Replaces original version. This version has been corrected at pp 5, 6, 7 & 8 Finnigan J

IN THE SUPREME COURT OF TONGA

CIVIL JURISDICTION

NUKU'ALOFA REGISTRY **C.NO.1570/98**

BETWEEN : LOTO'A HAVEA : ***Plaintiff***

AND : KINGDOM OF TONGA : ***Defendant***

BEFORE HIS HONOUR JUSTICE FINNIGAN.

Counsel: Ms Tonga for plaintiff, Mr Cauchi for defendant

Dates of Hearing : 14,15,18 October 13 & 14 December 1999
Date of Judgment : 31 March, 2000

JUDGMENT OF FINNIGAN, J

This is a claim in tort by a landholder against the government for damage to his land. The plaintiff says that during 1997 &1998 people employed by the defendant quarried away part of his land, without consultation and without permission. The total area of his land had been 8 acres and 1 rood, and he claims that the volume of rocks and topsoil removed was 147 meters long, 40 meters wide and 5 meters deep. He claims also that the quarrying destroyed a number of specified trees, and claims compensation for that. For the destruction of those fruit and coconut trees as well as the claimed unlawful trespass, unlawful conversion of the rocks & soil, damage to the natural state of the land and the loss of future cropping use, he claims damages of $170,000. Ms Tonga counsel for the plaintiff commented during the hearing that it was not for the volume of rock taken that the plaintiff claims, but the area of land destroyed. The claim rests on evidence of the value of the allotment at its surface. It is not part of the plaintiff's case to claim for restoring the allotment to its original condition.

THE FACTS

Briefly, the major relevant facts are these. Other matters were mentioned in evidence but may be omitted here as peripheral. The plaintiff lives in New Zealand. The land is in Vava'u. The plaintiff has been the landholder since 1983, but has not made any specific use of the land other than to allow the trees and vegetables on it to grow and he had rented it out for stock grazing at $100 per year. The land shares a common boundary with land owned by Sione Tu'i 'Ofa ("Sione Tu'i"). Sione Tu'i had a contract with the defendant to supply quarried coral rock for roading. In the course of quarrying the

land of Sione Tu'i, the defendant crossed the boundary into the plaintiff's land and took away the topsoil and sub-structure to a depth of 5 meters, over an area of 147 meters by 40 meters, i.e. 5,880 square meters. As well, it had stockpiled some of the quarried rock on an adjoining part of his land.

As soon as the plaintiff was told of this he came to Tonga. That was in August 1998. The defendant (the Ministry of Works) stopped the work and the plaintiff visited the land with the Minister of Works, who happened to be in Vava'u. There were meetings, at which the plaintiff and/or his lawyer were present, as was Sione Tu'i. The Ministry had paid the latter for all the quarried coral so far delivered. It was suggested by the Minister and generally agreed that Sione Tu'i would pay to the plaintiff half of what he had received. It is accepted that Sione had been paid $16,000. During their discussions, Sione Tu'i told the plaintiff that they were relatives. The plaintiff accepted that, and resolved to do something to help him. So on 4 September 1998, the day the plaintiff left for New Zealand, the two of them entered a written agreement [exhibit A]. They had agreed that Sione had paid $3,000 to the plaintiff, and would give the plaintiff the remaining stockpiled rock, so that he could sell it and keep the proceeds. In the agreement the plaintiff allowed that Sione had full authority to remove (and sell) stock from the stockpile on the plaintiff's land, and the money was to be given to the plaintiff's family. They agreed that this arrangement extinguished any liability that Sione might have to the plaintiff from the conversion of the plaintiff's coral rock and the damage to the land, and they promised each other to live in harmony. Sione paid the plaintiff another $500, and the plaintiff was satisfied, because he wanted to help Sione's family in their money difficulties.

In addition, the Ministry of Works was anxious to complete about 2 kilometres of partially constructed road. The Minister explained to the plaintiff and his lawyer at a meeting about the problem that early completion of those 2 kilometres was necessary in order to avoid paying penalties to the Asian Development Bank, which was financing the road. The plaintiff agreed to supply the Ministry with 663 loads of coral rock from the stockpile on his land so the 2 kilometres could be completed. He was paid $3,779.10 for these 663 loads before he left for New Zealand on 4 September 1998 [exhibit B].

