

IN THE SUPREME COURT OF SAMOA

HELD AT APIA

BETWEEN: TOVIA FONOTI of Tulaele, Retired:

Plaintiff

A N D: The Public Trustee as the Administrator of the Estate of FREDERICK JOSEPH ULBERG late of Vailoa, Deceased:

First Defendant

A N D: PAUL ULBERG, OLAF JOHN ULBERG, PA'O SINAPATI ULBERG

Second Defendants

Counsel: R Drake for plaintiff  
G B Powell and M Leung Wai for first defendant  
P A Fepuleai for second defendants

Hearing: 15 December 1998

Judgment: 17 December 1998

---

**JUDGMENT OF SAPOLU, CJ**

---

In these proceedings the Court has to deal with a motion for the first defendant to strike out the plaintiff's statement of claim. The grounds of the motion are threefold, namely, that:

- (a) the plaintiff has sued the wrong party as first defendant and is in breach of the relevant provisions of the Government Proceedings Act 1974;
- (b) the plaintiff has failed to give written notice as required under section 21 of the Limitation Act 1975 giving reasonable information of the circumstances upon which his claim is based as soon as practicable after the accrual of the cause of action; and
- (c) the statement of claim discloses no cause of action and the plaintiff has no actionable right.

For the purpose of the strike out motion the Court would have to assume that the facts pleaded in the statement of claim are true.

Now the plaintiff is claiming an interest in the estate of one Frederick Joseph Ulberg, now deceased, of Vailoa, Faleata. The first defendant is the Public Trustee who is the administrator of the aforesaid estate. The statement of claim does not mention who the second defendants are.

Essentially the facts pleaded by the plaintiff in his statement of claim are that the deceased was never married and had no natural children. He raised the plaintiff from a young age as his own son when he was a trader for Morris Hedstrom Ltd at Fasitoouta. When the deceased later moved to his father's estate at Vailoa, Faleata, he brought the plaintiff with him. A father and son relationship with mutual affection developed between the deceased and the plaintiff as the plaintiff grew up and continued to live with the deceased. At first the deceased and the plaintiff lived at Vailoa in a house that was on the

estate of the deceased's father. Later they lived in a European style house that was built by the plaintiff on land that the deceased inherited from his father's estate.

According to the plaintiff, he got married in 1962 and he, his wife and children continued to take care of the deceased. On instructions from the deceased and in reliance upon his father and son relationship with the deceased, the plaintiff says he, his wife and his children cleared, fenced and cultivated with crops the deceased's land they were living on at Vailoa. They also cleared and cultivated with crops the deceased's land at Tulaele. The plaintiff further says that he, his wife and his children expended much money and labour in improving the deceased's lands in reliance upon his father and son relationship with the deceased as well as the conduct and oral representations by the deceased while alive that the plaintiff would inherit the aforesaid lands. The deceased died in 1967 and the plaintiff built a European style house on the deceased's land at Tulaele. It is not clear from the statement of claim whether the deceased died intestate or not. I will have to assume from what I have heard from the bar that he died intestate.

By way of relief, an order is then sought against the first defendant to convey the lands of the estate to the plaintiff.

The plaintiff then finally says that the application by the second defendants in related proceedings for a declaratory judgment that they are the only beneficiaries of the deceased's estate and that the plaintiff is not a beneficiary should be dismissed, as the second defendants would be unjustly enriched at the expense of the plaintiff and his family if they are given any part of the lands of the deceased's estate. Up to this point, the allegations in the statement of claim still do not explain who the second defendants are. It

is also not clear from the statement of claim whether there is a cause of action in restitution for unjust enrichment against the second defendants even though the words "unjustly enriched" are used. The status of the second defendants only becomes clear when one turns to the second defendants' application for a declaratory judgment. That application shows that the second defendants are some of the children of the deceased's brothers and sisters and they are claiming to be beneficiaries of the deceased's estate under the statutory rules of succession on intestacy and therefore have an interest in that estate.

Whether or not the second defendants qualify under the rules of succession on intestacy as provided under section 44 of the Administration Act 1975 is a matter I need not decide in these proceedings. All that needs to be said is that the second defendants have not filed a motion to strike out the plaintiffs' claim as they appear not to be now pursuing their application for a declaratory judgment any further.

I turn now to deal with the grounds of the first defendant's motion to strike out the plaintiffs' statement of claim. The first ground, as already stated, is that the plaintiff has sued the wrong party and is in breach of the relevant provisions of the Government Proceedings Act 1974. Counsel for the first defendant in his clear oral and written submissions argued that the proper defendant to be sued in these proceedings is the Attorney-General on behalf of the Public Trustee rather than the Public Trustee himself. He referred to section 2(1) of the Government Proceedings Act 1974 which defines the expressions "Government Department" or "Department" to mean the Public Trustee and every other Department of the executive Government of Samoa. Thus, it was submitted that the Public Trustee is a "Government Department" for the purposes of the Government Proceedings Act 1974.

