

HIGH COURT. Apia. 1957. 29, January. WOODWARD A.C.J.

Petition by the Samoan Public Trustee to determine validity of direction of High Commissioner - direction disallowing interest on funds belonging to enemy estates and invested by Samoan Public Trustee - direction given in 1951 - effect of Enemy Property Regulations 1954.

The petition of the Samoan Public Trustee sought an order that pursuant to a direction of the High Commissioner given on 17 September 1951, he be authorised not to allow interest on funds belonging to enemy estates and invested by him in the Common Fund.

- Ordered that -
- (1) The Samoan Public Trustee was up to 3 March 1954 (the date of coming into force of the Enemy Property Regulations 1954) validly authorised by the direction of the High Commissioner of 17 September 1951, to disallow interest on funds belonging to enemy estates invested by him in the Common Fund of the Samoan Public Trust Office.
  - (2) Interest on such funds from the date it accrued up to 3 March 1954 may be retained by him.
  - (3) By virtue of the provisions of the Enemy Property Regulations 1954 (which revoked the Enemy Property Emergency Regulations 1939) interest accrued or to accrue since that date must be credited to the respective estates to which the funds belong.

Bridger, for petitioner.

Cur. adv. vult.

WOODWARD A.C.J.: This is a petition by the Samoan Public Trustee under section 30 of the Public Trust Office Act 1908 (New Zealand) and clause 21 of the Samoan Public Trust Office Order 1924.

The prayer of the petition is for an Order:

THAT pursuant to the direction of the High Commissioner of Western Samoa dated the 17th day of September 1951 the Samoan Public Trustee as Custodian of Enemy Property in Western Samoa be authorised not to allow interest on funds belonging to enemy estates and invested by him in the Common Fund of the Samoa Public Trust Office under regulation 12(3) of the Enemy Property Emergency Regulations 1939 and clause 4(c) of the Samoa Applied Regulations Order 1947 and regulation 11 of the Enemy Property Regulations 1954.

References in both the 1939 and the 1954 Regulations to the Minister of Finance are to be read in their application to Western Samoa as references to the High Commissioner of Western Samoa.

The validity of the High Commissioner's direction, the terms of which are set out in full in paragraph 8 of the petition, is challenged only in respect of that part of it which directs that no interest on the funds invested in accordance with it shall be credited by the Samoan Public Trustee to the enemy estates to which the funds belong.

The question of the validity of this part of the direction involves consideration of the wording of the relevant regulations in the Enemy Property Emergency Regulations 1939 and in the Enemy Property Regulations 1954 by which the 1939 Regulations are revoked.

"Regulation 1. - Preliminary.

.....

- (2) In these regulations, unless inconsistent with the context
  - (vi) "Enemy Property" means all property, real or personal, which belongs to an enemy or alien enemy or in which an enemy or alien enemy has any interest, and includes all money owing or payable to an enemy or alien enemy or to any person on behalf of an enemy or alien enemy:

Regulation 12 - Management.

- (1) Enemy property and the income thereof controlled by the Public Trustee in terms of these regulations, or the proceeds thereof, shall be held by the Public Trustee in trust for all persons having any interest in such property in accordance with their respective interests, save that no moneys shall be paid by the Public Trustee to any enemy or alien except with the consent of the Attorney-General or in pursuance of powers conferred on the Public Trustee by these regulations.
- (2) All moneys received by the Public Trustee in terms of these regulations and the proceeds of any property sold by the Public Trustee in terms of these regulations shall be invested by him in accordance with the direction of the Minister of Finance.

Regulation 13 - Charges.

- (3) For the purposes of calculating the fees to be charged no distinction is to be made between the proceeds of an asset and the income earned by such asset before realisation; the charges are to be calculated on the gross value of the total amount collected, both capital and income."

The words used in regulation 12(1) to specify the property which shall be held by the Public Trustee in trust for the persons having an interest therein are "enemy property and the income thereof.....or the proceeds thereof". The word "proceeds" like the word "income" refers back to the phrase "enemy property" and the phrase "proceeds of enemy property" means money resulting from its realisation by sale or otherwise and does not include income from such moneys.

