WESTERN SAMOA TRUST ESTATES CORPORATION v
TUIONOULA (LEOTELEIFALEESE), SAIPA'IA (OLOMALU) & OTHERS

Supreme Court Apia
Pain J
23 September 86 to 31 October 1986
19 January 1987

CUSTOMARY LAND - agreement to relocate by exchange of land - validity of agreement - history of arrangements negotiated.

DAMAGES - assessment of damages for trespass - exemplary/ aggravated damages inappropriate.

TRESPASS - unlawful entry to land previously exchanged.

HELD: Damages were assessed and injunctions were issued to prevent the villagers, Alii and Faipule of Satuimalufilufi from entering or occupying that land now of the Plaintiff, that had been validly exchanged during World War II by Satuimalufilufi for its present land at Falepuna.

CASES CITED:

- Sakariyawo Oshodi v Brimah Balogun [1936] 2 All ER 1632
- Attorney General v De Keysers Royal Hotel Limited [1920] AC 508
- Carltona v Commissioner of Works & others [1943] 2 All E.R. 560
- British Transport Commission v Gourley [1956] AC 1985
- McArthur & Co v Cornwall & anor [1892] AC 75
- Harbutts Plasticine Ltd v Wayne Tank & Pump Co Ltd [1970] 1 Q.B. 447
- Merest v Harvey (1814-1823) All E.R. 454
- Rookes v Barnard [1964] A.C. 1129
- Hall & Co v Pearlburg [1956] 1 All ER 297

LEGISLATION:

- Supreme Court (Civil Procedure) Rules 1980; rule 36
- Samoa Act 1921; Ss 4, 5, 268, 269, 271, 275, 280
- Samoa Land Emergency Regulations 1944
- Samoan Land for Defence Purposes Order 1945
- Statutes Amendment Act 1944; S 58
- Samoa Amendment (No. 2) Act 1956 - Part III
- Lands and Titles Act 1980; S 9

Lazar for Plaintiff
Sapolu for First Defendants
Va'ai for Second Defendants

Cur adv vult

This is an action in trespass. The Plaintiff pleads that it is the lawful owner and occupier of the lands at Faleolo described in paragraph 2 of the second amended statement of claim. It alleges unlawful entry on to the land and continuing occupation thereof entitling it to an injunction and damages against those responsible.

However this is no simple case of trespass. There is an unusual and complex background which has been carefully traversed during the six week hearing. It involves the village of Satuimalufilufi which, until 1942, occupied land at Faleolo as customary land of the village. Some of the people from that village have now returned to occupy part of that land. They challenge the title of the Plaintiff to the land and assert that it remains customary land of the village. Their actions have caused an unfortunate division within the village which was very apparent during the hearing. For the parties this action has been an opportunity to publicly voice grievances that have been harboured over many years.

In view of the very sensitive issues involved, I have been most indulgent in allowing the Defendants considerable latitude in the witness box. I considered it best that they should have the fullest opportunity to express their views on the matters that seemed important to them. However my decision must be based on admissible evidence that is relevant to the legal issues. A good deal of evidence given was strictly inadmissible (particularly hearsay evidence tendered as proof) and much of it was not relevant to the legal issues of the case.

However I say immediately that the case is to be determined according to the law of Western Samoa. In my view that law must necessarily have regard to the customs and traditions of the people. In this case that includes the recognition of the traditional village structure, the system of family titles and matai control and the functions authority and powers of the Alii and Faipule within the villages.

These are important considerations in construing the acts of certain people and the effect of certain documents.

They are also reflected in the naming of the first and second Defendants in this action - each in a representative capacity. Rule 36 of the Supreme Court (Civil Procedure) Rules 1980

specifically provides that "where there are numerous persons having the same interest in an action, one or more of them may sue or be sued .... on behalf of or for the benefit of all persons so interested". This action is not only against the specific occupiers of the land but also against the village of Satuimalufilufi from which they claim to derive their authority. A village in Samoa is a real collective entity that makes decisions, takes action and exercises discipline in a similar manner to a club or society. Instead of a committee or board it is the Alii and Faipule who exercise authority and control. They act and speak for the village and their decisions are accepted as binding upon those in the village. In this case there is a division within the village. Some families have moved on to the land at Faleolo and the rest have remained at Falepuna. The Plaintiff has joined as first Defendants the matais of the families occupying the land at Faleolo. They are sued as representatives of the occupiers (alleged by the Plaintiff to be trespassers) and orders for an injunction and damages are sought against them. The second Defendants are the matais of the families that remained at Falepuna and the Plaintiff seeks only an injunction against them. The reason for their inclusion as second Defendants is that, with the first Defendants, they comprise the Alii and Faipule of the whole village and an injunction is sought that will be binding on the whole village. In my view this is entirely correct and consonant with the realities of life in Western Samoa. Recognition must be given to the traditional village structure and any judgment or order made against the Alii and Faipule ought to be binding on the whole village.

It is essential that I should record the historical facts of this matter as I find them to be. It is impracticable for me to refer to the evidence of every witness and mention every document and plan produced. All have been carefully considered and taken into account. I have formed a very clear view of the facts.

The starting point of the inquiry is the year 1940. At that time Western Samoa, a former German colony, was administered by the Dominion of New Zealand under mandate conferred by the Council of the League of Nations. Statutes, regulations and orders in council for the territory were enacted by or through the parliament of New Zealand and the principal legislative authority for its administration was the Samoa Act 1921. Local administration was in the hands of an Administrator who was "charged with the administration of the executive government of the territory" and had power to make Ordinances for the peace order and good government of the territory. The Administrator was subject to the control of the New Zealand Minister of External Affairs who was also Minister for the Department of Island Territories in New Zealand. A Department of Native

Affairs in Western Samoa was administered by the Secretary for Native Affairs. At the relevant times under consideration the Administrator was Mr A.C. Turnbull and the Secretary for Native Affairs was Mr C. McKay.

The classification of land in Western Samoa was defined by Section 268 of the Samoa Act 1921 as:

> "268 (1) All land in Western Samoa is Crown land, or European land, or Native land.
>
> (2) "Crown land" means land vested in the Crown free from Native title and from any estate in fee simple.
>
> (3) "European land" means land held from the Crown for an estate in fee simple.
>
> (4) "Native land" means land vested in the Crown but held by Samoans by Native title, and not by grant from the Crown.
>
> (5) "Native title" means title to land in accordance with the customs and usages of the Samoan race."

The village of Satuimalufilufi was located from a point just east of the present Mulifanua wharf and extending east along the coast to the boundary with Satapuala village. It extended varying distances inland and took in the sub villages of Sanafili, Toloa, Tifitifi and Faleolo. Within these general boundaries some pockets of land were excluded. They must previously have been part of Satuimalufilufi customary land but been earlier disposed of. They were subject to Court Grants which were issued originally in the 1890's to persons who were able to establish that they had validly purchased customary land for proper consideration. The precise boundaries of the Satuimalufilufi land are not clear but they were probably as shown on the plan 25 U/XV L produced as Exhibit 2. According to that plan the customary land of Satuimalufilufi comprises 521 acres 1 rood 19 perches and the Satapuala customary land (extending east along the coast from the boundary with Satuimalufilufi) comprised 865 acres 2 roods 21 perches. The village of Satuimalufilufi occupied its land ("native land" within Section 268(4) of the Samoa Act 1921) in traditional customary fashion. Various high chiefs of the village held "pule" over defined portions thereof ("Native title" within Section 268(5) of the Samoa Act 1921) and, in particular, the Saipaia family occupied the area known as Faleolo which included part of the land now within the airport complex.

Inland of the Satuimalufilufi and Satapuala villages was a large area of land defined as Court Grant 92 which was issued by the High Court of Samoa on the 14th August 1894. It was previously part of a German owned plantation but after the First World War, when New Zealand was granted a mandate to administer the territory, all German owned land was vested in the Government of New Zealand. In 1940 that part of Court Grant 92 immediately adjacent to the Satuimalufilufi and Satapuala land was Crown land vested in His Majesty the King in the right of the Government of New Zealand. It was subject to the New Zealand Reparations Estates Order 1920 which provided for the administration of all such land by the Government of New Zealand. The land was cultivated by New Zealand Reparation Estates (N.Z.R.E.) and was known as the Mulifanua plantation.

In considering the events at this time (i.e. 1940 and through to 1942) there are several matters of extreme importance that must be born in mind. The first is that New Zealand (which included Western Samoa) together with Britain was at war. This crisis escalated for Pacific territories at the end of 1941 with the extension of fighting into the area and the entry of the United States into the war as one of the allied powers. This was followed by the establishment of a United States military base in Western Samoa. These matters dictated the course of events that followed. The existing state of war is a crucial factor in the consideration of important issues arising in this case.

By 1940 the strategic location of Western Samoa in the Pacific must have been realized and the need for an air base was becoming apparent. A study of the island must have been undertaken and the general area about Faleolo was seen as the most suitable site.

There is clear evidence that during 1940 the Secretary for Native Affairs, Mr McKay, together with a Samoan officer from the Department, Matatumua, who acted as interpreter, met with the Alii and Faipule of Satuimalufilufi. The purpose was to seek approval for sea-planes to land on the sea in front of the Satuimalufilufi land and this was granted.

The happening of events thereafter can be ascertained from exhibits (particularly the bundle of documents from the Government Archives file produced as Exhibit 70) and the evidence of the witnesses. There was a growing need for a military air base in Western Samoa and the site at Faleolo was further explored. By the end of 1941 or beginning of 1942 it must have been decided that such an air base, when required, would be at that site and native land of Satuimalufilufi and Satapuala would need to be acquired for the purpose. According to the memorandum produced as Exhibit 13 the decision was finally made on the 24th March 1942 which was the date that United States forces first landed in Western Samoa to set up a military base.

The implementation of this decision required urgent meetings and negotiations by the Government with the village of Satuimalufilufi whose customary land was required for the project. (A similar approach must have been made to the village of Satapuala but the arrangements for the acquisition of that land are not in issue in the present proceedings.) No doubt the land could have been taken by Ordinance under Section 271 of the Samoa Act 1921 leaving the dispossessed owners of the land to apply to the High Court for assessment of compensation. However such a sensitive issue as the acquisition of customary land required consultation and agreement with the village concerned.

Various witnesses for the first Defendants are quite wrong when they say that this important issue was discussed and agreement made at a single meeting at Faleolo between the Administration representatives and the matais of the village. That is most improbable. Such major decisions would have required deliberation by the Alii and Faipule of the village. There would have been, as Lilo Sa'u Fefiloi testified, several meetings with proposals and counter proposals being made before final agreement was reached. Village discussions would have taken place between these meetings.

