IN THE SUPREME COURT
REPUBLIC OF NAURU

Not Restricted

Civil Misc No.9 of 2012

Lukas Harris

Plaintiff

v

Myda Batsiua, Mida Hiram and Ruby Uera — Defendants

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| JUDGE: | Eames, C.J. |
| DATE OF HEARING: | 19 June 2012 |
| DATE OF JUDGMENT: | 20 June 2012 |
| CASE MAY BE CITED AS: | Lucas Harris v Myda Batsiua and Others |
| MEDIUM NEUTRAL CITATION: | [2012] NRSC 13 |

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CATCHWORDS:
Injunction – Alleged agreement made in 1989 by mother of plaintiff and defendants that plaintiff may assume tenancy in house - Whether agreement conditional on plaintiff vacating house if grandchildren require it - Grandchildren assert their right of residence 22 years later – House not subject to a lease – Plaintiff been in occupation since 1989 – Balance of convenience.

APPEARANCES:

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| For the Plaintiff | Pre Nimes Ekwona (Pleader) |
| For the Defendants | Vinci Clodumar (Pleader) |

CHIEF JUSTICE:

1 This case relates to a bitter dispute between siblings about the house which had been occupied by their mother at the time of her death in 1989. Tenancy of the house, which is known as No 13 Meneng District, on land portion 143, had for many decades been under the control of the Nauru Local Government Council pursuant to the Nauruan Housing Ordinance 1957-1967 ("Housing Ordinance") and the Nauru Local Government Council Ordinance 1951-1956 ("NLGC Ordinance"), s.7(1). Both pieces of legislation were repealed in 2011.

2 Although the land on which the house stood was owned by its landowners, the house was not (ss. 8 and 9 of the Housing Ordinance), and the Council had full power over the tenancy. The tenant of the house was deemed to be the person regarded as the tenant when the Housing Ordinance commenced (s.11(2)). In this case those were the parties' mother, Ebeneben, and her husband, Rudolph.

3 In allotting tenancy the Council had to give preference to landowners and priority to the head of family (ss. 11(3) and (4)). By s.13(1) a tenant had the same rights in respect of the land on which the house was erected as he would have if the house was owned by the owner of the land and the owner of the land had been the one who granted the tenancy. The Council had power to terminate a tenancy when a tenant died or ceased to reside in a house (s.17(1)(a)).

4 All of the parties here are landowners of this portion. In his very helpful submissions as to the history of this legislation, Mr Clodumar notes that the NGLC Ordinance and the Housing Ordinance were in effect when Ebeneben died in October 1989.

5 The Nauru Local Government Council was dissolved by the *Nauru Local Government Council Dissolution Act* 1992 ("the Dissolution Act"), on 2 March 1992 and Cabinet assumed its powers. The Housing Ordinance and the Dissolution Act were repealed by *Statute Law Revision Act* 2011.

6 There were no savings clauses when the Housing Ordinance was repealed, thus a vacuum existed and considerable uncertainty now arises as to the status of the tenancies created under that legislation. Mr Clodumar submitted that by virtue s.28(1) of the *Interpretation Act* 2011 the rights of the Council that had subsequently been vested in Cabinet and in the Minister for Internal Affairs were preserved, and that tenants could not acquire rights that did not exist before the repeal of the relevant legislation.

7 In deciding the present application it is unnecessary for me to delve further into the interpretation of this legislation.

8 In 1989, just before his mother died, the plaintiff got approval from her for him to reside in the house. He had been out of Nauru for many years holding government appointments. He was concerned that upon his return to Nauru he would have no house in which to reside with his family. He moved into the house and resided there for more than 20 years thereafter.

9 The plaintiff spends much of his year overseas. In December 2011, while he was overseas his son Valiant, was approached by his three siblings, Ruby Uera, Mida Hiram and Myda Batsiua, who said that the plaintiff had no right to live in the house and must vacate in favour of the three children of Myda Batsiua, namely June Star, Dillon Harris, and Troy Harris, the grandchildren of Ebeneben. When contacted by his son, the plaintiff objected, but said the sisters should await his return to Australia to further discuss the matter. On 16 January 2012, while the plaintiff was overseas, the sisters brought June and Dillon and their partners and children to the house and helped them move in, claiming two of the four bedrooms in the house. The plaintiff's son and their children occupied the two other bedrooms and so the plaintiff, when he returned, had to sleep in the lounge room.

10 The plaintiff applied for urgent injunctive relief and an interim restraining order was granted on 20 March 2012 ordering June and Dillon to depart and remain out of the house. This was granted ex parte due to urgency and the resident magistrate's

imminent departure on court business overseas. Given the evidence placed before him of friction and upheaval that had followed the high-handed conduct of the defendants the resident Magistrate's Order was quite appropriate. Unfortunately, the matter has not subsequently proved capable of resolution by mediation. A subsequent full hearing of all parties by the Resident Magistrate led to him terminating the Interim restraining Order and replacing it with an interim injunction, in similar terms, that was to remain in place, and has, until this Court made any further orders.

