then this judgment shall be declaratory only and there shall be no conveyance.

In the event of the other refusing to pay his share of the necessary sealing then either party may act unilaterally.

The Plaintiffs may carry out the necessary sealing work and make the driveway negotiable. Upon further application to the Court to be served upon the Defendant they may seek judgment for the reasonable costs of two thirds of such work and seek an order that the Defendant pay the costs of the application. Upon entry of such judgment it shall also constitute an instrument of title to effect the conveyance described above.

The Defendant may carry out the same work with the same implications and consequences save that the Plaintiffs liability is to amount to the costs of one third of such work.

In conclusion then:

- (a) An agreement was concluded between the parties
- (b) Such documentation as there is concerning this agreement was insufficient to transfer an interest in land
- (c) This agreement should be enforced having regard to the fact that the Defendant altered his position in reliance upon it
- (d) The Court should grant a measure of relief to the Plaintiffs being the costs of sealing this drain and making the driveway negotiable. Full relief is not appropriate as the Defendant should be compensated for loss by reason of delay by paying two thirds only of the cost of such works.

The Plaintiffs shall pay to the Defendant the sum of \$80.00 costs of application to rescind the injunction but there shall be no other order as to legal costs.