The records from the Government file (Exhibit 70) show that, although there was considerable urgency, several meetings were held before the final agreement was reached. It is appropriate that I should record the events as disclosed by those documents.

The original proposal in March 1942 was for the Government to lease the land required for the airstrip for the "duration of the war and such time after as the land may be required for airport purposes". Satuimalufilufi agreed to this at the meeting at Faleolo on the 25th March 1942 but said that if the lease ever terminated they desired to resume occupation of their land.

A tentative agreement for the land to be leased was made at a further meeting at Faleolo on the 27th March 1942 but the matter was held in abeyance pending a decision from the United States authorities regarding the total area required.

On 10/4/42 the Administration received advice that a very large area of land was required for the U.S. Marine Base. It was the foreshore from Mulifanua to the eastern end of the Satapuala village and extending two miles inland. This included all the Satuimalufilufi and Satapuala land. The previous proposal to lease part of their lands had to be abandoned and new areas had to be found for them.

A meeting was held at MULINU'U on 13th April 1942 at which Satuimalufilufi agreed to move to Falepuna and extra land above "acre for acre" basis was promised to them for cocoa and other cultivations they would lose. Terms of compensation were also agreed.

The file notes also refer to a further meeting to be held at Mulinu'u on April 22 although no further mention is made of that meeting. Reference is also made to the fact of an agreement having been signed with Satuimalufilufi and the copy on the file is dated the 13th May 1942.

This is a credible sequence of events which is quite inconsistent with the evidence of the first Defendants that there was only one meeting that resulted in a verbal agreement and no written contract. The meeting they observed at Faleolo in 1942 when the Government discussed the proposed air base with the Alii and Faipule must have been one of the first meetings on March 25 or 27. At those meetings no agreement was signed and the Alii and Faipule agreed to lease part of the village land and stipulated a desire to resume occupation when the lease expired.

However the plan to lease part of the village land was abandoned and the Government negotiated to take all the land and relocate the village at Falepuna. This was agreed to at a meeting at Mulinu'u on 13th April 1942 and no witness who gave evidence before me was present at that meeting. The terms agreed at that meeting were incorporated into the written agreement (Ex. 67) that was signed on the 13th May 1942. It is probable that the execution of this document also occurred at a meeting at Mulinu'u. The location for all meetings may have then been Mulinu'u rather than Faleolo which would explain why the first Defendants were not aware of the final terms and never saw the document being signed.

It is convenient to deal briefly at this stage with two contentions of the first Defendants. These are that no agreement was actually signed and that little or no compensation was paid.

Numerous witnesses were adamant that no formal agreement was signed in 1942 even though a written contract may have been prepared. Saipaia Olomalu produced the three page copy of an agreement (Exhibit C) which he said was given to him in that form in 1977 by Taloto Teleni and was the only document held by the village. he was quick to point out that the document had no signature page and was in English, which would not have been understood by the village signatories. Taloto Teleni confirmed that he gave a document to Saipaia Olomalu but said it had a greater number of pages and was written in both English and Samoan. Letelemaana Fuga said that at a meeting in the Prime Ministers Office in 1966 he saw a copy of the agreement and it had been signed by the matais. Both witnesses said that a copy

was read at a subsequent village meeting and was passed around those who were present. I accept this evidence from Taloto Teleni and Letelemaana Fuga as truthful. The later discovery and production of a complete copy of the agreement (Exhibit 67) confirms what they say. The document is written in both English and Samoan and shows execution by all the named parties. The documents on the Government file (Exhibit 70) make reference to agreements having been signed by both Satuimalufilufi and Satapuala. Although no originals can be located, I am satisfied that the documents Exhibits 8 and 67 are true copies and the originals were signed by all parties on the 13th May 1942.

The agreement itself acknowledges the payment of compensation having been made for fales and graves, provides for payment of 125 pounds to purchase foodstuffs and records that compensation is still to be agreed for two churches and a concrete foundation. The documents on the Government file (Exhibit 70) confirm the payment of compensation. It was originally negotiated that all fales be removed but, at a late stage, the United States commander ordered that no fales were to be removed except those on the proposed runway. As a result all others were compulsorily taken and compensation was paid in cash "on the spot" direct to the owners. Compensation at a lesser rate was paid to the owners of all fales removed. Compensation for the church buildings was settled and paid. On the exchange of lands extra acreage was given to Satuimalufilufi "in consideration of cocoa and other cultivations they will lose". Satuimalufilufi and Satapuala people were given preference when labourers were employed on the air base construction. A pass was given for "Saipaia Uepa and 14 other natives" to enter the military reservation between 6am and 6pm during the month of October 1942 to gather copra and cocoa from their plantation. I am satisfied that compensation was made to Satuimalufilufi at the time. The loss of land was compensated by the provision of a greater area at Falepuna. Cash payment was made for other property taken and for the purchase of food. By todays standards the sums involved may seem modest but they were more substantial in terms of 1942 values. No doubt the village did not want to move and the arrangements were somewhat forced upon them by the war time situation. The move from their ancestral land must have been an emotional wrench for the people and no specific payment was made for this. However there is no suggestion of any further claim for compensation and no application for additional compensation was ever made to the Court. The inference is that the village accepted the bargain made by the Alii and Faipule.

The agreement that the village of Satuimalufilufi should vacate their traditional land and move to the land at Falepuna was duly carried out. Evacuation occurred over a period of several weeks and was completed by the 6th June 1942. At the same time the United States military personnel proceeded with the construction of the runway for the air base. The other terms of the agreement

were also duly implemented. Re-settlement on the land at Falepuna must have presented some difficulties for the Satuimalufilufi people but any hardship may have been regarded as their contribution to the war effort. The land was divided amongst the matais in customary fashion and, in due course fales were built and plantations cultivated. Total village development was duly achieved and the Satuimalufilufi people have lived on and used the land in customary village fashion until the present time.

The United States military authorities completed the runway and air base adjacent to the sea frontage at Faleolo. The runway (and later developments and extensions of it) extends across both Satuimalufilufi and Satapuala land. However the aerodrome facilities were not the only development. A large U.S. marine base was also established. Tupa'i Morris Lee who worked on the adjacent Mulifanua plantation at that time explained how the marines took over and occupied all the land of both the Satuimalufilufi and Satapuala villages. He said that the marine base spread over the whole area and the marines remained in occupation until 1945. The base must have been a very substantial concern.

Documents on the file (Exhibit 70) show that it was the Government's intention to perfect title on the exchange of lands by compulsorily taking the Satuimalufilufi (and Satapuala) land and passing an appropriate statute or ordinance constituting the land at Falepuna as "native land". However there were considerable delays in carrying this out. Surveys of the blocks were required and legal opinions were obtained as to how these objects could best be achieved. New legislation was ultimately deemed necessary. This occasioned further delay and the war-time situation probably exacerbated these problems.

The Samoa Land Emergency Regulations 1944 were made by Order in Council on 11th October 1944 and came into force in Western Samoa on the 9th November 1944. These defined "defence purposes" as including "the provision of aerodromes and the construction of works of any nature whatsoever for naval, military or air force purposes" and authorised the taking of any European or Native Land in Samoa by Order in Council for defence purposes. Then the Samoan Land for Defence Purposes Order 1945 was made by Order in Council on the 18th day of April 1945 and became effective in Western Samoa on the 20th June 1945 (following publication in the Western Samoa Gazette on the 19th June 1945). This order took for defence purposes pursuant to the Samoa Land Emergency Regulations 1944 the former lands of the villages of Satuimalufilufi and Satapuala together with the land in certain Crown grants contained in and adjacent thereto. The land so taken is delineated on plan 25 U/XV (Exhibit 2) and comprises a total area of 1910 acres made up of:

| | | | |
|---|---|---|---|
| Satuimalufilufi land | 521 acres | 1 rood | 19 perches |
| Satapuala land | 865 | 2 | 21 |
| Crown land (in 11 Court grants) | 126 | 1 | 9 |
| European land (in 3 Court grants) | 396 | 2 | 31 |
| | 1910 acres | | |

A copy of the Order was lodged with the Land Registrar with a letter dated 2nd May 1945 (Exhibit 18) and was registered against the various titles affected on the 1st September 1945. The customary land taken from Satuimalufilufi and Satapuala was incorporated into Volume 7 Folio 263 of the Land Register (Exhibit 19) for a total area of 1387 acres in the name of "His Majesty the King under 3(1) of the Samoa Land for Defence Purposes Order 1945".

Unfortunately the intention of the Government to vest the land at Falepuna as native land for the village of Satuimalufilufi has not been carried out. At the time of the exchange in 1942 the land was registered in the Western Samoan Land Registry Volume 1 Folio 97 as Crown land in the name of His Majesty the King in right of the Government of New Zealand but subject to the New Zealand Reparation Estates Order 1920. It was administered by the New Zealand Reparation Estates and a substantial portion was in plantations. The file of documents (Exhibit 70) includes correspondence between the Administrator for Western Samoa, the Secretary for Native Affairs in Western Samoa and the Department of Island Territories in New Zealand regarding the appropriate manner for the land to be vested as native land. There was general agreement that it could be done by warrant of the Governor General pursuant to Section 58 of the Statutes Amendment Act 1944 and a form of warrant was drafted in November 1945. However it was never executed because of a dispute as to whether the land at Falepuna declared to be native land should be vested in the "the Alii and Faipule of Satuimalufilufi" or in "those persons who on the 13th May 1942 were entitled to the beneficial ownership of the former Satuimalufilufi land in the same shares and for the same interests as they then held that land". On the 1st April 1957 Part III of the Samoa Amendment (No. 2) Act 1956 came into force. This created the Western Samoa Trust Estates Corporation to assume the control and management as trustee for and on behalf of the people of Western Samoa of the assets of the New Zealand Reparation Estates. All Crown land subject to the New Zealand Reparation Estates Order 1920 thereupon became vested in the new corporation and all Land Register titles were noted accordingly by the registration of a certificate date 20th May 1959 given by the High Commission pursuant to Section 24(2) of the Samoa Amendment (No. 2) Act 1956 (Exhibit 26). Thus the land at Falepuna occupied by Satuimalufilufi, which was part of a larger block in Certificate of Title Volume 1 Folio 97 became

vested in Western Samoa Trust Estates Corporation. This irregularity must have been subsequently realized because by deed dated 25th March 1961 (Exhibit 29) Western Samoa Trust Estates Corporation transferred the land to Her Majesty the Queen in right of the Government of Western Samoa. However this was not registered in the Land Registry until the 1st October 1963 and a new title Volume 10 Folio 99 issued. The land has remained so registered until the present day. It is an indictment on the New Zealand Administration and successive Governments that in over 44 years since the Agreement was signed the land has not been vested as customary land for the village of Satuimalufilufi. This is a sore point with the people. The gross disadvantage for them is that the land has always remained Crown Land and therefore outside the jurisdiction of the Lands and Titles Court.