There were two meetings at which the plaintiff and his lawyer discussed with the Minister and his advisers resolutions of all the issues that had arisen. Any issue of liability of the defendant to the plaintiff was left unresolved after the meetings. A claim was subsequently made, this action was filed, and the claim has been redefined to $170,000, based on the evidence of a valuer about the value of the damage done.

At some point not made clear by the evidence, a part of the remaining allotment was stripped of its topsoil. The evidence does not show who removed it. The valuer who assessed the damage 13 months after the events in issue noticed the removal.

There was a letter produced in evidence that appeared to give authority to the plaintiff's mother to deal with the allotment, and thus allow the quarrying. This letter was in the hands of the defendant, and clearly had been given by the mother. The plaintiff denied knowledge of the letter, and in any event the defendant did not rely on it as a defence. At all times, including during the hearing, it has acknowledged that the incursion onto the plaintiff's land was by mistake.

One final fact is important and needs to be mentioned. The plaintiff intends to retain the damaged allotment and to use the part that remains. He has already used some of it as a quarry and sold out the rocks.

THE ISSUES

Counsel approached the matter first on the basis of liability and second on the basis of quantum. The defendant did not seriously contest liability, and on the evidence had not done so from the start. The main submission of counsel for the defendant about liability is that the agreement with Sione Tu'i was a settlement of all he could claim for the damage caused, and that any claim the plaintiff might have had on the defendant was settled in the meetings. I cannot accept that submission. I find that it was the defendant that did the work that encroached from Sione Tu'i's quarry onto the plaintiff's land, and that the payment by Sione Tu'i was no more than payment from the proceeds of what he had wrongfully received for selling the substance of the plaintiff's land to the defendant. There still remains a liability in the defendant for the encroachment and for the destruction. Nothing in the evidence to show that this liability has been compromised. I find that a case has been made out in liability. There was clearly a breach by the defendant of a duty of care to the plaintiff, in the course of which it committed the torts of trespass and conversion.

I turn to quantum.

THE APPROACH TO VALUATION

A unique opportunity was offered to the Court by the plaintiff in this case to develop the law governing valuation of land for the purpose of assessing damages. The plaintiff's claim is for loss of and damage to the surface of his land, and to quantify the injury suffered by the land he adduced the evidence of a government land valuer. The valuer's evidence was supported by that of another government valuer called by the defendant. The fundamental step in the valuation evidence of both witnesses was the concept of freehold land as a tradable commodity in an open market. Both valuers assured the Court that this concept is accepted in the Ministry of Land. It is put into operation they said in the following way. While law prohibits sale of land, the right to occupy land can be and is sold. There are even benchmark values, I was told, which are accepted in the Ministry for transfer of the right to occupy land, depending on locality and area. Generally, as I understand it, this buying and selling the right to occupy land may be effected by way of lease, but the acquisition in this way of a registered allotment in a land subdivision was also mentioned.

I have given this matter a lot of thought and taken time to examine it. I have concluded that the invitation to import the concept of freehold land cannot be accepted. However, I do accept as a fact that in Tonga, subject to the Land Act and to cabinet approval, the right to occupy land is given in return for money. It is common experience that the right to occupy land in Tonga is a traded commodity.

However that right once acquired is hedged about by the Land Act. The King, the nobles and the government hold all the land primarily as estates. The nearest approach for the ordinary citizen to land ownership is something granted, i.e. a right to occupy land in the estates of a primary holder. A registered Deed of Grant conveys a title against the world, except that it is itself subject to the rights of an heir. Even surrender of an allotment requires the consent of the heir. Women may buy sell and own leases, and pass them on by will, but the lease has a fixed term and conveys only a right to occupy. Registered title, except for the life tenancy of a widow, is for males only.

