

produce a prima facie case. However, the factual situation is not helped by the non-appearance of the NPRT and NRC, either of whom may have produced material in aid of the court's consideration of the matter.

On the evidence, whilst there is a prima facie case that assets of the NRC have been the subject of illegal dealing, it is difficult for the plaintiffs to convince a court at a point of time when they are not a player, as the NRC clearly is but are sitting on the outside with a future beneficial interest that is more difficult to assess in any monetary terms.

It appears clear from the affidavit that the sale proceeds are not with the NRC, and were placed in an NPRT bank account in Melbourne. It also appears clear that these proceeds were being held by the NPRT for the benefit of the government. It was, however, not clear whether they were presently in the bank account of the NPRT or not. The oral evidence from the legal representative of the plaintiffs indicated that US\$2.88m was in the NPRT bank account on 28 April 2003. No later knowledge was brought before the court.

Evidence was also given that the NRC obtained from the Victorian Supreme Court an interim injunction restraining the NPRT from releasing the funds other than to the NRC although the actual terms of the restraining order were not known. That injunction was discharged when, after changes to the Board of the NRC, the Board sought the lifting of the injunction. What transposed between the government at that time and the NRC was not revealed to the Court, although in the amended Statement of Claim there was alleged a loan from the NPRT to the Government. That would appear to be an unlikely answer as the money was not that of the NPRT but the NRC. No doubt that will be discovered later.

The Court is concerned that any injunction granted out of the Nauru Supreme Court to restrain these moneys may not be able to be enforced if the moneys are held overseas, though, no doubt, action in breach of an injunction could be taken in Nauru in the event of later distribution, in contravention of any order. There is therefore some aspects which would indicate futility of performance, and this would tell against the granting of the injunction. There is some evidence that the breaches complained of have already taken place. In a case such as this where the impossibility or futility has perhaps not been fully established and there a probability question whether the interim injunction will be effective, one must exercise judgment as to the balance of justice whether to grant or withhold relief.

The plaintiffs indicated that they would accept the usual undertakings as to damages arising from any injunction in the event of it being granted.

The Court exercising its discretion has come to the view that the material before the Court is not sufficiently convincing of the degree of harm to the plaintiffs and the effectiveness of interim relief that it should grant interim injunctions against either the NPRT or the NRC. Of course, that is not fatal to the substantive case. It is noted that the substantive case has raised a number of fiduciary issues involving the NPRT, the NRC and the Republic. These matters are not affected by this decision. In fact, the defendant parties should readily recognize the fiduciary trust factors that are raised by the case, and that any present dealings outside proper legal and trust arrangements that dissipate

assets will be of concern. In fact, if defendants one to three and five had been present there was some case for the Court seeking an undertaking to maintain the status quo, whatever that might be at the moment, rather than an injunction.

The application is refused and I make no order as to costs.

