

IN THE SUPREME COURT OF WESTERN SAMOA

HELD AT APIA

BETWEEN: DRAKE & CO. a
partnership practising
as Solicitors, Barristers
and Notaries at Level 2,
Chandra House, Apia.

First Plaintiff

A N D: BANK OF WESTERN
SAMOA a duly
incorporated company
having its registered
office at Apia.

Second Plaintiff

A N D: THE COMMISSIONER
OF INLAND REVENUE

Defendant

Counsel: R Drake for first plaintiff
TK Enari for second plaintiff
The Attorney-General, BP Heather, for defendant

Hearing: 15 September 1997

Judgment: 3 November 1997

JUDGMENT OF SAPOLU, CJ

In these proceedings the first plaintiff is a partnership and law firm of
barristers and solicitors; the second plaintiff is the first plaintiff's banker; and the

defendant is the Commissioner of Inland Revenue who is the permanent head of the Inland Revenue Department.

The relevant facts may be briefly stated. From March 1997 to June 1997 the defendant made several requests to the first plaintiff, the first plaintiff's accountants, and the second plaintiff for information for the purpose of a review of the tax liability of the first plaintiff and its partners in respect of the years 1991-1995. Included in the request for information were trust account records and related information held by the first plaintiff for its clients. The first plaintiff and its accountants declined to produce or disclose that information to the defendant or other officers of the Inland Revenue Department on the ground of legal professional privilege. They also claimed that the first plaintiff's clients have not given any authority to waive their privilege relating to the confidentiality of their trust accounts.

The first plaintiff also complains that the requests by the defendant for information in relation to its client's trust accounts lack specificity in that the requests do not name any specific client. Thus the first plaintiff is not in a position to ask any particular client whether he would agree to disclose information relating to his trust account. It is further claimed that the inquiry and related actions by the defendant and other officers of the Inland Revenue Department were improper, unreasonable, invalid and unlawful. As I understand this complaint it also relates to the question for legal professional privilege.

As for the second plaintiff which was joined as a party to these proceedings, it had also declined requests from the defendant for the production of information

relating to the first plaintiff's clients trust accounts as well as the trust accounts of the first plaintiff's partners. It has also claimed privilege. It is not, however, claiming the protection of any statutory secrecy provision which is normally associated with a banker and customer relationship. Perhaps there is some reason for this. The second plaintiff has not brought any action against the defendant. It sought to be joined as a party to these proceedings in order to safeguard its position in relation to its customers. As counsel for the second plaintiff told the Court, the second plaintiff will abide by any ruling given by the Court. Perhaps the second plaintiff's position will become truly relevant when the Court has to deal with the issue of privilege and confidentiality of information. At this stage of proceedings the real fight is between the first plaintiff and the defendant.

Appropriate proceedings:

Now the first plaintiff has brought proceedings for judicial review and for an interim injunction against the defendant. No specific prerogative writ or order was sought in the application for judicial review. On the defendant's behalf the Attorney-General argued that the appropriate proceedings should have been brought by motion for a declaratory judgment under the provisions of the Declaratory Judgments Act 1988 or for a declaration.

I am of the respectful view that the most appropriate proceedings in this case would be a motion or application for a declaration. Section 12(1) of the Government Proceedings Act 1974, as far as relevant, provides :

"In any civil proceedings under this Act by or against the

“Government or to which the Government is a party or
“third party the Court shall, subject to the provisions of
“this Act and any other Act, have power to make all such
“orders as it has power to make in proceedings between
“subjects, and otherwise to give such appropriate relief as
“the case may require.”

The term “order” is defined in section 2 to mean :

“‘Order’ includes a judgment, decree, rule, award, or declaration.”

So section 12(1) clearly gives the Court jurisdiction to grant a declaration in proceedings against the government. Proviso (a) to section 12(1) then provides that in any proceedings against the government, the Court may “make an order declaratory of the rights of the parties” in lieu of an injunction. And proviso (b) provides that in any proceedings against the government for the recovery of land or other property, the Court may “make an order declaring that any person is entitled as against the Government to the land or property or to the possession thereof” instead of making an order for the recovery of the land or the delivery of the property. When one turns to section 12(2) that provision speaks of “any order against an officer of the Government.” That must include a declaration because of the definition of the term “order” in section 2. So section 12 clearly contemplates proceedings for a declaration when bringing civil proceedings against the government. In other words the 1974 Act does point out the way for bringing civil proceedings against the government where section 12 applies.

Proceedings for judicial review are excluded from the 1974 Act because of the definition in section 2 of the expression "civil proceedings". Section 2 defines "civil proceedings" to mean :

"Civil proceedings' means any proceedings in any Court other than criminal proceedings; but does not include proceedings in relation to habeas corpus, mandamus, prohibition or certiorari,"

At common law proceedings for judicial review could not be brought against the Crown because the prerogative writs, or orders as they are now called, could not be granted against the Crown. That is why judicial review proceedings for habeas corpus, mandamus, prohibition or certiorari are excluded from the Crown proceedings legislations. So it is unlikely that at common law, proceedings for judicial review can be brought against the government. The position in the case of servants and officers of the Crown acting within their official capacities was somewhat uncertain. But even if proceedings for judicial review could be brought against a servant or officer of the Crown or of the government in our Samoan context, such proceedings are not appropriate in this case. Habeas corpus and mandamus are obviously not applicable to the facts of this case. Likewise certiorari is not applicable as there is no decision, order, instrument, or record to be quashed. Prohibition would also not be appropriate because of the provisions of section 12(2) which embrace "any proceedings" and are not restricted only to "civil proceedings under this Act." In other words prohibition cannot be granted against an officer of the government if its effect would be to give relief against the government where such relief would not have been obtained in proceedings against the government directly in terms of section 12(2) of the 1974 Act.

