

Board of Trustees of the Congregational Church of Samoa v Fililia I'aulalo Pouvi and Tapusoa Maluaufai: Having your Cake and eating it in Samoa

By Sue Farran^[*]

This was a case in the Supreme Court of Samoa heard in July 2002, for which the judgment of Chief Justice Sapolu was handed down on 14 February 2003. The case is unreported at present.

The Facts

The case is a land dispute case between the Congregational Church of Samoa, which was the successor in title to the London Missionary Society (LMS) in Samoa, and representatives of the family Iaulualo of Faala, Palauli. The land in dispute was land referred to a Paepaelauniu at Faala, Palauli, upon the eastern part of which there had been for over one hundred years a church or churches built and owned by first the London Missionary Society and then the Congregational Church. The eastern part of the land had also been occupied for a number of years by members of the Iaulualo family, who occupied land which was not used by the church. The land had originally been given to the London Missionary Society by a Samoan pastor in 1888. A church had already been built on the site at the time of transfer. The first building had been replaced by a second building. The Congregational Church replaced the London Missionary Society and took over their property. The church lands in question and the church was transferred to them in 1968/69. In 1984 a third church was built but not on the land in dispute.

The residential site (*maota*) of the title of the Iaulualo family was linked to the land in dispute.

The Legal Issues

These relate to title to land, whether it is freehold or held under customary land tenure; the question of adverse possession and the operation of the law concerning limitations in Samoa; and the question of damages for harm suffered as a result of an injunction being granted against the defendants.

The Claim

The plaintiffs claimed that they were the freehold owners of the land and were registered as such. The defendants' defence was that the land was customary land and the traditional land associated with the title of their family. They also claimed in the alternative that if the land was found to be freehold then they had acquired rights by adverse possession.

The plaintiff's sought an order of eviction, the defendants in their counter claim conferment of title and damages for harm caused as a result of the plaintiffs obtaining an interlocutory injunction against them. This was not pursued at trial.

The Outcome

The court found that the Congregational Church were the registered holders of the freehold title of the land. However the court also held that the defendants had been in adverse possession of part of the land for a period exceeding twelve years, which is the limitation period for land claims under the *Limitation*

Act 1975 in Samoa. The court granted the defendants customary title to that part of the land which they had been occupying.

Legal Principles

Ratio Decidendi

The Chief Justice addressed the issues raised in four parts: the question of title to land; the question of adverse possession; the current status of the land; the issue of damages following from an interlocutory injunction.

1. Title to Land

The church had written evidence dating from the original deed of gift in 1888 that the land had been transferred to them by a Samoan pastor, for the purposes of the church. A church had already been built on the land at this date. This transfer was recognized and registered by the Land Commission and a court grant made in 1894. In 1921 the land was registered in the name of the London Missionary Society (LMS) as a fee simple and classified as European land in accordance with the classification categories provided in the *Samoa Act 1921*. In 1968 the LMS conveyed land held in fee simple to the Board of Trustees of the Congregational Christian Church in Samoa, which replaced the London Missionary Society. A second church had been built on the site of the first church in 1954. In 1984 a third church was built, but on a different piece of land. From sometime before 1888 to 1984 the church – first the LMS and then the Congregational church – has been in occupation of the land.

The defendants claimed the land to be the traditional residential site associated with the title of their family and that the Iaulualo family had been living on the land for over one hundred years. The documentary evidence produced to support the claim purported to be a decision of the Land and Titles Court in 1917. This was rejected by the court due to certain inconsistencies between this evidence, historical fact, and the copy held by the Registrar of Land and Titles. In particular, the documents purported to be decision of the Land and Titles Court established under the *Constitution of the Independent State of Western Samoa* but at that date, 1917, there was no such court and no constitution.. Also the information on the document produced in court was not the same as that held on the court file. It also seemed probable that if there was a dispute in 1917 it was about the title rather than land. Other evidence relied on by the defendants to support a claim to the land was the existence of five burial sites on the land. The age of these was not certain. Reference to the land as the *maota* of the title in one of the books of honorific titles was also made.