Against that background it seems to me inappropriate to import the principles relied on by the plaintiff's valuer, innovative though that may be. Concepts such as market value that assumes a willing but not anxious vendor and purchaser, and free exposure to the market, do not fit readily into Tongan land tenure, and it is beyond the mandate of the Court to introduce them. I do find however that the concept of highest and best use, defined by the plaintiff's valuer as the most profitable legal use to which a parcel of land may be put, does apply in the Tongan system of land tenure.

I have been told that there is only one previous case in point. It seems to me that the proper course for the Court is to follow that case and let the law develop in that way. The case is an unreported judgment of Webster, J that was delivered on 13 June 1989: *Mokofisi v The Kingdom of Tonga*, C111/88.

In that case, which is very similar on its facts, the Court considered the paucity of authority and on the evidence allowed damages under the following heads:

Trespass to land	-	Removal of land (including the commercial value of the rock removed) Loss of amenity Barrier fence (at edge of excavated area)
		Conversion of topsoil from the remaining land
		Damages at large

I shall follow the same approach, making the best I can of the evidence.

DISCUSSION, AND AWARDS UNDER HEADS OF DAMAGE

In *Mokofisi,* the Court held, once it was established that the defendant had encroached on the land of the plaintiff by quarrying and by removing rock and topsoil, that the defendant was liable to the plaintiff in damages for the torts of trespass to land and conversion. On the authority of *Darbishire v Warran* [1963] 3 All ER 310 (CA), it held that the measure of damages is the sum necessary to put the plaintiff in the same position as though the damage had not happened. It then held that for trespass to land where there is permanent deprivation of land, as was the case before it where rocks had been quarried away at the boundary, that measure is the value of the land. The question for the Court there, as it is here, was how to assess the value of the land. In *Mokofisi,* the Court had the evidence of a valuer that the value of the land could be said to be $15.25 per square meter. The defendant accepted that value in that case, and for 150 square meters the value was fixed by the Court as $2,287.50.

The Court then held that it would be unfair to allow damages for both the **trespass** on the land (in that case causing a loss of 150 square meters) and the **conversion** of the same 150 square meters of its substance. It said (at p6) that this was because both types of damages had the same basis, i.e. the value of what was lost. In the present case I take a contrary view. On the facts before me, what is lost in the loss of surface is different and additional to what is lost in the loss of the underlying substance, and each has a different value. In the present case, the value of the substance that was lost (the rocks) was settled at the meetings. The Minister of works suggested, and the two adjoining owners accepted, that Sione should pay to the plaintiff half of what the Ministry had paid Sione. Arrangements were made for Sione Tu'i to pass on that payment. He and the plaintiff settled this in their own separate agreement. Nothing remains to be awarded by the Court under the head of conversion of the underlying rock. The head of **trespass onto the land** however remains. I shall follow the reasoning of the Court in *Mokofisi* and make an award under that head when I assess damages at large.

Before proceeding, I comment that *Darbishire v Warran* is the English authority that was selected by the Court in 1989. That is a case involving the destruction of a motor vehicle in a collision. As the English Court of Appeal noted in that case, the law applied there was the law of damages arising out of collisions between motor vehicles, which has been developed out of the admiralty rule on collisions at sea. No authorities at all governing damages for destruction of land were put before me, except *Mokofisi.*

I turn to **loss of amenity**. This is the major head of damage in the plaintiff's claim. The valuer calculated the quantum of the claim by the following method. First he valued the whole allotment by valuing each of 35 proposed residential allotments, the total being $150,000 or $18,000 per acre. Then he valued 5.779 acres, which is what remains, excluding an area from which topsoil has been removed. This area he valued not as residential subdivision but by per acre values of individual acres, said to be based on evidence of exchanges of land for money. These valuations were $10,000,

$8,000, $6,000 for three of the acres and $5,000 for the remaining 2.779 acres. By this method for that area he reasoned a value of $38,000. The difference, $112,000, he says is the value of what has been taken. What hs been taken, he says, is in two parts. One is the quarried part, the other has not been quarried but has had its top soil taken. The rest of the claim of $170,000 is made up from his fee, legal fees, the plaintiff's valuation of lost trees, and general damages.

