

**Lealaisalanoa Aukusitino v.  
The Corporation of the Presiding Bishop of the  
Church of Jesus Christ of Latter-Day Saints**

Supreme Court  
Maxwell C.J.  
25 October 1988

*Practice and procedure—jurisdiction of the Supreme Court—preliminary question of law—whether the Supreme Court has jurisdiction to issue declaratory judgments—whether the court has jurisdiction to grant consequential relief—Judicature Ordinance 1961, ss. 31 and 39.*

*Declaratory judgment—whether such jurisdiction is a matter of inherent jurisdiction.*

**Facts:**

The plaintiff sought declaration from the Supreme Court pursuant to articles 111, 113, and 114 of the Constitution and sections 31 and 39 of Judicature Ordinance 1961 that:

1. the extra 300 acres registered against the defendant is customary land and thus the land of the present heir Salanoa Solomona and Salanoa Muliufi;
2. compensation is available for seventy-nine years that the defendant has used this extra land.

The defendant argued that the Court has no jurisdiction to grant such orders. It was common ground that there was no express grant or creation by statute of any power to make declaratory judgments. The Constitution in article 114(a) preserved “English common law and equity” for the time being in force in Western Samoa.

**HELD:**

- (1) The application of the common law through the Constitution does not include an inherent right to make declaratory orders and the plaintiff's submissions in this respect must fail: page 445, line 150. *Apia Bottling Co. Ltd. v. Attorney-General and the Director of Economic Development* (1970–1979) W.S.L.R. 227 not followed.
- (2) The making of a declaratory order is not a matter of procedure. It is in other jurisdictions a creature of statute, a form of relief which has created principles and a structure of its own: page 445, line 167.
- (3) Declaratory relief has never been part of the laws of Western Samoa. It is not covered by the definition of “law” in section 111 of the Constitution as a matter of common law or equity. Section 31 of Judicature Ordinance 1961 cannot be used to create new forms of relief where none existed before.

**Cases referred to in judgment:**

*Apia Bottling Co. Ltd. v. Attorney-General and The Director of Economic Development* (1970–1979) W.S.L.R. 227

- <sup>40</sup> *Attorney-General v. Western Samoa National Provident Fund and Banking* (1970–1979) W.S.L.R. 218  
*Clough v. Ratcliffe* (1847) 1 de G & S 163; 63 E.R. 1016  
*Guaranty Trust Company of New York v. Hannay and Company* [1915] 2 K.B. 536  
*Hollard v. Ollivier* (1881) 1 N.Z.L.R. 1 S.C. 197  
*Hunt v. B.P. Exploration Company (Libya Ltd.)* [1980] 1 N.Z.L.R. 104  
*Mayor Councillor and Burgess of Borough of Lower Hutt v. Yerex* (1904) 24 N.Z.L.R. 697

**Legislations referred to in judgment:**

- Constitution of Western Samoa, articles 111 and 113  
<sup>50</sup> Declaratory Judgments Act 1908 (N.Z.)  
Judicature Ordinance 1961

**Other sources referred to in judgment:**

de Smith, *Judicial Review of Administration Acts* (4th. edn.)

**Counsel:**

*H. T. Retzlaff* for the plaintiff  
*C. J. Nelson* for the defendant

**MAXWELL C.J.**

**Judgment:**

<sup>60</sup> The background to this matter is set out in the plaintiff's statement of claim; however, I do not intend traversing the allegations which are made. It is sufficient to say that the plaintiff seeks declarations that:

1. the extra 300 acres registered against the defendant is customary land and thus the land of the present heir Salanoa Solomona and Salanoa Muliufi;
2. compensation is available for the seventy-nine years that the presiding bishop of the Church of Jesus Christ of Latter-Day Saints as corporation sole has used this extra land.