The court found in favour of the plaintiffs on this point, on the basis of the strong documentary evidence in their favour. The Congregational church was held to be the registered owners of the fee simple

2. The question of adverse possession and acquisition of possessory rights

The court found that the church had occupied the land for over one hundred years, this being evidenced by the presence of the church buildings of the first and second churches. When the third church was built the second church – which had been built on the site of the first – was pulled down. From 1984, therefore, there was no church on the site and the site remained vacant from that date until the date of the dispute. The churches had not occupied the whole area of the land in question but only the western portion, leaving the eastern portion of the land unoccupied by the church.

The defendants relied on a survey plan dated 1917 – which may have been drawn up in relation to the dispute over title in 1917 – which showed the church on the western side of the land and another building on the eastern portion, which the defendants claimed belonged to a member of their family, later the title

holder. The authenticity of this sketch plan which had the same reference number as the dispute documents referred to above – the authenticity and genuineness of which had been rejected – does not appear to have been challenged. The court accepted this as evidence of occupation of the land at least from 1917. Further evidence was proffered that the defendant family were in occupation of the land in 1958, 1959 and 1961. The court found that the plaintiffs' predecessor and defendants co-occupied the land – which was not large – peaceably until at least 1954 when there was some dispute over the construction of the second church – which was resolved through conciliation. A further dispute arose in 1984 regarding the removal of construction materials from the second church to the third church. In 1988 the defendant occupants fired guns to keep a survey team off the land and a fight occurred between the Land Committee of the church and the defendants. Police intervened. These occurrences were held by the court to be evidence of the defendants' intention to possess and own the land. Other evidence accepted by the court on this point was the burial sites of members of the defendants' family. The court also held that reference to the land as the traditional residential site of the title holder was evidence of the defendants' intention to possess and own the land.

In 1988 the plaintiff church was granted an interlocutory injunction against the defendants to prevent the construction of a double storey building on the land. The plaintiffs also filed an action for possession of the land against the defendants. A further injunction was granted in 2001 on the plaintiff's application and a claim to evict the defendants was filed.

The requirements for establishing a title to land by adverse possession were stated by the court to be 1) that the true owner has either been dispossessed or discontinued his possession of the land and 2) that the claimant has been in possession of the land for the full limitation period – which is over twelve years in Samoa – with the necessary intention to possess the land for the time being to the exclusion of all other persons including the true owner and that this possession has been adverse to the true owner's title. Possession was understood by the court not to be restricted to actual occupation but to include exclusive physical control over land combined with the necessary intention to possess. For possession to be adverse the court adopted with approval the reasoning of Cooper J in *McDonnell v Gibbon* (1904) 23 NZLR 660 at 662-663, that possession must be for the full period, actual, open and manifest, exclusive and continuous.

The court found that the church had not discontinued possession prior to 1984. However the court was prepared to consider adverse possession of part of the disputed land – the eastern part. The court accepted evidence supporting the defendants that they had been in occupation of this part of the land since 1917, building a number of houses on the site as well as burying members of the family on the land. The court held that the church had been dispossessed of the eastern part of the disputed land either by 1965 or earlier. The claim by the defendants to the western and seaward part of the land failed, because the court was not satisfied that the claims relating to buildings on this part of the land were there before the 1988 survey by the church.

3. The Status of the Land

Having held that the defendants had established a claim to the eastern part of the land by adverse possession the court had to rule on the status of the acquired land. The defendants claimed that the land was customary land belonging to the title Iaulualo. The court had already established that the land was freehold land. The court held that conferring freehold title on the defendants would make them individual owners of the land which would deprive the title Iaulualo of the residential site associated with the title – an idea founded on customary land and not freehold land. To address the issue the Court relied on its powers under Section 31 of the *Judicature Ordinance* 1961: 'The Supreme Court shall possess and exercise all the jurisdiction, power and authority, which may be necessary to administer the laws of Samoa'. Using this power, the court held that the land which had been claimed by the defendants by adverse possession and used by them in accordance with Samoan custom and usage was customary land pertaining to the title Iaulualo. The court also relied on its interpretation of s9 (1) of the *Limitation Act*

which bars the government from bringing an action to recover land after a sixty year period. The court held that where this happened an individual might, by adverse possession, acquire freehold title, thereby illustrating the possibility of moving from one category of land holding to another.