I return now to further consider the history of the 1910 acres around Faleolo that were taken for defence purposes on the 20th June 1945 under the Samoa Land for Defence Purposes Order 1945. The land continued to be used as an aerodrome and U.S. Marine Base until the U.S. forces moved out some time after the end of the war in 1945. Once the American base was disbanded the area was no longer required for defence or military purposes. An airport had been constructed and it was obviously sensible for the Government to continue using it. A decision must then have been made to adopt the air base as the principal airport for the country. Such use of that portion of the land has continued until the present day. The balance of the land, which was a far greater area and had been occupied as a U.S. Marine Base was basically plantation land. It included substantial portions of the land formerly occupied by the villages of Satuimalufilufi and Satapuala. Tupa'i Morris Lee said that it was absorbed into the adjoining Afia and Magia plantations of the New Zealand Reparation Estates. A number of witnesses confirmed that it was taken over for cultivation purposes and became part of the N.Z.R.E. plantations. Significantly the people of Satuimalufilufi, who must have observed this happening, made no objection and took no steps to re-occupy the land that they had earlier vacated.

This separate use of parts of the land for airport and plantation purposes has continued until the present day. The only nominal change has been the succession of Western Samoa Trust Estates Corporation to the interests of the New Zealand Reparation Estates on 1st April 1957 in terms of Part III of the Samoa Amendment (No. 2) Act 1956.

From a relatively early time, it must have been the intention of the New Zealand Government to recognise this actual use of the land by vesting the separate areas in the de facto occupiers for their respective purposes. A letter dated 20th January 1947 from the Assistant Secretary to the Treasury to the Secretary of the Department of Island Territories (part of Exhibit F) records:

"LAND TAKEN FOR DEFENCE PURPOSES IN WESTERN SAMOA

Receipt is acknowledged of your memorandum I.T. 62/2/4 of the 8th instant, with reference to land acquired for defence purposes in Western Samoa. The land appears to fall into two categories: (a) that required for the air strip and (b) the balance available for other purposes. The Natives and others dispossessed from this land were largely settled on land taken over from New Zealand Reparation Estates.

In Treasury opinion the title to this land should be taken as to the airstrip in the name of His Majesty in right of the Government of New Zealand for general purpose and as to the balance in the name of His Majesty in right of the Government of New Zealand for Reparation Estates purposes.

In assessing compensation to Reparation Estates for land taken from the Estates a deduction was allowed of 9,888 pounds as the value of the 1,685 acres resumed so that actually the Estate have paid for this land and no further accounting adjustment is necessary."

An undated memorandum from the Minister of Island Territories to Cabinet on Exhibit F indicates that compensation payable to N.Z.R.E. was approved on 27th September 1946. It would therefore appear that by that date N.Z.R.E. was using for plantation purposes approx. 1685 acres of the total 1910 acres taken for defence purposes. It was intended to be a permanent arrangement because, in assessing compensation payable to N.Z.R.E. for the 1896 acres given to re-settle the villages of Satuimalufilufi (826 acres) and Satapuala (1070 acres) a deduction of 9,888 pounds was made for the 1685 acres taken over.

Subsequently New Zealand Reparation Estates and its successor Western Samoa Trust Estates Corporation pressed for the land to be transferred to it. After all, it had paid for the land with the deduction made in 1946 from the compensation moneys payable. However, as with so many other steps in the history of this matter, action was protracted and delayed. A survey was needed to define the separate airport and plantation areas. Plans 2691 for the airport land of 198 acres 2 roods 2 perches and 2692 (47U/XV Exhibit 3) for plantation land of 1701 acres 2 roods 10 perches were finally approved on 26th October 1961. By deed of Crown Grant pursuant to Section 269 of the Samoa Act 1921 dated 6th December 1961 (Exhibit 20) the Government of New Zealand vested this plantation land in Western Samoa Trust Estates Corporation. This grant was registered in the Land Registry on 29th December 1961.

So far as the Land Registry title is concerned the only significant changes since that time have been the surrendering of further parcels of land for the airport. The most significant

was in 1971. In that year the existing road on the inland side of the airport was constructed and the old coastal road closed. Subsequently Plan 3550 (Exhibit 5) was deposited at the Land Registry and land was taken to extend the airport boundary up to the new road as shown on that plan.

For completeness, I ought to record the situation in relation to the land inland of and adjoining the southern boundary of the land taken for defence purposes and subsequently vested in Western Samoa Trust Estates Corporation. It has featured in the evidence and its title and ownership are quite clear. I have already mentioned that it is part of Court Grant 92. It was a former German owned plantation taken over by the New Zealand Government after the First World War and administered in terms of the New Zealand Reparation Estates Order 1920. It is a substantial area of land contained in Land Registers Volume 1 Folio 95 (Exhibit 24) and Volume 1 Folio 97 (Exhibit 25). In terms of Part III of the Samoa Amendment (No. 2) Act 1956 the newly constituted Western Samoa Trust Estates Corporation assumed all the assets of the New Zealand Reparation Estates and the change of ownership of the land was effected on the certificate of the New Zealand High Commissioner (Exhibit 26). The land has since remained registered in the name of Western Samoa Trust Estates Corporation. It comprises the extensive Mulifanua plantations of the corporation. Since at least 1920 it has been cultivated by N.Z.R.E. and its successor W.S.T.E.C. The area adjacent to the former Satuimalufilufi customary land is the W.S.T.E.C. Afia plantation of the Mulifanua group. That part of the former Satuimalufilufi customary land taken for defence purposes and subsequently transferred to W.S.T.E.C. has been absorbed into the Afia plantation. Any claim by Satuimalufilufi can only relate to its former customary land that was taken for defence purposes. It cannot relate to any part of Court Grant 92 which has always been vested in and occupied by N.Z.R.E. and W.S.T.E.C. I accept the plans 25 U/XV L, (Exhibit 2) and 47 U/XV L (Exhibit 3) as correctly defining the boundaries of the former Satuimalufilufi village and the land taken for defence purposes. The survey for plan 25 U/XV L, in particular, would have been done at a time when the actual physical boundaries would have been well defined. I refer to Exhibit 33 which is a copy of plan 47 U/XV L with the new main west cost road and buildings of the first Defendants added. It will be seen that towards the western end of the plan the main road bisects Court Grant 92 in two places. Some houses are shown to have been erected by the First defendants alongside that part of the roadway that is within Court Grant 92. Satuimalufilufi can have no claim to that area which is outside the former customary land surrendered by them in 1942. This is probably a mistake on the part of the First Defendants as to the actual boundaries of their former customary land. (Although I note in passing that 25 U/XV L (Exhibit 2) shows these houses to be an appreciable distance from the former Faleolo sub-village of the Saipaia family whom the occupants

represent and much closer to the former sub-villages of Sanafili and Toloa). However I am satisfied that they have no claim whatsoever to this part of the Plaintiffs land. I need not refer further to this land. The real issues are in respect of that part of the former customary land of the village as shown on plan 25 U/XV L (Exhibit 2) which is now within the land in plan 47 U/XV L (Exhibit 3) and vested in the Plaintiff.

I have given a comprehensive summary of the factual and legal history of the relevant land transactions. The practical realities so far as the parties to this action are concerned, are that I am satisfied that the New Zealand Administration and the Alii and Faipule of Satuimalufilufi entered into and all signed the Agreement dated the 13th May 1942 in the form of Exhibit 67. In terms of that Agreement the people of Satuimalufilufi moved on to and occupied the land at Falepuna given in exchange for their customary land. Compensation was paid in terms of that Agreement. The village of Satuimalufilufi was re-established at Falepuna and the land has been occupied and used in accordance with Samoan custom although the land remains registered as Government land. The land surrendered by the village was taken by the Government for defence purposes and used as an airport and United States Marine Base from 1942 until after the end of the war in 1945. Part was then set aside, for continued airport purposes and the balance was taken over for plantation purposes by N.Z.R.E. and its successor W.S.T.E.C. This balance of land was transferred to W.S.T.E.C. in 1961 for due consideration allowed when compensation was fixed for the land provided at Falepuna to resettle the village of Satuimalufilufi in 1942. W.S.T.E.C. has continued to occupy the land and use it for plantation purposes until the present time.

I have already mentioned that, after the war, the village of Satuimalufilufi remained at Falepuna. No positive steps were taken to return to the former customary land even though it must have been apparent that a good portion was being taken over by N.Z.R.E. Evidence from some of the First Defendants about approaches being made to the Government after the war I found most unconvincing. It is quite inconsistent with the inactivity and the terms of the Agreement that had been signed shortly before.

Since Independence in 1962 the village of Satuimalufilufi has taken some action in relation to land matters. This has mostly been by descendants of those who made the Agreement on behalf of the village in 1942. These descendants may well be dissatisfied with the bargain made but their evidence and actions cannot alter the terms of the original Agreement. It is apparent that as time passed the land at Falepuna was seen as inadequate for the needs of the village. Approaches were then made to Government for more land. The first Defendants say that personal approaches were made to all Prime Ministers since independence and evidence has

been given of formal written applications. In the documentary evidence of these applications that has been produced there is an emphasis on the need of the village for more land at Falepuna and no demand for a return of the former customary land at Faleolo. This documentary evidence records:

(i) An application dated 18 August 1966 (Exhibit 39) by the Alii and Faipule of Satuimalufilufi to the Prime Minister for a lease of 600 acres "between our boundaries with Samatau in order to solve the problem of land scarcity for plantation purposes which we are now facing". It also refers to "our application concerning this particular piece of land for the same purposes a few years ago". The application was not granted.

(ii) An application to W.S.T.E.C. by the Alii and Faipule of Satuimalufilufi for land at Falepuna which was declined by the Board on 16th August 1972.

(iii) An application in 1973 to W.S.T.E.C. by villages in the electoral district. The Board agreed to lease 50 acres to each village and Satuimalufilufi was offered land at Olomanu. At the request of the village W.S.T.E.C. altered the location of the land to Falepuna and a lease of 45 acres was granted to the Alii and Faipule for a term of 20 years from 1st December 1977 (Exhibit 28).

(iv) An application to W.S.T.E.C. dated 4th November 1981 (Exhibit 43) by a committee of land holders of Satuimalufilufi for lease of "extra land at Falepuna for plantations". By letter dated 11th January 1983 (Exhibit 44) the Board agreed to lease 38 acres at Falepuna to the Alii and Faipule for 20 years from 1st October 1982.

(v) A letter to W.S.T.E.C. dated 26th September 1983 (Exhibit 50) signed by 43 chiefs and orators of Satuimalufilufi asking that the leased land of 45 acres and 38 acres at Falepuna be sold to the village. The letter states "We have worked and developed these lands and modern permanent homes are built on them, believing that you will eventually agree to give us these lands". The application was deferred by W.S.T.E.C. pending a valuation being made of the land and has never been actioned.

