IN THE SUPREME COURT OF SAMOA

HELD AT APIA

C.P. 455/94

BETWEEN: MISILETI TUFUGA FATU of Leufisa, Widow as Administratrix of the Estate of TUFUGA FATU late of Asau

PLAINTIFF:

A N D: SIAOSI LEAVASA of Fugalei, Workman:

DEFENDANT:

Counsel: P A Fepuleai and F Tufuga for Plaintiff
R S Toailoa for Defendant

Hearing : 16 & 17 March, 6, 7 & 13 May 1998

Judgment: 14 May 1998

JUDGMENT OF SIR GORDON BISSON

The Plaintiff is the Administratrix of the estate of her late husband Tufuga Fatu who died intestate on or about 5 December 1981. Part of the assets of the estate is a piece of land at Fugalei described as Parcel 198/44 Flur III Volume 10 Folio 66.

The defendant Siaosi Leavasa, said in evidence, that in 1968 he met with the deceased and his wife, the plaintiff, at their house and asked for a piece of land to build a house on. The deceased agreed that the defendant could build a house on a swampy piece of his land and after building the house he should reclaim the land. The plaintiff who was present said in evidence that the arrangement was that the defendant could reside on the land

for some time to enable him to take his children to school but if "we need the land he has to find somewhere else to reside". I accept the evidence of the plaintiff that her husband did not give the defendant permission to build a permanent home. The initial rent was 15/- per month soon after converted to $5.00 per month which has remained the rent down to the present time. It is accepted that the defendant's occupation of the land was by way of a monthly tenancy determinable on one month's notice in writing.

The plaintiff produced a copy of a letter dated 15 June 1988 written by the estate solicitors to the defendant giving him until 31st August 1988 to vacate the land. The defendant did not remember receiving the letter but said he handed all letters on to his then solicitor but nothing turns on this as the defendant does acknowledge receipt of a letter dated 31 January 1994 a translation of which is as follows:-

"TRANSLATION

"31st January, 1994

To: Siaosi Levasa
Fugalei,

Ré: Land of Tufuga Fatu (deceased)

On the 15th June 1988 Mr. Enoka Puni of our office wrote to you and instructed you to vacate and remove all belongings from the land of Tufuga Fatu that you are leasing.

It appears that you are still occupying the land and rents have not been paid since June.

We are notifying you that by the 4th day of March 1994 you should vacate the land, remove all buildings and any other things you have erected on the land. You should also update all rental payments to our office.

Your continued occupation of he land has prevented the Company currently implementing the drainage project from completing the filling in of the land which means more monies will be expended to completely fill in the land.

Your refusal to comply with this notice will result in legal action for your removal.

KRUSE, VA'AI & BARLOW

LESATELE RAPI VA'AI"

By statement of claim dated 31 October 1994 the plaintiff commenced an action in this Court against the defendant claiming an order evicting the defendant from the land and judgment for unpaid rents of $50.00 per month. On 18 August 1995 judgment was entered by consent in terms of an agreed settlement. This judgment was set aside on 31 October 1995. The claim for vacant possession and unpaid rent since 1 January 1998 is not contested.

I hold that the monthly tenancy of the defendant was determined by the notice to quit of 31 January 1994 pursuant to s.105 of the Property Law Act 1952. He has remained in occupation of the land and not removed any buildings or other erections. He has made two annual payments of rent for 1996 and 1997 into the trust account of the estate solicitors but it is not contended that a new tenancy has thereby been created.

What is contested is the defendant's counter claim. He seeks judgment against the plaintiff for the value of improvements to the Fugalei Land by way of reclamation and for the costs of removal of his house . The claim for costs of removing his house has not been pursued. It is a new house erected after the notice to quit had been given but the plaintiff does not object to its removal along with the other erections on the land. The defendant said the house could easily be dismantled and moved to his other land. The plaintiff admits that the defendant is entitled to some compensation. What remains for the resolution of the Court is quantum.

