IN THE SUPREME COURT OF TONGA
CIVIL JURISDICTION
NUKU'ALOFA REGISTRY

NO.C366/99

BETWEEN	:	SEINI LANIVIA a.k.a. SEINI SO'OSO'O	-	***First Plaintiffs;***
		VILI SUNIA a.k.a. FATAKI-E-HAU	-	***Second Plaintiffs***
AND	:	SECRETARY FOR FISHERIES	-	***First Defendants;***
		LIKUTAU TAUELANGAI	-	***Second Defendants.***

BEFORE HON JUSTICE FINNIGAN

Counsel: Mr Tu'utafaiva for plaintiffs,
Mr Kefu for first defendant,
Mr Niu for second defendant.

Date of hearing: 7 June 1999
Date of judgement: 29 June, 1999

JUDGMENT OF FINNIGAN, J

This is an application for an extension of time in which to seek leave to apply for judicial review. The action of which review is sought is the refusal of a fishing licence by the first defendant on or about 5 January 1998. The licence is for a fish fence on a site near Ha'atafu. The delay since then has occurred because, among other things, the plaintiffs commenced legal action in the wrong form. The remedy sought was essentially the same, but they issued a writ of summons. This was done on legal advice, and the writ was filed on 8 September 1998, well within time for such action and well before consideration for the next issue of the licence was due. The writ was struck out on 26 January 1999 and the plaintiffs have begun afresh. They filed this application on 31 March 1999.

The licence sought by the second plaintiff had been issued to the second defendant, and by s 17(1) of the Fisheries Act No 18/1989 it was valid for 12 months.

THE PRINCIPLES FOR EXTENSION OF TIME

I accept the principles upon which the plaintiffs rely. Under O27 R2 of the Supreme Court Rules, they must have leave in order to seek judicial review. That leave must be sought promptly and in any event within 3 months from the date when the grounds for the application first arose. To obtain an extension of the time they are required by R2 (2) to persuade the Court that there is "good reason for extending that period". The Court's discretion is exercised in accordance with principle. The length of the delay and the reasons for it are taken into account, along with the degree of merit apparent in the proposed case and the degree of prejudice, if any, to the proposed defendant(s). As well, since the issue if valid is in the realm of public law, the importance to the public of the issue is a relevant factor in deciding whether there is "good reason".

THE FACTS

For the facts the Court relies on the untested affidavits of the parties. It assumes that the major facts stated therein are capable of satisfactory proof. There are few if any major conflicts of fact in the affidavits, but there are substantial omissions from the affidavits of the plaintiffs. These omissions are so substantial that they weaken the plaintiff's case.

It is not necessary to recount the whole history of the matter. References to the Royal family are omitted, specifically for the reasons that were stated in a letter written by counsel for one of the parties to counsel for another.

About the history of the matter, suffice to say this. Initially the second plaintiff was the licensed holder of the fish fence site in question, and he had held it for many years. He had held 6 fish fence sites, but pursuant to a ministry direction he became limited to 3. So in December 1995 the first plaintiff, his daughter, applied for and was granted the licence for this site for 1996. In about April 1996 the plaintiffs allowed the second defendant, for a payment of T$3,000, to erect his fish fence on the site. His fence was there from June 1996. However, both plaintiffs fell into a dispute with him. The parties corresponded through their lawyers in August 1996, and that same month, the first plaintiff complained to the Ministry of Fisheries that the second defendant had erected a fish fence on the site. The acting secretary for fisheries on behalf of the first defendant in response to that complaint wrote on 22 August 1996 to the second defendant. The letter accused him of breaching the Fisheries Regulations (Preservation and Maintenance) 1994 by putting a fish fence without a licence on the site. It demanded immediate removal of the fence. The second defendant's lawyer replied that the fence was put there on behalf of the first plaintiff. Neither the first plaintiff nor the second defendant had disclosed to the first defendant the T$3,000 arrangement. The first defendant then withdrew the allegation of illegal conduct by the second defendant. The second defendant removed the fish fence anyway.

About 19 October 1996 the second defendant filed an application for the licence for the 1997 year. On 22 October 1996 the acting secretary for fisheries on behalf of the first defendant wrote to the first plaintiff. He advised her that he was aware there was a

misunderstanding over the site, and he asked her to allow him to help a little in the matter. He said that current use is not necessarily a ground for renewal of a licence and that the history of one's use of a site is included in the consideration of renewal of a licence. He advised that as soon as the first defendant returned from overseas he would contact her and the second defendant. He said that they should both come at the first opportunity after his return so they could both talk with the first defendant.

On 1 November 1996, in response to the second defendant's application for the licence, the acting secretary for fisheries wrote to the second defendant's lawyer. He said that the issue of who should have the licence should be put off until the decisions about new licenses were made early the following year. On 2 and 3 December 1996 respectively the second then the first plaintiffs attended at the ministry to file their application, and were given the same information. However, on 9 December 1996 the plaintiffs and the second defendant had separate interviews at the Ministry of Fisheries, and later that day the licence was issued by the first defendant to the second defendant for the calendar year 1997. The first defendant specifically took into account his conclusion that the first plaintiff had been in breach of her 1996 licence by allowing the second defendant to erect a fish fence on the site without a licence in exchange for money. He issued the licence to the second defendant on that ground. I make no judgement of the second defendant's action, because that is not required for present purposes. However I note that, prima facie, the officers of the ministry had themselves concluded only four months previously that the second defendant himself had breached The Fisheries Regulations (Preservation and Maintenance) 1994 by erecting the fence.

