Seiler v Kingdom of Tonga

Supreme Court, Nuku'alofa
Dalgety J
Civil case C.57/92

15, 16, 17 July, 11 September, 30 October 1992

Crown - Minister can only bind if delegated such authority
Defence - not pleaded - unavailable
Estoppel - not apply to Crown.
Minister - acts not deemed those of Crown
Pleading - substantial defence and statutory provisions relied on must be pleaded
Practice and procedure - defence not pleaded - not able to be relied upon.

The Plaintiff who had been employed by the Defendants as an economic analyst, had his employment terminated when further funding for his position, from outside agencies, was not forthcoming. He sued for various damages, salary and other various allowances.

HELD, allowing the claims in part, declining aggravated or exemplary damages, but allowing for 3 months notice and salary and other allowances:-

1. Section 17(4) of the Government Act not having been pleaded the Crown could not rely on such.
2. A substantial point of law which may dispose of the whole action should be pleaded; as should a defence based upon a special statutory provision and that is particularly so when the Government wishes to avail itself of such a provision against a private person.
3. (obiter) In Tonga a Minister of the Crown can only bind the Crown in a contract of employment if he had been delegated such authority and he does not bind the Crown merely because it is on a matter falling within his portfolio.
4. (obiter) The acts of a Minister are not as such to be deemed the acts of the Crown.
5. (obiter) Notwithstanding section 103(2) Evidence Act the Crown can not be estopped from exercising its powers and duties; nor can estoppel give a public authority a power which it does not possess.

Cases considered: Independent Automatic Sales v Knowles & Foster [1962] 1 WLR 974

re Robinson's Settlement, Grant v Hobbs [1912] 1 Ch 717
Regina v Transworld Shipping Ltd [1976] 1 CFCR 159
Fangupo v MBM Ltd C8&9/92, 12/5/92
Esso Petroleum Coy v Southport Corpn. [1956] AC 218
Morrisons Associated Coys Ltd v JamesRome & Sons Ltd [1964] SC 160
Attorney General for Ceylon v de Silva [1953] AC 461
Meates v Attorney-General [1979] 1 NZCR 41
R v C.A.E. Industries [1986] 1 FC 129
Mackay v Attorney General for British Columbia [1922] 1AC 457
Town Investments v Dept. of Environment [1978] AC 359

Statutes Considered : Evidence Act, s.103, s.166
Government Act, s.17
Interpretation Act, s.2, s.11

Rules of Court : SCR 0.8 r.2.(2)

Counsel for Plaintiff : Mr Hogan
Counsel for Defendant : Solicitor General (Mr Taumoepeau)

Judgment (The Judge found certain facts as follows):

(a) The Plaintiff is a qualified Economic Analyst.

(c) On or about the 10th February 1988 the Plaintiff and the Defendants entered into a service agreement whereby the Plaintiff became employed by the Defendants as an economic analyst. That agreement was a contract of employment between the parties to this action. The terms of said contract (sometimes referred to as "the foundation contract") are as set forth in Document P.1.

(c) Inter alia the foundation contract contained terms and conditions as to the payment or provision of Salary, Allowances, Leave, Passages, Baggage, Freight and Housing.

(d) The foundation contract was for a fixed period of two years from the 10th February 1988, but with a provision for re-engagement and extension of the contract by mutual agreement between the parties.

(e) The foundation contract was extended from 10th February 1990 until 9th May 1991 by a renewal agreement dated 3rd and 22nd, both days of April 1991. The terms of that renewal agreement are set forth in Document P.37.

(f) At a meeting held within the Ministry of Finance on 7th May 1991 the Minister of Finance asked the Plaintiff to continue working for the Defendants on and after 10th May 1991 on the conditions and provisions of the renewal agreement, and the Plaintiff agreed to do so. Said arrangement was a temporary measure only.

(g) Said arrangement referred to in finding (f) was intended to remain in force up to and including 9th February 1992.

(h) Between 10th May 1991 and 20th December 1991 the Plaintiff acted as Economic Analyst and fulfilled for the Defendants the whole range of functions he had carried out since 10th February 1988; and between 20th December 1991 and 9th February 1992 he was available to carry out said functions and would have done so but for his purported dismissal as at 20th December 1991.

