TONGA

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Court of Appeal

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Hon Justice Sir Peter Blanchard
Hon Justice Kenneth Handley
Hon Justice Sir Gordon Ward
Hon Justice Rodney Hansen
Hon Justice Lord Tevita Tupou

Supreme Court

Lord Chief Justice O.G Paulsen
Hon. Justice MD Scott
Hon Justice Charles Cato

Land Court

Lord President O.G Paulsen
Hon Justice MD Scott
Hon Justice Charles Cato

Magistrate Court

Chief Magistrate
Sione Folau Lokotui

Principal Magistrate
Salesi Mafi
Paula Tatafu

Senior Magistrate
Feleti Tuita
Similoni Tu'akalau

Magistrates
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Sione Finau Sisifa

Director of Public Prosecutions

'Asipeli 'Aminiasi Kefu

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Application by M (Maintenance of Illegitimate Children Act)

Supreme Court, Nuku'alofa
Cato J
FA 228/2015

4 January 2016

Adoption application – divorced applicant – satisfactory support – best interests of child – application granted

The applicant was a divorced, 43 year old woman. She was self-employed and earned a reasonable income. She applied for adoption and change of name of a three-month old child. The child had been living with her since 3 weeks of age. The natural mother was divorced and had five children from that marriage. The natural mother and father were not cohabiting and both consented to the adoption.

Held:

1. The applicant satisfied the court that it was in the best interests of the child that the application be granted. The applicant was well able to care for the child in every respect being a mature woman still young, and gainfully self-employed. She had ample support from her extended family and friends to enable her to work; and they also would assume a parental role should the applicant die prematurely. The natural mother and family were poor and the relationship was unstable. The application was granted and the change of name was approved.

Cases considered:

Re Adoption Application 034/001/90
Re H (adoption) (1994) 12 FRNZ 375

Judgment

[1] This application for adoption was brought by the Applicant, M, who was divorced and had no children of her own. She is aged 43. She has been self-employed in a professional capacity since 1998 and derives a reasonable income from her practice. She resides in her family home which is a large house and easily able to accommodate the child. Although I approved the application for adoption and change of name of the child on the 18th December, 2015, because there were aspects of the application that were unusual, I have supplemented my orders with a judgment recording my reasons for granting the application.

[2] The Applicant and the child's natural mother had been friendly for about two years and the natural mother, who had been previously married, had five children of her own. After she had been divorced, the natural mother gave birth to the child the subject of this application. The natural mother described herself as close to the Applicant and as being like sisters. The child had been given to the Applicant by the natural mother at about 3 weeks of age. The child is now about three months old and has been living with the Applicant. The natural mother consents to the adoption. She is unemployed and performs domestic duties.

[3] The Guardian Ad Litem report stated that the natural mother was still in a relationship with the natural father after being divorced. I was concerned about this application for a number of reasons. First, because the applicant would be a sole parent, and secondly, because the natural parents of the child were said to be still in a relationship. Whilst I had no doubt that the Applicant firmly wanted to adopt the child and was otherwise a suitable applicant to adopt him, my concern was also as to who would act as caregiver when, as was inevitable, the applicant was active in her practice. Further, I was concerned as to who would take over the parental role should the Applicant die, prematurely. The Guardian Ad Litem report did not cover these matters, so I adjourned the Application for a short time and requested a supplementary report.

[4] Mr Kefu, who had not appeared initially, appeared on the application when the hearing resumed and a supplementary report was filed. In this report, the Applicant explained that when she was working her elder sister, aged 57 and retired, would look after the child, and her own hours were flexible enabling her to go home for lunch and from work at 3pm to enable her to be with the child. She had discussed the question of her passing prematurely and her sister and extended family had all agreed to support the child. Further, the natural father also gave his consent to the adoption. Mr Kefu explained that the couple were not living together and the relationship was unstable. The natural mother and family were poor, and the view of the extended family was one of concern that the natural mother had given birth to this child, in these circumstances.

[5] Although, adoptions are generally brought by couples, in Butterworth's Family Law, 13th edition, 2007, NZ at pg 1124, it is stated;

> "Traditionally, there was some judicial reluctance to allow adoption by a person who would become a single parent. Today, it is possible that applicants by such persons are more favourably viewed by the Courts and there are now a number of cases where such an application has been successful."

In support, a number of cases were cited including *Re Adoption Application* 034/001/90 where an adoption order was made in favour of a man who had care of a child over a five year period and with whom he had bonded, the applicant having ample support and assistance, and *Re H (adoption)* (1994) 12 FRNZ 375 where the child had been in the care of the applicant since birth, the natural parents consented and had little continuing relationship, the adoption again acknowledging the reality of the situation.