As it will also become clear later in this judgment, an injunction which is basically a private law remedy is not available at common law in proceedings for judicial review. So the present proceedings which seek judicial review and an injunction at the same time cannot lie at common law at least at this stage of our legal development. The particular prerogative writ or order that is being sought should also be specified in an application for judicial review.

I should also point out that in England the common law position in respect of proceedings for judicial review has been changed by the 1977 R.C.S. Ord. 53 which was given statutory authority by the United Kingdom Supreme Court Act 1981. The change is that in proceedings for judicial review an applicant may now not only obtain a prerogative order of mandamus, prohibition or certiorari but he may also obtain a declaration or injunction in the same proceedings where it would be just and convenient for a declaration to be made or an injunction to be granted : *M v Home Office* [1993] 3 WLR 433, at 458-459. In New Zealand a declaration or an injunction may now also be obtained in an application for judicial review under the New Zealand Judicature Amendment Act 1972. Section 4(1) of that Act, as far as relevant, provides :

“The High Court may ... grant...any relief that the applicant
“would be entitled to, in any one or more of the proceedings
“for mandamus, prohibition, or certiorari or for a
“declaration or injunction.”

As I understand the position in Australia, that country also has a similar statutory procedure for judicial review proceedings. We do not have a similar statutory procedure for judicial review so that we have to fall back onto the common law position which has been found to be unsatisfactory in other jurisdictions.

I should also point out that in the past there were two forms of proceedings where a declaration could be obtained in England against the Crown or an officer of the Crown. The first was proceedings by way of a petition of right at common law or in equity. The second form of proceedings was by ordinary action against the Attorney-General. This was the form of proceedings that was used in *Dyson v. Attorney-General* [1911] 1 KB 410. Professor PW Hogg in the first edition of his book *Liability Of The Crown* (1971) points out at pp18-19 that the first form of proceedings for a declaration by way of a petition of right has been superseded by the procedure for suing the Crown prescribed by the Crown proceedings legislations of Australia, New Zealand and the United Kingdom. On the other hand, he points out that there have been only occasional suggestions that the *Dyson* procedure for obtaining a declaration is still available. He then says at footnote 46 at p.19 :

“Whether the *Dyson* procedure is still available depends
“on whether it is expressly or impliedly excluded by the
“relevant Crown proceedings statute. The authorities above
“indicate that the Court will not readily treat it as impliedly
“excluded. However, the Tasmanian [statute] s.65 and the
“New Zealand [statute] s.3(2)(e) expressly exclude the *Dyson*
“procedure. This is also the better interpretation of the U.K.
“Act (ss.1, 13,23(2))”.

Section 3(2)(e) of the New Zealand Crown Proceedings Act 1950 is similar but not identical to section 3(2)(d) of our Government Proceedings Act 1974. The question whether the *Dyson* procedure applies to Samoa irrespective of section 3(2)(d) of the 1974 Act was not argued in this case. I would, therefore, prefer not to express any conclusive view on that question in this case.

In all then, I have come to the conclusion that the most appropriate proceedings in this case would be proceedings for a declaration which is contemplated by section 12. I make no decision on the applicability of the Declaratory Proceedings Act 1988 to this case.

Is the defendant a servant and officer of government:

I turn now to the question of whether the defendant as Commissioner of Inland Revenue is a servant and officer of the government for the purpose of the Government Proceedings Act 1974. If he is not, then the provisions of the Government Proceedings Act 1974 do not apply to him and to this case. Counsel for the first plaintiff submitted that the defendant is not a servant or officer of the government but an employee and officer of the public service by virtue of the provisions of Article 83 of the Constitution, the Public Service Act 1977, and the Public Service (Special Posts) Act 1989.

This submission seems to be based on the assumption that the public service is different and separate from government service and that one is independent of the other. Counsel did not elaborate on the meaning and scope of the expression "public service" or discuss the provisions of the Public Service (Special Posts) Act 1989

which have made the position of Commissioner of Inland Revenue a special post and effectively take it out of the control of the Public Service Commission and most of the provisions of the Public Service Act 1977 relating to the public service. Counsel's submission was that the Constitution provides for the independence of the public service from the executive government and her submission if accepted would maintain that independence.

If counsel for the first plaintiff is correct that the defendant is not a servant and officer of the government for the purpose of the Government Proceedings Act 1974, then in my respectful view that would undermine the whole purpose of the 1974 Act to the point where one questions whether it is worthwhile having a Government proceedings legislation. The reason I say this is because the Government Proceedings Act 1974 deals with the liability of the government for civil wrongs committed by its servants or officers. The Act does not purport to undermine any independence of the public service or to impose any government control on the public service. The purpose of the Act is to provide for liability of the government for civil wrongs committed by its servants or officers in their official capacities. To exclude holders of special posts and public servants from the definitions of "servant" and of "officer" of the government in the 1974 Act would legally free the government from liability for any civil wrongs committed by holders of special posts or public servants. That may be good for the government but it certainly will not be good for members of the general public who may be injuriously affected by the actions of public servants in their official capacities, especially if a public servant does not have the money to pay compensation or damages for a civil wrong he has committed.