(i) Both parties wished to enter into a new agreement, on terms to be satisfactorily negotiated between them, with effect from 10th February 1992, but such a new agreement was conditional on United Nations funding being available, as both parties well knew. No such funding was made available, despite the efforts of the Defendants to obtain same.

The Solicitor-General argued that under Section 17(4) of the Government Act (cap.3) only the Prime Minister, with the consent of the Cabinet, had the power to appoint or dismiss Government Officers. "Officer" is defined by Section 2(1) of the Interpretation Act (cap.1) as meaning "any person, other than a labourer, in the permanent or temporary employment of the Government." Such a definition is apt to include the Plaintiff. It followed therefor, according to the Defendants, that as the arrangement of 7th May 1991 had never received the approval required by Section 17(4) the Plaintiff's employment under the renewal agreement ceased on 9th May 1991, irrespective of anything the Minister may have agreed with him. The Crown is not liable for the actions of a Minister who qua Agent of the Crown actually makes a contract in circumstances where he has no legal authority so to do. The Minister of Finance had no authority, be it actual, ostensible

or otherwise, to conclude a contract of employment with the Plaintiff. The Plaintiff's employment after 10th May 1991 was as a casual worker only, for which he had been paid.

The essential simplicity of that submission was countered by Mr Hogan for the Plaintiff in a well researched and ably presented argument. His case was that the Minister of Finance in fact did have authority to enter into the contractual arrangements described in Finding-in-Fact (f); that the Defendants were bound by the actions of the Minister; and, that the absence of Cabinet approval or the intervention of the Prime Minister was a mere procedural irregularity which did not invalidate the arrangements made on7th May 1991. In addition, he founded upon the absence of any averment in the Defences to effect that there was no contract of employment with the Crown binding upon the Defendants, as the said 7th May arrangements had never been approved by Cabinet and no appointment had been made by the Prime Minister. Finally, he argued that the Crown having accepted the Plaintiff's services on the faith of the 7th May agreement are now personally barred from denying the existence of a contract to extend the Plaintiff's services to the Defendants with effect from 10th May 1991.

In paragraph 8 of his Statement of Claim the Plaintiff pleads quite explicitly that -

> "Prior to the 9th day of May 1991 the Minister of Finance on behalf of the Government asked the Plaintiff to continue his employment as an economic analyst and offered to extend the foundation contract in terms of the (renewal) contract."

That offer "the plaintiff accepted" (paragraph 9). In paragraph 10 it is averred that "it was an express or implied term" arising out of the 7th May arrangements that the Plaintiff's remuneration package would continue to be as described in the renewal contract. He performed the same professional tasks both before and after 10th May 1991 (paragraph 11). To these very precise averments the Defendants' reply was merely that -

> "The Defendant(s) (have) no knowledge of and therefore (deny) paragraphs 8,9,10 and 11."

In answer to Paragraph 14 the Defendants do expressly deny that the 7th May arrangements constituted a contract of employment. They go on to say that

> "The services rendered by the Plaintiff were those duties that he performed as if he was the Economic Analyst for the Ministry of Finance"

and suggest that the proper remuneration for the services he rendered should be assessed on a quantum meruit basis. Nowhere is there any suggestion that the 7th May arrangements were not legally enforceable.

Order 8 Rule 2(2) of the Supreme Court Rules 1991 requires that -

> "A defence shall state concisely the grounds of defence on which the defendant intends to rely ....."

Mr Hogan suggested that no substantive matters of fact had been pled which permitted the Solicitor General to make a legal submission based upon Section 17(4) of the Government Act. This argument is well founded. A ground of defence upon which the Defendants obviously intended to rely was Section 17(4). There were no factual averments in their Defences entitling them to rely upon that defence. The effect of Order 8, Rule 2(2) is that a defendant must plead concisely all materia. facts which he offers to prove and upon which he relies a his grounds of defence. It is facts which are pled, not law, although sometimes points of law might require to be pled. The ground work for

raising a pure point of law must however have been laid in the pleadings. What the Defendants ought to have done to secure their position was to have added at the end of their answer to paragraph 8 a furthe averment along the following lines -

> "In any event, the Plaintiff was never appointed an officer in the employment of the Government of Tonga with effect from 10th May 1991 by the Prime Minister with the consent of Cabinet. The Minister of Finance had no authority to employ or appoint the Plaintiff, whether on a temporary or a permanent basis. Any arrangements he might have entered into with the Plaintiff on or about 7th May 1991 do not bind the Defendants. Reference is made to Section 17(4) of the Government Act."