Obiter Dicta

There are a number of points raised in the case which although not directly of relevance to the decision are of interest. First, the court accepted by implication that the action brought was a representative action, the family being represented by the current title holder, who in fact was not named as a defendant. Indeed the defendants did not appear at trial. Secondly, the succession of the Congregational Church to the London Missionary Society was noted and unchallenged. This seems to have taken place during the 1960s.

Thirdly the history of land registration was set out. The original gift was evidenced in a memorandum in 1888. In 1889 a Land Commission was set up under Article II, section 2, the *Final Act* of the Berlin Conference on Samoan Affairs. Between 1889 and 1893 the London Missionary Society applied to this Commission for recognition of its title and registration thereof. The Land Commission in 1893 found the claim to be valid and this was confirmed in 1894 by the Supreme Court of Samoa and a court grant issued. Under the Samoa Act 1921 (NZ) – which replaced the *Samoa Constitution Order* 1920, the land in dispute fell under the category of ‘European land’. The *Samoa Land Registration Order* 1920 provided for registration of European land along with other categories of land, and in 1921 the land in dispute was so registered. Under Article 123 of the *Constitution of Samoa* 1962, land categorized as ‘European land’ became freehold land.

Fourthly the history of the Land and Titles Court is evident in the judgment. This came about in 1937 under the *Native Land and Titles Ordinance* which set up a Land and Titles Commission, which in turn became the Native Land and Titles Court and then the Land and Titles Court which exists today. Originally Samoa had a Land and Titles Commission under German administration and then a similar Commission under the *Samoa Native Land and Titles Order* 1920 implemented by New Zealand.

Finally the court spent some time dealing with damages sustained by the grant of an interlocutory injunction to the plaintiff. This matter was not pursued at trial, nevertheless the court addressed it. Where an interlocutory injunction is ordered and the defendants consider it has been granted in error, the correct procedure is to apply for a discharge of the injunction and not to disobey it – which then becomes contempt of court. Where a defendant considers that damages have been suffered as a result of the injunction then the correct procedure is to apply for an enforcement of the plaintiff’s undertaking as to damages. If there is no such undertaking then the court cannot award damages for loss suffered by the defendant as a result of the injunction wrongly made. It is the undertaking which confers jurisdiction on the court and is given to the court not the other party. The enforcement of the undertaking by the court is discretionary. The onus of proof lies on the defendant to show that the interlocutory injunction was granted in error and damages suffered as a consequence. The defendant has to satisfy tests of causation and establish quantum.

Comment

It is a feature of the law relating to land, in the USP region, that there are a number of different forms of land tenure, including, as raised in this case, customary land tenure and freehold land tenure. The latter is not found in all the island countries of the region, but is found in Samoa, where about 6% of land is held under freehold tenure. It is also common to find some movement between different forms of land tenure both historically and in the present day. Land held under customary land tenure may be taken and become state or public land, or leaseholds may be granted over customary land or freeholds. Alternatively – as happened in Vanuatu on independence in 1980 – freeholds may be abolished and the land formerly held under freehold goes to the State or back to the custom owners. So a degree of change in the categorization

of land by form of tenure is not that unusual. Sometimes this change is temporary, as where a fixed term lease is granted over freehold, customary or state land and the reversionary interest is still held by the original title holder, or it is permanent, as where for example, all freehold in the Solomon Islands became either perpetual estates or fixed leases in 1977.