I should also point out that the executive power of Samoa is vested by Article 31 of the Constitution in the Head of State. But the general direction and control of the executive government is vested by Article 32 of the Constitution in Cabinet. Government on its own cannot carry out the immense task of public administration and running the country. It needs human servants and agents. Government therefore exercises its executive power and performs its functions and responsibilities through human servants and agents. Government activities carried out by its servants and agents have extended to every sector of society. They do affect the lives of people. Most of those servants are public servants. Because they are human they do go wrong sometimes by committing a tort, breach of contract, breach of trust, or breach of duty in the course of their employment. Under English common law, civil servants are servants of the Crown. But because of the maxim that "the Crown can do no wrong", the Crown was generally not liable at common law for the actions of its servants. The United Kingdom Crown Proceedings Act 1947, which is the grandparent of our Government Proceedings Act 1974, has cured that defect in the law and make the Crown liable for the torts and other specified civil wrongs committed by its servants and officers in the course of their employment.

We do not have a Crown, but we do have a government which is defined in section 2 of the Government Proceedings Act 1974 to mean the Government of the Independent State of Samoa. To accept that the defendant, other holders of special posts, and public servants of whatever grade are not servants or officers of the government for the purpose of the Government Proceedings Act 1974 could have serious ramifications which extend beyond this case. It could, for example, expose

the public to the risk that they can not sue the government for torts committed by holders of special posts and public servants in the course of their employment.

As to the concern expressed about the independence of the public service being affected if the defendant, other holders of special posts, or public servants are held to be servants and officers of the government under the provisions of the Government Proceedings Act 1974, I do not think any independence of the public service would be affected. Under the provisions of the Government Proceedings Act 1974, we are dealing with the question of government's liability for the actions of its servants, officers and agents and not with any exercise of control by the government over the public service. The relationship between the government and the public service on an employment basis is dealt with elsewhere. But here we are not really dealing with the question of employment per se but with the question of government's liability for the actions of its servants, officers and agents.

I will refer now to the relationship between the government and the public service for the purpose of showing that the defendant should be held to be a servant and officer of the government for the purpose of the Government Proceedings Act 1974. Part VII of the Constitution and the provisions of the Public Service Act 1977 vests the direct control of the public service in the Public Service Commission. The provisions of the Public Service Act 1977 also provide for the appointment and conditions of employment of employees of the public service and give them protection and security of tenure. But the law does not treat the public service as completely divorced from the government.

Article 87(2) of the Constitution provides that the Public Service Commission shall have regard to the general policy of Cabinet relating to the public service and shall give effect to any decision of Cabinet defining that policy as conveyed to the Commission in writing by the Prime Minister. Section 5 of the Public Service Act 1977 then provides that the permanent head of every department shall be responsible to the Minister for the time being in charge of that department for the efficient and economical administration of the department, and he shall at the end of every financial year provide a report to the Minister concerning the operations of the department for that year. In the case of the defendant as Commissioner of Inland Revenue, section 4 of the Income Tax Administration Act 1974 provides that there shall be appointed a Commissioner of Inland Revenue who shall, subject to the control of the Minister, be the permanent head of the Inland Revenue Department and who shall be charged with the administration of the Inland Revenue Acts and other functions as may be lawfully conferred upon him. A similar provision may be found in most legislations which set up other government departments.

So even though the Public Service Commission has the direct control of the public service and has the authority to regulate and control the making of appointments to the public service and to prescribe the terms and conditions of employment in the public service, the public service and the permanent heads, in particular, are not divorced from the executive government. If one is then to turn to section 2 of the Government Proceedings Act 1974, the expression "Government Department" or "Department" is there defined to mean the Public Trustee and every other department or instrument of the executive government of Samoa. And Article 31 of the Constitution vests the executive power of Samoa in the Head of State while

Article 32 vests the general direction and control of the executive government of Samoa in Cabinet. It is also to be borne in mind that public servants or employees of the public service are employed in government departments. Their salaries, wages and allowances are also paid out of the Treasury Fund as provided in section 19 of the Public Service Act 1977. I should, however, mention that the Department of Police and Prisons and the Legislative Department together with the members of their staffs are not within the "public service" by reason of Article 83 of the Constitution.

Recently the posts of heads of departments have been designated as special posts pursuant to Article 87(3) of the Constitution and the provisions of the Public Service (Special Posts) Act 1989. Under this new arrangement it is the Head of State, acting on the advice of Cabinet after Cabinet has consulted with the Public Service Commission, who is responsible for making appointments to the special posts and for prescribing their terms and conditions of employment. The effect of the Public Service (Special Posts) Act 1989 is to take the posts of heads of departments or permanent heads out of the direct control of the Public Service Commission. The Act also excludes the application of numerous provisions of the Public Service Act 1977 to special posts. The post of Commissioner of Inland Revenue is now a special post. Whether the holders of special posts are within the "public service" is a question I do not find necessary to decide in this case. The real question the Court has to decide in this case is whether the defendant as Commissioner of Inland Revenue is a servant and officer of the government for the purpose of the Government Proceedings Act 1974.

Section 2 of the Government Proceedings Act 1974 defines the term "servant" in relation to the government to mean any servant of the government including a Minister of the government but service in certain specified capacities not relevant to this case is excluded. The term "officer" in relation to the government is defined to include any servant of the government and includes a Minister of the government but not service in certain specified capacities not relevant to this case. The term "Government" is also defined to mean the Government of the Independent State of Samoa. Obviously the definitions of the terms "servant" and "officer" are not exhaustive but inclusive. The use of the word "includes" in both definitions is a conclusive pointer in that direction.