Only thus are the factual issues relied upon by the Defendants properly brought to the notice of the Plaintiff. In my opinion the pleading of a reference to Section 17(4) is essential. Buckley J. in Independent Automatic Sales -v- Knowles and Foster [1962] 1 WLR 974 at page 981 stated that -

> ".... it does not seem to be to be a convenient course normally to be followed, where there is a substantial point of law which may dispose of the whole action, not to make any mention of it in the pleading(s), because if no mention of it is made in the pleadings, the other side may be lulled into a sense of false security in that particular respect, and may appeear before the Court less ready and able to argue what may be a difficult matter."

He could indeed have been speaking of this case for there is no doubt that Mr. Hogan was taken unawares when the Defendants put forward their Section 17(4) defence at the end of theTrial. This eventually led to Counsel having to be recalled in September 1992 to address me further on questions of law of considerable importance for a proper resolution of this dispute.

Moreover, by raising such a point of law as the said statutory defence in the pleadings the opportunity then exists for the case to be disposed of as a preliminary point of law, which may well result in a saving of time, effort and expense, not unimportant factors. The consequences of failure to give adequate notice of a ground of defence were most appropriately summarised by Buckley L.J. in Re Robinson's Settlement, Grant -v- Hobbs [1912] 1 Ch. 717 at page 728 -

> "..... for reasons of practice and justice and convenience "the Defendant requires" to tell his opponent what he is coming to the Court to prove. If he does not do that the Court will deal with it in one of two ways. It may say that it is not be allowed to rely on it; or it may give him leave to amend."

In this case the Defendants made no motion to amend.

Although Indepedent Automatic Sales and Re Robinson's Settlement were cases decided in the context of English Rules of Practice, they both enunciate issues of general principle applicable to any jurisdiction which, like Tonga, insists upon a system of written pleadings modelled, no matter how loosely, upon United Kingdom practice. In Tonga there is an express obligation upon a Defendant to plead concisely any ground of defence upon which he relies. That was not done here. For reason of practice, justice and convenience therefore the Section 17(4) defence is not open to the Defendants: they did not raise it in their defences and ought not to be allowed to rely on it now. I shall not allow them to do so.

The contractual arrangements which the Plaintiff says were concluded on 7th May 1991 having been established in fact and their being no defence which would prevent me

enforcing that contract, the Defendants are obliged to honour these arrangements and remunerate the Plaintiff accordingly. It is with interest that I noted the decision of the Canadian Court of Appeal in the case of Regina -v- Transworld Shipping Ltd [1976] 1 C.F. (Canadian Federal Case Reports) 159, a judgment of a superior court of a Commonwealth nation which, by virtue of Section 166 of the Evidence Act (cap.15), enjoys "persuasive authority" in Tonga. In that case, the Crown had a defence that there were no completed contractual arrangements (a charter party for which Transworld had tendered) with Transworld, the necessary Treasury Board authority not having been obtained, an essential requirement under the Government "Contracts Regulations". Nor had the Crown pled that the Government officer who accepted Transworld's tender was not "a person specially authorised authorised" in terms of Statutes such as section 15 of theCanadian "Department of Transport Act" and section 25(1) of the "Financial Administration Act". In his judgment the Chief Justice of Canada (page 165) noted that no defence had been raised in this case based upon any of these statutory provisions. He continued at page 170 -

> "In my view, justice requires that any defence based on special statutory provisions must be pleaded, particularly if it is based on specific facts, so that the opposite party may have discovery with regard to such facts and prepare to adduce evidence with regard thereto. This is all the more so when such defence is based on an indoor housekeeping rule applicable to government administration and is being used by the Government as against an outside claimant. To permit an amendment on appeal to raise a defence based on facts not so pleaded an litigated at trial would open the door to possibilities of rank injustice."