(vi) In 1984 the village of Satuimalufilufi staged a protest against the opening of the new airport runway extension at Faleolo. As a result of negotiations with Government, particularly the Prime Minister Tofilau

Eti, the village was offered 20 acres of land from the W.S.T.E.C. Afia plantation. By a decision of Cabinet on 9th January 1985 the area was increased to 30 acres. By further Cabinet decision on 6th November 1985 the location of the land was changed to Paepaeala because the proposed Afia block was within land on the southern side of the coast road that was being set aside as an airport reserve. The land at Paepaeala was surveyed at 31 acres and was taken over by the Satuimalufilufi village in November 1985.

These various land transactions have no substantial relevance to the issues arising in this case regarding the dealings with the customary land at Satuimalufilufi in the period 1942 to 1945. However they are not consistent with the contention of the first Defendants that the village has been negotiating and pressing for a return to its original land since 1945. The absence of any formal claim and the applications for further land at Falepuna are more consistent with the Plaintiffs submission that there was a final and permanent exchange of land in terms of the Agreement in 1942. It is only the descendants of the chiefs who concluded that Agreement who have, at a very much later time, claimed a right for the village to return to its former land. In particular it is members of the Saipaia family who have advanced such a claim.

The final episode in this lengthy saga began in December 1985 when the first Defendant Leoteleifaleese Tuionoula, wearied at what she saw as a failure on the part of the Government and the Alii and Faipule of Satuimalufilufi to meet her demands, decided to take positive action to reclaim the villages former customary land. On 10th December 1985 she and her family entered on to the Plaintiffs Afia plantation on the inland side of the road opposite the airport. They erected a house and have remained there ever since. Their intentions were very clear from the outset. They were laying claim to the villages original customary lands as their own. The letter from Leoteleifaleese Tuionoula to the Prime Minister dated 31st January 1986 (Exhibit 52) refers to "our land" and advises that W.S.T.E.C. labourers and cattle would not be permitted on it and, if the road fence was not removed by W.S.T.E.C., it would be taken down. Then on the 24th March 1986, principally on the instigation of Saipaia Olomalu supported by Saipaia Kome, the remaining second Defendants and others of the Saipaia extended family moved on to the land also. Approximately 50 structures (principally Samoan fales) were erected on the locations shown on the plan Exhibit 33. These people occupied the land to the exclusion of W.S.T.E.C. and its workers. Road fences have been taken down and areas have been cultivated. Most of them have remained in occupation until the present time and under the leadership of Saipaia Olomalu and Saipaia Kome they claim to be entitled to the land as customary land of the village of Satuimalufilufi.

This claim by the first Defendants that the village of Satuimalufilufi is entitled to re-occupy the former customary land vacated in 1942 is the crux of the present dispute. If correct it would include not only part of the Plaintiffs Afia plantation but also part of the airport runway and land. It is a claim that is challenged by the Plaintiff and not supported by the second Defendants.

The historical summary I have given shows how the land now occupied by the first Defendants came into the possession and ownership of the Plaintiff. W.S.T.E.C. (and its predecessor N.Z.R.E.) have occupied the land as a plantation since 1945 and have had a registered legal title since 1961. Until the present entry by the first defendants the Plaintiffs title and occupation have continued unchallenged and uninterrupted. It did not consent to the entry on to the land by the first Defendants. On the face of it, that unauthorised entry is contrary to the Plaintiffs possession and title and constitutes a trespass.

Counsel for the first Defendants submits that there is a flaw in the title ostensibly acquired by the Plaintiff and that the valid title still remains with Satuimalufilufi as original customary land of the village. It is argued that as they are now in actual possession and with a valid title the first Defendants are not trespassers.

In his very succinct submissions Mr Sapolu attacks the validity of the Samoa Land for Defence Purposes Order 1945 which vested the land in the name of His Majesty the King. He submits that this Order in Council is void and the subsequent title that purportedly passed to the Plaintiff is therefore invalid. His final submissions make little reference to the agreement entered into between the Administrator and the village of Satuimalufilufi in 1942 (Exhibit 67) although a great deal of evidence was given about it. It has assumed great significance in the minds of the parties and, in my view, is extremely relevant to the legal issues in this case. It is appropriate that I should record my findings on its validity and terms before dealing with the specific legal submissions.

I have already stated that, contrary to the evidence and views of the first Defendants, I am completely satisfied that the agreement was signed by all parties in the form of Exhibit 67. The New Zealand Administration wished to acquire the land for the purposes of an airport and marine base. After negotiations with the Alii and Faipule of Satuimalufilufi it was agreed that the village would surrender its customary land to the Government and receive land at Falepuna in exchange. Other terms were also agreed and incorporated in the agreement that was duly signed and implemented. This was a valid agreement for proper consideration that was binding on the parties.

In terms of Section 280(1) of the Samoa Act 1921 it was competent for the village to "alienate or dispose of Native land whether by way of sale, lease, license, mortgage or otherwise howsoever in favour of the Crown". Such alienation of customary land must necessarily be in a way that effectively binds the whole village. The Privy Council decision in Sakariyawo Oshodi v Brimah Balogun [1936] 2 All ER 1632, referred to by counsel for the Plaintiff, is a good illustration of how the alienation of customary land can only be effective and binding if it is done in accordance with native law and custom. In the present case the Alii and Faipule entered into the agreement and this effectively bound the whole village of Satuimalufilufi.

In the authorities mentioned in argument there is nothing to suggest any prohibition on the Crown or Government from acquiring land by negotiation and agreement. Historically it is a recognized practice (See Attorney General v De Keysers Royal Hotel Limited [1920] AC 508 at pages 524 and 563). Section 273 of the Samoa Act 1921 gave the Administrator express power to "purchase any land in Samoa or acquire by assignment any limited right title estate or interest in any such land, for and in the name of His Majesty for any public purpose". Section 275 of the Act defined "public purpose" as including "all lawful purposes and functions of the Government of Samoa". In terms of Sections 4 and 5 the Executive Government of Samoa was vested in "His Majesty the King in the same manner as if the Territory was part of His Majesty's dominions" and the Administrator was "charged with the administration of the executive government". The establishment of an airport and an allied force's marine base during a time of war would certainly be a lawful purpose and function of His Majesty's Government. The Administrator therefore had the necessary power to purchase the land.

I have no hesitation in finding that the agreement dated 13th May 1942 (Exhibit 67) was a valid contract for the exchange of land and was binding on both the Government and the whole village of Satuimalufilufi.

The first Defendants also asserted that, notwithstanding the written agreement, there was a verbal agreement between the Government and the village that the village would be allowed to return to its original land after the war. I reject this. At best this may have been a desire that was expressed in the initial negotiations but the overwhelming evidence is that it was never a term of the final agreement. Some salient features of the evidence on this particular issue are:

1. Such a contention is quite contrary to the terms of the written agreement which is expressed in a very final form. Land is surrendered, other land is given in exchange and compensation is paid for removal expenses and buildings. The land given to the village is to be held by it "in

accordance with the usages and customs of the Samoan people". A temporary relocation for the duration of the war is totally inconsistent with these terms.

2. Such a term is inconsistent with the records and actions of the Administrator. In the comprehensive Government file (Exhibit 70) the only reference to a desire of the village to return to the land is in the notes of the first meeting held on 25 March 1942. That was in relation to the initial proposal to lease part of the land only. The records indicate that when the proposal was changed to a surrender of all the land in exchange for other land at Falepuna no such term was included. The comprehensive memorandum of the Secretary for Native Affairs dated 15th June 1942 (Exhibit 13) refers in para. (a) (XVI) on page 3 to certain land not being surrendered and to revert to the owners after the war but no mention is made of Satuimalufilufi. Their land was surrendered and para. (b) on page 3 of the memorandum notes that work still to be done includes "effecting changes in titles of all lands involved". The comprehensive memorandum on this file (Exhibit 70) giving data from which the agreement between Satuimalufilufi and the Government is to be drafted contains a provision that "upon completion of this transaction the present area of native land within Satuimalufilufi to be declared free from native title and the land given at Falepuna to be declared free from European title pursuant to legislation now being drafted". Steps were initiated to implement this after the agreement was signed. Finally a memorandum on the file from the Secretary for Native Affairs to the Chief Surveyor dated 9th April 1943 concludes that apart from a stated exception relating to Satapuala "there was nothing provisional in the nature of the arrangements made". It was of course, the Secretary for Native Affairs who negotiated the terms of the Agreement on behalf of the Government.

3. Such a term is inconsistent with the subsequent actions of the Alii and Faipule of Satuimalufilufi who concluded the agreement on behalf of the village. I have already mentioned their inactivity after the war ended. That is the time they would have pressed for a return to their land if they believed it was part of the agreement with the Government. Instead they remained on and developed the land at Falepuna. It was only when the village grew dissatisfied with the land at Falepuna (because of increase in village population and unsuitability of some of the land for cultivation) that any positive steps were taken. Significantly this action was to seek further land at Falepuna and not to return to their original land. The written application to the Prime Minister dated 18 August 1966 for a further 600 acres at Falepuna (Exhibit 39) is particularly significant. The Alii and Faipule who made

that application included some who were signatories to the 1942 agreement and some of the present day matais. They met with the Prime Minister and I accept the evidence of Letelemaana Fuga as to what happened at that meeting. The only request made by the matais at that meeting was for substantial additional land at Falepuna and no claim was advanced for the village to return to its former land. The Prime Minister referred to the 1942 agreement by which the village surrendered its land at Faleolo and received a larger area at Falepuna in return and this was accepted without dissent or discussion. Records have been produced of further applications made by the village in 1971 (Exhibit 34), 1973 (Exhibit 35, 36 and 37), 1981 (Exhibit 43) and 1983 (Exhibit 50) for further land at Falepuna. These also contain no reference to a purported right to be able to return to their former land and no such claim has ever been made in writing.

I have no hesitation in finding that a term allowing the village to resume occupation of its former land after the war was never part of the agreement concluded between Satuimalufilufi and the Government in 1942. I make that finding without recourse to a consideration of such evidential matters as whether, in any event, there is any admissible evidence of such a term (in the absence of a party to the agreement or an eye witness testifying to such a term) and whether it should be admitted to vary or contradict the terms of the written agreement.

In this rather discursive dissertation I have attempted to settle the facts and discuss the issues of practical and legal importance to all the parties. I return now to consider the specific legal submissions of counsel for the first Defendants.