[6] On the basis of the additional information, I considered that it was in the best interests of this child that this application be granted. The Applicant was well able to care for the child in every respect being a mature woman still young, and gainfully self-employed. I was satisfied that she has ample support from her extended family and friends to enable her to work; and also would assume a parental role should the

Applicant die prematurely. It was plain to me she had a close bond with the baby who was very well presented at the hearing. Both natural parents consented, and with five other children by her first marriage, the natural mother would have enough to cope with in providing for them, no doubt with assistance of her extended family. Further, I was told the mother's relationship between her and the child's father is not one where the parties were cohabiting and, in that sense, is of uncertain duration. Having received this additional information from Mr Kefu, I considered that it was in the best interest of this child that his future be settled and this application granted. I also approved the change of name sought.

Application by Pupungatoa and Fonua (Guardianship Act 2004)

Supreme Court, Nuku'alofa
Cato J
FA 137/2015

4 January 2016

Guardianship application – no evidence that parents could not care for child – application declined

The applicants were a married couple in well-paid employment who lived in Australia. They applied for guardianship of a 5 month old boy. The child was born legitimate to a married couple who had four other children. The parents consented to the application.

Held:

1. The application met with the difficulty that there was no evidence that the natural parents and extended family were unable to adequately care for the child, and to allow him to leave Tonga would be to separate him from his siblings and Tonga, indefinitely.
2. The court did not consider that it would be in the best interests of the child to be removed from Tonga, from his four other young siblings and also from the care of his natural parents and extended family in Tonga, there being no evidence that they were unable to provide for his needs.

Case considered:

Saavedra v Solicitor General [2013] Tonga LR 60 (CA)

Judgment declining application

[1] The Applicants, husband and wife (who appeared in person on this application, her husband remaining in Australia) are both permanent residents of Australia. The male Applicant had been born in Tonga and educated in Tonga but is now a permanent resident of Australia. The female Applicant is a New Zealand citizen but had received her schooling in Australia where she had lived for many years. The Applicants were married in 17th October, 2009 in New South Wales and have no children. Both reside in Sydney. The male Applicant is aged 38 and the female Applicant is aged 41. Both the Applicant are in well-paying employment in Australia; the male applicant being a glazier with an income AUD $67,000 per annum. The female applicant is employed as a products complaints coordinator and earns $65,000 per year. They rent accommodation and are saving for a house to purchase. The accommodation, in a report

provided to the Court, was considered to be suitable for the child should he be allowed to reside in Australia.

[2] The child is about 5 months old. He was born legitimate, the natural mother being aged 30 and the natural father being 31. They have been married since 2006, and have four other children, 3 boys and one girl, the ages of the children being 9, 6, 4 and two. Both consent to the application and believe it is in the best interest of the child that the Applicants raise him. They had agreed to give a previous child to the applicants, however, because the child was a girl they had wanted to keep her. They are more than willing they said to have the Applicants bring up this male child. Both parents are employed in Tonga. There is no suggestion in this Application that the natural parents themselves are unable to care for this child through economic hardship or for any other reason.

[3] The Guardian Ad Litem report supported the application which had support also from a Minister of religion and others. However, I had my concerns on reading the Guardian Ad Litem report that his application was in order, and asked that further consideration be given principally to two issues which I considered reflected adversely on it. Mr Kefu later appeared on this Application which was adjourned for couple of days for consideration of the issues that concerned me.

[4] The two matters which concerned me were the uncertain state of the child's acceptance by Australian immigration authorities for entry into Australia. This had been an issue of concern also to the authors of a Confidential home assessment report on the Applicants which was a lengthy document running to several pages that was filed with the Application. The authors, social workers, had advised the applicant to seek an independent report as to whether the child was likely to be able to immigrate to Australia, but they had not done so stating that they had relied on other Tongans' experiences, they having children come to live they maintained in similar circumstances. There had been some consideration given by the Applicants to obtaining multiple entry visas which would mean that the child would need to leave Australia returning at the end of the three months for four years before he could apply for Australian residency. The authors of this report did not think this was a very good suggestion and canvassed with the Applicants the possibility of their coming to Tonga should the child not gain entry to Australia. Both said they would be prepared to relocate to Tonga. I note, however, in doing so both would be foregoing quite remunerative employment. The Guardian Ad Litem report had not addressed this important issue so I requested this matter be further considered by a senior Crown counsel.