And in as much as theCrown had not pled that the officer who accepted Transworld's bid was not a "person specially authorised" under various statutory provisions, it could not be established in fact that the officer did not have the requisite authority. It must be assumed that he did. The Crown were debarred from relying on that defence -

> "when such a challenge, which is of a factual nature, was not made when the facts were being litigated, it is, in my view, too late to make it on an appeal."

The Section 17(4) defence is a defence based upon a special statutory provision which the Defendants, the Kingdom of Tonga, (i.e. the State) wish to avail themselves of against a private citizen. The Chief Justice of Canada, in my view, is quite correct in saying that justice requires that any such defence be pled. Only such frankness complies with the Tongan requirement for a concise statement of each ground of defence.

Earlier this year in Fangupo and Sekona -v- M.B.M. Limited (8-9/92; judgment 12th May 1992) I had occasion to comment generally upon the very real function pleadings served in the conduct of litigation. I would commend these dicta to Counsel. The purpose of pleadings is to ascertain and demonstrate with precision the matters on which the parties differ and those on which they agree, thus enabling parties, their Counsel, and the Court to ascertain with ease the issues upon which a judicial decision is required. Furthermore, pleadings must -

> "give fair notice of the case which has to be met so that the opposing party may direct his evidence to the issues disclosed by them":
> Esso Petroleum Company -v- Southport Corporation [1956] AC 218 per Lord Norman at page 238 (House of Lords).

This case is no more that a particular illustration of that principle. Pleadings are designed to prevent one party taking the other by surprise by introducing issues not focused in the pleadings. Lord Guthrie in Morrison's Associated Companies Limited -v- James Rome and Sons Limited, [1964] S.C. 160 at page 190 (Scottish Appeal Case) stated that -

> "It is a fundamental rule of our pleading that a party is not entitled to establish a case against his opponent of which the other has not received fair notice upon record (i.e. in the pleadings). It follows that a (defendant) cannot be held liable upon a ground which is not included in the averments made against him by the (plaintiff)"

The converse is equally true -

> "These are not mere technical rules, since their disregard would tend to create injustice . . . . . "

That statement of general principle applies equally in Scotland, England, Canada or Tonga. It is wholly consistent with Order 8 of the 1991 Rules.

For the sake of completeness it is appropriate to comment on the Solicitor General's Section 17(4) submission upon the assumption that it had been properly pled and established in evidence. In Tonga that sub-section requires the Prime Minister with the consent of Cabinet to appoint officers, and without such a decision there is no valid appointment. Such power can of course be expressly delegated. Assuming therefore that the evidence had satisfied me in fact that there had been no delegation of authority to the Minister of Finance and no appointment by the Prime Minister with the consent of Cabinet then I would have concluded that the Plaintiff's employment with the Defendants ceased at the end of his renewal agreement on 9th May 1991 and that the actions of the Minister of Finance on 7th May 1991 did not bind the Crown as he enjoyed no delegated power to employ, or more correctly continue to employ, the Plaintiff after that date. He certainly had no actual authority to bind the Crown by any unauthorised contract of employment he might purport to conclude with an officer or prospective officer of Government. Mr Hogan's response was that as a Minister of the Crown, the Minister of Finance had ostensible authority to bind the Crown in respect of the arrangements concluded with the Plaintiff on 7th May 1991. I am not satisfied that this argument is well founded in law. The apparent authority of Crown servants was authoritatively explained by the Privy Council in Attorney General for Ceylon -v- de Silva [1953] A.C. 461 at page 479 -

> "It is a simple and clear proposition that a public officer has not by reason of the fact that he is in the service of the Crown the right to act for and on behalf of the Crown in all matters which concern the Crown. The right to act for the Crown in any particular matter must be established by reference to statute or otherwise."

In that case it was established in fact that the Principal Collector of Customs had no authority to sell Crown property or to enter into a contract on behalf of the Crown for the sale of such property.