What is interesting about this Samoan case however, is that the legal framework applicable to one form of tenure – here freehold, is used to justify the grant of a different form of tenure, namely customary tenure. The acquisition of rights by adverse possession and the barring of an action to recover land cannot apply to customary land. This is clearly stated in s 4 of the 1975 Act. It can however apply to freehold land. Under the *Samoa Act* 1921, the land in question had been categorized as European land which under that Act meant ‘land held from the Crown for an estate in fee simple’. The classification of land as ‘European’ changed in 1962 to the category ‘freehold’ under Article 123 of the *Constitution of Samoa*, and Samoan land became customary land. Implicitly, if title to the freehold failed for some reason, the land would revert to the Crown – prior to 1962, or the State post 1962. There was no suggestion in the Constitution or the law which proceeded it that freehold land would revert to being Samoan or customary land.

As has been indicated above, the claim to title of land based on customary land tenure failed. The evidence adduced to support the claim, such as oral histories, records of honorific titles associating the *matia* title with the land, the location of burial sites and a very dubious decision of a so-called Land and Titles Court, which at the time of the alleged evidence did not exist, was all rejected. Yet some of this evidence was held to be sufficient to establish adverse possession of the land, for example the sketch survey map of 1917 was accepted as evidence of intention to possess as owner because of the presence of buildings indicated on the sketch, even though the written evidence to which it was attached had been rejected as suspect.

The doctrine of acquisition of title by adverse possession is an introduced concept. It requires that a person comes onto the land of another without permission and uses the land openly in a way in which others are aware of the use, and uses it exclusively and continuously, without the owner’s challenge, with the intention of taking complete and exclusive control of the property and using the land in such a way as to deny the owner a claim to title. It has been held not to apply in the case of land held under customary land tenure, largely because it is not unusual with customary land tenure for the owner to give up possession or to leave the land for long periods of time. Case law from the South Pacific region clearly establishes that long possession or occupation of customary land, by others will not of itself support a claim to title. This will particularly be the case if there is either express or implied permission for the occupying claimants to be on the land, or at least no one has objected to them being there.

The criteria for claiming title by adverse possession was clearly set out in this case. In considering these one by one there are some uncertainties as to how the court reached the decisions that it did.

First, and essentially, the true owner must be either dispossessed or discontinue the possession of the land. However, the court confirmed the freehold claim of the church. It is evident that certainly until 1984 the church occupied the land and the survey of 1988 by the church indicates that this continued to be the case even after the third church was built on other land closer to the pastor’s house.

Secondly, the claimant must have been in occupation for the full limitation period. This period - the limitation period – starts from either the time of dispossession of the paper owner, or the discontinuance of possession, and then must be a full twelve years. This is the period set out in the *Limitation Act* of Samoa limiting actions in relation to land. The *Limitation Act* of Samoa is a 1975 Act. There is no indication in the Act that it was intended to be retrospective, yet the court found that adverse possession of the land was found to have been established either by 1965 or previously. The Act was not in force at this time. As from 1975 twelve years was the time period within which claims for land could be brought. This period would only run – in the case of land – if the true owner’s title was threatened by adverse possession. It is

from this moment that the right of action arises. If the running of time is interrupted then it must recommence. In 1984 there was a dispute relating to the land in which Office of the Registrar of Land and Titles had to intervene to protect the claim of the church. Arguably this interrupted any running of time. If it did not then the interlocutory injunction in 1988 might have done had not the twelve year time period, from 1975, been completed by then. If the *Limitation Act* did not apply retrospectively, then the law which applied to pre-1975 was the 1950 *Limitation Act of New Zealand*, which was repealed by the 1975 Act. Section 7 of the *New Zealand Act* provides a similar period of limitation for actions relating to land and a requirement of adverse possession. There is no discussion of which laws applied to the period under consideration in the court's judgment.

Thirdly, the possession must be with the intention to exclude all others. However the court held that the church and the family of the defendants co-occupied the land, indeed for many years quite peacefully. The church cannot have been unaware of the burial sites of the defendant's family members nor of the common knowledge that the land was claimed as the residential site of the family. Indeed until the disputes between the two parties started it is not clear how this element was manifested.

Fourthly, the possession must be adverse. In other words it must be intended to strike at the true owner's title and not to claim a lesser or different right. As the claim demonstrates, however, the defendants were claiming a different right – that of the *maota* – a traditional or customary land claim.