[5] Even more fundamentally, however, was the problem that granting the application would mean that this child was separated from his young siblings and from a family environment in Tonga, and, in circumstances where there was no evidence that the parents and any extended family would be unable to provide for the child. A similar issue was considered by the Court of Appeal recently in Tonga in the case of *Saavedra*

v Solicitor General [2013] Tonga LR 60[1] where the Court of Appeal upheld the decision of Scott CJ to reject an application by American citizens (non-Tongans) to adopt a male child and take the child to the United States on the ground that there was a caregiver available in Tonga for the child, his grandmother, although the mother had consented to adoption. The child had been cared for by his grandmother for about five years and he did not want to go with the female Applicant. In that case, Scott CJ had granted an adoption order of a younger female child to the Applicants, his reason being that the natural parents and extended family in Tonga could not look after both children. The Court of Appeal observed, in upholding the decision of Scott CJ, that the best interests of the child was the paramount consideration "in adoption, including inter-country adoptions, and indeed in other cases involving children". Tonga, the Court observed was a party to the United Nations Convention on the Rights of the Child, Article 41 of which provides;

> "(b) Recognize that inter-country adoption may be considered as an alternative means of a child's care, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child's country of origin."

[6] In my view, the same considerations apply where the Application is for a Guardian order to remove a child from Tonga. Where a child has been born legitimate under Tongan law, that child is not able to be adopted, however, in a suitable case a Guardianship order may be made, under the Guardianship Act for the Applicant to have custody of the child. In this case, the Applicants had been unable to have children and the relationship of the female Applicant and the natural mother and her mother had influenced the Applicants to proceed to seek guardianship of this child, which both natural parents had supported. In my view, this application met, however, with the difficulty that there was no evidence that the natural parents and extended family were unable to adequately care for the child, and to allow him to leave Tonga would be to separate him from his siblings and Tonga, indefinitely. This issue had not been addressed in the guardian ad litem report and so I had sought further information on this aspect, also.

[7] Mr Kefu appeared on the second occasion. He was unable to provide further information on the immigration issue, which had troubled Australian social workers and concerned me, also. Whilst I might have deferred the case to have ascertained or received further information and evidence from Australian immigration or other Australian source such as the High Commission as to the child's prospects of success on gaining entry into Australia were a Guardianship order to have been made, the Application in my view failed more fundamentally because there was no evidence that the child could not be adequately cared for by his parents in Tonga. Mr Kefu did not suggest otherwise.

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[1] Subsequently, circumstances changed, and a further application for adoption brought by the same applicant was successful.

[8] Thus, whilst the Applicants, who are plainly desirous of having a child to care for and no doubt would be able to provide well for him, I do not think, following *Saavedra*, that it would be in the best interests of this child to be removed from Tonga, from his four other young siblings and also from the care of his natural parents and extended family in Tonga, there being no evidence that they were unable to provide for his needs.

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Application by Fifita and Fifita (Maintenance of Illegitimate Children Act (Cap 30))

Supreme Court, Family Division, Nuku'alofa
Cato J
FA 66/2014

20 January 2016

Adoption – grandparent adoption – granted

The applicants for the letters of adoption were in their fifties, been married for 33 years, had six children and were in generally good health. They were the grandparents of the child of the application, a boy, whom they have been caring for since birth and who was aged 12. They were retired and lived off remittances. They wanted to legalise their relationship with the child so he could be recognized under law for land entitlements, and so forth. The natural mother supported the application. She was now married and had four other children. She has had no contact with the natural father since his birth in 2003. The child who was illegitimate had never lived with the mother, and the child knew his natural mother as his sister.

Held:

1. It was plainly in the best interests or welfare of the child to have his status legitimized by adoption. First, his grandparents were still young and able to effectively continue to operate as his parents and caregivers in the fullest sense. There was no clear age or health impediment to their being suitable to adopt. The child regarded the applicants as his parents and not his mother whom he regarded as his sister. There will be no dislocation to any family relationship by making the order. Granting the application was doing no more than reflecting the practical reality of the child's life; namely the applicants had been his parents providing all his needs throughout his young life, and it was appropriate and in his best interest that they be legally recognized as such, and he as their son.

Cases considered:

A, Re Adoption of [1992] NZFLR 422
AB (an Infant), Re [1949] 1 All ER 709
K, Re an application by (FA 151/2014, 12 February 2015, Paulsen CJ)
Lolo Funganito (FA 152/2010, 27 October 2011, Scott CJ)
M v Kendall [1992] NZFLR 63
Parker v Pearce (1985) 4 NZFLR 150
Pupungatoa and Fonua (FA137/2015, 4 January 2016, Cato J)

Q, Re Adoption of (1993) 10 FRNZ 340
Saavedra v Solicitor - General [2013] TOCA 7 (CA)
T (An Adoption), Re [1995] 3 NZLR 373

Counsel for the appellant : Name
Counsel for the respondent : Name

Application for Letters of Adoption by Mr Isileli Mavaetangi Fifita and Mrs Seisolomoa Fifita

[1] I heard this application for adoption earlier today, and was concerned I had insufficient detail to make the order sought and so adjourned the application until this afternoon so that I could be provided with further information concerning authorities on grandparent applications in Tonga, and also any problems that might arise affecting the family structure including any possible inheritance issues. That information was provided, and hence I was able in the afternoon to proceed with the Application. I granted the Application and said that I would give formal reasons for doing so because applications of this kind were uncommon.