The principle of unjust enrichment has been stated by Sapolu CJ in *The Public Trustee v Foketi Brown and others* C.P. 393/93 judgment dated 24 January 1995. In a scholarly judgment Sapolu CJ after considering developments in this field of restitution in Canada and in England preferred to adopt the Canadian formulation. In summary it is "a benefit/detriment analysis, that is, what benefit has the defendant (in this case the plaintiff) gained and what corresponding detriment has the plaintiff (defendant) sustained" (p.23).

After calling for further submissions Mr Toailoa referred me to a case cited in ***Chitty on Contracts*** 24th Ed at p.872 para 1824 dealing with the measure of damages for trespass to land. I do not find that relevant. Mr Toailoa referred to a case in which the Court held that an equity in the land had been created where a son had expended money on the land of his father in the expectation, induced or encouraged, by his father, that he would be allowed to remain in occupation (***Inwards and others v Balher*** [1965] 2 Q.B.29). That was a case of equitable estoppel and on somewhat similar facts McGechan J found no difficulty in accommodating remedial approaches appropriate to both proprietary estoppel and constructive trusts in ***Stratulatos v Stratulatos*** [1988] 2 NZLR 424. I would distinguish this case from those of estoppel or constructive trust on the facts. Here there was no underlying concept whereby filling of the land would give the defendant any allowance for capital growth in the value of the land by virtue of his effort in carrying out some reclamation but by no means filling and leveling all the land. As I read the evidence the deceased allowed the defendant to live on the land provided he paid a rental of $5.00 per month and reclaimed the land. It was not to be his permanent home. He was to find somewhere else to reside if the deceased and his wife needed the land. That was the agreement from the outset and it never changed. There was only one occasion in evidence when the deceased and his wife visited the property and that was for a reason which had nothing to do with the reclamation of the land but over a dispute between the defendant and his neighbours. On that occasion there was no comment on the reclamation. Clearly the deceased and his wife played no part over the years to encourage the defendant to continue with and finish the reclamation work or to improve the property in any other way so as to give him to believe he would gain an interest or equity in the property beyond his rights as a tenant.

Mr Fepuleai referred me to the record of the New Zealand Law Society Seminar on "***Unjust Enrichment - The New Cause of Action.***" At para 10.5 there is a helpful passage as follows,

> "As for the cases, it seems to be established that if the improver of another person's assets is still in possession of them, such that the other has to sue to recover them, the courts can allow as a defence the value of any improvements the improver may have made to the assets."

The emphasis is mine. It is the value of any improvements not the increase in value to the assets which the Court can allow. And again at para 10.8 under the heading "Measure of Gain" is the following passage.

> "The measure must be the lesser of: (a) the marketable accretion to the defendant's assets; and (b) the market cost of the work done and the expenses incurred by the plaintiff. To give the plaintiff the market accretion when that exceeds the cost of its time and expenses would be to deprive the defendant of the contribution made by its ownership of the capital item which has been improved."

These passages are consistent with the approach I have taken in finding against the defendant having any equity in the property itself. I would respectfully adopt and apply the concept of unjust enrichment as an applicationof the law of restitution as stated by Sapolu CJ. I agree with Mr Toailoa that it is the market cost of the work done and expenses incurred by the defendant which must be the measure of compensation in this case, that is, if I do not accept his argument in favour of added value to the estate land. I do not accept the argument for the added value to the land for the reasons already given.

The defendant's evidence of the extent to which he provided fill to reclaim the land goes back to 1968 when he got a permit for sand from the Public Works. Not much sand was obtained from this source. He could not recall how many loads. It all depended on how much he could afford at the time. Next he used trimmings from trees along the main beach road, arranging for the workers to dump the rubbish on his land and in return provided them with cigarettes and food. There is no evidence of the amount involved either in quantity of trimmings and rubbish or the cost. Then the defendant obtained some loads of soil from the