From all that which has been said, I am of the clear view that the defendant as Commissioner of Inland Revenue is included in the definitions of "servant" and of "officer" in relation to the government for the purpose of the Government Proceedings Act 1974. To double check whether that view is right, I will refer to some of the relevant authorities.

In the case of *Inland Revenue Commissioners v Rossminster Ltd and Others* [1980] AC 952 officers of the Inland Revenue Department obtained a warrant to search the premises of Rossminster Ltd and two of its directors. Armed with the warrant and in the company of the police, the officers of the Inland Revenue Department embarked on their search. They searched the premises of Rossminster Ltd and the houses of two of its directors. A large number of documents and files were seized. The lawyers for Rossminster and its directors applied, inter alia, for an injunction from the Court to stop the officers of the Inland Revenue Department.

In the Court of Appeal Lord Denning MR described the whole operation as a military style operation. His Lordship then goes on to say at pp 969-970:

“If the lawyers had had more time to think about it, they
“would have realised that it was not a case where an
“injunction would lie against *the officers of the revenue*.
“*They were officers of the Crown* : and under section 31
“of the Crown Proceedings Act 1947 no injunction would
“lie against the Crown or its officers.” (italics mine)

I think there is a typing error here. The correct provision of the United Kingdom Crown Proceedings Act 1947 is section 21 and not section 31. Section 21 of the United Kingdom legislation is identical word for word to section 12 of our Government Proceedings Act 1974 except that our legislation uses the word “government” instead of the word “Crown.”

The case of *Rossminister* went to the House of Lords. Lord Wilberforce when dealing with the question of injunction says at p.1000:

“Thirdly, *the defendants being in effect, the Crown or Crown*
servants, an interlocutory injunction cannot be granted
“(section 21 of the Crown Proceedings Act 1947).” (italics mine)

Viscount Dilhorne at p.1002 and Lord Diplock at p.1014 expressed similar views. The defendants mentioned in the passage just cited were the officers of the Inland Revenue Department.

The important point to note for present purposes is that the Court of Appeal and House of Lords expressly held that the officers of the Inland Revenue Department were servants of the Crown to whom the Crown Proceedings Act 1947 applied and therefore an interlocutory injunction could not be granted against them. This is consistent with the conclusion I have already reached that the defendant as Commissioner of Inland Revenue is a servant and officer of the government within the meaning and for the purpose of our Government Proceedings Act 1974.

To round off this part of my judgment, I refer to a passage from Professor PW Hogg's book *Liability Of The Crown* (1971) 1st ed which lends support to the conclusion I have reached. At p.60 of his book the learned author says:

"Laski took the mysticism out of the concept of 'the Crown'
"with these apt words :

" 'Crown in fact means government, and government
" 'means these innumerable *officials who collect our*
" '*taxes* and grant us patents and inspect our drains.
" 'They are human beings with the money-bags of the
" 'State behind them.'

"Like a corporation, the Crown can only act through human
"servants or agents." (italics mine)

Is an injunction available against the defendant:

I turn now to the question whether an injunction may be issued against the defendant as Commissioner of Inland Revenue. Here it would be helpful to set out the provisions of section 12 of the Government Proceedings Act 1974 in full. Section 12 provides :

“(1) In any civil proceedings under this Act by or against
“the Government or to which the Government is a party
“or third party the Court shall, subject to the provisions of
“this Act and any other Act have power to make all such
“orders as it has power to make in proceedings between
“subjects, and otherwise to give such relief appropriate as
“the case may require:

“Provided that -

“(a) Where in any proceedings against the Government any such
“relief is sought as might in proceedings between subjects be
“granted by way of an injunction or specific performance, the
“Court shall not grant an injunction or make an order for
“specific performance, but may instead make an order
“declaratory of the rights of the parties; and

“(b) In any proceedings against the Government for the recovery
“of land or other property, the Court shall not make an order
“for the recovery of the land or the delivery of the property, but
“may instead make an order declaring that any person is entitled
“as against the Government to the land or property or to the
“possession thereof.

“(2) The Court shall not in any civil proceedings grant any
“injunction or make any order against an officer of the
“Government if the effect of granting the injunction or
“making the order would be to give any relief against the
“Government which could not have been obtained in
“proceedings against the Government.”

There was no dispute that in proceedings to which the section 12(1) provisos (a) and (b) apply no injunction would lie against the government. In my view the wording of section 12(1) of the Act is so clear to permit for any argument that an injunction may lie against the government. I will therefore move on to section 12(2).

It is clear that section 12(2) is not restricted to civil proceedings which may be initiated under the provisions of the Government Proceedings Act 1974. It applies to “any civil proceedings” which must include civil proceedings which may not or are

not instituted under the Act. Secondly, section 12(2) does not apply to proceedings in relation to habeas corpus, mandamus, prohibition or certiorari because of the definition of the expression "civil proceedings" in section 2 of the Act. That, however, does not mean that an injunction would lie against the government or its servants and officers in proceedings for judicial review at common law. I will return to this point later in this part of my judgment. Thirdly, the wording of section 12(2) suggests that it would not apply if the granting of an injunction or the making of an order against an officer of the government would not have the effect of giving relief against the government. Likewise, even if the granting of an injunction or the making of an order against an officer of the government would have the effect of giving relief against the government, section 12(2) would still not apply if such relief is one which could have been obtained against the government before the passing of the Act.