[2] The Applicants are in their fifties, have been married for 33 years, have six children and are in generally good health. They are the grandparents of the child of the application, a boy, whom they have been caring for since birth and who is now aged 12. They are retired and live off remittances. The application states that they want to legalise their relationship with the child so he can be recognized under law for land entitlements, and so forth.

[3] The natural mother supports the application. She is now married and has four other children. She has had no contact with the natural father since his birth in 2003. The child who is illegitimate and now aged 12 has never lived with her, but has been cared for by the Applicants since birth. The Applicants did this so they said the natural mother should be free to live her own life. The child knows his natural mother as his sister. The further information that I received satisfies me that there will be no dislocation of family relationships should I make this Application. There is unlikely to be any dislocation over succession problems to land either since the Applicants have two older sons who will inherit any land under Tongan law.

[4] I note that there have been two judgments in Tonga relating to the grandparents applying to adopt grandchildren. In *Lolo Funganito* FA 152/2010, 27th October 2011, Scott CJ citing *Re AB (an Infant)* [1949] 1 All ER 709 and *Parker v Pearce* (1985) 4 NZFLR 150 said such applications should be made only in exceptional circumstances because of the potential to dislocate family structures. Scott CJ was concerned at the age disparity between the grandparents and the child and the fact they were living in New Zealand on welfare benefits. Further, although the applicants, the natural mother and the child were all Tongan citizens, they were all permanent residents of New Zealand and Scott CJ considered that, although he had jurisdiction to make such an order, it was more appropriate for any adoption or guardianship application to be made in that jurisdiction. More recently, Paulsen CJ in *Re an application by K* (FA 151/2014, 12th February 2015) considered that the overall or paramount consideration was the best interests of the child and this should not be fettered by exceptional circumstances. He cited *Re T (An Adoption)* [1995] 3 NZLR 373, where Samoan grandparents had successfully adopted and *Re Adoption of A* [1992] NZFLR 422 where Maori

grandparents had been allowed to adopt a young grandchild. Although accepting that there were some advantages for the child to live with his grandparents in New Zealand principally economic and educational, he rejected the application by Tongan grandparents living in New Zealand to adopt the child because the natural mother had cared for the child for a number of years in Tonga and she, and the child's step father, not only had another child but it was considered that the child of the application must have bonded closely to his mother, stepfather and sibling. For this reason and also because following *Saavedra v Solicitor - General* [2013] TOCA 7 (CA) it could not be said, being an inter – country adoption that all means or caring for the child in Tonga had been exhausted, the application was dismissed. Paulsen CJ observed, however, that, but for the international consideration and *Saavedra*, the matter would to his mind be finely balanced.

[5] The issue of adoption by grandparents has been given consideration in Butterworths "Family Law in New Zealand" (Vol one, 13th edition, 2007), where it is stated at para 6.654:

> "Adoption by relatives has been criticized, as it might be said to extinguish relationships on one side of the child's family, and distort relationships on the other. In practice, the most common sub category of applications for adoption by relatives has been application s by grandparents – a consequence of which can be that the natural mother becomes, from a purely legal point of view, the sister of her own child. Such falsification and readjustments of relationships is obviously highly questionable, an in the majority of situations guardianship would appear to be a more appropriate response"

[6] That said, the authors acknowledge that in Maori and Pacific Island applications the perceived disadvantages of the legal readjustment of family relationships are not so relevant, presumably because of the extended family relationships are not so relevant, presumably because of the extended family relationship. Applications by grandparents have been successful in appropriate circumstances, in New Zealand as is seen in *Re T* and *Re A* involving a Samoan and a Maori application. Other instances in New Zealand where grandparent applications have been successful are *M v Kendall* [1992] NZFLR 63 where a grandmother had cared for boys from birth, they understood her to be their mother and the boys regarded her as their mother and their mother and sisters as their own sisters; and *Re Adoption of Q* (1993) 10 FRNZ 340 where grandparents had provided their granddaughter with emotional and physical security, the mother having consented to the application and being unable to provide adequate care and her husband having a history of sexual crimes against children. The Judge, in *Q*, granted the application because of the sensitivity of the applicants and their awareness of the child's needs and after being satisfied that the boy was unlikely to be confused as to the family relationships.