The first submission made is that the land in question remained customary land of the village of Satuimalufilufi up until the time of the Samoa Land for Defence Purposes Order 1945. However this submission ignores the realities of the situation and the effect of the agreement made between Satuimalufilufi and the Government on 13 May 1942 (Exhibit 67). I have already expressed the view that this was a valid agreement binding on the parties. Moreover the terms of that agreement have been performed by the parties. Satuimalufilufi surrendered up and gave possession of its land to the Government and compensation for the church structures was agreed and paid (para. 1). The Government gave Satuimalufilufi the land at Falepuna which has since been held by the village in accordance with the usages and customs of the Samoan people (para. 2). The Satuimalufilufi signatories to the agreement indemnified the Government against claims by any other person to an interest in the land surrendered (para. 3). Satuimalufilufi have a continuing obligation to surrender any land at Falepuna required for roading purposes (para. 4). The air base was called Faleolo Air base (para. 5). The sum of 125

pounds was paid to Satuimalufilufi for purchase of food (para. 6). The agreement has been executed in the sense that all its terms have been performed. In my view it was an effective and binding exchange of lands. The agreement made no express provision for the issue of a legal title although it was no doubt expected that a transfer of such title would be perfected. The Government was empowered to purchase native land but I am not sure how title could then be acquired. Perhaps the agreement itself could have been registered in the Lands and Deeds Office as a conveyance and a title issued for Crown land. If that was not possible then a formal taking of the land as implemented by the Government may have been necessary. However that was only to perfect the agreement that had already been performed.

For the reasons given earlier in this decision, I am satisfied that the agreement which was binding on both parties, effectively conveyed beneficial ownership of the Satuimalufilufi land to the Government. It no longer remained customary land. The issue of a legal title was not necessary although it was highly desirable. As owner the Government could (subject to any statutory requirement) have transferred ownership to W.S.T.E.C. without any further legislation. In my view the Government's agreement with Satuimalufilufi dated 13 May 1942 (Exhibit 67) and subsequent Deed of Assignment to W.S.T.E.C. dated 6 December 1961 (Exhibit 30) were sufficient in themselves to grant legal ownership of the land to W.S.T.E.C. The formal taking of the land by Order in Council was actually unnecessary.

In case I am wrong in my conclusion that the agreement signed by the Alii and Faipule in 1942 (Exhibit 67) is an effective bar to any further claim by the village to its former customary land, I turn now to consider the further submission by counsel for the first Defendants that the Samoa Land for Defence Purposes Order 1945 is void. This submission is made on two grounds.

It is first submitted that Section 278 of the Samoa Act 1921 created a clear fiduciary relationship between the Crown (as trustee owner) and the Alii and Faipule of Satuimalufilufi (as beneficial owners under native title) in respect of the land at Faleolo. For the reasons stated in the submissions, it is argued that the Crown was in "flagrant breach of this fiduciary relationship" in taking the land by Order in Council in 1945 and should be deemed to have thereafter held the land upon a constructive trust for the village of Satuimalufilufi.

The relevant portion of Section 278 provides:

> "All land in Samoa which at the commencement of this Act is held by Samoans by Native title is vested in the Crown as the trustee of the beneficial owners thereof, and shall be

held by the Crown subject to the Native title and under the customs and usages of the Samoan race and all such land is hereby declared to be Native land accordingly....."

I agree that, in respect of Native land, the section vested title in the Crown but only as trustee for the beneficial native owners. A trust was created. Furthermore, as a general rule a trustee can only take any further or new title to the trust property, subject to the terms of the trust and not in his own right and for his sole benefit. In such case he is presumed to have acted in the interests of the beneficial owners under the trust.

However the distinguishing feature in this case is the agreement entered into between the Crown and the native owners in 1942. In terms of that agreement the native owners, for due consideration and in binding form, had surrendered their beneficial ownership to the Crown. It is competent for a beneficiary to put an end to a trust and this is what had occurred in 1942. Therefore, no trust remained in 1945. Moreover, if a trust still continued, Section 280 of the Samoa Act 1921 specifically authorised disposition of native land to the Crown in its own right. This created a statutory exception to the presumption that a trustee can only acquire title to the trust property on terms of the trust.

I am also satisfied that the Crown was not in "flagrant breach of its fiduciary relationship" in the manner submitted. For completeness I will comment on the eight reasons mentioned in the submissions:

1. I have already positively found that there was no agreement that the people of Satuimalufilufi would return to their original lands after the war.

2. It is correct that only a small portion of the land was utilised for an air strip but the evidence is that the total balance of the area was used for a U.S. Marine Base.

3. The evidence of Tupa'i Morris Lee, which I accept, is that occupation of the land as a U.S. Marine Base continued until the end of the war and it was when the marines left that N.Z.R.E. started to cultivate the land.

4. There was no need for the Crown to consult with Satuimalufilufi before the land was taken by Order in Council in 1945 because the village had already surrendered its beneficial rights of ownership by the agreement in 1942.

5. The evidence is that the whole of the land was used for an airstrip and US Marine Base until the end of the war. Those were defence purposes.

6. The evidence is that after the war ended a substantial portion of the land was cultivated for plantation purposes. At that time the village of Satuimalufilufi had long since relinquished its interest in the land and the U.S. Marine Base had been disbanded. The village of Satuimalufilufi had been permanently settled at Falepuna and only part of their original land became available as the airport remained. It is understandable that no thought would have been given by the Administration to re-settling the village back at Faleolo. Utilisation of the land for some other appropriate purpose was entirely proper.

7. There is evidence that Satuimalufilufi were compensated for their crops in 1942. I have already referred to the payment of 125 pounds in terms of the agreement and the permission given to Saipaia Uepa to enter the military base in October 1942 to gather produce from the plantation. I would not expect compensation to be paid for chickens and pigs. These could be taken to the new location.

8. I have already said that the failure of the Government to vest the land at Falepuna as customary land of the village of Satuimalufilufi is a matter for censure. However the people of Satuimalufilufi still have their rights and have obtained the benefits of the agreement entered into in 1942. That agreement remains binding on the village and the Government. The land was given to the village and the village has had undisturbed occupation of it since 1942. The omission to record the interest of Satuimalufilufi on the legal title is neither a breach of the agreement nor a breach of any fiduciary relationship between the parties.

For these reasons I am satisfied that the first submission of counsel for the first Defendants must be rejected.

The Samoa Land for Defence Purposes Order 1945 is not void because of any breach of a fiduciary relation between the village of Satuimalufilufi and the Crown arising under Section 278 of the Samoa Act 1921.

The second submission on behalf of the first Defendants is that the purported taking of the land by the Samoa Land for Defence Purposes Order 1945 was "ultra vires on the ground of lack of good faith". Counsel cites the decision of Carltona v Commissioner of Works and others [1943] 2 All E.R. 560 as authority for the Court to inquire into the bona fides of the exercise of an executive power, even in respect of war-time regulations.

As the Court has very limited powers of inquiry into an executive decision made pursuant to an empowering regulation it is appropriate to quote the words of Lord Greene M.R. delivering the decision of the Court of Appeal in that case (at page 564):

> "It has been decided as clearly as anything can be decided that where a regulation of this kind commits to an executive authority the decision of what is necessary or expedient and that authority makes the decision, it is not competent to the courts to investigate the grounds or the reasonableness of the decision in the absence of an allegation of bad faith .....
>
> .....Parliament, which authorises this regulation, commits to the executive the discretion to decide and with that discretion, if bona fide exercised, no court can interfere. All that the court can do is to see that the power which it is claimed to exercise is one which falls within the four corners of the powers given by the legislature and to see that those powers are exercised in good faith. Apart from that, the courts have no power at all to inquire into the reasonableness, the policy, the sense or any other aspect of the transaction."

Accordingly, in this case, the only power of the Court is to see whether the Samoa Land for Defence Purposes Order 1945 comes within the powers given by The Samoa Land Emergency Regulations 1944. If so, the Court can only interfere if it is shown that the power was not exercised in good faith.

There is no challenge by counsel for the first Defendants to the statutory basis for the Order in Council taking the land. The Samoa Land Emergency Regulations 1944 (Exhibit 14 - which came into force on the 9th November 1944) defined "defence purposes" as "including military or air force purposes" and authorised the taking of "any European or Native Land in Samoa" for defence purposes. The Samoa Land for Defence Purposes Order 1945 (Exhibit 15) is expressed to be made in pursuance of the Samoa Act 1921 and the Samoa Land Emergency Regulations 1944. It specifically provides that the native land described in the first schedule (which includes the land formerly occupied by Satuimalufilufi) is taken for defence purposes and vested in His Majesty free from all estates rights and interests of other persons. If, as counsel for the first Defendants contends, this land was still customary land of Satuimalufilufi then the Order in Council taking it for defence purposes (namely an aerodrome and U.S. Marine Base) was clearly within the powers given by the legislation.

The submission on behalf of the first Defendants is that this power to take the land was not exercised in good faith. The onus of proving this rests on the first Defendants.

The first ground advanced for this submission is the alleged "flagrant breaches by the Crown as trustee of its fiduciary obligations to the customary owners of the Satuimalufilufi lands". This is the same argument relied upon in Counsel's first submission challenging the validity of the Samoa Land for Defence Purposes Order 1945. I have already dealt at length with that submission and found that there was no breach of any such fiduciary relationship.

Counsel further submits that the Satuimalufilufi and Satapuala lands taken "in 1945 for a military air base or defence purposes were never utilised for those purposes, for the war ended in May 1945 just after a few weeks of the taking and the New Zealand Administration must have know in April 1945 when it took the lands of Satuimalufilufi that the war was coming to an end".

This argument ignores the history, facts and circumstances leading up to the taking of the land. It may have had some force if the land had never been used for defence purposes and the decision to take it, as well as the actual taking was made in April 1945. However that is not the situation in this case.

The taking of the land for defence purposes in 1945 was only the perfection of something that had been begun and given practical effect to since the 24th March 1942. According to the Memorandum of the Secretary for Native Affairs (Exhibit 13), that was the date that the U.S. forces first landed in Western Samoa and the decision was made to lease land at Faleolo from the native owners. By the 10th April 1942 it was known that the area required for the aerodrome and marine base was so large as to require all of the Satuimalufilufi and Satapuala lands. The decision was then made to acquire all those lands. This was done by agreements providing for the exchange of lands and compensation and the villages of Satuimalufilufi and Satapuala moved out in 1942. Thereafter all the lands were used for defence purposes until the end of the war. It was clearly intended from the outset that the former Satuimalufilufi land would be vested in the Crown by some appropriate means. The memorandum giving data for the draft agreement for exchange of lands on the Government file (Exhibit 70) contains the entry:

> "7. Upon completion of this transaction, the present area of Native land within Satuimalufilufi to be declared free from Native title and the land given at Falepuna to be declared free from European title pursuant to legislation now being drafted."