The court managed to avoid some of these problems by exercising powers under Section 31 of the *Judicature Ordinance*, and effectively sub-dividing the land retrospectively, so that the claim of title by adverse possession could be examined with reference to only part of the land – the eastern part – in other words a claim to a part of the whole. In support the Chief Justice referred to his own judgment in the case of *Nelson Mackenzie Ltd v Sale Lamosi* (1995) (CP 125/93) This is an unreported judgment for which leave to appeal to the Court of Appeal was sought in 1996 (8/95) but refused. The court was unable to find any English or New Zealand reference to claims of adverse possession to part of undivided land. There is however authority in Australian law and English law which suggests that adverse possession may be asserted respect of part of the land, whether that land is divided on its surface or by stratum – i.e. at different levels.

Whether the power conferred on the court by the *Judicature Ordinance* 1961 extends as far as suggested by this case has not been tested. The reference in the section is to the administration of laws of Samoa. The Ordinance is subject to the *Constitution* as the supreme law of the country. In Samoa – unlike some other jurisdictions of the Pacific – there is no reference in the Constitution to the application of customary law to land matters. Section 100 of the *Constitution* states that *matia* titles shall be held in accordance with Samoan custom and usage. Prior to independence custom law was applicable for the purpose of ascertaining the rights to customary titles and land. While the *Samoan Act* was replaced by the *Constitution*, the *Land and Titles Ordinance* remained in force but was repealed by the *Land and Titles Act* 1981. The court did not however refer to or rely on this Act probably because s9 of the Act severely restricts the power of a court to declare registered freehold land to be customary land.

The court also relied on s9(1) of the *Limitation Act*, which bars recovery of land by the government after a sixty year period. Under Article 101 (4) of the *Constitution* Public land – formerly Crown land - is 'land vested in Samoa being land that is free from 'customary title and from any estate in fee simple'. The court held that an individual acquiring title to government land would acquire freehold title. It is not self-evident why this should be so, and no authority was referred to for this proposition.. Equally it might be argued that the land reverted to the custom owners.

Even with subdivision however, the court fails to address the issue of point one required for successful adverse possession namely the discontinuance of possession or ouster of the title holder. There was no evidence that the Church had ever built on the eastern part of the land or used it for any particular purpose.

Had it therefore ever been ousted from possession or followed into possession by the defendants? Nor was there any evidence as to how long before the 1917 sketch plan, the defendants might have had a building on the land. The possibility that the defendants were tenants at will was not considered despite the fact that there was evidence of peaceful co-existence of the parties for a number of years.

The adverse possessor acquires a possessory title to the land. Until the expiration of the limitation period such a title is enforceable against everyone except the true owner. After the expiry of the limitation period the possessory title is also enforceable against the true owner, whose own title is extinguished by the running of time. The possessory owner may, if there is provision, ultimately register the title to the land. If a claim to title by adverse possession succeeded then the claim would be to the title previously held by the true owner – here freehold. In this case however adverse possession is used as a means for conveying customary rights to land. Thus using the rules applicable only to a freehold situation to confer a non-freehold benefit. Normally if a person is found to be in adverse possession they will acquire the title that the original holder had. This is because their possession is adverse to the title of the original occupant/possessor. In English law – the source of the concept of acquisition of title by adverse possession - there has recently been some movement away from the idea that possession must be adverse to title, and support for the idea that possession by itself is sufficient. The House of Lords has held that only factual possession is required not an element of adverse possession or confrontation or inconsistent user ouster or intention to use the land so as to exclude the true owner.