[7] I consider that, in this case, it is plainly in the best interests or welfare of the child to have his status legitimized by adoption. First, his grandparents are still young and able to effectively continue to operate as his parents and caregivers in the fullest sense as they have been in the past. There is, in my view, no clear age or health impediment to their being suitable to adopt and the child has been with them for about 12 years. The Child regards the Applicants as his parents and not his mother whom he regards as his sister. He has not lived with his natural mother. No doubt, however, as is the Tongan

way, he will continue to be supported by and in close association with the natural mother and her four children from a subsequent marriage in the future. That in my view, is a good thing for his development. There will, I am satisfied, having seen the parties and after receiving additional information from the Guardian ad Litem, be no dislocation to any family relationship by making this order. In my view, granting this application is doing no more than reflecting the practical reality of this child's life namely the Applicants have been his parents providing all his needs throughout his young life, and it is appropriate and in his best interest that they be legally recognized as such, and he as their son.

[8] I accordingly grant the orders sought which include a change of the surname of the child to that of the Applicants.

[9] As a footnote it should be noted that in the case of *Re an application by K for adoption*, consider above, involving an application by adoption of grandparents who were overseas, Paulsen J had adjourned the case to enable inquiries to be made on the issue of Tongan adoption and guardianship orders and a child being allowed by New Zealand immigration to live permanently in New Zealand. Very recently, in *Pupungatoa and Fonua* (FA137/2015, 4 January 2016), I had occasion to also ask for further information on the effect of making a guardianship order where it was proposed to have the Tongan child reside in Australia with his caregivers, Tongan who were permanently resident, there. In a report which had been filed with the application from Australian social workers, some concerns had been expressed about the child's residence and Australian immigration. No satisfactory or certain answer could be provided by the Guardian ad Litem which troubled me because guardianship as with adoption applications, are concerned with the best interests of the child, and I have difficulty in seeing how it can be said to be in the best interests of a child to make order intended to enable a child to reside with an overseas caregiver where his or her immigration status is uncertain and indeed permanent residence may not be granted for the child to do so. In any event, the Application for guardianship was dismissed for *Saavedra* reasons, namely the child had appropriate caregivers namely his parents and siblings in Tonga. I consider, however, that in these inter-jurisdiction or country applications, either for adoption or guardianship, the Guardian ad Litem should provide the Court with accurate and most importantly up to date information on immigration issues as they will affect the intended residence of the child. These may vary considerably from jurisdiction to jurisdiction, and rules may change from time to time, also. In my view, it should not be left to chance that residence will be satisfied consequent upon an order being made by a Tongan court.

R v Taufahema

Supreme Court, Nuku'alofa
Cato J
Cr 3/2015

26 January 2016

Sentencing – manslaughter – suspicion of infidelity not mitigating factor – 15 years starting point with three year discount for mitigating factors

On 26 December 2014 the prisoner poured a pot of hot cooking oil deliberately over his wife's face and upper body. The relationship was very strained on Christmas day and had been for a long period. The motivation of the prisoner was to scar his wife so she would not be attractive to anyone else. She later died in hospital. He was found not guilty of murder by a jury and pleaded guilty to manslaughter. He appeared to be sentenced.

Held:

1. The court was satisfied that the prisoner's motive for acting as he did was because he believed that his wife was having an affair, but did not regard this as any reason for mitigating his actions. Even if he acted in the belief that his wife was having an affair and out of a misguided attempt to keep her, this could not excuse or lessen the criminality of his actions. He had ample opportunity to desist from burning her.
2. The appropriate starting point was 15 years imprisonment to reflect the criminality and cruelty inherent in the prisoner's actions. By way of mitigation, the court allowed a discount of three years imprisonment to take into account his guilty plea to manslaughter, his co-operation with the police, his remorse and his overall history of relatively positive achievement. The court did not regard suspicion of infidelity as any mitigation for his premeditated and heartless actions. The court imposed a sentence of 12 years imprisonment for manslaughter for which he was convicted. The final two years were suspended because the court considered that he was capable of rehabilitation.

Cases considered:

Kofutu'a v R [2010] TLR 120
R v Patric Unga CR 84/2014
Tu'itavake v R [2005] TLR 348
Vaomotou v R [2014] Tonga LR 62 (CA)

Statute considered:
Criminal Offences Act (Cap 18)

Sentence

[1] Mr Taufahema appears today for sentence on one charge of manslaughter contrary to sections 85, 86(1) (a) & (2), 92 and 93 of the Criminal Offences Act. He had pleaded guilty on arraignment to manslaughter on the 24th February 2015. He had on that date pleaded not guilty to murder and, after a trial lasting 6 days in which he represented himself and gave evidence, he was acquitted of murder by a Jury on the 23rd November 2015. The sentencing had been adjourned over the vacation to enable a probation report to be supplied to the Court.

[2] The basis of the Crown's case on murder was that he, on the 26th December, 2014, had poured a pot of hot cooking oil that had been heated on the stove over his wife's face and upper body deliberately when she was lying on a couch nearby. The Crown case was that he had deliberately poured the oil on her intending to cause her bodily injury, and at the time he knew that the injury was likely to cause her death and carried on reckless whether death ensued or not. He denied in a record of interview taken after his arrest that he had intended to kill her, and at trial confirmed that he did not know that it was likely she would die. He gave evidence and said also, in his record of interview, that his reason for pouring the hot oil upon her was to scar her so she would not be attractive for other men. The probation report confirmed a discussion with him in which he advanced once again his motive.