Section 2(2) of the same Act then provides, inter alia, that any reference in the Act to the Government, in relation to any civil proceedings, shall be construed as including a reference to any Government Department. As the expression "Government Department" is defined to mean, inter alia, the Public Trustee, any reference in the Act to the Government must necessarily embrace the Public Trustee, where that is appropriate, by reason of section 2(2). Counsel for the first defendant then goes on to point out that as the present proceedings by the plaintiff are civil proceedings against the Public Trustee, they are necessarily civil proceedings against the Government. Therefore, section 3 of the Act which deals with civil proceedings to enforce claims by or against the Government applies. Accordingly, the civil proceedings and claim by the plaintiff must be taken in accordance with the provisions of the Act. And as section 9 provides that civil proceedings to which the Act applies must be instituted by or against the Attorney-General, counsel, therefore, further submitted that the proper defendant to be sued is the Attorney-General rather than the Public Trustee.

To reinforce his argument that the proceedings by the plaintiff should have been taken in accordance with the provisions of the Government Proceedings Act 1974, counsel for the first defendant also referred to section 44(1)(e) of the Administration Act 1975. That section provides that where none of the persons who can take an interest in an estate on intestacy survives the deceased, the Government takes the whole estate as *bona vacantia*. As it appears that neither the plaintiff, nor any of the second defendants, or any other person qualifies under section 44 of the Administration Act 1975 to take an interest in the deceased's estate, it would seem that the Government would take the whole of the deceased's estate as *bona vacantia*. It was therefore submitted that the plaintiffs' action is

in effect against the Government taking the whole estate as *bona vacantia* because the plaintiff is claiming he has an interest in the estate.

In considering the submissions and arguments for the first defendant I think one must also turn to the provisions of the Public Trust Office Act 1975 which establishes the office of Public Trustee and prescribes his powers in order to see whether they permit the Public Trustee to be sued as a defendant in this case. As with any case concerned with the interpretation of a statute, the real objective is to ascertain the intention of the legislature primarily from the words used in the statute even though extrinsic materials are in some cases a relevant aid to the interpretation of a statute.

Section 4 of the Public Trust Office Act 1975 provides for the appointment of the Public Trustee as an officer of the public service and describes him as a corporation sole with perpetual succession and a seal of office. Section 87, which was referred to by counsel for the plaintiff, then provides as far as relevant :

“Where the Public Trustee is executor, administrator, trustee, guardian or otherwise  
“authorised to act in the administration of an estate, then, unless a contrary intention  
“is expressed in this Act or in any other relevant instrument, the Public Trustee may  
“in his discretion, but without restricting any other powers, exercise the following  
“powers :

“(f) bring or defend any action, suit or other proceeding, and suffer judgment to  
“go by default or consent to any judgment, decree or order in the action, suit or  
“proceeding upon such terms and conditions as the Public Trustee thinks fit.

“(g) take proceedings to cause any person to be adjudicated a bankrupt, or any  
“company to be placed in liquidation, and vote and act either personally or by proxy  
“at meetings of creditors or shareholders, and in the case of a company/whether it  
“is in liquidation or not.

“(h) take criminal proceedings touching or concerning property, and for the  
“purposes of the proceedings, the property shall, unless the contrary is proved, be

“deemed the property of the Public Trustee and in possession of the Public Trustee”.

The other provisions of the Public Trust Office Act 1975 which expressly give the Public Trustee power to bring or defend Court proceedings in his own name are section 73 in respect of unclaimed property of an estate and section 92 where the Public Trustee can sue himself while acting in another capacity. There may be other provisions of the Act under which the Public Trustee may, himself, bring or defend Court proceedings but I have referred only to the obvious ones.

Section 87(f) of the Act which seems to be the relevant provision for the purpose of this case provides, as far as ~~for~~ relevant, that where the Public Trustee is the administrator of an estate, then unless a contrary intention is expressed in this Act or in any other relevant instrument, the Public Trustee has the power to do any of the following :

- (a) bring or defend any action, suit or other proceedings;
- (b) suffer judgment to go by default; or
- (c) consent to any judgment, decree or order in an action, suit or proceeding upon such terms and conditions as he thinks fit.