> "It is therefore clear that the Principal Collector of Customs had no actual authority to enter into a contract for the sale of the goods which are the subject matter of this action. Next comes the questions whether (he) had ostensible authority, such as would bind the Crown, to enter into the contract sued on. All "ostensible" authority involves a representation by the principal as to the

> extent of the agent's authority. No representation by the agent as to the extent of his authority can amount to a "holding out" by the principal. No public officer, unless he possesses some special power, can hold out on behalf of the Crown that he or some special power, can hold out on behalf of the Crown that he or some other public officer has the right to enter into a contract in respect of the property of the Crown when in fact no such right exists."

Where his powers are regulated by statute "the limits of the authority conferred are fixed rigidly" (page 480). The Court realised that it might cause "hardship" to the purchaser of the property if the onus of proving whether or not the Collector had authority to conclude a sale of the property lay upon him, but -

> "to hold otherwise would be to hold that public officers had dispensing powers because they then could by unauthorised acts nullify or extend the provisions of (Statute). Of the two evils this would be the greater one (page 481)."

With these views I respectfully agree. They apply equally to contracts of employment as they do to contracts of sale. By Statute in Tonga a Minister could only bind the Crown in a contract of employment if he had been delegated such authority. For present purposes it is assumed he had no such authority. Therefore he did not have ostensible authority to bind the Crown in the matter of the contract of employment purportedly entered into on 7th May 1991. And a Minister, even a Prime Minister, who makes promises during an election campaign did not bind the Crown thereby in contract in circumstances where he had no statutory warrant, Cabinet approval or authority to make such promises : Meates -v- Attorney General [1979] 1 NZLR 415. Mr. Hogan attempted to distinguish Attorney-General for Ceylon by submitting that (First) a Minister had a fundamental ability to bind the Crown on a matter falling within his portfolio and (Secondly) that the Crown is one and indivisible with the result that any act of a Minister is deemed to be the act of the Crown. The first of these submissions is based upon provisions of Canadian Law. As was noted in Regina -v- Transoworld Shipping at page 163 -

> "government operations in Canada are divided among statutorily created departments each of which is presided over by a Minister of the Crown who has, by statute, the "management" and direction of his department. In my view, subject to such statutory restrictions as may be otherwise imposed, this confers on such a Minister statutory authority to enter into contracts of a current nature in connection with that part of the Federal Government's business that is assigned to his department."

Even in Canada there can be limitations on a Minister's management authority in respect of his department as a result of Statute, Order in Council or Cabinet Direction: see, Hogg on "Liability of the Crown" page 168; Regina -v- C.A.E. Industries [1986] 1 F.C. 129; Mackay -v- Attorney General for British Columbia [1922] 1 A.C. 457. Hogg makes the point that where there are statutory restrictions on the authority of servants or agents to bind the Crown -

> "these restrictions must of course be complied with and no actual, ostensible or usual authority can override a statutory prohibition (page 169)."

That of course is the effect of Attorney General for Ceylon. There are statutory restrictions in Tonga upon the appointment of "Officers" of the Crown and accordingly the portfolio authority argued for by Mr. Hogan could not apply in the present context. In any event such authority is a statutory creation of Canadian law. It has no exact

parallel in the Law of Tonga.

As to the second argument that the Crown is one and indivisible this is a fiction of British Consitutional Law. The term "the Crown" is used to denote the collection of such of those powers as remain extant (the royal prerogative) together with such other powers as have been expressly conferred by statute on "the Crown": it is also used to describe "the government", a term appropriate to embrace both collectively and individually all of the Minister of the Crown and "parliamentary secretaries" (i.e. junior ministers, and not civil servants) under whose direction the administrative work of government is carried out by the professional cadre of civil servants employed in the various government departments : see, Town Investments -v- Department of the Environment [1978] A.C. 359. "The Crown" is a term of art in constitutional law. It is a fundamental constitutional doctrine that the Crown in the United Kingdom is one and indivisible (page 400). Be that as it may, it does not assist the Plaintiff to circumvent the fact that the Minister of Finance of the Kingdom of Tonga was not authorised to conclude a contract of employment with him on 7th May 1991. The decision in the Attorney General for Ceylon would have applied.