[3] The trial had proceeded and evidence had been given to suggest that, for some time, the relationship between the deceased and the prisoner had been strained and unhappy. The accused had believed his wife was having an affair and matters came to a head on Christmas day 2014 when the deceased appeared as distant from him. The next day, the morning of the assault, the prisoner had planned to take his children to the beach and he had commenced to cook some chicken. He proceeded to boil fat for this purpose. About this time, the accused maintained in his evidence he had seen a text message from the deceased's alleged lover to her. He said he loved her and was jealous and wanted her scarred so as to keep her for himself. Provocation in any legal sense in Tonga can only operate as a defence to murder where the accused sees the deceased in the act of adultery with another. That was not the case here, and provocation was not advanced at trial.

[4] The jury plainly gave the prisoner the benefit of the doubt on the central issue at this trial for murder namely did the prisoner when he poured the pot of oil on the deceased, know that the deceased was likely to die? It is insufficient in Tonga that the accused knew that serious harm was likely to occur. The standard of foresight of likelihood of death is a high threshold for the Crown to meet under section 87(1)(b) of the Criminal Offences Act in order to obtain a conviction for murder.

[5] For the purposes of this sentence, I make no finding as to whether the deceased was in fact having an affair but it seems clear her feelings for the prisoner had waned over probably a lengthy period and he resented this. I have no doubt that his motivation was to scar his wife so she would be attractive to nobody else. The relationship was very strained on Christmas day and had been it seems for a long period. I consider that something must have operated as a trigger to cause him to act as he did the morning following Christmas day when earlier he had intended to cook chicken and take the

children to the beach. The Crown case was never one that he intended to kill his wife, and I consider that his intention to scar her so she would be unattractive to others was inconsistent with any murderous intent. I am prepared to accept for the purposes of this sentence that he did, as he said in evidence, sight a text message to his wife from her alleged admirer that morning, although I do this on the basis of giving the prisoner the benefit of the doubt. Before he poured the oil on her there was evidence that he had taken the pot out and placed it on a table outside. Plainly, he appreciated that it was very hot because he had some protection on his hands when he handled the pot. His motive for pouring oil on her to scar her face so she would not be attractive to others was callous, brutal and a wicked response to her perceived infidelity. I consider he had ample time to reflect on the consequences of what he would do when he uplifted the pot and took it outside and must have appreciated that at the very least she would suffer considerable harm and suffer agony as a consequence of hot oil being poured upon her. Plainly, she died later at the hospital as a consequence of what must have been an extremely painful and lingering death.

[6] I have had reason to consider starting points for manslaughter in a number of recent cases. These were summarized in *R v Patric Unga* CR 84/2014. Also sighted to me as sentencing comparables in this case by the Crown were cases involving provocation where manslaughter. In *Vaomotou v R* [2014] Tonga LR 62 (CA), for example, the prisoner had been acquitted of murder of his wife apparently following a successful defence of provocation, (although it is unclear what that provocation was) and had been sentenced to 16 years imprisonment with the final two years suspended by the sentencing Judge.

[7] In *Vaomotou*, the Court of Appeal observed;

> "... in the present case, we consider that the combination of extreme violence (the use of a knife some 23 times on a sleeping woman) and the absence of provocative behaviour at the actual time of attack require a starting point (before mitigating features are taken into account) beyond the 10-12 years range. The starting point in our view should be 14 years imprisonment."

[8] The Court of Appeal considered that substantial credit should be given for the early confession and guilty plea, the appellant's remorse, his disordered state of mind and the fact he was a first offender. In the light of these matters, the Court of Appeal considered that the appropriate sentence was 10 years, a discount overall of 4 years imprisonment from the starting point of 14 years. The final 2 years of his sentence was suspended because he was considered to be unlikely to commit such a crime again.

[9] In *Tu'itavake v R* [2005] TLR 348, the Court had to consider another manslaughter sentence also after a successful defence of provocation to murder, in this case provocation under section 89(a) of the Criminal Offences Act which involves a violent act of aggression as provocation. The sentencing Judge had sentenced the accused to ten years imprisonment with the final two years suspended for two years. The Court of Appeal, after reviewing English authorities and guidelines on provocation and sentences for manslaughter, concluded that the sentence was manifestly excessive and imposed a sentence of 5 years imprisonment, the final two years of which were to be suspended. In that case, the prisoner was regarded as being under considerable or extreme provocation when attacked by the deceased.