I turn now to examine whether in the circumstances of this case section 12(2) would apply or not. The first plaintiff is seeking judicial review and an interim injunction against the defendant as Commissioner of Inland Revenue. I treat the first plaintiff's application as common law proceedings for judicial review because we do not have a statutory procedure for proceedings for judicial review. The application is a general one and does not specify which prerogative writ or order is being sought. At this early stage of our legal development in this area, we should follow the common law practice of specifying in the application the actual prerogative writ or order which is being sought. The Attorney-General who has appeared for the Commissioner of Inland Revenue opposed the motion for an interim injunction.

In *M v Home Office* [1993] 3 WLR 433; [1993] 3 All ER 537 the House of Lords had to deal with section 21 of the United Kingdom Crown Proceedings Act 1947. Lord Woolf in delivering a judgment with which the other Law Lords concurred said this at p.451 in respect of the legal position prior to the Crown Proceedings Act 1947 :

“The position so far as civil wrongs are concerned, prior to the Act of 1947, can be summarised, therefore, by saying that as long as the plaintiff sued the actual wrongdoer or the person who ordered the wrongdoing he could bring an action against officials personally, in particular as to torts committed by them, and they were not able to hide behind the immunity of the Crown. This was the position even though at the time they committed the alleged tort they were acting in their official capacity. In these proceedings an injunction, including, if appropriate an interlocutory injunction, could be granted.”

When His Lordship came to the position under the Crown Proceedings Act 1947, he said at p.453 :

“Returning to section 21, what is clear is that in relation to proceedings to which section 21 (1) provisos (a) and (b) apply, no injunction can be granted against the Crown. In addition there is the further restriction on granting an injunction against an officer of the Crown under section 21(2). That subsection is restricted in its application to situations where the effect of the grant of an injunction or an order against an officer of the Crown will be to give any relief against the Crown which could not have been obtained in proceedings against the Crown prior to the Act. Applying those words literally, their effect is reasonably obvious. Where, prior to 1947, an injunction could be obtained against an officer of the Crown, because he had personally committed or authorised a tort, an injunction could still be granted on precisely the same basis as previously since, as already explained, to grant an injunction could not affect the Crown because of the assumption that the Crown could do no wrong. The proceedings would,

“however, have to be brought against the tortfeasor personally
“in the same manner as they would have been brought prior to
“the Act of 1947. If, on the other hand, the officer was being sued
“in a representative capacity, whether as an authorised government
“department, for example, one of the named Director Generals or as
“Attorney-General, no injunction could be granted because in
“such a situation the effect would be to give relief against the Crown.
“The position would be the same in those situations where proceedings
“would previously have been brought by petition of right or for a
“declaration but could now be brought against the authorised
“department.”

His Lordship then goes on to deal with the new statutory procedure for judicial review provided in section 31 of the United Kingdom Supreme Court Act 1981 and he held that under this new statutory procedure an interim or final injunction may now be granted against the servants of the Crown in proceedings for judicial review. We do not have a statutory provision similar to section 31 of the United Kingdom Supreme Court Act 1981. In respect of the position prior to the Supreme Court Act of 1981, it appears that the English Courts had no jurisdiction to grant an injunction in proceedings for judicial review. That appears from the judgment of Woolf LJ in *Reg v. Licensing Authority, ex parte Smith Kline (No.2)* [1990] 1 QB 574 where His Lordship said at p.601 :

“The Crown Proceedings Act 1947 was not dealing with
“injunctions on application for judicial review because, of
“course, you could not get injunctions on the Crown side
“in 1947. It was as a result of the change in procedure that
“they became available for the first time on the Crown side.”

That means proceedings for judicial review were at common law brought on the Crown side of the King’s Bench Division but the Crown side of the King’s Bench Division did not have jurisdiction to grant injunctions. The change in procedure

which is referred to is the change in procedure for proceedings for judicial review brought about by the Act of 1981. We do not have such an Act in Samoa.

The current position in the United Kingdom is summarised in *de Smith, Woolf and Jowell Judicial Review of Administrative Action (1995)* 5th ed at p.211, para 4-016 as follows:

“In general the Court has the same power to make orders in
“civil proceedings involving the Crown as it has in proceedings
“between subjects. This is, however, subject to a restriction
“relating to the grant of an injunction or specific performance
“or an order for recovery of land against the Crown, where
“in lieu of making such an order, the Court may grant a
“declaration. In addition, in civil proceedings, the Court
“cannot grant an injunction or make an order against an
“officer of the Crown ‘if the effect of granting the injunction
“ ‘or making the order will be to give relief against the Crown
“ ‘which could not have been obtained in proceedings against
“ ‘the Crown.’ This restriction does not prevent an injunction
“being granted against an official personally if the entitlement
“to such relief could have been established prior to the 1947 Act.
“It also does not apply to proceedings for judicial review where
“interim and final injunctions can be granted against
“the appropriate Minister.”