It is to be noted also that in regulations 13(3), while reference is made to fees chargeable on the income earned by an asset before realisation, there is no reference to fees chargeable on income from the proceeds of realisation.

The unavoidable conclusion from the wording of regulations 12(1) and 13(3) is that there is no direction to the Public Trustee to hold in trust for any persons the income from the proceeds of the sale of enemy assets or to credit it to the estates concerned.

The fact of there being no such direction in the regulations may indeed be explained as in paragraph 5 of letter "F" in the petition by the draftsman having used phrases taken from regulations made in respect of enemy property resulting from the first World War. Those regulations provided, as the 1939 Regulations do not, for the investment in the Common Fund of the Public Trust Office of the proceeds of the realisation of enemy property and for the disallowance of interest on such investments and made

no provision for the Public Trustee charging fees or commission as the 1939 Regulations do, though only in respect of income earned otherwise than by the proceeds of realisation. Whatever the explanation may be, the fact of the absence of any such direction to hold in trust the income from the proceeds of the sale of enemy assets remains, and it is by no means clear whether, and if at all, for whose benefit, the principles of the law of trusts relied on by the writer of letter "F" in paragraph 8 thereof apply to such income.

The case against the validity of the High Commissioner's direction to credit no interest to enemy estates to which invested money belong depends, as the New Zealand Crown Solicitor admits and the correspondence shows, only upon inference as to the intended meaning of the relevant 1939 Regulations. A strong and contrary inference is supplied by regulation 11 of the Enemy Property Regulations 1954 which revoke the 1939 Regulations and which in its application to Western Samoa reads as follows:-

"11. All money from time to time held by the Custodian of Enemy Property and being enemy property shall if so directed by the High Commissioner be invested in such manner as may be so directed; and the income arising from such investment shall be deemed to form part of the enemy property from the investment whereof it arose and shall follow the destination thereof."

Regulation 11 is clearly not retrospective. It settles as from the date of its enactment the question of the crediting of income arising from the investment of moneys held by the Samoan Public Trustee and being enemy property, and it settles that such income as from that date shall follow the destination of the enemy property from which it arose.

Regulation 11 was enacted after the exchange by correspondence at a high level between New Zealand and Western Samoa on this vexed question and after the recommendation of the New Zealand Crown Solicitor, referred to at the foot of page 2 of his letter "J", that the question be settled in the regulations then being drafted. The 1954 Regulations are those regulations. There can therefore be drawn from regulation 11, the strongest inference that the Governor-General in Council did not intend to reverse what had been done under the direction of the High Commissioner up to the date of the Regulations, namely, 3rd March 1954. Had that been the intention, the wording of the latter part of the regulation would have been "and the income arising from such investment shall be deemed to form and to have always formed part of the enemy property from the investment whereof it arise and shall follow and be deemed to have always followed the destination thereof."

No such reliance on the saving provision of regulation 19 of the 1954 Regulations as the writer of letter "L" expresses in his last paragraph is needed to preserve the validity up to the date of those Regulations, of the disallowance of interest directed by the High Commissioner nor on the other hand does that regulation validate such disallowance after that date. Regulation 19 is a provision to preserve the effect only of things done under the revoked regulations and which could have been done under the 1954 Regulations. The High Commissioner's direction is not one of those things. Regulation 19 does not authorise the continuance of a practice which is opposed to that laid down for the future by the regulations of which it is part.

That Court's answer to the petition is an Order:

- (1) That the Samoan Public Trustee was up to 3rd March 1954 validly authorised by the direction of the High Commissioner of 17th September 1951, to disallow interest on funds belonging to enemy estates invested by him in the Common Fund of the Samoan Public Trust Office;
- (2) That interest on such funds from the date when it accrued up to 3rd March 1954 may be retained by him; and

- (3) That interest accrued or to accrue since that date must be credited to the respective estates to which the funds belong.