The justification which the Chief Justice seems to rely on for switching tracks from freehold to customary land tenure is that it would be inconceivable for a title holder to hold title without land because the two are inseparable. Yet there are many cases in Samoa where the dispute is over the title alone and not the land. Indeed in this case evidence was proffered— although of dubious veracity – concerning a dispute over the title in 1917. In previous case law it has been held that even where freehold land is occupied in a traditional manner, i.e. by the family with the title holder acting as matia, the land remains freehold. Under the *Land and Titles Protection Ordinance* 1934 s 16 there is provision for the Land and Titles Court to reach a finding on whether or not freehold land is held in accordance with ‘the usages and customs of the Samoan people’. If it is, then s15 applies and the land can be declared to be land held according to the usages and customs of the Samoan people. Although this Ordinance has been repealed there is similar provision in the *Land and Titles Act*. This possibility was not referred to in the judgment.

One major advantage of freehold land is that the title holder of freehold land is less restricted when it comes to the alienation – including mortgaging of the land, although any proceeds of sale of the land, for example, may still be regarded as property held on trust for the clan or family. As it is, confirmation that the land is held under customary title means that the possibilities of dealing with the land, by way of lease, or mortgage are likely to be more curtailed, and future disputes as to who is the rightful title holder entitled to manage this land, which are a notorious feature of customary land tenure in Samoa, are more probable.

A further comment needs to be made and that is the common confusion which occurs between the acquisition of rights by way of adverse possession and the limitation of rights which results from the expiry of time. In this case reference is made to the running of time under the *Limitation Act*. In Samoa the time limit for the bringing of actions in relation to land is twelve years . Consequently where a state of affairs is allowed to continue without interruption – such as court proceedings – then the eventual plaintiff may find that he or she is time barred from pursuing an action. The result of this is that the status quo, for example, the occupation of the land by the defendant, is allowed to continue without interruption. Adverse possession is not a positive way of acquiring title but a negative way. What has happened is that the plaintiff has lost the right to a remedy and therefore their right is unprotected. The claim that an action is time-barred will usually be brought by the defendant, for example, against an action for ejectment, or eviction or an injunction to refrain from developing the land in some way. It does not follow inevitably

that the court, in granting relief from forfeiture or refusing an order of eviction, must then confer good title on the defendant. In Samoa the confusion is perhaps inevitable because the *Limitation Act* itself states that the possession must be 'adverse' to preclude recovery by the owner. Possession will be adverse if it is open and not secret; peaceful and not by force; and not by consent of the owner. While there is little doubt about the first criteria being met in this case, there is the issue of the use of a firearm as regards the second, and certainly it could be argued – although it was not, that there was for a considerable time at least, implied consent to the occupation of the land by the defendants. If there is permission, implied or express, then a claim of acquisition of title by adverse possession must fail.

While it is often said that the law abhors a vacuum, it is suggested, with respect, that there were other avenues available to the court in this case. As has been indicated above, the title acquired, if acquired by adverse possession would normally be the same title – here freehold. Alternatively a tenancy at will or at sufferance might have been found – consideration is not essential – or indeed an equitable lease of uncertain duration. It might be argued that none of these would have met the requirements of land as a *sine qua non* of traditional title. However, it must be the case, even in Samoa that some titles (*matai*) have lost their *maota* (residential sites). Indeed in this case the title holders had still lost their residential site which fell under the western, freehold portion of the land.

Another possible route would have been to find that the terms of the original gift of land which were incorporated into the Supreme Court grant of 1894, had not been observed. These terms were that the land was a gift to the Mission (LMS) for religious purposes. When the new church was built in 1984 on a different site, the old church was dismantled and at the date of the dispute the land was found to be vacant. Indeed the court was not impressed by vague plans that future church development would take place on the land. If the terms of the original gift were no longer observed then it could be argued that the owners of the land were those who held the reversionary title. In this case, following the classification of freehold land back to European land, that would be the State (formerly the Crown), not the original native title holders.

It is to be wondered however, if this decision sets a useful precedent. Does it mark a route whereby freehold land in Samoa – which is of increasing value – will gradually be claimed back as customary land? Is the decision a useful step forward for development or is it an example of how difficult it is in Samoa to move away from the power of the *Matai*? Perhaps the decision simply illustrates the benefits of having pluralistic systems of law which enable judges to leap from one to the other with a certain facility and create new pathways for old problems.

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