[10] Although I am satisfied that the prisoner's motive for acting as he did was because he believed that his wife was having an affair, I do not regard this as any reason for mitigating his actions. Even if he acted in the belief that his wife was having an affair and out of a misguided attempt to keep her, this could not excuse or lessen the criminality of his actions. He had in my view ample opportunity to desist from burning her. He was seen to place the hot oil down on a table outside the house before returning into the house to pour it over her. I observe that in *Kofutu'a v R* [2010] TLR 120 the Court of Appeal did not interfere with a starting point of 15 years for punching a woman repeatedly in the body leading to her death. The paramount sentencing factor in a case like this is the loss of human life attributable to the prisoner's actions. A further important sentencing rationale where death arises from a gross act of domestic violence is to denounce and deter the conduct and protect women. I consider an appropriate starting point to be one of the 15 years imprisonment to reflect the criminality and cruelty inherent in the prisoner's actions.

[11] I now consider the mitigating factors. The probation report indicates that the prisoner has led a life which has been constructive. He is 42 years of age and had lived in Navutoka where the incident occurred. He had been married since 2000, and has four children ranging from 12 to 6. He left secondary school early because of low achievement; however, he seems to have been in gainful employment earning income for his family by taking any job available to him. He has carpentry skills and performed carpentry for employment much of the time. At other times, he fishes for extra income.

[12] He was a talented soccer player and he represented Tonga as a national player and coach and has been involved in various ways training and in workshops. He became assistant coach for the national under 17 boys team for the Oceania Qualifying Tournament in 2013.

[13] His pastor of the Gospel church wrote of problems in the marriage going back 10 years. The prisoner would ask for help in trying to unite his family. He loved he says his wife and children. He was committed to weekly bible studies. His children are plainly the losers also in his offending and the Pastor writes of this, also.

[14] The prisoner has a previous recent conviction for housebreaking for which he received a small fine, and a conviction for driving offences but nothing for personal violence.

[15] The probation report states he is remorseful and that is the impression I got during his evidence when he was tearful, at times. He maintained this also at sentence in a short personal statement.

[16] From the starting point of 15 years, by way of mitigation, I allow Mr Taufahema a discount of three years imprisonment which takes into account his guilty plea to manslaughter, his co-operation with the police, his remorse and his overall history of relatively positive achievement. Taking into account, these mitigating factors, his actions were, however, premeditated and heartless, and I impose a sentence of 12 years imprisonment for manslaughter for which he is convicted. As I have said, I do not regard his difficult marriage or the deceased's perceived infidelity as any mitigation for such a cruel and wanton act. The sentence is to be backdated to the date of his remand in custody.

[17] However, taking into account his co-operation with police, his guilty plea and his expression of remorse, I consider it is unlikely he will be involved in any action of this

kind, or indeed violence of any kind, again. Any criminal history he has does not include violence. I consider he is capable of rehabilitation and there is an indication that he has been involved with religious study in prison, already. Accordingly, I suspend the final two years of his sentence on the following conditions;

a. He is not to commit any offences punishable by a term of
180 imprisonment for two years.

[18] The Solicitor-General is appointed as Guardian ad Litem to report to me as soon as possible as to appropriate arrangements for the custody and welfare of the children under the Guardianship Act. This report should be placed before this Court when this matter will be next considered with a view to appropriate orders being made by me on the 1st March, 2016.

Latu anor v Lavulavu

Supreme Court, Nuku'alofa
Paulsen CJ
CV 90/2014

25 and 30 November, 1-4, 8, 9, 14-16 December; 29 January 2016

Electoral law – petition alleged bribery and overspending on election campaign – allegations proved – election of respondent was declared void

On 30 September 2014, His Majesty the King issued the writs of election to hold elections of the Representatives of the Nobles and of the People to the Legislative Assembly on 27 November 2014. Mr Lavulavu won election as the Peoples' Representative for the Vava'u No. 16 Electoral District. The petitioners, Dr Latu and 'Aisea Silivenusi, had stood unsuccessfully for election in the same constituency. They made an election petition under section 25 of the Electoral Act 1989 (the Act) challenging Mr Lavulavu's election. The petition alleged that Mr Lavulavu committed bribery in breach of section 21(1)(a) of the Act and spent more than the permissible sum of $10,000 on his election campaign in breach of section 24(1) of the Act. The petition sought to have the election of Mr Lavulavu declared void under section 32 of the Act.