From about August 1997 no licences have been issued because new regulations are being prepared. Those people who were holding licences have been permitted to continue using their licences until the new regulations come into force.

Nonetheless, on 22 October 1997 the first defendant met the second plaintiff and discussed this licence. After that he wrote a letter to him advising that he would consider the matter of this licence after the licence granted to the second defendant expired, which was stated on the face of the licence to be 9 December 1997. In the letter he also mentioned that the three bases for granting a licence were the history of the site/licence, the opportunities available to other licence applicants and the total number of fish fences considered by the Ministry to be reasonable. He said he would contact the second plaintiff after the licence had expired, so both parties could come for a meeting with him about who should have the licence in the next year.

There was a meeting on or about 5 January 1998, of the second plaintiff and the first defendant. I accept this fact from the draft statement of claim, though none of the affidavits refer to it. Also, the second plaintiff annexed to his affidavit a letter written on 5 January to him by the first defendant and in this letter the first defendant referred to their meeting that day. In the letter he also said that the licence had been taken away from the plaintiffs in 1996 by decision of the Minister, because of their agreement with the second defendant for him to use the site. He said that the issue of a licence was a matter between the Ministry and the licence holder, there being no transfer without the

involvement of the Ministry. He said that the Ministry of Fisheries considered that the plaintiffs had surrendered the licence, and that the Minister was free to transfer it to another applicant. He said he did not know the facts of any agreement that there may have been between the plaintiffs and the second defendant, but he understood that the second plaintiff had allowed the second defendant to build a fence on the site.

Thus, the first defendant carried out his promise to meet the second plaintiff after the expiry of the 1997 licence. He made a decision not to give the licence back to the first plaintiff. He advised the second plaintiff of his decision and the reasons for it.

DECISION

For completeness, and in favour of the plaintiffs, I hold on the facts that there is no real prejudice at all to either defendant from the delay. Nor do I think the delay is inordinate, since the plaintiffs sought legal advice and according to that advice, which was wrong, they were acting reasonably and with a due sense of urgency (*R v Stratford-on-Avon District Council & Anor, ex p. Jackson* [1985] 3 All ER 769).

I treat both plaintiffs as being to all intents and purposes one person in their dealings with the second defendant.

The purpose of the remedy, if granted, is to repair and redress a breach of natural justice in the way that the second defendant dealt with the second plaintiff's application. From the facts set out above it seems to me that the plaintiffs, on the case they have presented, have practically no prospect of success in any attempt to establish that they were not given a proper or fair hearing. Their application for leave to proceed out of time must be declined on that ground alone. I have reached this view on the facts. On the evidence that is before the Court, about the way that the second defendant dealt with them over the 1998 licence, the second defendant committed no breach of natural justice. Despite their claim to the contrary, both plaintiffs were given the opportunity to state their case, and the history of the matter shows that the second defendant was not only aware of the merits of the second plaintiff's claim to a licence, but considered them.

For this reason the application for extension of time to file for judicial review is refused.

It was not raised as part of the argument, but I have considered the significance if any of the possibility that the second defendant may himself have been previously in breach of the law with regard to this site. It seems to me that it was not decisive, only one of the factors which should have been weighed by the second defendant, and it clearly was known to him before he decided that the plaintiffs had surrendered their licence by trading it for money.

Before concluding, I must refer briefly to another aspect of the matter that is not part of the argument. After the attempt to involve His Majesty the King, the parties are now well aware that the lawful source of authority for the issue of the licence is the Fisheries Act No 18/1989. By s 17(1) any licence issued can have a life of only 12 months. Unless

there has been some other statutory provision made, which is not referred to in the submissions before me, the licence issued to the second defendant on 10 December 1996 was valid, as it said on its face, only until 9 December 1997. If that is so, then a decision by the second defendant to allow a 1997 licence to run on indefinitely, if made in those terms, may be invalid, i.e. beyond the licensing power bestowed by the Act. Unless the Act has been amended it seems that, for a licence to be valid at any particular time, it must have been issued within the previous 12 months and be issued for only 12 months. That being so, any decision to allow current licensees to retain their licences until new regulations are made must be put into effect by annual renewals and payment of any prescribed annual fees.

It is for the plaintiffs to consider whether there may or may not emerge from this some other cause of action for them, but no claim to breach of natural justice can arise from it in this present case. This is because the decision that they seek to challenge is not the decision to let existing licences run on. They cannot in judicial review challenge the second defendant's decision to let the second defendant's licence run on. They can challenge only his decision that neither of them will be given the licence for 1998. They have sought to challenge that, and I have held that they have shown no sufficient case of a breach of natural justice in that decision.

Costs in the present application are awarded in favour of the second defendant, to be agreed or taxed. I expect the first defendant to carry its costs of the case in the ordinary course of its business.

SUPREME COURT TONGA

NUKU'ALOFA, 29 June 1999 **JUDGE**