In the the light of my exclusion of the Section 17(4) defence I am of opinion that he Defendants are obliged to remunerate the Plaintiff for the period from 10th May 1991 until 9th February 1992 (a period of some nine months) on the conditions and provisions of the renewal agreement, that being the agreement concluded, albeit irregularly and informally, on 7th May 1991. I would refer in particular to findings-in-fact (f), (g) and (h). Throughout the said period the Defendants had enjoyed the benefit of the Plaintiff's services in precisely the same fashion and to the same extent as they had prior to 10th May 1991. The Plaintiff was led to understand that he would be remunerated therefor as per the renewal agreement. The evidence is conclusive that the Defendants did not expect him to perform such services gratuitously. Even in their pleadings the Defendants concede that the Plaintiff is entitled to some remuneration for said services although they contend that such remuneration should be assessed quantum meruit and paid at local rates only. Were I to have calculated remuneration on a quantum meruit basis I would have had regard to the provisions of the renewal agreement and not the local rate. He had been earning a monthly salary of 3721.50 United States Dollars under the renewal agreement and not the local rate. He had been earning a monthly salary of 3721.50 United States Dollars under the renewal agreement : the local salary for an economic analyst was considerably less, only 797 pa'anga per month. I would not feel justified in applying the lower rate on the facts of this case.

In the circumstances it is not necessary that I decide this case on the basis of the interesting arguments addressed to me on personal bar. There are however two general observations which it would be appropriate to make. First, there are the estoppel provisions of Section 103(2) of the Evidence Act (cap.15) to effect that -

> "If a person, either in express terms or by conduct, makes a representation to another of the exitence of a certain state of facts which he intends to be acted upon in a certain way, and it is acted upon in the way in the belief of the existence of such a state of facts to the damages of him who so believes and acts, the first is estopped from denying the existence of such a state of facts."

They appear designed to regulate the situation which has arised in this case and Mr.Hogan relied upon it as a subsidiary argument in the event that I was against him on the exclusion of the Section 17(4) defence. There is no doubt that the Plaintiff responded

positively to a request or representation from the Minister of Finance to continue in his employment upon the basis of the renewal agreement. The Minister clearly intended the Plaintiff to believe that he was to remain an employee of Government and was to receive the same level of salary and other benefits as he had enjoyed hitherto. Mr Hogan submitted that the Crown were accordingly estopped, in the circumstances of this case, from denying the existence of such a state of facts. In referring to the Crown Mr Hogan required to overlook the provisions of Section 11 of the Interpretation Act (cap.1) that -

> "No Act shall be deemed to affect in any manner whatsoever the right of the Crown unless it is expressly stated or unless it appears by necessary implication that the Crown is bound thereby."

I do not consider that he was entitled to do so. Certainly there is no formula in the Evidence Act to effect that the Crown is bound by the provisions of that Act. Whether the Crown is bound by necessary implication is a difficult question I do not require to answer in this case. Secondly, are the general principles of estoppel insofar as they affect the Crown in the United Kingdom, analysed by Professor Wade in Chapter 11 of "Administrative Law" (6th edition) and exemplified in decisions such as Western Fish Products Limited -v- Penwith District Council [1981] 2 All E.R. 204 (C.A.); Evenden -v- Guildford City Football Club [1975] 3 All E.R. 269 (C.A.); Rootkin -v- Kent County Council [1981] 2 All E.R. 227 (C.A.); Wells -v- Minister of Housing [1967] 2 All E.R. 1041; Ocean Steam Navigation Company -v- Crown (1925) 21 Lloyd's List Law Reports 301; and Gowa -v- Attorney-General [1984] "The Times", 27/12/84. I am not persuaded that the Plaintiff is entitled to rely upon any of the recognised exceptions to the general rule that the Crown cannot be estopped from exercising its powers and duties, nor can estoppel give a public authority a power which it does not possess. These principles are part of the law of Tonga - Civil Law Act (cap.25) - provided always that Section 103(2) of the Evidence Act does not apply to the Crown. If it does then that section prevails and the United Kingdom provisions are of historical interest only.