Church of Jesus Christ of the Latter Day Saints. Again he could not recall how many loads he obtained from this source nor when but thought it was perhaps in 1970 to 1972. He did, however, "well remember" that it was in 1993 when the last work was done. In that year he obtained some loads of fill for the land from the Special Project Development Corporation. He could not recall when asked in his examination in chief how many loads there were from the SPDC and he had no record of the amount he had paid but he said he paid $80.00 per load. That was the extent of the defendants own evidence in chief. However in cross examination he tried to recall what he had paid the church and then said it was approximately £10 per load for over 100 loads. When it was put to him that he had spent over £1000 at least he said "I suppose that is correct." It was also put to him that he must have some idea of how many loads he got from SPDC. He said it was about 350 and 360 loads. The price of $100 per load for SPDC sand was reduced to $80 per load if he dealt through the foreman, one Selota Ailolo. The defendant said he paid the money for the SPDC sand to the SPDC through the SPDC foreman. At $80 a load for 360 loads that would amount to $28,800. He said this was paid over a period of 8 months by instalments of $400 fortnightly, sometimes weekly depending on the income from his business as a restauranteur . I found his evidence vague and unreliable.

The foreman, Selota Ailolo gave evidence that sand from the SPDC was bought "through" him at $80 instead of $100 a load. He did not see the size of the loads. He said that he received payments of $400 in cash from the defendant at his shop in the market where he waited for his bus. He then paid it to the Company but obtained no receipts. When it was put to him that 360 loads at $80 per load amounted to $28,800", he replied "There was no $28,800.00." To that extent I accept his evidence. He was also asked if $24,000, that is 300 loads at $80 per load, passed through his hands over a period of 8 months. His reply was, "I do not know". I accept that too as he said he did not count the money he was given.

From the evidence of the defendant and Selota Ailolo I find no reliable evidence on which to base how many loads of sand were obtained from SPDC or its foreman, what size the loads were and how much was paid for them. Moreover, the plaintiff called a witness Frances Fruean, the assistant accountant at SPDC who had worked there since 1986. She produced the receipt book for the whole 1993 which showed that the defendant had paid no money in 1993 and that Selota had made eight payments to the company for the following amounts $240, $60, $20, $120, $180, $756, $19.50 and $280 totalling only $1,675.50. I accept the evidence of this witness which shows how unreliable was the evidence of the defendant and the foreman Selota as to the number of loads of sand from the SPDC and money paid for them. The defendant said he did not keep records and now relies on the evidence of expert witnesses to calculate the quantity of fill and its cost.

I come now to consider the evidence of the expert witnesses.

The defendant called as his expert witness Mr. Peseta Luaiufi Tone M.I.P.E.N.Z., M.I.C.E. of PLT Consultants. He had 27 years experience in engineering and construction work and had been involved in the construction of the drainage system for the Apia township. Part of this drainage system runs adjacent to the southern side and eastern or rear boundary of the estate land. It had been a mangrove swamp submerged in part during tidal variations. The drainage system has a concrete canal with 1.5 m of fill provided by the contractor along the boundary of the estate land to support the concrete side to the canal. This witness produced his report, Exhibit 3, undated, but based on his inspection of the property on 8 April 1998.

The report gives an approximate area filled as 715 m^2 to a depth of 1.45m with a volume of loose fill of 1610 m^3 which at the current rate of $28.00/m^3$ gave an estimated cost of fill of $45,080.00.

The plaintiff called an engineer Mr Ross Peters B.E., N.Z.C.E. I.P.E.W.S. who produced his report dated 17 August 1995, Exhibit 4. His approximate area of filled land was 678 m^2 to an average depth of 1.11 m with a volume of loose fill of 828 m^3. At a cost of $11.25 per cubic metre the total cost of fill was $9,315.00.