The defendant now seeks a ruling that the Supreme Court of Western Samoa has no jurisdiction to issue declarations or declaratory judgments. I am indebted to counsel for the thorough and painstaking manner in which submissions have been prepared.  
<sup>70</sup> There was a preliminary point raised by Mr. Nelson as to my jurisdiction to determine preliminary issues. I am in no doubt as to my jurisdiction and it was not an issue pursued by the plaintiff. The plaintiff argues that the Supreme Court does have jurisdiction to issue declaratory judgments with or without consequential relief. Indeed as long ago as the *Attorney-General v. Western Samoa National Provident Fund and Banking* (1970–1979) W.S.L.R. 218, the Attorney-General was arguing that, in spite of there being no specific legislation, there was power to issue a declaratory order. Sections 31 and 39 of the Judicature Ordinance 1961 were relied on. However, Duggan A.C.J. decided that, if the Court in that instance were to issue an injunction, making a declaratory judgment would be superfluous. It is clear to me  
<sup>80</sup> that the learned judge had himself reservations as to whether there was jurisdiction to make such orders. He was as I see it able to resolve the issue without the need to decide on that point.

I propose dealing with this matter of whether or not jurisdiction derives under two heads:

1. common law and equity as applied by articles 111 (i), 113, and 114 of the Constitution of the Independent State of Western Samoa;
2. that Statutory authority in Western Samoa.

### I. Common Law and Equity

It is clear that there is no express statutory authority for the making of a declaration or declaratory order. I have had the opportunity of reading de Smith's *Judicial Review of Administration Acts* (4th. edn.), and it is clear from that portion dealing with declaratory proceedings that he proceeds from a position of caution as to the making of such orders. In the nineteenth century the Court of Chancery expressed an aversion to making such orders—see *Clough v. Ratcliffe* (1847) 1 de G & S 164 per Bruce V-C. Tentative steps were taken during the middle of the century to resolve the matter by legislation. I do not propose here to traverse the history of that legislation but, as a remedy available to a litigant, declarations as a remedy suffered from mixed fortunes. However, as the learned author says at page 481 of his text:

During the present century the action for a declaration has become one of the most popular forms of proceedings in the High Court.

In New Zealand the matter was resolved by the Declaratory Judgments Act 1908. Prior to that there had been conflicting authority. On the one hand the matter was first mentioned in *Hollard v. Ollivier* (1882) N.Z.L.R. 1 S.C. 197 where it was held that, by Rule 238 of the *Regulae Generales* of 1856, the New Zealand Supreme Court was given jurisdiction to make a declaration. In *The Mayor Councillors and Burgess of the Borough of Lower Hutt v. Yerex* (1904) 24 N.Z.L.R. 697 the Chief Justice expressed doubt as to the Supreme Court's jurisdiction to make a decree. It seems again that the learned Chief Justice was influenced in making a declaratory order by the fact that he could also issue injunctions. While acknowledging the views of Richard J., in *Hollard v. Ollivier*, he said at page 702:

Our code of procedure has no similar rules and though our Court has all the Powers of the Court of Chancery in England, it may be questioned whether the Court can pronounce a declaratory decree.

As I see it the matter was only satisfactorily resolved by the passage of the Declaratory Judgments Act 1908. While there is specific jurisdiction in the United Kingdom and Canada this was never extended to Western Samoa and this nation has no declaratory judgments legislation of its own.

"Law" in article 111 of the Constitution is defined as:

"Law" means any law for the time being in force in Western Samoa; and includes this Constitution, any Act of Parliament and any proclamation, regulation, order, bylaw or other act of authority made thereunder, the English common law and equity for the time being in so far as they are not excluded by any other law in force in Western Samoa, and any custom or usage which has acquired the force of law in Western Samoa or any part thereof under the provisions of any Act or under a judgment of a Court of competent jurisdiction.

Article 113 provides:

113. This Constitution shall come into force on the day approved by the General Assembly of the United Nations as the date of the termination of the Trusteeship Agreement for the Territory of Western Samoa approved by the General Assembly on 13 December 1946.

114. Subject to the provisions of this Constitution—

- (a) The existing law shall, until repealed by Act, continue in force on and after Independence Day; and
- (b) All rights, obligations and liabilities arising under the existing law shall continue to exist on and after Independence Day and shall be recognised, exercised and enforced accordingly; and
- (c) Proceedings in respect of offences committed against the existing law may be instituted on and after Independence Day in that Court, established under the provisions of this Constitution, having the appropriate jurisdiction, and offenders shall be liable to the punishment provided by the existing law.