Because of my finding-in-fact that the May 1991 extension to the renewal agreement was not without limit of time but only until 9th February 1992 I am not strictly speaking concerned with the dismissal requirements of public law which require notice and the granting to the employee of a right to be heard in his defence : Ridge -v- Baldwin [1964] A.C. 40; Malloch -v- Aberdeen Corporation [1971] 2 All E.R. 1278; R -v- Civil Service Appeal Board [1988] 3 All E.R. 686; 'Uta'atu -v- Commodities Board, Case 40/89 decided in the Supreme Court on 19th October 1989 and in the Appeal Court on 27th March 1990; and Pohiva -v- Kingdom of Tonga, Case 07/86 decided 6th May 1988. Accordingly, I do not consider that the Plaintiff has made out a case for an award in his favour of general damages, aggravated damages or exemplary damages for wrongful dismissal; or for the consequential loss claimed by him in paragraphs 2.10-12 of his Statement of Claim. In any event the claim for consequential loss was far too vague to merit an award of damages. This is not a case of summary dismissal.

For the avoidance of any doubt I wish to make it clear that all the evidence demonstrates that the Plaintiff was a valued servant of Government, a diligent employee, and had done nothing which would have justified his summary dismissal. He was continuing to work for the Defendants on the ad hoc basis suggested by his Minister on 7th May 1991 pending a new project formulation which both he and the Minister hoped would prove accetable to the United Nations. It was no fault of his or the Defendants that

the United Nations did not accept the new formulation. He had no guarantee that a new contract would be offered to him.

The Defendants cannot be faulted in law for bringing these ad hoc arrangements to an end when it became clear that United Nations funding for a new project was not available. It says a lot for their faith in and respect for the Plaintiff that they spent almost nine months trying to find the funding which would have enabled them to offer him a new two year contract. The Defendants first saught to terminate the Plaintiff's "services" with effect from 20th December 1991 and eventually did so, as from that date, by letter dated 25th February 1992. In finding (g) I found-in-fact that the parties intended these ad hoc arrangements to remain in force up to and including 9th February 1992 (see, Documents P.47 and 49).

The Plaintiff is entitled to his pay and allowances to that date when the temporary measure arranged between himself and the Minister of Finance on 7th May 1991 came to and end. On 25th February 1992 the Defendants, by letter, offered the Plaintiff "an extra 3 months pay in lieu of notice of termination of services." The terms of this letter were pled by the Plaintiff and were admitted by the Defendants in their Defences. This offer was fair and reasonable and I shall give effect thereto be awarding general damages equivalent to three months salary.

Under the renewal agreement the Plaintiff was entitled to an annual salary of 44,658 United States Dollars. For the nine months from May 1991 to February 1992 his entitlement therefore was to a salary of 33,493.47 United States Dollars. He was also entitled to a Housing Allowance of 480 Untied States Dollars per month, a total of 4,320 United States Dollars; and Accident and Sickness Insurance of 750 United States Dollars per annum, being 562.50 United States Dollars for the nine months. His leave entitlement accured at the rate of two and one-half days per month (Clause 4 of document P.1) during the nine month period, a total of 22.50 days. On the basis of a 30 day month his Leave Pay entitlement amounts to 2790.13 United States Dollars. His employment with the Defendants now having come to an end he is entitled under the renewal agreement to a Repatriation Payment of 2500 United States Dollars. This is a once and only payment and is now due and payable. It is intended to cover the cost of return passage to Canberra for the Plaintiff and his family. The foundation contract specified that the payment wooud be based on "actual costs incurred" but that formula was departed from in the renewal agreement which substituted a fixed sum payment. As to the actual cost of air passages for the Plaintiff, his wife, 2 children over 12 years of age, 4 children aged between 3 and 7 years, and I infant, I heard evidence from a New Zealand Airlines Ticket Agent, Fuapau Tu'jvai that the actual cost of such passages at the present time would be in the order of 3,800 pa'anga, or about 3,000 United States Dollars. The Plaintiff has however correctly saught only the lump sum payment in his pleadings (para : 25.6): this is the payment to which he is entitled. He also claimed a Freight Allowance but under Clause 6 of document P.1 his allowance is based on "actual costs" subject to a maximum payment of 1,900 Untied States Dollars. This head of claim is premature. He is however entitled to an Order requiring the Defendants to honour this contractual obligation whenever he departs Tonga for Canberra. I understand from the Solicitor-General that the Defendants have every intention of paying the necessary freight.

