IN THE SUPREME COURT OF TONGA
LAND JURISDICTION
NUKU'ALOFA REGISTRY

NO.L.11/00

BETWEEN : ***FUND MANAGEMENT LIMITED*** - ***Plaintiff***

AND : ***TEVITA MISA FIFITA*** - ***Defendant***

AND CASES 12/00 – 17/00.

BEFORE THE HON. CHIEF JUSTICE WARD IN CHAMBERS

Counsel: Mr Garrett for applicants
Mr Tu'utafaiva for Fifita, Cowley, Vea and Lavulavu;
Pulotu in person

Date of hearing: 20 July 2000
Date of ruling: 24 July, 2000

Ruling

This is an application for an interim injunction applied for in similar terms in a number of cases numbered 11 of 2000 to 17 of 2000. They all relate to the same piece of land in Nuku'alofa of which the plaintiffs/applicants in the various actions are sub lessees and of parts of which the various defendants/respondents are occupants.

The writs filed on 23 June 2000 seek an order declaring the plaintiff is the lawful occupier of the land and various orders relating to rent and damages.

The principal injunctive relief sought is for the defendants to vacate the land. That is not part of the claim but it became clear at the hearing in chambers that the omission was the result of a misunderstanding of the effect of an earlier order of this court. Counsel for the plaintiffs sought to amend his pleadings to include such a prayer and I have given leave for him to do so.

There has only been service of the application upon some of the defendants and all those served oppose the application. Mr Tu'utafaiva for Fifita, Cowley, Vea and Lavulavu has filed written submissions and Pulotu who appeared in person has associated himself with them.

I do not need to deal in any detail with the background of the case or the submissions but, briefly, the plaintiffs wish to develop the land in question and need vacant possession for that reason. The defendants oppose on the general ground that there are a number of arguable points that require a hearing and that, if the injunction is granted, it will effectively decide the action in favour of the plaintiffs.

The general position in relation to interim injunctions has been frequently stated and needs no repetition. The particular feature of this case is that the application is for a mandatory injunction. The courts have always been reluctant to order such an injunction at the interlocutory stage although it will be ordered in an appropriate case.

The position has been clearly expressed by Megarry J in *Shepherd Homes v Sandham* (1971) Ch 340 at 351 where he stated that at the interlocutory stage:

> "The court is far more reluctant to grant a mandatory injunction than it would be to grant a prohibitory injunction. In a normal case the court must, inter alia, feel a high degree of assurance that at the trial it will appear that the injunction was rightly granted; and this is a higher standard than is required for a prohibitory injunction."

He explained earlier, at 348, his reasoning.

> "As it seems to me, there are important differences between prohibitory ands mandatory injunctions. By granting a prohibitory injunction, the court does no more than prevent for the future the continuance or repetition of the conduct of which the plaintiff complains. The injunction does not attempt to deal with what has happened in the past: that is left for the trial, to be dealt with by damages or otherwise. On the other hand, a mandatory injunction tends at least in part to look to the past, in that it is often a means of undoing what has already been done, so far as that is possible. Furthermore, whereas a prohibitory injunction merely requires abstention from acting, a mandatory injunction requires the taking of positive steps, and may... require the dismantling or destruction of something already erected or constructed. This will result in a consequent waste of time, money and materials if it is ultimately established that the defendant was entitled to retain the erection."

The Shepherd Homes case concerned the erection of a fence but the principle is the same.

The suggestion of the need for a "high degree of assurance" in the remarks of Megarry J have not been applied so stringently and in the case of *Films Rover v Cannon Film* (1987) 1 WLR 671 Hoffmann J, whilst acknowledging the differences between the two forms of injunction, suggested that the fundamental principle on interlocutory applications for both prohibitory and mandatory injunctions is that the court should take whichever course appears to carry the lower risk of injustice if it should turn out at the trial to have been wrong.

In the present application, it is clear that grant of an injunction would have a high risk of injustice should the order turn out to be wrong and may well not be adequately remedied by an award of damages. I also accept there are matters of defence raised that should be tried in order to ascertain the position. On the other hand, it is equally clear that the necessity for a trial will hold the applicant out of his remedy but such a delay, if he should ultimately succeed in his claim, may be measured in terms of monetary damages.

I am also reassured by the words of Lord Diplock in relation to all interlocutory injunctions that, where "other factors appear to be evenly balanced it is a counsel of prudence to take such measures as are calculated to preserve the status quo." American Cyanamid v Ethicon (1975) AC 396 at 408.

This is just such a case. I am satisfied that the application must be refused with costs in the cause.

I would add that this case should be listed for hearing as soon a possible and I shall hear counsel on the best way forward to achieve that.

SUPREME COURT TONGA

NUKU'ALOFA: 24 July, 2000.

CHIEF JUSTICE