I have some reservations about this methodology. However, the evidence of the plaintiff's valuer, written oral and photographic, does put it beyond dispute that the defendant's incursion caused considerable loss of amenity to the plaintiff's land. It lost its natural terrain. The quarried area has removed completely the surface that once was there, to a depth of 5 meters. At the edge of the excavation, roughly 40 meters in from the former boundary, there is now a plunging escarpment. It must be allowed in the defendant's favour that Sione Tu'i was entitled to create a quarry up to the common boundary, so long as he provided on his land natural support of the plaintiff's land up to the plaintiff's boundary. Had he done so, there would still have been some obligation on the plaintiff to fence his land. However, the need for that has now been grossly magnified. In addition, on another substantial area there was a stockpile, and in another place a road had been formed for access by trucks. These latter parts can be put right by removal action, possibly some topsoil enhancement and the passage of time, but they are remediable by damages nonetheless. As the valuer said, the quarried area must now be severed from the plaintiff's land management plan, and the remainder now needs a new management plan.

On that topic, the valuer asserted that the highest and best use of the land, as defined, before the excavation work, was for it to be subdivided into commercial accommodation units or smaller residential lots of at least 30 perches. I confess to a little scepticism about this. There was no evidence that this piece of land 3 kilometres from Neiafu, elevated though it is and with pleasant views, would have attracted in the reasonable future the 35 residential purchasers that he postulated. While mentioning the valuer, I comment in passing that his inclusion of an area of missing topsoil must be disregarded. This is for the reason that his inspection took place over a year after the damage was done, and in that time the plaintiff had conducted further quarrying. There is no evidence by the plaintiff or by any other witness about when the missing topsoil was removed, or by whom.

I am satisfied by the evidence that this piece of land was formerly 8 acres and 1 rood. The plaintiff's valuer agreed that 8a 1r is 3.3 hectares, which is 33,000 square meters. What was taken by quarrying is 5,880 square meters. The plaintiff's valuer measured the usable surface as now reduced to 5.779 acres or 2.339 hectares, or 23,390 square meters. This excluded the area of missing top soil. By my calculation, the area of missing topsoil must therefore be 3,730 square meters. I must ignore the missing topsoil, but clearly by the removal of 5,880 square meters the plaintiff's allotment has suffered substantial loss of amenity. It has been reduced by about one fifth. It had its contours altered irrevocably, it lost 140 meters of its north-

eastern boundary and it was made different in character by the defendant's careless quarrying roading and stockpiling. While the affects of the roading and the stockpiling are not permanent, the loss of 5,880 square meters is. The allotment is no longer what it was. The missing parts of it had intrinsic value because they faced the sun and enjoyed good slope, drainage and views. What remains is irregular in shape and less valuable than it was, even if for no other reason than that it is reduced in size and irregular in shape. There is a part that has no views or even capacity to support housing or crops.

How to assess the value of that loss of amenity? In *Mokofisi* the Court had evidence of a market value for the original allotment, and a range of assessments by a valuer of reductions from that value for disfigurement and in addition for loss of privacy view and outlook. The Court rejected a reduction at the lower end of the scale because of the individual quality of the piece of land, what I have referred to above as the character.

In the present case also there is evidence of market value. Both valuers who gave evidence attested the fact that land in Tonga has a market value and the valuation evidence before Webster, J, also attested that fact in 1989. I accept the evidence of the valuers that there is a market and that in Tonga the occupancy of pieces of land does change hands in return for money. It is established as a fact. This evidence is supported by evidence heard by the Court in other cases. I accept the plaintiff's valuer's view that market value is the value agreed in an open market between a willing buyer and a willing seller.

The land seems to me to be a family asset, little used, and a family asset for which the plaintiff had no plans. His mother lived in Vava'u but did not live on it. Nobody lived on it. Its chief value was its cultural value as the plaintiff's link with the land of his birth, and his refuge as of right should he return. It is the inheritance of his heirs. It was 33,000 square meters, and he has lost 5,880 square meters of it, and the lost land was said to have good topsoil to a depth of 2 and 3 meters. It was good growing land. There were many useful trees destroyed, at least 83 by his estimate. There is also the loss of contour and change in character. There is the irregularity of shape of what remains.

