IN THE SUPREME COURT OF SAMOA

HELD AT APIA

BETWEEN: GMA CONSTRUCTION LIMITED

Plaintiff

A N D: TUPA'I SE APA as Attorney-General for and on behalf of the Public Works Department of the Government of Samoa

First Defendant

A N D: YAZAKI SAMOA LIMITED

Second Defendant

Counsel: T K Enari for the Plaintiff
F L Tufuga for the First Defendant
R Drake for the Second Defendant

Hearing Date: 24 August 1998

ORAL DECISION OF JUSTICE YOUNG

The second defendant seeks an order of this court in the words of the motion dismissing and striking out the statement claim as it relates to the second defendant as a party to the proceedings.

The grounds of the motion is that the second defendant did not exist or carry on business at any of the material times referred to in the plaintiff's statement of claim and as a result the second defendant has been improperly joined.

This is an action by GMA Construction against the Attorney General as first defendant and Yazaki originally Western Samoa Ltd but now Yazaki EDS Samoa Ltd. The action involves the construction of a building in Samoa.

The plaintiff believes that it was awarded the contract for the construction of this building by the Government and then alleges contract was wrongfully cancelled. It is thus suing the Attorney General alleging the wrongful cancellation of the contract.

The plaintiff sues the second defendant Yazaki Western Samoa on the basis that it unlawfully interfered in the legal relations between GMA Construction and the Government by convincing the Government that it should break its contract with the plaintiff and award the building contract to another company.

The motion can be stated simply but regretfully the legal issues are not quite so straight forward. Mrs Drake on behalf of the applicants (the second defendant) points out that the second defendant was not incorporated as a private company in Samoa until 2 November 1995. Although not relevant, for the sake of completeness I mention that Yazaki Western Samoa changed its name in December 1997 to Yazaki EDS Samoa Ltd. She says therefore that given the allegations in the statement of claim relate to July/August 1995 and that the second defendant did not come into existence until after the cause of action arose the action against the second defendant must evidently fail because it did not exist at the time of the alleged legal wrongs.

It seems that at the time of the alleged wrong the second defendant was "represented" by a company called Yazaki Australia Pty Ltd. That was the company which had registered itself as a foreign company in March 1991 in Samoa. In January 1996 Yazaki Australia Pty advertised, advising they were to cease in having a place of business in Samoa. Subsequently in October 1996 it seems that a liquidator was appointed for Yazaki Australia Pty although then known as Harness & Company Pty Ltd it having apparently changed its name during 1996. This entangled situation is the factual background to the application.

When the second defendant filed its statement of claim while it denied the plaintiff's allegation of it being a party to the illegal interference in the contract it did not in its pleadings explicitly say that it was not in existence of the time of the alleged events. The statement of defence was filed in April 1996 and this application is dated July 1998, two years later.

I have decided having heard the submissions of counsel that I am not prepared to grant the application today nor in the circumstances am I prepared to refuse the application. I have reached the conclusion that this matter must be properly tried as an integral part of the trial of this case. I say that for number of reasons:- Firstly the plaintiff may be left in the unusual situation on the face of it of not having a litigant to sue with regard to the allegation of improper or unlawful interference of the contract.

I say that because Yazaki Western Samoa Ltd was not existence at the time of the events which gave rise to this action secondly Yazaki Australia Pty Ltd. now no

longer exists it having put itself into liquidation in October of 1996. The plaintiff is in the situation where it has not had effective notification of the liquidation of the Australian Company.

It seems to me that at least at this stage these issues may arise with respect to the process by which Yazaki Western Samoa came into existence and the process by which Yazaki Australia Pty went out of existence.

Firstly, should the court lift the corporate veil. What that means in the context of the current litigation will be the subject of evidence and discussion as to who were the shareholders of Yazaki Australia Pty and who are the shareholders of Yazaki Western Samoa.

Secondly is there evidence which could show that Yazaki Samoa while not incorporated until November 1995 was through its agents acting as if a legal entity prior to incorporation. There does appear to be some evidence even at present that Yazaki Australia may have held Yazaki Samoa out as a legal entity before incorporation.

Thirdly are Yazaki Australia and Yazaki Western Samoa any more than part of an agreed enterprise of companies controlled by a parent company such that in commercial reality the business is really the parent company and that therefore the proper defendant here may be the parent company.

I mention these because they may be all matters which the plaintiff will need to raise at the trial if indeed it can establish evidentially that there is a basis for doing so. It may be that the events described are no more than a coincidence of circumstances and that the plaintiff's situation that I have mentioned is simply its bad luck. But it may be that there is a less generous interpretation of the facts.