The first part of section 87(f), in my respectful view, clearly gives the Public Trustee the power to defend the plaintiff's action against him. It is clear from the statement of claim that the plaintiff is claiming an interest in the estate of Frederick Joseph Ulberg, deceased, and is suing the Public Trustee as administrator of that estate. In terms of section 87(f) the Public Trustee has the power to defend the plaintiff's action himself. That means the

Public Trustee can defend the plaintiff's action in his own name and, therefore, the plaintiff can sue the Public Trustee direct.

I have checked whether there is a contrary intention expressed in the Public Trust Office Act 1975 or in any relevant instrument which by definition in section 2 of the Act includes an Act of Parliament. I have found none. Section 126 of the Public Trust Office Act 1975, however, seems to be relevant for the purpose of the arguments for the first defendant in relation to section 44 of the Administration Act 1975 and the Government Proceedings Act 1974. Section 126 provides :

**“Relationship between this Act and other Acts and instruments - (1) Any Acts for the time being in force relating to administration of estates or trusts and trustees shall be read and construed so as not to affect any of the express provisions of this Act, and shall be read and construed as subordinate to the provisions of this Act.**

**“(2) Nothing in this Act shall be deemed to deprive the Public Trustee of, or to limit or restrict, any powers or authorities vested in or exercisable by him by or under any other Act, instrument, or law; and all powers and authorities conferred by this Act on the Public Trustee shall be deemed to be in addition to and not in limitation or restriction of other powers or authorities vested in or exercisable by him by or under any other Act or instrument or law.**

**“(3) Except in so far as it is expressly otherwise provided by this Act, all rights, powers and remedies conferred by any other Act or law upon any Court or Judge, or upon the Public Trustee or any other person, shall remain unrestricted, and the provisions of this Act shall be read and construed as conferring upon such Court, Judge, Public Trustee or persons the rights, powers and remedies hereby provided in addition to and not in derogation of any rights, powers and remedies conferred by the other Act or law, and so that the rights, powers and remedies conferred by that other Act or law and by this Act shall be capable of being exercised independently the one of the other, or in aid the one of the other; but, nevertheless, the express provisions of this Act shall not be restricted by any other Act or law”.**

I refer now to subsections (1) and (3). As I read subsection (1) it is saying that any other Act which relates to the administration of estates must be read and construed as



subordinate to the provisions of the Public Trust Office Act 1975 and not to affect the provisions of that Act. That must mean a legislation such as the Administration Act 1975 which relates to the administration of estates generally is to be read and construed as subordinate to the provisions of the Public Trust Office Act 1975 and not to affect the provisions of that Act. Once that point is accepted, then the supporting submission based on section 44 of the Administration Act 1975 that the proper defendant in this case should have been the Attorney-General instead of the Public Trustee loses its force.

As to subsection (3) as aforesaid, I am of the view that there is nothing in that subsection which restricts or derogates from the special power conferred upon the Public Trustee under section 87(f) to bring or defend any action, suit or other proceedings. This is so particularly in view of the concluding words of subsection (3) which state that the express provisions of the Public Trust Office Act 1975 shall not be restricted by any other Act or law.

In all then, I am of the respectful view that the Public Trustee has been properly sued as a defendant in the plaintiff's action. As counsel representing the Public Trustee submitted that the Government, in the circumstances of this case, is entitled to take the deceased's estate as *bona vacantia* the Attorney-General may apply to be joined as a party in these proceedings on behalf of the Government if she wishes to do so.

In relation to the second and third grounds of the motion to strike out, I have decided to deal with the third ground next and then deal last with the second ground. The third ground of the motion, as already stated, is that the statement of claim discloses no cause of action and the plaintiff has no actionable right.

From the facts alleged in the statement of claim, I am of the view that there is a basis for a cause of action founded in the equitable doctrine of proprietary estoppel. This is a cause of action in equity. It is somewhat unfortunate that there is no express mention of proprietary estoppel in the statement of claim. However, what is alleged that the plaintiff and his family expended much money and labour in improving the deceased's lands in reliance on the deceased's conduct and oral representations that the plaintiff would inherit those lands after his death can form the basis of a cause of action in proprietary estoppel. The Court has dealt with the doctrine of proprietary estoppel as the basis of a cause of action in such cases, for instance, *Rosita Meredith & Others v Pualagi Pa'u (1994)* (C.P. 78/94, judgment delivered on 5 May 1994); *Norman Paul v Ilalio Lauvao Tuanai (1994)* (C.P. 55/93, judgment delivered on 6 December 1994); *Rosita Meredith & Others v Pualagi Pa'u (1995)* (C.P. 78/94, judgment delivered on 26 April 1995). I need not repeat in the present case what was said in those cases; suffice to say that on the basis of those cases, I am not satisfied that the statement of claim does not disclose of action in proprietary estoppel which is maintainable in law.