In the memorandum of the Secretary for Native Affairs to the Secretary to the Administration dated 15th June 1942 (Exhibit 13) regarding the agreements for exchange of lands with Satuimalufilufi and Satapuala an entry under the heading of "Work still to be done" is:

"(b). Effecting changes in titles of all lands involved."

The further documents on the Government file (Exhibit 70) show that some consideration was given to the appropriate way of vesting title but, as with many other transactions given in evidence in this case, there were lengthy and unexplained delays. Finally it was decided to regularise the exchange of lands by a formal taking of the former Satuimalufilufi and Satapuala lands for defence purposes. To this end the Samoa Land Emergency Regulations 1944 were passed on 11 October 1944 and came into effect in Western Samoa on 9 November 1944. However it was still not until the 18th April 1945 that the Samoa Land for Defence Purposes Order 1945 taking the land was finally passed. At this time the war still continued and the land was still being used for defence purposes. It may well be that the war ended shortly afterwards and imminent victory for the allied Forces may have been anticipated by the New Zealand Government. However there was no fraud or lack of good faith on the part of the government for taking the land at that time for that purpose. With more expedition and diligence it could, and perhaps should, have been done earlier. However it was still only giving effect to the intention, the decision to acquire the land, the agreement permanently surrendering the land and the actual use of the land that had continued in full force for over 3 years. The delay, even though it prolonged the formal taking by Order in Council until near the end of the war is no indication of lack of good faith on the part of the Government. I therefore reject the submission of the first Defendants that the Samoa Land for Defence Purposes Order 1945 was ultra vires on this ground.

Thus none of the first Defendants submissions asserting a continuing customary title to the land for the village of Satuimalufilufi or attacking the Plaintiffs title to the land can be sustained. For the extensive reasons I have given I find that the Plaintiff, Western Samoa Trust Estates Corporation, has occupied the land since its formation on 1 April 1957 and has had a valid title since registration of the Conveyance (Exhibit 30) on the 29th December 1961. (Its predecessor New Zealand Reparation Estates previously occupied the land from 1945.) The village of Satuimalufilufi has had no valid title and no lawful right to occupy the land since its customary rights were surrendered by deed to the Crown and the land was vacated in 1942. It follows that the members of the village who have unlawfully entered into occupation of part of the land are trespassers and the Plaintiff is entitled to the remedies available at law for this trespass.

I realize that this decision is unlikely to be taken kindly by the first Defendants and I am anxious that the present division within the village should be repaired before irreparable harm is done. I therefore wish to go further and comment on the reasons given by the various members of the Saipaia family for returning

to the former village land at Faleolo. I do this in deference to their feelings and so that they will know their evidence has been listened to and considered. Each was asked to give his or her reasons for entering into occupation of the land and the various answers can be summarised as follows:

- It is the Satuimalufilufi original customary land "given to it by God".

- Because of the history, traditions and customs that connect Satuimalufilufi people to this land.

- A belief that no signed written agreement was entered into by their ancestors to surrender the land to the Government.

- A belief that there was only an oral agreement with the Government to give up the land for the period of the war only.

- A feeling of being misled or tricked by the Government into giving up its land and the Government not keeping its promises.

- A belief that the compensation paid was inadequate.

- A realization that the land at Falepuna is not in the name of the village and is not within the jurisdiction of the Land and Titles Court as customary land.

- The failure of successive Governments to "recognize their claims.

- Dissatisfaction with the fertility of the land at Falepuna particularly when compared to the original land at Faleolo.

However neither singularly nor collectively can these reasons be sustained to give a lawful justification for resuming occupation. They must accept that there was a written agreement by which their ancestors surrendered the land at Faleolo to the Government and accepted the land at Falepuna in return. That was a final exchange and there was no term that the village would be allowed to return to its original land after the war. A bargain was made and compensation was paid. Some of the present generation may be dissatisfied with the bargain - particularly when they look at the situation of the Satapuala village and also see the present value of their former land with the development of the international airport. However it was a binding agreement that was duly executed and performed by both parties. In terms of that agreement Satuimalufilufi cannot re-occupy the land it surrendered, just as the Government could not claim the land at Falepuna it gave in exchange. There was no trickery on the part of the New Zealand Government at the time although something

should have subsequently been done to finally settle the land at Falepuna as customary land of Satuimalufilufi, rather than merely allow occupation in a customary fashion with legal title remaining in the name of the Crown and now the State. Furthermore a growing dissatisfaction with the fertility of the land at Falepuna and the failure of Government to provide additional land and compensation cannot vitiate the original agreement which has always been binding on the village. Likewise activist instincts and characteristics which are a feature of the Samoan race do not entitle the people of Satuimalufilufi to reclaim their original lands.

The agreement made by the Alii and Faipule in 1942 effectively bound the village and the present generation are also bound by it. Those who have unlawfully entered into occupation of the land must have the good sense to accept that they have no legal right to do so and return peacefully to Falepuna so that harmony in the village can be restored.

DAMAGES

The Plaintiff is entitled to recover damages from the first Defendants for any loss proved to have been suffered as a result of the trespass. In this respect the first Defendants are liable in their representative capacity for loss or damage caused by any of the trespassers.

The evidence clearly establishes that the conduct of the trespassers considerably interfered with the Plaintiffs use of the land for plantation purposes. They also converted the Plaintiffs produce to their own use and caused damage to stone walls and fences.

Mr Boholte the field plantation manager for the Plaintiff corporation gave very convincing evidence of how the unlawful occupiers affected the production of the Afia plantation. He explained how the labour force was reluctant to go on to the areas of land occupied by the trespassers to collect coconuts. He also observed that coconuts had been collected and piled outside the houses. Mr Stowers the manager of the Afia plantation until April 1986 confirmed that the workers were threatened and could not work on the occupied areas. He also saw clear evidence of nuts collected by the trespassers and removed off the plantation. Leto Ifo a worker employed on the Afia plantation gave evidence that on the 27th April 1986 she and other workers were threatened and chased off the area by one of the trespassers who was brandishing a bush knife. She said that after that the workers did not return to work in that area because they were afraid of the Satuimalufilufi people who were occupying the land. Seuseu Arona a security officer at the Afia plantation confirmed the incident involving the trespasser with a bush knife. He said further that the occupants rejected the

plantation workers and some of them were stoned. He also saw bags of coconuts being taken away from the plantation two or three times a week. Tafao Aloimalo an overseer at the Afia plantation gave evidence of an incident in April 1986 when workers collecting nuts were chased away. Senior Sergeant Sale Uelese and Sergeant Filituna Loli also saw evidence of trespassers having collected coconuts and removed them from the land.

All the evidence clearly proves that, when the trespassers entered into occupation, they assumed control of the land to the exclusion of the Plaintiff and its workers. The Plaintiff was effectively prevented from collecting the coconuts from that part of its Afia plantation. They were collected by the trespassers and used for their own purposes.

Evidence from Seuseu Arona, Mr Stowers, Pale Kasara, Inspector Penitito Alai'a and other witnesses proves that the boundary fences and stone walls of the Afia plantation adjacent to the main road were in good order prior to the unlawful occupation. After the first Defendants and others of the Saipaia extended family trespassed on to the land, these fences were demolished and holes were made in the stone walls. The evidence of the first Defendants denying any knowledge of this matter was completely without credit. Only Leoteleifaleese Tuionoula was prepared to make any concession that the damage may have been caused by the occupiers. The evidence of the Plaintiffs witnesses in conjunction with the view taken by the Court leads to the clear inference that the damage to the stone walls and fences was done by the occupiers to give access to the land and their houses on it. Indeed the damage is only to be found to the fences and stone walls along the road boundary immediately in front of those houses.

Loss and damage is proved to have been caused to the Plaintiff by the actions of the trespassers. The Plaintiff in the amended prayer for relief claims:

(a) Judgment awarding $35,000 in damages against the first Defendants, jointly and severally in their own right including in that amount special damages of:

(i) "$7,162.30 for cost of repair and replacement of damaged wire and stonewall fencing, and

(ii) $17,920 for 35 tons of converted and lost production of copra or, in the alternative $13,936 for 29 tons of converted and lost production of copra."

The special damages claimed total alternative figures of $25,082.30 or $21,098.30 and the balance of the total claim of $35,000 must be for general damages of $9,917.70 or $13,901.70. It is appropriate to deal with the three separate heads of claim of loss of production, damage to stonewall and fences and general damages.

There can be no doubt the occupation by the trespassers caused some loss of production for the Plaintiff. It was denied the coconuts from that part of the Afia plantation so occupied. The difficulty is in assessing that loss in money terms.

The Plaintiff relies on the evidence of its field plantation manager Mr Boholte for proof of its loss. He impressed as a knowledgeable expert with long experience in the field of tropical agriculture. He explained the working of the Mulifanua plantation which comprises five sub-plantations of Afia, Magia, Olo, Tausagi and Vaipapa which are cultivated and managed as separate and distinct units. The trespassers occupied part of the Afia plantation. It is divided into 19 blocks and blocks 5, 10 and 12 were occupied. The self-fallen coconuts are collected every 10 days and the number collected from each block is recorded. They are taken to the drier where they are chopped open and the wet copra is removed and weighed. The wet copra is then dried and it is taken by truck to the head office of the Plaintiff corporation at Apia and weighed. This dry copra is then taken to the Copra Board where it is weighed again before being delivered to the copra mill. The Plaintiff is paid by weight for the dry copra so delivered at the current price per ton fixed by the Copra Board.

Mr Boholte produced a schedule (Exhibit 57) showing the weight of dry copra in complete tons produced by the sub-plantations of Mulifanua for the months from January to August in 1985 and 1986. For the Afia plantation 388 tons were produced during this period in 1985 but only 359 tons were produced for the same period in 1986. Mr Boholte attributes this fall in production of 29 tons to the actions of the trespassers in preventing the collection of coconuts. He compares the figures for the Afia plantation with the figures for the Magia plantation which has a similar acreage and coconut trees of the same age. For the same period the Magia plantation had an increase in production of 20 tons. Mr Boholte expressed the view that the 1985 level of production for the Afia plantation should have been maintained in 1986, or, on the basis of comparison with the Magia plantation, even increased. He could find no factors contributing to this drop in production other than the actions of the trespassers in preventing the workmen from collecting coconuts and using the coconuts themselves. He calculates the gross loss of revenue from the drop of 29 tons of production, on the basis of the prices paid by the Copra Board, as $13,936. This is one of the alternative amounts claimed for loss of production in the prayer for relief.

A calculation was also made by Mr Boholte on the same basis for the loss during the months of March, April, May and June 1986 compared with the same period in 1985. This is the period from when the main body of trespassers moved on to the land until the date of the interim injunction restraining the first Defendants from removing or interfering with the produce of the said land. The drop in dry copra produced by the Afia plantation for those four months compared with 1985 was 35 tons. The gross loss of revenue from 35 tons is $17,920 and this is the other alternative amount claimed for loss of production in the prayer for relief.