For those reasons therefore I am not satisfied that the issues are fully dealt with and I am not therefore prepared to make any final decision on the motion. It may be these issues are to be resolved before trial and there will be a need to have a separate hearing or it may be that they can be adequately dealt without trial. I express the hope and belief that the motion will be better dealt with perhaps as a preliminary matter at the beginning of the trial although I recognise this may cause unfairness to the second defendant because it will have to prepare for the substance of the trial as well as for this matter.

The only requirement now is to adjourn the application by the second defendant. I reserve the question of costs for the resolution of this issue or for the resolution of the trial.

The plaintiff now seeks in this matter further and better discovery from both the first and second defendants. Firstly the first defendant. The first defendant, the Attorney General, has filed currently a brief list of documents. No division within that list is maintained nor there is any indication in the list currently whether public interest immunity is claimed with respect to any documents. However, there is an affidavit

filed in response to the motions seeking better discovery from the Attorney General on behalf of the government which does assert public interest immunity claims.

Those claims do not relate to any particular documents but make a general assertion in regard to public interest immunity and a general assertion that the obtaining of such documents by the parties would be against the public interest in that disclosing the relevant information may result in ill informed public criticism.

I have indicated to counsel for the crown that the crown, as far as public interest immunity is concerned, must do the following:- firstly the first defendant needs to complete discovery by ensuring that it lists all documents which it has relevant to these proceedings on behalf of the Public Works Department and on behalf of Cabinet and the Executive. It is counsel's responsibility of course to ensure that a diligent search is made.

Secondly the affidavit must detail which documents that can be produced and with respect to which public interest immunity is claimed. Clearly the appropriate ministerial certificate (R 94(e)) will be required were appropriate. Also the reason for claiming public interest immunity will need to be asserted with respect to each individual document as each individual document is claimed as being a public interest immunity document. I have indicated to counsel already that it would be an unusual situation where public interest immunity could be properly asserted because of the danger ill informed criticism of the government.

I have indicated that such an affidavit should be filed and served by 5.00 p.m., Wednesday, 2 September and that this matter should come before me again at 9.00 a.m. on 3 September to have any further matters in relation to the affidavit and any further argument with regard to public interest immunity can be dealt with then. I deal now with the matters relating to the discovery with respect to the second defendant at the plaintiff's request.

Plaintiff has detailed both in its submissions and in its affidavit what further discovery is sought as a general proposition. Mrs Drake on behalf of the second defendant does not object as a matter of principle to those requests but points out that it may well be that many of the documents that are sought her client does not have. The proper course here is for her to cover each of the categories of discovery and indicate what documents she does have or has had, indicate whether or not they are properly discoverable or privileged and where no documents are held to indicate that by way of affidavit.

This I believe should properly cover discovery as far as the first defendant and second defendant is concerned. I reserve the right for further argument with regard to these matters to be dealt with later in terms of the timetable which I will now record.

As far as the second defendant is concerned there is to be further and better of discovery to be completed by the 30 September. Inspection and any further interlocutory matters are to be dealt with by 16 October. That will leave time of

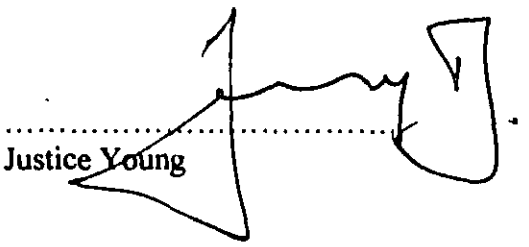
course for the parties to further apply should there be any need for court intervention as far as discovery is concerned. Any further response should be completed by 7 November. The hearing could then commence on ~~13~~ 30th November subject to this comment.

I do not currently know whether the other fixtures have been allocated for that time so it would depend upon the availability of a Judge. Secondly Mrs Drake has indicated that she does not currently have her diary and thus does not know her availability. I am sure that she can in the course of today or tomorrow let the court know her availability. I would also like to make some general comments about the course of this litigation.

Litigation does require, in my view, if it is to be dealt with in a proper way, for counsel to co-operate particularly on issues of discovery notice to admit documents and further particulars and inspection. Arguments requiring court time in these areas should be very rare.

Counsel who are responsible and I know that those who are here today are in that category with good will and maturity can settle most of these matters. I except difficult public interest immunity questions in this case. But for the other interlocutory matters I express the hope it be dealt with by counsel rather than asking for court time.

All questions of costs should be reserved but I am sure that ultimately questions of costs will be decided at trial taking account of the history of the case and acknowledging the case requires speedy if not urgent attention.



Justice Young