I must add that the plaintiff must expressly plead proprietary estoppel against the Public Trustee as administrator of the deceased's estate so that the Public Trustee is informed in clear terms as to the legal basis of the cause of action. The plaintiff must also expressly plead and show that any interest the Government may have in the estate is to be subject to any pre-existing equity the plaintiff may have already acquired in the deceased's estate. If the statement of claim is to survive the motion to strike out, these are the amendments the Court would like the plaintiff to make to the statement of claim.

I turn now to the ~~third~~ ground of the motion to strike the statement of claim, namely, that the plaintiff has failed to give written notice of the circumstances upon which his claim is based as soon as practicable after the accrual of the cause of action as required under section 21(1) of the Limitation Act 1975. Section 21(1) as far as relevant to these proceedings, provides :

**“Protection of persons acting in execution of statutory or other public duty -**

**“(1) No action shall be brought against any person (including the Government) for any act done in pursuance or execution or intended execution of any Act of Parliament, or of any public duty or authority, or in respect of any neglect or default in the execution of any such Act, duty, or authority, unless -**

**“(a) Notice in writing giving reasonable information of the circumstances upon which the proposed action will be based and the name and address of the prospective plaintiff and of his solicitor or agent (if any) in the matter is given by the prospective plaintiff to the prospective defendant as soon as practicable after the accrual of the cause of action; and**

**“(b) The action is commenced before the expiration of one year from the date on which the cause of action accrued:**

**“Provided that, where the act, neglect, or default is a continuing one, no cause of action in respect thereof shall be deemed to have accrued, for the purposes of this section, until the act, neglect, or default has ceased”.**

As I read section 21(1), its opening words apply that section only to an action in respect of an act which has been done in the following circumstances :

(a) an act done in pursuance or execution or intended execution of a statute;

(b) an act done in pursuance or execution or intended execution of a public duty or authority; or

(c) a neglect or default in the execution of a statute, public duty or authority.

The present action by the plaintiff is founded in equity on the equitable doctrine of proprietary estoppel. What the plaintiff is really saying, even though it is not so expressed in the statement of claim, is that he has acquired an equity in the deceased's estate because he, his wife and children had expended much money and labour in making improvements to the estate in reliance on representations by the deceased while alive that the lands comprising the estate would be inherited by the plaintiff. The plaintiff is therefore, in effect saying that the most appropriate way for the Court to satisfy that equity is to order the Public Trustee as administrator of the deceased's estate to convey the lands comprising the estate to the plaintiff. Any claim by the Government to take the estate as *bona vacantia* under the rules of succession on intestacy provided in section 44 of the Administration Act 1975 must be subject to the plaintiff's pre-existing equity. This is how I understand the action by the plaintiff even though that is not how it is framed in the statement of claim.

The question which then arises is whether the action by the plaintiff is covered under any one of the circumstances to which section 21(1) of the Limitation Act 1975 applies. After careful consideration, I am of the respectful view that it does not. This is not an action against the Public Trustee for an act he has done in pursuance or execution or intended execution of a statute; neither is it an action against the Public Trustee for an act he has done in pursuance or execution or intended execution of any public duty or authority he holds; nor is it an action against the Public Trustee for neglect or default in the execution of any statute, or any public duty or authority he holds. From the pleadings there is no mention of the Public Trustee having done anything. As I see it, the plaintiff's action is really directed at the estate of the deceased because of representations made by the deceased while alive to the plaintiff upon which the plaintiff acted and expended much

money and labour and thereby suffered detriment. The Public Trustee is only being sued in a representative capacity because he is the administrator of the deceased's estate but not because of any act he has done or because of any neglect or default on his part.

I conclude, therefore, that section 21 of the Limitation Act 1975 does not apply to this case.

Having said all that, I must point out that I have not expressed any conclusive view on the merits and credibility of the plaintiff's claim. That must be decided at the substantive hearing. I have also confined myself to section 21 of the Limitation Act 1975 without considering whether any other provision of that Act or any other law may apply to this case as section 21 was the only provision raised in these proceedings in relation to the question of limitation.

In all then, the motion to strike out is denied. The plaintiff is ordered to file and serve on the other parties an amended statement of claim as already indicated in this judgment by 18 January 1999. This case is adjourned to 18 January 1999 for remention..

There will be no order as to costs.

*T F M Sapala*  
.....  
**CHIEF JUSTICE**

**Solicitors:**

Drake & Co's Law Firm of Apia, for plaintiff  
Attorney-General's Office of Apia, for first defendant  
Fepuleai Law Firm of Tamaligi, for second defendant