Mrs. Phillips cites *Guaranty Trust Company of New York v. Hannay and Company* (1915) 2 K.B. 536 as authority for the proposition that English common law and equity applied to the procedural law governing relief. With respect, I do not believe it can be said as at the first of January 1962 jurisdiction to issue declarations existed under the common law of England. The case relied on certain statutory authority and is not in my view relevant. The problem must always have been regarded as uncertain in the United Kingdom, and once legislation was enacted and the matter codified, although with unusual results, it ceased to form part of the English common law. I find that the application of the common law through the Constitution does not include an inherent right to make declaratory orders and the plaintiff's submissions in this respect must fail.

## II. Sections 31 and 39 of the Judicature Ordinance 1961 and the *Apia Bottling Company case*

The strongest authority upon the plaintiff relies is *Apia Bottling Co. Ltd. v. Attorney-General and The Director of Economic Development* (1970–1979) W.S.L.R 227. The issue was not argued before Nicholson C.J., and it is clear he relied heavily on the dicta of Richmond J., in *Hollard v. Ollivier*. He said:

In pursuance of the discretion vested in me by s. 39 of the Judicature Ordinance, I conclude that it is in accordance with natural justice and convenience for me to allow an action seeking a declaratory judgment alone. I conclude that there is jurisdiction for the Supreme Court to make a declaratory decree alone in Western Samoa.

Now it is clear that the issue was not seriously resisted as in the present case. With great respect to the learned Chief Justice, I believe I am entitled to review the issue. I do not see the making of a declaratory order as a matter of procedure. It is in other jurisdictions a creature of statute, a form of relief which has created principles and a structure of its own. It goes beyond, as I see it, being a matter of mere procedure. Sections 31 and 39 of the Judicature Ordinance 1961 provide as follows:

**31. Jurisdiction of the Supreme Court**—The Supreme Court shall possess and

exercise all the jurisdiction, power, and authority, which may be necessary to administer the laws of Western Samoa.

39. **Practice and procedure**—Subject to the provisions of this Ordinance, the Code of Criminal Procedure, and the Rules of Court, the practice and procedure of the Supreme Court in the exercise of its civil and criminal jurisdiction shall be such as the Court thinks in each case to be most consistent with natural justice and convenience.

180 These sections extend to the Supreme Court of Western Samoa the jurisdiction to do procedurally what is necessary to administer the laws of Samoa. It is from here that the plaintiff seeks to persuade me that I have an inherent jurisdiction to ensure the effective and proper administration of the laws of Western Samoa. I have no argument with the concept that I have an inherent jurisdiction to carry out the administration of justice within my jurisdiction. I accept also Mrs. Phillips's contention that Nicholson C.J. took a robust approach in holding that the matter was a procedural one. I have expressed my views on that point and I cannot come to the same conclusion as the Chief Justice. I do not believe that declaratory relief has ever been part of the laws of Western Samoa. I do not accept that it is covered by the definition of "laws" in section 111 of the Constitution as a matter of common law or equity. I accept the submission of Mr. Nelson that section 31 cannot be used to create 190 new forms of relief where none existed before.

Section 39 deals with practice and procedure of the Supreme Court and is subject to section 31 and the Rules of Court, and I do not see it as helpful. I can accept the reasoning (*Hunt v. B.P. Exploration Company (Libya) Ltd.* [1980] 1 N.Z.L.R. 104) but I believe that is distinguishable bearing in mind the type of injunction sought. I am not able to say that making a declaration is a matter of procedure and I do not believe that it is a matter coming within my inherent jurisdiction. It is a remedy which I am asked to create and I do not have the inherent ability to do so. I have looked at the cases where declarations issued, but these were not challenged by the parties and to that extent I am satisfied the remedy was consented to.

200 I therefore conclude I have no jurisdiction to make the orders sought. I do say this, however. The plaintiff asks that if there is no power to make a declaration, the prayer for relief should be amended and he should be able to claim an injunction restraining the defendant from continuing to occupy and trespass on the land and for ancillary orders. The plaintiff claims an interest in the land and since I have found that the Supreme Court of Western Samoa has no authority to grant a declaration I am prepared to consider an application for leave to amend the pleadings.

The question of costs on the application is reserved.

Reported by F.T.