Mr Boholte is the only witness who gave specific evidence regarding a basis for calculation of the loss of production. Mr Stowers gave some general evidence estimating a drop of 7 tons of dried copra per week caused by the actions of the trespassers and said approximately 25% of the Afia plantation could not be cultivated.

Counsel for the first Defendants submits that there was no evidence to prove the removal and use of coconuts and/or copra by the occupiers to the extent claimed and points out that, except for one family, the occupiers did not move on to the land until March 1986. However the evidence does establish that the occupiers denied the Plaintiff the coconuts from the land occupied and this must have resulted in a loss of copra production for the Afia plantation. I accept that any substantial loss would only have occurred after the main body of occupiers moved on to the land in March 1986. The difficulty is to assess exactly what this loss must have been.

In the first place it is quite impossible to say exactly how many additional coconuts would have been collected by the Plaintiff from the Afia plantation if the trespassers had not been occupying part of the land. I have carefully studied the monthly production charts (Exhibit 56) which record the number of coconuts collected each month from the nineteen separate blocks in the plantation but can find no discernible pattern. There is no consistency or correlation between the number of coconuts collected from different blocks of seemingly similar size and production capability. Furthermore the actions of a dishonest clerk at this time lessens the reliability of these figures.

In these circumstances, and on the basis of the evidence given, the only method of assessing the Plaintiffs loss is in respect of the final product. The only evidence I have is that the production of dry copra from the Afia plantation ought to have equalled, or even exceeded, the production for the previous year. Mr Boholte was resolute in this opinion and I see no good reason to question it.

For the purposes of ascertaining this loss, the occupation of the land by the first Defendants must be divided into three distinct periods. There has not been a uniform interference with the Plaintiffs plantation business from the initial entry into occupation until the present time.

The first period is from the 10th December 1985 until the 24th March 1986 when only the Tuionoula family was in occupation. At first there must have been little or no interference with the plantation business. However the letter sent by Leoteleifaleese Tuionoula to the Prime Minister dated 31st January 1986 (Exhibit 52) shows that positive interference with the plantation business and obstruction of the plantation workers commenced from the first week of February 1986. Nevertheless it was limited to the efforts of one family only.

The second period is from the 24th March 1986 until the 27th June 1986. That is from the day that the rest of the first Defendants and their families entered into occupation until the granting of the interim injunction. This is the period of maximum interference when substantial loss must have been caused to the Plaintiff. The significant month is April when the full impact of the trespassers activities must have been felt by the Plaintiff. I have already referred to the evidence of Leo Ifo and Tafao Aloimalo regarding particular incidents during that month. The schedule of dry copra production (Exhibit 57) shows a decrease of seven tons for the Afia plantation in April 1986 compared to April 1985, whereas the Magia plantation had an increase of twenty tons for that month. Block 5 of the Afia plantation, which was the block most affected by the occupiers according to Mr Boholte, had a dramatic drop in coconut collection for the month of April 1986. The monthly production charts (Exhibit 56) show that 9,125 coconuts were collected from that block in April compared with 17,457, 19,200 and 21,802 for each of the preceding three months. The figures of 8,600 12,180 and 12,920 for coconuts collected from Block 5 for the months of May June and July indicate a continuing but lessening loss for the Plaintiff.

The third period is from 27th June 1986 until the present time. Inspector Penitito Alai'a said that after the interim injunction was granted many of the houses were vacated and the number of occupiers was reduced to about 17. The interim injunction restrained the occupiers from removing or interfering with any produce on the land and there has been no evidence of any substantial interference since then.

The substantial loss to the Plaintiff occurred during the second period mentioned above from 24th March to 27th June. On the basis of Mr Boholte's evidence I am satisfied that a proper assessment of this loss is on the basis of the decrease in dry copra produced for the months of April, May and June compared

with the previous year. The crop production schedule (Exhibit 57) shows this to be 7 tons for April, 18 tons for May and 4 tons for June which is a total loss of 29 tons of dry copra. (Significantly for these same three months the Magia plantation had a gain of 6 tons on the figures for the previous year.) The Copra Board price at that time was $512 per ton and the gross loss for 29 tons is therefore $14,848.

There could also have been some loss of production for the Plaintiff during the first period mentioned above from 10th December 1985 to 24th March 1986 when only one family occupied the land. In particular that would be during the period of about 6 or 7 weeks from the first week in February until the 24th March. However it is impossible to calculate such loss with any degree of certainty. For the third period mentioned above from 27th June 1986 until the present time production figures are only given for July and August and these show an increase which is comparable with the increase for the Magia plantation. Although continued occupation by a lesser number of trespassers would probably have resulted in some loss of coconuts and drop in production, no calculation can be made of this.

I note that the 29 ton loss of production I have calculated for the months of April, May and June is exactly the same as the total drop of production for the full period from January to August (inclusive) 1986 compared with 1985. Mr Boholte's evidence that he would have expected the 1985 figures to have been maintained or bettered during this entire period in 1986 is a complete justification for assessing a total loss of at least that figure. However this should be valued at the ruling Copra Board price of $512 per ton for dry copra during the months of April, May and June when this substantial loss is proved to have occurred. I therefore confirm the figure of $14,848 as the gross loss of production of 29 tons of dry copra suffered by the Plaintiff.

Counsel for the Plaintiff submits that the gross total loss should be allowed as damages without any deduction for the cost of production. I disagree with this submission.

The harm done to the Plaintiff by the trespassers was preventing the Plaintiff from collecting coconuts and/or converting them to their own use. The Plaintiff suffered a loss of its coconuts and would be entitled to recover their value. There is no evidence of the value of these coconuts, as coconuts, and in any event, their value to the Plaintiff was for production of copra in the course of its plantation business. The true loss is in the potential or ultimate value of that dry copra. Such loss can only be ascertained by calculating the value of the dry copra

that would have been produced from those coconuts and deducting the costs of producing it. That is the Plaintiffs true loss. It is a loss of profit that is recoverable and not the gross loss of revenue.

This is a principle of long standing. Damages are awarded to compensate a Plaintiff for loss. They are intended, so far as money can do it, to put him in the same position he would have been in if the tort had not been committed. Damages are not to provide a bonus which the Plaintiff would not have received if no actionable wrong had occurred. In the present situation this means that only a net loss of profits and not a gross loss is recoverable as damages. The cost of production must be deducted from the gross return that would have been received.

This principle was recognized without argument by Lord Tucker in the celebrated House of Lords case of British Transport Commission v Gourley [1956] AC 1985 which determined that the tax position must be taken into account in calculating damages for loss of earnings. At page 215 he noted the difficulty in deciding what items of expenditure following the earning of profits are to be taken into account and said:

> "Such items are clearly distinguishable from those which are incurred in the process of earning the profits and which have to be deducted in the computation thereof."

I find nothing in the authorities cited by counsel for the Plaintiff to derogate from this well established principle. It is the Plaintiff who would unjustly receive the "windfall" in this case if such production costs are not deducted. In my view the decision of McArthur & Co v Cornwall & anor [1892] AC 75 cited by counsel for the Plaintiff is a general application and is not distinguishable from the present case. It was there held by the Privy Council that in assessing damages for trading or production losses a deduction must be made for expenses that would have been incurred.

I therefore hold that from the gross revenue loss of $14,848 suffered by the Plaintiff on 29 tons of dry copra must be deducted the costs that would have been incurred in producing that product. Mr Boholte gave evidence that the average production costs for the Afia plantation for the period from January to August 1986 were $337 for each ton of dry copra delivered to the Copra Board. These were the costs incurred for coconut collection, transport of the coconuts to the drier, cutting and chopping, drying, bagging and loading, sacks and twine, weeding, pest and disease control, motor transport and plantation staff salary. For 29 tons these costs amount to

$9,773. When deducted from the gross loss of $14,848 a net loss of $5075 remains. This is the amount recoverable by the Plaintiff for specific loss of 29 tons of dry copra production that has been proved.

The next item of claim to be considered is $7162.30 claimed for the cost of repair of the damaged wire fence and stone wall.

I have already found it proved that the occupiers were responsible for the damage to the wire fence and stone wall along the roadside boundary. A trespasser who causes such damage is liable to the owner of the land. I agree with counsel for the Plaintiff that the appropriate measure of damages is the cost of reasonable reinstatement and no deduction should be made because the owner receives a new fence to replace the old one that has been destroyed. That betterment is a necessary result of the reinstatement. (Harbutts Plasticine Ltd v Wayne Tank and Pump Co Ltd (1970) 1 Q.B. 447). Accordingly, the issue to be determined is what cost of reasonable reinstatement has been proved.

Prior to the occupation the road boundary was fenced partly by a 5 strand post and barbed wire fence and partly by a stone wall. Above the stone wall a 3 strand barbed wire fence was secured by posts. This was necessary to contain the Plaintiffs cattle that graze on the plantation. The evidence (confirmed by the view) is that the 5 strand wire fence has been substantially demolished, stones have been removed to create holes in the stone wall to give entrance to the occupiers houses in approx. 22 places and the 3 strand wire fence above the stone wall has been taken down.

Pale Kasara a draughtsman employed by the Plaintiff corporation gave evidence that he measured the length of damaged wire fences and stone wall. He said that from the start of the damage the 5 strand wire fence ran for 998 metres to the stone wall. The stone wall then ran for 1968 metres. Then followed a further 5 strand wire fence for 250 metres to the end of the damage. This involved a total and continuous road boundary of 3216 metres being 1248 metres of 5 strand wire fence and 1968 metres of stone wall with a 3 strand wire fence above. Mr Roache, the acting livestock officer for the Plaintiff corporation, gave evidence of the cost of completely renewing the 5 strand wire fence and the 3 strand wire fence above the stone wall throughout the entire length of 3216 metres. Separate quantities and costs were itemised for barbed wire, fence posts (spaced 4 yards apart), corner posts, staples and labour. He also estimated the labour costs for repairing the holes in the stone wall and gave evidence of the cost of transporting the posts to the site. These costs totalling $7162.32 are fully itemised on the statement produced by him as Exhibit 61.

This is the only evidence of the cost of reinstating the fences and wall that has been given. Mr Roache's testimony was not shaken by cross-examination and I have no reason to disbelieve it. I accept it as proving that the total cost of repairing the stone wall and erecting new 5 and 3 strand wire fences along the entire distance of 3216 metres is $7162.32.