I will now consider those statements of principle in relation to the circumstances of this case. The first question is whether the granting of an injunction against the Commissioner of Inland Revenue as an officer of the government would have the effect of giving relief against the government. Under the provisions of the Income Tax Administration Act 1974, the principal function of the Commissioner of Inland Revenue and the Inland Revenue Department is the assessment and collection of income tax. The collection of public revenue, including income tax, is an essential function of government. Government needs that revenue for its operation. Income

tax is one of the major sources of revenue for the government. It is imposed by Act of Parliament, namely, the Income Tax Act 1974. Under Article 92 of the Constitution income tax is public revenue and shall be paid into the Treasury Fund unless required by an Act of Parliament to be paid into another public fund or account. The powers to inspect books and documents and to require their production which are given to the Commissioner of Inland Revenue under sections 9 and 10 of the Income Tax Administration Act 1974 are related to and necessary for the proper and effective performance by the Commissioner of Inland Revenue of his function to assess and collect income tax. To grant an injunction in this case to prevent the Commissioner of Inland Revenue from exercising his powers under sections 9 and 10 of the Income Tax and Administration Act 1974 for the purpose of reviewing the tax liability of the first plaintiff and its partners will have the effect of giving relief against the government in terms of section 12 (2) of the Government Proceedings Act 1974 because the function which is exercised by the Commissioner of Inland Revenue is an essential function of government and it is being exercised on behalf of the government.

The principal authority which was relied on by counsel for the first plaintiff on this part of the case is the decision of the High Court of Ontario in *MacLean v. Liquor Licence Board of Ontario and Others* (1975) 9 OR (2d) 597. In that case certain employees of the Liquor Licensing Board of Ontario informed the nightclubs where the plaintiffs performed as musical entertainers that the performance by the plaintiffs was obscene and immoral. Therefore any nightclub that continued to engage the plaintiffs as musical entertainers would have its licence to sell alcoholic beverages cancelled. As a result, the nightclubs cancelled their engagements with the plaintiffs

who then brought proceedings for an injunction against the Board and its relevant employees.

The High Court of Ontario held that the Liquor Licensing Board was a Crown agency. It also held that under the relevant legislation and regulations neither the Board nor its employees had the power to cancel a licence on the ground of obscenity and immorality. An injunction was therefore issued against the relevant employees of the Board. It is clear from my reading of the judgment in that case, that the Court's decision was founded on the premise that since the Board and its employees had no power to cancel a liquor licence on the ground of obscenity and immorality, the granting of an injunction against the employees would not have the effect of giving relief against the Board which was a Crown agency.

In my view that is not the situation in this case. The powers exercised by the Commissioner of Inland Revenue are powers given to him under the Income Tax Administration Act 1974. The exercise of those powers is related to the performance of the Commissioner's principal function which is the assessment and collection of income tax. The assessment and collection of income tax is an essential function and activity of government. Therefore, to grant an injunction against the Commissioner of Inland Revenue in this case would have the effect of giving relief against the government which is not permitted by section 12(2) of the Government Proceedings Act 1974.

As I also understand the first plaintiff's position, its focus of concern is to protect the confidentiality of its clients trust accounts which it holds, and the accounts

held by the second plaintiff as the banker for the first plaintiff. That is why the first plaintiff is claiming legal professional privilege. I will have to deal with the issue of legal professional privilege separately as these proceedings have been restricted to arguments relating to the provisions of the Government Proceedings Act 1974.

In all then, the facts of *MacLean's* case are clearly distinguishable from this case and therefore that case does not assist the first plaintiff in these proceedings.

The second question I have to deal with is this. If the effect of granting an injunction against the Commissioner of Inland Revenue is to give relief against the government, is such relief one which could not have been obtained against the government prior to the 1974 Act. In view of what I have said in relation to the first question, it is perhaps not necessary to deal with the second question. However, the submissions by counsel extended to the whole of section 12(2). So I will deal with the second question that I have posed, namely, whether an injunction could have been obtained against the government prior to the 1974 Act.

Here I should mention that prior to the Government Proceedings Act 1974, the New Zealand Crown Proceedings Act 1950 applied to Samoa and formed part of the law of Samoa. Section 26 of the 1974 Act repealed the application of the New Zealand Crown Proceedings Act 1950 to Samoa but re-enacted most of the provisions of the New Zealand Act. In particular section 12 of the 1974 Act re-enacted section 17 of the New Zealand Act word for word except that the word "government" has been substituted for the word "Crown". The New Zealand Act in turn was based on the United Kingdom Crown Proceedings Act 1947 and section 17 of the New Zealand Act

is identical to section 21 of the United Kingdom Act. So the English authorities on the relevant provisions of the United Kingdom Act would be relevant and of useful assistance to understanding our own Act.

It is clear from the English authorities that at common law and prior to the Crown Proceedings Act 1947 an injunction could not be granted against the Crown. In the case of *Reg v. Home Secretary, ex parte Herbage* [1987] QB 872 Hodgson J said at p.881:

“The immunity of the Crown and its officers from injunctive relief is to be found in section 21 of the Crown Proceedings Act 1947. Prior to the Act of 1947 the remedy in private law matters was by way of petition of right in the High Court. It was confined to four cases, debt due under contract or statute, unliquidated sums due by statute, damages for breach of contract, and recovery of property. Proceedings on the Crown side of the King’s Bench Division consisted and consisted only of habeas corpus, mandamus, prohibition, certiorari, and injunction in the nature of quo warranto.... There was no remedy by way of injunction available on the Crown side of the King’s Bench Division, nor was any interim relief available”.

In other words, in private law matters, the only remedy against the Crown was by proceedings by way of petition of right. An injunction was not available against the Crown in such proceedings. On the Crown side of the King’s Bench Division, proceedings for prerogative writs or orders, which may be described as common law proceedings for judicial review, did not include an injunction except perhaps an injunction in the nature of quo warranto which is not relevant to this case.

