

NEW SAMOA INDUSTRIES LIMITED

v

ATTORNEY-GENERAL

Supreme Court Apia
 18 December 1978; 19 February 1979
 Nicholson CJ

PRACTICE AND PROCEDURE (Discovery) - State privilege to refuse disclosure of documents if such disclosure would be "injurious to the public interest" - s 20 Government Proceedings Act 1974 - Court order for discovery against the State to be made only following advice that the State does not wish to exercise its privilege in a particular case or in relation to a particular document.

MOTION to discharge order for discovery made against defendant as a matter of course.

Order discharged.

Cruickshank for applicant.
 Mrs Drake for respondent.

NICHOLSON CJ. This is a motion to discharge an order for discovery issued as a matter of course against the defendant by the Registrar of this Court on 10th February, 1978. The grounds for the motion are stated to be -

- (1) that discovery as a matter of course is not available against the State;
- (2) that the order must specify which officer of Government should supply the affidavit of discovery;
- (3) that the order is too broad and should specify which documents and which Department of State are to be the objective of the order.

As to the first ground, I am satisfied that the defendant must succeed. The position in Western Samoa is governed by the Government Proceedings Act 1974, section 20 as follows:-

20. Discovery - (1) Subject to and in accordance with rules of Court, -

- (a) In any civil proceedings to which the Government is a party or third party, the Government may be required by the Court to answer interrogatories if the Government could be required to do so if it were a private person of full age and capacity; and
- (b) In any such proceedings as aforesaid the Government may be required by the Court to make discovery of

documents and produce documents for inspection if the Government could be required to do so if it were a private person of full age and capacity:

Provided that this section shall be without prejudice to any rule of law which authorises or requires the withholding of any document or the refusal to answer any question on the ground that the disclosure of the document or the answering of the question would be injurious to the public interest.

(2) Any order of the Court made under the powers conferred by paragraph (a) of subsection (1) of this section shall direct by what officer of the Government the interrogatories are to be answered.

(3) Without prejudice to the proviso to subsection (1) of this section, any rules made for the purposes of this section shall be such as to secure that the existence of a document will not be disclosed if, in the opinion of a Minister of the Government, it would be injurious to the public interest to disclose the existence thereof.

It will readily be seen that the proviso to subsection (1)(b) and subsection (3) provide certain privileges to Government in the matter of discovery. It appears obvious to me that before any Court order for discovery may issue, the State must be given the opportunity to consider whether or not it wishes to exercise those privileges and to advise the Court of Government's attitude to discovery in a particular case or in relation to a particular document. It would be singularly inappropriate for this Court to issue an order first and then for a Minister of Government thereafter to state whether he will comply with the Court's order or not.

I am not satisfied that the remaining grounds have been made out. The submission that the officer of Government to make the affidavit ought to be specified, I do not accept. In subsection (2) of section 20 of the Government Proceedings Act 1974 the Legislature has taken the trouble to spell out that, in the case of an order for interrogatories, the officer to make the answers thereto shall be specified in that order. No such requirement is mentioned for an order for discovery of documents. Moreover, the issues raised in the pleadings revolve around a contract between the parties and I see little possibility of difficulty for the defendant in sorting out the responsible departmental officer to make discovery.

As for the submission that the order is too broad, again the issues are such that it ought to be clear that discovery is sought of all documents relative to this contractual dispute.

On the first ground alone the order is discharged. If the plaintiff wishes to obtain discovery, it may move the Court on notice. I award costs of \$20.00 to the defendant, in any event.