My only concern is that the fences have not been entirely demolished over that whole length of the boundary. Some parts of the fence remain intact and some posts are still standing. The Plaintiff has a duty to minimise loss. In my view the remaining fence and posts ought to be utilised in the reinstatement. Any competent and prudent farmer repairing damaged fences would utilise any useable materials that remain. The portion of fence that remains standing ought to be left as it is with the wire strands being joined to the wire strands of the new fence. Some of the original posts that remain should be salvaged and used again, although Mr Roach explained that if it is necessary to remove these posts from the ground they have a tendency to break.

It was apparent from the view taken that there is only a limited amount of original fence and posts that could be salvaged and re-used. No precise assessment can be made and the justice of the situation will be met by a 10% reduction of the posts and wire required to renew the whole fence line. This would be 86 posts and almost 3 coils of wire which represent fencing materials for over 300 metres. The proved figure of $7162.32 to repair the stone wall and erect a new fence along the total length of 3216 metres includes $6290 for wire and posts (excluding corner posts which will all still be needed). An allowance of 10% amounts to $629 and when deducted from the total cost a balance of $6533.32 remains. This is the appropriate sum for damages under this head.

The special damages proved are therefore $11,608.32 being $5075 for the net loss of 29 tons of dry copra production for the months of April, May and June 1986 and $6533.32 for the cost of re-instating the damaged fence and stone wall.

The final item of damages claimed is the balance of the claim up to a total sum of $35,000.

In my view general damages, as such, are not recoverable in the present situation. If no loss or damage is suffered as a result of the trespass, the Court can award nominal damages. However if some loss or damage is caused then damages can be recovered for the loss that is proved. This is more in the nature of special damages. In appropriate cases a general sum may be fixed as damages to compensate for damage that cannot be quantified. Usually this encompass such matters as pain, injury, inconvenience or loss of reputation or some other intangible commodity suffered by the victim. In this case the wrong has

been suffered by a corporation and there is no evidence of any tangible or intangible loss or suffering to it apart from the actual damage to its plantation business and property. However in calculating this loss in its plantation business there are some items that cannot be quantified. I have already referred to production loss through being deprived of coconuts during the periods from the first week of February until 24th March 1986 (when only one family occupied the land and was interfering with the Plaintiffs workers) and from the 27th June onwards (after the interim injunction had been granted and only approx. 17 people continued in occupation). Also Mr Boholte gave evidence of having observed that the occupiers had taken palm fronds from the coconut trees for roofing and picked green coconuts which he said would have an adverse affect on the productivity of those trees. The actual loss in respect of these matters cannot be calculated and it must be remembered that only the net loss after deduction of production costs is recoverable. In these circumstances the Court is justified in fixing a general sum for damages. I intend to give some modest allowance for these Matters by rounding off the loss of $11,608.32 proved for special damages to a round figure of $12,000.

There are some other bases upon which damages can be awarded that were referred to by counsel for the Plaintiff in his submissions. One of these is exemplary damages which can be awarded in rare cases as a punishment or deterrent but the facts of this case do not bring it within any category for such an award. Counsel for the Plaintiff submits that the conduct of the first Defendants "warrants consideration of aggravated damages" and cites Merest v Harvey (1814-1823) All E.R. 454 as authority for such an award. The basis for the damages given in that case must now be questionable in view of the later House of Lords decision of Rookes v Barnard [1964] A.C. 1129. Lord Devlin, in his extensive review of the authorities referred to Merest v Harvey with several other old authorities and noted in relation to that case and one other that (page 1223) "the sums awarded were so large as to suggest that they were intended to be punitive". The decision makes it clear that punitive or exemplary damages are inappropriate in such cases. Aggravated damages can be awarded where the damages are at large (in the sense of not being restricted to pecuniary loss that can be specifically proved) and the wrongdoers motives, conduct or manner of committing the tort have aggravated the Plaintiffs damage. They are designed to compensate the Plaintiff for his wounded feelings. In this case the damages are not at large in that sense. The first Defendants trespassed upon and occupied part of the Plaintiffs coconut plantation. Their conduct prevented the Plaintiffs workmen from collecting coconuts from the occupied area and the Plaintiffs production suffered accordingly. Damages for that pecuniary loss have been assessed and the conduct of the occupiers could not be said to have aggravated that particular loss. Likewise damages for the damage to the fences and stone wall have been assessed.

There is no sufficient evidence of any other loss or damage suffered by the Plaintiff for which further or greater damages ought to be awarded. There is no evidence of injury to the Plaintiffs feelings, dignity or pride which aggravated the loss suffered. A further award suggested by counsel for the Plaintiff of a reasonable sum for the Plaintiffs use and enjoyment of the land is also inappropriate. In this case the Plaintiff is being compensated for that loss of use and enjoyment of the land by being paid the loss of profits from the plantation business conducted upon it. That puts the Plaintiff back in the same financial position as if the trespass had not taken place. To award a reasonable rental as well for the first Defendants occupation would be an unjustified bonus. Such an award should only be given where no other basis for calculating damages for the loss of use and enjoyment of the land is appropriate (as was the case of Hall & Co v Pearlburg [1956] 1 All ER 297 referred to by counsel where damages for loss of use of the land were assessed on the basis of the rental that would otherwise have been received).

The proper measure of damages in the present case is compensation for the actual loss suffered by the Plaintiff, as a result of the trespass by the first Defendants. This is loss of production and cost of re-instatement of damaged fences and stone wall which, for the reasons already given, I fix at $12,000.

INJUNCTION

The Plaintiff also seeks a mandatory injunction to compel the first Defendants to vacate the land and remove all buildings and a restrictive injunction to restrain the first and second Defendants (as the Alii and Faipule of the village of Satuimalufilufi) from further acts of trespass in the future.

The authorities show that an injunction is a recognized form of remedy in respect of trespass. However it is an equitable remedy and will only be granted on proper grounds.

In this case damages have been awarded and an order for possession could be made against the first Defendants. However these would not be sufficient remedies in the present situation and would not give adequate protection of the Plaintiffs rights. Counsel for the first Defendants made a brief submission that, as a matter of discretion, no injunction should be granted. However I find no substance in the grounds advanced. The preponderance of evidence and equities in this case clearly favours, indeed compels, the issuing of injunctions.

The first Defendants are in substantial and deliberate violation of the Plaintiffs rights as owner and occupier of the land. Their actions and evidence give good reason to suspect that they will not cease the trespass without appropriate and enforceable

orders of the Court. A mandatory injunction is required to compel them to vacate the land and remove the buildings they have erected.

Moreover the attitude of the first Defendants gives rise to a real risk that such trespass could be repeated in the future. I hope this fear proves unfounded and that the first Defendants will be reunited with the rest of the village and remain permanently at Falepuna. However the rights of the parties have been finally determined on their respective claims to the land in question. To safeguard the rights of the Plaintiff and avoid any possible re-occurrence of the trespass there ought to be a perpetual restrictive injunction binding on the whole village.

The only concession I am prepared to give the first Defendants is to allow them a reasonable time to remove their buildings. However it must be only the minimum time necessary because of the gross violation of the Plaintiffs rights and the possible continuing loss being suffered by the Plaintiff while the unlawful occupation continues. I am not influenced by the fact that crops have been planted by the first Defendants. They chose their course of action knowing that their occupation was challenged. They assumed the risk of planting crops and must suffer any loss. In any event most of the crops are growing on the verge alongside the public road and are not within the boundaries of the Plaintiffs land.

No submissions have been made challenging the form of the injunctions sought in the prayers for relief in the second amended statement of claim (as amended during the hearing). I have made some amendments to those forms in the orders for a mandatory injunction I will be issuing against the first Defendants to vacate the land and remove the buildings and the restrictive injunction I will be issuing against the first and second Defendants to restrain any further entry on to the land. These amendments have been particularly directed to ensuring that the injunctions are sufficiently comprehensive and effectively bind the whole village of Satuimalufilufi.

COSTS

The Plaintiff having succeeded in the action is entitled to costs. However these will be awarded against the first Defendants only. It was the first Defendants who committed the trespass giving rise to this action and they positively defended the claim. The second Defendants were not at issue with the Plaintiffs and were only added as Defendants to ensure that any judgment would be binding on the whole village of Satuimalufilufi. I will make no order for costs for or against the second Defendants.

Finally I again draw attention to the fact that the land at Falepuna, occupied by the people of the village of Satuimalufilufi as their permanent home since 1942, still remains registered as Government land in the name of the State (as successor to Her Majesty the Queen in terms of the Constitution). The agreement entered into in 1942 between the New Zealand Administration and the Village of Satuimalufilufi remains binding on the present Government and, in terms of that agreement, the land has been held by the village "in accordance with the usages and customs of the Samoan people". However it is not customary land within the Land and Titles Act 1980 and the people of the village are denied access to the Land and Titles Court under that Act for resolution of land disputes. This is an omission that ought to be remedied by the Government as soon as possible so that the land will be customary land in all respects. This may require a special Act of Parliament or a consent application under Section 9 of the Lands and Titles Act 1980 may suffice. Some other way may be more appropriate but the Government should immediately take the initiative in this matter.

In terms of the foregoing judgment and for the reasons given I now make the following orders:

1. Judgment for the Plaintiff against the first Defendants for damages of $12,000.

2. The following writs of injunction to issue in respect of the Plaintiffs land at Mulifanua in Western Samoa described as First those parcels containing 1520 acres 1 rood 12.3 perches more or less described as Parcels 410/97 and 411/97 Flur XV Upolu parts being also Court Grants 861 and 894 and part Court Grants 788, 893, 905, 913, 1013, 1015, 1022, 1023 and part closed road, being the residue of the land in Volume 10 Folio 30 of the Land Register of Western Samoa and more particularly shown on deposited plan 47 U/XV L and Secondly that parcel containing 5400 acres more or less being the residue of Court Grant 92 Flur XV and XVI, Upolu and being part of the land registered in Volume 1 Folios 95 and 97 of the Land Register of Western Samoa and more particularly shown on deposited plan 1053 L and Block Sheets 1, 6 and 7 (together being hereinafter referred to as "the said land").

   (a) A writ of injunction against the first Defendants personally and as representatives of all persons from the village of Satuimalufilufi occupying any part or parts of the said land and/or having any buildings or other structures whatsoever erected thereon (so as to bind all such persons by this writ) to compel them, their servants, agents, workmen and any other person acting under or by their authority to vacate the said land and to remove all buildings and other structures

whatsoever erected by them on the said land within 28 days of the issue of this order.

(b) A writ of injunction against the first and second Defendants personally and in their representative capacity as Alii and Faipule of the village of Satuimalufilufi (so as to bind by this writ all people of the village of satuimalufilufi) to permanently restrain them by themselves, their servants, workmen, agents, successors, heirs and assigns or otherwise howsoever from thereafter entering on to or occupying the said land or any part thereof.

3. An order that the first Defendants pay the Plaintiffs costs and disbursements as fixed by the Registrar.