11 The action brought by the plaintiff by writ is a claim for a declaration that the plaintiff is the tenant of the house under the *Nauruan Housing Ordinance* 1957 and he also seeks an order that the defendants do not interfere with his quiet enjoyment of the house. The defendants filed a counter-claim in which they seek declarations that the house is owned by all of the children of the late Ebeneben Harris and her husband, and seek a declaration that June, Troy and Dillon have "the absolute right" to live in the house. In addition, they seek an order that the plaintiff's son, Valiant Harris, and his family be removed from the house. Magnanimously, the defendants do not seek an order that Lucas Harris also vacate the house!

12 It is not possible for the court to resolve the question of the status of the plaintiff's and defendants' claims, and those of the three grandchildren, as to rights of tenancy of the house. There was simply not enough time for a hearing as to those questions and it was obvious that no research had been done by either side on the common law implications of the repeal of the relevant legislation that previously governed the rights of tenants. It is possible that the repeal of the legislation means that the house is now a fixture to the land. If that is so, the house would likely be owned by all of the landowners. The plaintiff is one such landowner, having a 1/30th interest. He may well occupy the house under a tenancy at sufferance or tenancy at will[1], in which case a majority of landowners may well have a right to terminate his tenancy, if it exists.

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[1] See *Grund Detabene v Ronphos and Anor* [2011] NRSC 8, at [42]-[48]

13 The merits of those claims will be a matter for a trial to be conducted at a later date. The issue for the moment, therefore, is whether the interim injunction should be continued pending trial of the issues. That requires that I consider whether the plaintiff has demonstrated that there is a serious question to be tried, or as it is sometimes put, whether there an arguable case for relief. In addition, I must assess whether the balance of convenience favours the retention of the injunction[2].

14 I heard evidence which focussed on the competing contentions concerning the terms in which Ebeneben allowed the plaintiff to move into the house. That evidence allowed me to form a preliminary assessment of the respective merits of the claims, and I also heard submissions relevant to the issue of the balance of convenience concerning the injunction.

15 It is not necessary for me to set out that evidence in detail. It may be summarised as follows. The plaintiff says that he first asked his mother if he could move into the house when she was in Melbourne, being treated for cancer. He agrees that she initially said he could not, and he agrees that he asked again. He says that on the second occasion she was reluctant to agree and asked why he could not move into his wife's home instead. He replied that it was too crowded. She then said OK, he could move into the house but added that he was not to forget the grandchildren because they had no where to stay. She said "look after them".

16 Later when he and his mother were in Nauru, he again asked her if he could live there, and his mother said yes. He said he was unsure whether the grandchildren were then living at the house; it was crowded with relatives staying close to his dying mother. He agreed that after his mother's death he had ordered June out of the house.

17 The plaintiff was somewhat vague about many items of his evidence, not surprising given the lapse of time, perhaps.

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[2] *Nicholas John Holdings Pty Ltd v ANZ Banking Group Ltd* [1992] 2 V.R. 715 at 723; As to the relevant principles, see, generally, S. Colbran, et al, "*Civil Procedure*", 4th Ed, Lexis Nexis, Chapter 15..

18 If his mother had agreed in Melbourne to him staying in the house it is surprising that he thought it necessary to ask her again, in Nauru. He said he had done so because there had been a prospect of him gaining access to a house being built in Buada, but that had not eventuated. He denied that at any time his mother had said that the house was earmarked to be given to the grandchildren.

19 The defendant Myda Batsuia said that she was present at the Melbourne conversations and that her mother said to the plaintiff that he could not stay in the house because the house was for the grandchildren, and they had no place to live. She says that her mother said "no" both times the matter was discussed in Melbourne.

20 In Nauru the plaintiff asked again, and she says her mother replied "you can't live here; it belongs to the grandchildren". Myda Batsiua said that the plaintiff asked again, later. This time the mother agreed, and said that Lucas could live in the house and take care of the grandchildren. She said words to the effect that he could take care of them until they had grown up, but then he had to leave the house because it does not belong to him but to the grandchildren. (I note that in her affidavit she added to her account, saying that the plaintiff had agreed that he would not stay permanently in the house because he had a house forthcoming in Buada. She did not repeat that in her oral evidence.)

21 Mida Hiram, another defendant, gave evidence of one conversation in Melbourne. Her mother said, "No, the house belongs to the grandchildren and you look for your own home". In Nauru, she heard one conversation where her mother said, "I can't give it to you, it belongs to the grandchildren, but then she said that he could stay if he looked after the grandchildren.