In *de Smith Judicial Review of Administrative Action* (1980) 4th ed which was the edition of that book in existence before changes were made by the United Kingdom Supreme Court Act 1981 to the procedure for judicial review proceedings whereby an injunction may now be obtained against the Crown and an officer for the Crown, it is stated at p.445 :

“Before the Crown Proceedings Act 1947 an injunction would lie against an officer of the Crown if he committed a civil wrong in his personal capacity; *it would never lie against the Crown; but whether it lies against a government department, or against an officer of the Crown for a wrongful act done in his official capacity, was uncertain. The 1947 Act left unaffected the law on proceedings against an officer of the Crown in his private capacity; it reaffirmed the rule that no injunction would lie against the Crown; and it provided that no injunction was to be granted against an officer of the Crown if the effect of granting it would be to grant relief against the Crown which could not have been obtained against the Crown directly*”. (italics mine)

A discussion then follows of the conflicting views as to the extent of the immunity of officers of the Crown for acts they commit within their official capacities. It shows the uncertainty surrounding the availability of an injunction against officers of the Crown while acting within their official capacities.

Whatever is the real position in that regard, it is clear that prior to the 1947 Act an injunction could not be granted against the Crown. Given that our Government Proceedings Act 1974 is based on the New Zealand Crown Proceedings Act 1950 which is in turn based on the United Kingdom Crown Proceedings Act 19⁴⁷~~74~~, I am of TEM S the view that an injunction could not have been obtained against the government prior to the 1974 Act. That must be so because it was the New Zealand Crown Proceedings

Act 1950 that applied to Samoa prior to the enactment of our own Government Proceedings Act 1974. Furthermore, the common law position before and after the enactment of Crown proceedings legislations is that no injunction can be granted against the Crown. In the context of Samoa that must mean the government. So the answer to the second question I have posed must be that no injunction could have been granted against the government prior to the 1974 Act.

It follows, therefore, that an injunction cannot be granted against the Commissioner of Inland Revenue in this case because of section 12(2) of the 1974 Act. It appears to me in a general way that the effect of section 12(1) of the Act is that you cannot obtain an injunction against the government. The effect of section 12(2) of the Act is that if you cannot obtain an injunction against the government directly, then you cannot obtain an injunction against the government indirectly by seeking an injunction against an officer of the government who is acting within his official capacity.

In my view all that explains why Lord Denning MR in the Court of Appeal and Lord Wilberforce, Viscount Dilhorne and Lord Diplock in the House of Lords held in *Inland Revenue Commissioners v Rossminster Ltd and Others* [1980] AC 952 that an injunction could not be granted under section 21 of the Crown Proceedings Act 1947 against the officers of the Inland Revenue Department in that case because they were officers of the Crown. But it has to be borne in mind that the position in England has been changed by the United Kingdom Supreme Court Act 1981 which now permits the grant of an interim and a final injunction against the Crown and officers of the Crown: *M v Home Office* [1993] 3WLR 433; [1993] 3All

ER 537; Reg v Secretary of State for the Home Department, ex parte Herbage [1987]
QB 872; Reg v. Licensing Authority, ex parte Smith Kline (No.2) [1990] 1 QB 574;
de Smith, Woolf and Jowell Judicial Review of Administrative Action (1995) 5th ed at
p.211, para 4-016.

Counsel for the first plaintiff referred to the decision of the Privy Council in *Nireaha Tamaki v Baker [1901] AC561* where an injunction was granted against the Commissioner of Crown Lands in New Zealand. It should be borne in mind that that case was decided before the Crown proceedings legislations were enacted in the United Kingdom and New Zealand. The Commissioner of Crown Lands in New Zealand at that time was also not the Crown against whom no injunction could have been granted but only a servant of the Crown. It was also pointed out in *MacLean's* case p.610, a case already referred to in this judgment, that Professor B.L. Strayer in an article entitled "Injunctions Against Crown Officers" 42 Can. Bar Rev. 1(1964) concluded that the rule expressed in *Nireaha Tamaki's* case has been abolished.

The conclusions I have therefore reached are : (a) to grant an injunction against the Commissioner of Inland Revenue in this case would have the effect of giving relief against the government; and (b) to grant an injunction against the Commissioner of Inland Revenue in this case would have the effect of giving relief against the government which could not have been obtained against the government prior to the 1974 Act. Therefore an injunction can not be granted in this case by reason of section 12(2) of the 1974 Act.

I do not have to consider the issue stated in the passage from *de Smith, Woolf and Jowell Judicial Review (1995)* 5th ed para 4-016 p.211. That is whether an injunction could be granted against an official personally where he commits a tort in his official capacity, provided such entitlement could have been established prior to the 1974 Act. Counsel did not raise such an issue. Such question may be arguable where an official is committing a civil wrong, in particular a tort, in his official capacity. There is no allegation in this case that the Commissioner of Inland Revenue is committing or has committed a tort. The complaint by the first plaintiff is really founded on legal professional privilege.

Appropriate defendant:

Counsel raised in this case whether the Attorney-General or the Commissioner of Inland Revenue is the proper defendant to these proceedings. In proceedings under the provisions of the Income Tax Administration Act 1974, the Commissioner of Inland Revenue may be cited as a party to those proceedings. Technically the question raised by counsel is not without difficulty even though it is not crucial to the outcome of this case.