The plaintiff's valuer valued first the whole allotment and then on that basis valued the part which is missing. The valuation of what is now missing is a value before the damage occurred. I think that is the right approach. However I am unable to accept the plaintiff's valuer's concept of residential subdivision as realistic. It seems to me unrealistic. There was no evidence of any demand for the land as residential allotments, only the statement of the valuer in his report (at p 29) that in this area "buildings development is high", and "properties of this size are few in number.... and the demand for these type are reasonably high". On the evidence of the plaintiff's use of the land, the photographs and the evidence of the valuer, subdivision into 35 residential lots is not reasonably the highest and best use for this allotment

at present. It seems to be surrounded by land undeveloped for residential purposes. Regrettably, the valuer offered no alternatives.
After a lot of thought, I have concluded that the best I can do with the evidence is to take $38,000 which is the valuer's valuation of the 5.779 acres, i.e. the part of what remains that is still undamaged. He agreed that this is 23,390 square meters. From that I can average out a value per square meter which I shall apply to the whole allotment. The remainder is (33,000 – 5880 =) 27,120 square meters.

By this calculation, the averaged value per square meter is $1.62, and for the 5880 square meters lost the total averaged value is $9,526. The proportion of the whole that is lost is 5,880/33,000, or 17.82%. When I calculate a portion of 17.82% of that averaged valuation to represent a value for what has been lost the result is the same, $9,526. That is the sum I fix upon consideration of the evidence that was presented. However it represents not the loss of amenity but the value of the **lost surface.** As the Court commented in *Mokofisi*, (at p7) the damages for lost surface and the damages for **the lost amenity** may be different and cumulative. In making that comment the Court was dealing with damages specifically for lost surface (topsoil) that was removed from the surviving part of the allotment. On the different facts of the present case, where the surviving surface must be treated as intact apart from the stockpile and the roading, I think the principle still applies. The loss of amenity still exists as a remediable head of damage even after damages have been awarded to compensate for the lost portion. So I still have to consider damages for loss of amenity apart from damages for the lost portion.

It seems to me impossible to assess an amount on the evidence. In *Mokofisi* the Court had the benefit of a valuer's assessment, broad-brush though it may have been. It fixed damages under this head at $5,000, about midway in the range suggested by the valuer. Without the benefit of such evidence, I propose to include damages under this head in my assessment of damages at large.

I turn now to the **fence**. I mention it only because it was a head of damages in *Mokofisi*. This was not raised as part of the present case, or mentioned in argument by either party. It would be inappropriate for me to include any allowance under this head.

Conversion of the additional topsoil from a further area has not been shown to be part of the damage caused by the defendant, so no award is made under that head.

There remains the head of **damages at large.** As noted above, this includes the head of **trespass onto the land**, as well as the **loss of amenity**. As the Court noted in *Mokofisi*, (at p7), there should be an assessment under this head of damages in order to show that the damages are not limited to provable specific pecuniary loss. This arises from the affront caused by the torts of trespass to land and unlawful conversion. In that case the Court awarded $2,000. That included another element not present in the present

case, i.e. aggravated damages for the defendant's' conduct, but the present case has the added elements of trespass onto the land and the loss of amenity. I also must include an element for the lost trees. The only evidence of that loss is the plaintiff's self-assessment. He claimed for 48 trees and his valuations add up to about $10,000. It seems to have an element of guess in it. I have to assess not replacement cost but a sum representing restitution of the grown trees. My assessment is necessarily subjective and open to different points of view. I bear in mind that the plaintiff still has the use of the remainder including the ability to subdivide it if he chooses, something that the valuations tended to overlook. My assessment of what is fair compensation under this head, after considering the whole of the evidence over a lengthy period of time, is $17,500.

CONCLUSION

The damages that I award therefore, in summary, are:

Lost surface – the part removed:
$9,526

Damages at large, including trespass onto the land, tree loss and the loss of amenity: $17,500

In addition to these two awards, the plaintiff is entitled to his costs, which are to be agreed or taxed.

NUKU'ALOFA, 31 March 2000

SUPREME COURT TONGA

JUDGE