22 I did not consider the whole of the evidence contained in the affidavits and transcript of the hearing before the resident magistrate. As the authorities make clear[3], it is not appropriate for a judge hearing an application for an interim injunction to make final

[3] *American Cyanamid v Ethicon Ltd* [1975] AC 396 at 407-8, per Lord Diplock.

findings of fact. My task at this stage is only to assess the relative strength of the plaintiff's case for a declaration. So what I now say is not a final view, and I might well come to a different conclusion were I to hear full argument and evidence at trial. That said, it seems to me that there is evidence that the plaintiff's presence in the house was permitted reluctantly, and only if he promised to look after the grandchildren.

23 Prima facie, the mother would not have contemplated the possibility that within weeks of her death the children would be no longer living in the house and would remain out of it for more than 20 years thereafter. I am less confident that when she said look after the grandchildren she meant even when they are in their 30s.

24 Did the mother say words to the effect that the tenancy was to be that of the grandchildren, and specifically or by inference, that when that time arrived, the plaintiff would have to vacate? As Mr Ekwona submitted, the mother could not have decided who was the tenant, because the Housing Ordinance did not give her that right. Even so, she might have thought that her opinion as head of the family would have carried weight with the Council which decided tenancies. As presently advised I think that she probably did say something to that effect. What the legal consequences were of her saying so is a more difficult issue. I have heard no submissions as to the legal consequence of such a statement, and that will be an issue for trial.

25 Not having heard legal argument as to the common law, relevant to tenancy issues in this case, and allowing for the fact that I heard only limited evidence, I cannot conclude, at the moment, that the plaintiff's case for a declaration is a strong one.

26 The next question I have to consider is the balance of convenience. What is the effect, and upon whom, if I do or do not continue the injunction. Where does the least impact fall? Should the status quo be retained?

27 There are four bedrooms. The plaintiff and his son, plus the son's wife and children, cannot stay in the house if both June and Dillon and their partners and children also

move in. There are not enough bedrooms. Someone would be sleeping in the lounge. The defendants propose that the plaintiff be permitted to stay (whether they propose he do so only if sleeping on the couch, is unclear), but his son Valiant and family be ordered out. I have no evidence but assume that they would not easily find alternative accommodation and would face similar difficulties to those now experienced by June and Dillon.

28 I accept that for the plaintiff the offer that he be permitted to stay is not an attractive option if June and Dillon and families move in. He is uncomfortable with them; they are not close family, like his son. The overcrowding would be very upsetting to him, made all the worse by the very poor relations that now exist between the two camps.

29 On the other hand, the plaintiff does not permanently live in the house. He spends significant time out of Nauru. In the last 12 months he spent some three months in Australia. He says he expects two of his children to return from overseas and to take up residence in Nauru and for that reason wants to keep one room, at least, available for them. But their return is not imminent. His daughter and her three children are expected back in August 2012.

30 This balancing of inconvenience is set against the unique Nauru reality of an acute housing shortage. I would not be contemplating, at all, making an order that people move out of accommodation they have lawfully held for years were it not for the fact that others, who might yet be proved to have no more than a moral claim, are themselves living in very poor circumstances of overcrowding. I am told, and accept, that that is the case for June and Dillon and families.

31 The situation of the plaintiff's son Valiant and his family is unclear. It was Valiant who agreed to the others moving in, last December, and he then lived with June and Dillon without apparent trouble, so I presume he might be able to do so again, if space can be found. The difficulty, however, is that both June and Dillon want to move in with their families and that makes Valiant's position very difficult if his father also requires a room, as he might reasonably do.

32 Aspects of the way the defendants went about forcing the issue in this case, while the plaintiff was out of Nauru, leave much to be desired, but I accept that they genuinely believe that they have the moral force of their mother's wishes behind them, and they have acted under the compelling pressure of their concern about the present living conditions of June, Dillon and their families.

33 At the end of the day I am not persuaded that the plaintiff has made out his case for an injunction and, subject to what I next say, I will order the injunction be lifted.

34 I am concerned that by making that order the already bad blood between members of the families will only get worse and may lead to confrontation. No doubt that risk would equally have arisen if I had decided to continue the injunction. I think a cooling-off period is required, for sensible heads to explore ways to reduce the tensions, and try to find as much room for compromise as may be achievable. To that end, I propose not to withdraw the injunction until the expiration of 14 days. Perhaps, in the meantime, a further meeting, involving all landowners and other interested parties, might be called to consider the issues again, in the light of my remarks in this judgment. That is merely a suggestion.

35 I order that as at 5pm Wednesday 4 July 2012, without further order, the injunction granted by the Registrar, on 30 April 2012, will be cancelled.

36 I will hear the parties as to any other orders that may be required.

Geoffrey M Eames AM QC

Chief Justice

20 June 2012