Given that I have decided the appropriate proceedings in this case should be a motion or application for a declaration, the real question then is whether a motion or application for a declaration is "civil proceedings under this Act" in terms of section 9 of the Government Proceedings Act 1974. Even though the expression "civil proceedings" is defined in section 2 of the Act in very broad terms, section 9 does not apply to just any civil proceedings. Its application is restricted only to "civil proceedings under this Act." Section 9(1) provides :

“Subject to the provisions of this Act and any other Act,
“*civil proceedings under this Act* shall be instituted by
“and against the Attorney-General.” (italics mine)

So the real question is whether proceedings for a declaration are “civil proceedings under this Act”. In other words, the words “civil proceedings” in section 9 are qualified and restricted by the words “under this Act”.

I have decided to leave this issue open for two reasons. Firstly, further arguments are required. Secondly, from the research already carried out by the Court on this issue, it became clear to me that it would only further delay the delivery of this judgment if one were to carry on with that research. But there is a real element of urgency in this case. The only change I have decided to make to the designation of the defendant is to omit the personal name of the Commissioner of Inland Revenue because he is not being sued in his private capacity, but substitute the words “Commissioner of Inland Revenue” because he is really being sued in his official capacity as such. That change is now reflected in the name of the defendant shown in the intitulement of this judgment.

Interim Declaration:

I will now turn to the question of whether an interim declaration may be granted in proceedings against the government. In England the serious gap in the old law where an injunction could not be granted against the Crown or officers of the Crown acting within their official capacities has been remedied by the United Kingdom Supreme Court Act 1981. But there is still open the question of whether an

interim declaration can be granted in proceedings against the Crown or officers of the Crown. In 1976 and 1994 the United Kingdom Law Commission recommended that legislation be enacted to make express provision for the grant of an interim declaration. No such legislation has been enacted. However in *de Smith, Woolf and Jowell Judicial Review of Administrative Action* (1995) 5th ed the learned editors state at footnote 37 at p.,744 :

“It is still possible that the English Courts may hold
“that, even in the absence of specific statutory powers
“to do so, they already have jurisdiction to grant interim
“declarations. The position was left open by the House
“of Lords in *M v Home Office* [1993] 3WLR 433.

In the *Home Office* case, Lord Woolf pointed out that in New Zealand and Israel jurisdiction now exists for the grant of an interim declaration. Section 8 of the New Zealand Judicature Amendment Act 1972 provides that the Court has jurisdiction to grant an interim declaration in proceedings against the Crown where it is *necessary* to preserve the position of the applicant.

It is clear from section 12(1) of the Government Proceedings Act 1974 that in proceedings against the government a declaration may be granted against the government. It is also clear from section 12(1) that in any proceedings against the government an order declaratory of the rights of the parties may be granted in lieu of an injunction. Our legislation does not expressly say whether such a declaratory order would include an interim declaration. However section 12(1) also provides that the Court may make such orders “to give appropriate relief as the case may require”.

Counsel for the first plaintiff also cited to the Court case law from other jurisdictions where the Courts have granted interim declarations as well as the cases where the Courts have stopped short of granting an interim declaration. These cases although ~~lightly~~ ^{highly} persuasive are of course not binding on our Courts.

CJ

I have given some serious consideration to this part of the case. Given what is said in *de Smith, Woolf and Jowell Judicial Review of Administrative Action (1995)* 5th ed at p.74, the fact that in New Zealand the Courts now have jurisdiction to grant interim declarations, and the express wording of section 12 of our own legislation, I have come to the view that this Court has jurisdiction to grant an interim declaration against the government or an officer of the government in an appropriate case under the Government Proceedings Act 1974. Not to have such jurisdiction would leave a serious gap in our law because there is no jurisdiction to grant an interim injunction against the government or its servants and officers acting in their official capacities. It is also somewhat uncertain whether an interim injunction would lie against a servant or officer of the government who is committing a tort within his official capacity. But there may be circumstances where the justice of a particular case would justify the granting of interim relief until the final determination of the substantive issues. If the Court does not have jurisdiction to grant an interim injunction and does not have jurisdiction to grant an interim declaration, that may give the impression that in some circumstances the government as well as its servants and officers are virtually above the law. I doubt whether the servants and officers of the government would consider that to be a desirable situation because at some stage they too will become ordinary members of the public while others become servants and officers of the government.

The jurisdiction to grant an interim declaration in government proceedings must, however, be exercised sparingly. The interim declaration *must be reasonably necessary* to preserve the position of the applicant until the final hearing. The approach, I would suggest, to be adopted is that stated by the New Zealand Court of Appeal in *Carlton and United Breweries Ltd v. Minister of Customs* [1986] 1 NZLR 423 as applied in subsequent New Zealand cases.

As the first plaintiff did not seek an interim declaration in its pleadings, I will not grant an interim declaration in this case.

The first plaintiff is ordered to file and serve by 10.00am, 4 November 1997 an amended statement of claim pleading a claim for a declaration. A motion for a declaration should also be filed and served at the same time.

This case is adjourned to 12.00 noon, 4 November 1997, for hearing submissions and arguments on the remaining issues including legal professional privilege.

T M Sapulu
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CHIEF JUSTICE

Solicitors:

Drake & Co, Apia for first plaintiff
Kruse, Enari & Barlow, Apia for second plaintiff
Attorney General's Office, Apia for defendant