The plaintiff also called Mr Elon Betham of Apia, a Licensed Public Valuer and Property Consultant with 21 years of valuation experience including work both in Samoa and American Samoa. He produced a report dated 17 August 1995 as Exhibit 6. He estimated the filled area of land measured 655.78 m^2 and in his opinion the measure of compensation for the added value to the land by virtue of the filled area was $7,776.00. In cross examination he gave evidence that the present day difference in value of swampy land and dry land for a similar area was $92,340.00 but he was strongly opposed in his professional opinion to this "before and after approach" as a method for the calculation of compensation in a case such as this. In arriving at the added value of $7,776.00 he applied an appreciation factor of 12%. If this factor were 28% the added value would be $57,024.00. However, he stressed that an engineer would be more knowledgeable and more appropriate to calculate the actual volume of fill upon the reclaimed land. His own estimate of volume and cost of fill was $5,445.00.

Here the Court is faced with reports and evidence ranging from $5,445.00 to $45,080.00 for the cost of fill and to $92,340.00 for an increase in value to the land on the before and after method. I think the falacy in the valuations of Mr Betham whether as to added value to the land or before and after valuations is that they treat the defendant as if he

had an equity in the land entitling him to share in the appreciation in land values. This appreciation can be due to market forces far removed from reclamation work and it must be remembered, that Mr Tone said much of the considerable improvement to the ground surface with little if any sign of tidal movements in the property is due to the drainage canal system which has benefited this and all other properties in the vicinity of the system. As a monthly tenant the defendant had only a right to occupy the land determinable on one month's notice in writing. He had no expectation of any further rights or interest in the land whether by way of constructive trust or otherwise. While occupying a home on the land for 30 years he enjoyed some benefits himself from the reclamation work he carried out while paying the same rental of $5.00 per month over the whole period. Now that he must vacate the land it would be unjust for the plaintiff not to reimburse him for the cost of his reclamation work. This is in accordance with the principle of unjust enrichment whereby the owner of the land is spared the cost of reclaiming the land. That is the "benefit" to the owner in a case such as this. This "benefit" to the owner of the land has been provided at the tenant's expense. It would be unjust for the owner to retain this benefit without making good to the defendant his corresponding deprivation.

As the defendant was quite unable to prove the expense he incurred in providing the fill to the land, I must rely on the engineering evidence. In this respect I prefer that of Mr Peters. A view was taken of the land which supports the smaller area of land which had been filled as shown on the plan in Mr Tone's report Ex.3. On this plan Mr Tone included within a yellow line all the land as having being filled whereas Mr Peters marked in ink only the front portion of the land. Mr Tone referred to the filling being wedge shaped with a big hole under the building and to the rear. He said he took this into account. He calculated the fill to a depth of 1m overall and then a top layer of an average depth of .45m. I prefer Mr Peters average depth of 1.11m for a smaller area of land reclaimed to three levels. Another point of difference is that Mr Tone allowed for a compaction factor of 20% to convert fill in solid

volume to fill in loose volume, the latter representing fill material as delivered to the site. The defendant gave no evidence of spreading or compaction but there would be some by the delivery vehicles. Mr Peters allowed 10% for compaction which I accept. Accordingly on Mr Peters calculations the loose volume of material amounted to 828 m³. His cost per delivered cubic metre was $11.25 in 1995. Mr Tone's current rate of $28 m³ was for his construction contracts but Mr Peters obtained an up to date maximum cost from the SPDC for loads of sand to the site in Fugalei of $15 m³. At this rate 828 m³ would cost $12,420.00. That is the market cost the plaintiff would incurr to fill the land to the same extent today, and that is the appropriate amount to award the defendant by way of restitution for the benefit he bestowed on the plaintiff.

Judgment is given to the defendant on his counterclaim in the sum of $12,420.00. The defendant may continue to occupy the land until the plaintiff has paid to him the amount of $12,420.00 in full. He must then give vacant possession of the land clear of his house and any other erections within 30 days of his receiving the said payment and the Court so orders. Judgment is given to the plaintiff against the defendant in the sum of $5.00 per month from 1st January 1998 down to the date vacant possession is given to the plaintiff.

Both parties have succeeded on their respective claims. In the circumstances there will be no order for costs.

G E Bimson J.