The Plaintiff also claimed payment in respect of leave passage to Australia in 1990 to which he was entitled at the end of the initial two year contract, and Leave pay for the

period February 1988 to October 1990. Notwithstanding the terms of his original contract, the Defendants by Memorandum dated 23rd July 1991 confirmed that "it is the regulation of the Tonga Government that when an officer cannot be released to go on his leave, that officer may be paid his/her passage in cash if he/she so desired" (P.78). That was indeed the situation here according to the Plaintiff. I have no reason to disbelieve the evidence in this regard. On the basis of Tu'ivai's evidence return economy air passages Tonga - Canberra for the Plaintiff and his family in or about February 1990, some two and one-half years ago, would have been 20 per centum less than current costs. Then, the Plaintiff would have had to pay 4 adult fares, 3 child fares an 1 infant fare. The current adult fare is 1209 pa'anga each way. Today that would cost him -

4 x 1209 x 2	=	9672		
50% (3 x 1209 x 2)	=	3647		
10% (1 x 1209 x 2)	=	241	=	13,560 pa'anga

His actual entitlement under this head of claim (para : 25.4 of his Statement of Claim) is 80 per centum of that sum or 10,848 pa'anga. His local leave pay to October 1990 he calculates (para : 25.8) at 1,595 United States Dollars and that figure was established in evidence to my satisfaction.

Exchanging all United States Dollar payment to pa'anga at the current exchange rate of 1 United States Dollar = 1.23 pa'anga the total value of the Plaintiff's claim is:-

General Damages (paragraph 9)	:	11,164.53 USD		
Salary (paragraph 10)	:	33,493.47 USD		
Housing Allowance (para.10)	:	4,320.00 USD		
Accident Insurance (para.10)	:	562.50 USD		
Leave Pay (para.10)	:	2,790.13 USD		
Repatriation Payment (para.10)	:	2,500.00 USD	:	64,873.83 pa'anga
Leave Passage (para.11)	:		:	10,848.00 pa'anga
Leave Pay to October 1990 (para.11)	:	1,595.00 USD	:	1,961.85 pa'anga
				77,683.68 pa'anga

To account of that sum the Plaintiff had been paid a total of 9,519.18 pa'anga by the Defendants between 26th July 1991 and 27th December 1991, and a further interim payment of 18,03.43 pa'anga by Court Order dated 1st May 1992. The balance outstanding and due to him therefore is 49,661.07 pa'anga. By letter dated 28th December 1991 addressed to the Deputy Prime Minister the Plaintiff acknowledged that he had been overpaid local salary between October 1990 and February 1991 to the extent of about 2,800 pa'anga. That sum should be deducted from any payment due to the Plaintiff. In the result the net sum due by the Defendants to the Plaintiff is 46,861.07 pa'anga and I shall award decree accordingly, together with interest on that sum at the rate of 10 per centum per annum from 23rd March 1992, the date of commencement of this action, until payment to follow hereon. Costs in my opinion should be borne by the Defendants and I shall award the Plaintiff his costs against the Defendants, as same may be agreed or as taxed. I shall therefore pronounce an ORDER in the following terms:-

> **IT IS ORDERER AND ADJUSTED THAT** (ONE) the Defendants do pay to the Plaintiff the sum of 46,861.07 pa'anga together with interest thereon at the rate of 10 per centum per annum from 23rd March 1992 until payment to follow hereon; (TWO) the Defendants be found liable to the Plaintiff in the Costs of and incidental to the present proceedings as same may be agreed

which failing as taxed; and (THREE) the Defendants do pay to the Plaintiff the actual costs of his return Freight to Canberra, Australia upon production of evidence of said costs, subject to a maximum payment of the pa'anga equipment of 1,900 United States Dollars calculated at the date of payment.