Held:

1. It was established that on 26 November 2014 Mr Lavulavu gave Mrs Melekiola and Mrs Lau'i a gift of TOP$50. They were registered electors. Mr Lavulavu failed to discharge his burden to prove that the gift was made for some reason other than to influence their votes. The court found that the allegation that the gift was a bribe was proved.
2. It was established that on 26 November 2014 Mr Lavulavu gave the Sei 'o Lepuha Weavers a gift of TOP$100. Of the weavers present it was proved that Uinifou Fili and 'Alilia Talakai were registered electors. Mr Lavulavu failed to discharge his burden to prove that the gift was made for some reason other than to influence their votes. The court found that the allegation that the gift was a bribe was proved.
3. It was established that on 26 November 2014 Mrs Lavulavu indirectly gave, on behalf of Mr Lavulavu, TOP$4,000 to electors of the district at the prize giving. Mr Lavulavu failed to discharge his burden to prove that the money was given for some reason other than to influence the electors' votes. The court found that the allegation that the payment was a bribe was proved.
4. As to the fourth allegation of bribery, although the coral rocks were undoubtedly donated it cannot be said that they were given to or for any identifiable elector or electors. The roads paved with the coral rocks benefit and were available for use by everyone in Vava'u. For that reason the court

found that the allegation that the donation of the coral rocks was a bribe was not proved. The court therefore needed to consider Dr Latu's alternative argument that the donation of the coral rocks was an undisclosed election expense.

5. The court found that both the money to pay the costs of the road works and the coral rocks were provided by Mr Lavulavu. Mr. Lavulavu was in total control of every aspect of road works and the Vava'u Road Works Council, Inc had no part to play in the road works.
6. If the spending on the road works was for a charitable purpose, that sum was to be disregarded. The court found that the payments were not made for a charitable purpose. They were made for the purpose of Mr Lavulavu's election campaign. When a payment was made for a mix of charitable and non-charitable purposes it was not sufficient if the charitable purpose was merely "ancillary in the sense that it was secondary, subordinate or incidental" to a non-charitable purpose.
7. It was proved that Mr Lavulavu failed to disclose spending on his election campaign amounting to $67,550.07 (the sum of the amounts for fuel, wages to the operators of the heavy machines, the hire of a bulldozer, $19,550.07, and $48,000 for the coral rocks). When one took account of the amount he declared in his return to the Supervisor of Elections, $6,360, Mr Lavulavu's spend on his campaign amounted to $73,910.07. There was no doubt that Mr Lavulavu made these payments knowingly and intentionally and the court was satisfied that it was established that he committed an offence.
8. The court made the declaration that Mr Lavulavu committed bribery on three occasions, and made the further declaration that Mr Lavulavu overspent on his election campaign. In respect of each matter, pursuant to section 32 of the Electoral Act 1989, the court made a declaration that the election of 'Etuate Sungalu Lavulavu on 27 November 2014 as the Peoples' Representative for the Vava'u No. 16 Electoral District was void.

Cases considered:

Ah Him v Amosa [2001] WSSC 16
Attorney-General v Day [1900] 1 Ch 31
Bay of Islands Election Petition [1915] 34 NZLR 578
Belfast Borough Case (1869) 1 O'M & H 281
Director of Public Prosecutions v Luft [1977] AC 962
Education New Zealand Trust, Re [2010] NZHC 1097
Electors of the Constituency of Matavera v Cowan [1983] CKHC 5
Faitua v Vaelupe [2011] WSSC 50
Fasi v Pohiva [1990] Tonga LR 79
Fasi v Pohiva (No 2) [1990] Tonga LR 156
Fusitu'a v Ta'ofi & 'Aho [1996] Tonga LR 102
Great Yarmouth Borough Case (1906) 5 O'M & H 176
Greenpeace, Re [2014] NZSC 105
Ha'apio v Keniasina [2011] SBHC 177
Haomae v Bartlett [1988-1989] SILR 35
Hastings Election (1869) 1 O'M & H 217
Henslow v Fawcett (1835) 3 Ad & El 51
Kalsakau v Principal Electoral Officer [2013] VUSC 99
Kingston-upon-Hull (1911) 6 O'M & H 389

Launceston (1874) 2 O'M & H 129
Petaia v Pa'u [2007] WSSC 15 January 2007
Posala v Su'a [2006] WSSC 29
Salemalo v Tari [1998] VUSC 46
Scott v Martin (1988) 14 NSWLR 663
Wigan Case; Spencer & Presst v Powell (1881) 4 O'M & H 1
Wigmore v Matapo [2005] CKCA 1
Z v Dental Complaints Assessment Committee [2009] 1 NZLR 1

Statutes considered:
Charitable Trusts Act 1993
Electoral Act 1989

Counsel for the first petitioner : Mr WC Edwards Snr SC
Counsel for the respondent : Mr S Tu'utafaiva

Ruling

The petition

[1] On 30 September 2014, His Majesty the King issued the writs of election to hold elections of the Representatives of the Nobles and of the People to the Legislative Assembly on 27 November 2014. 'Etuate Sungalu Lavulavu (Mr. Lavulavu) won election as the Peoples' Representative for the Vava'u No. 16 Electoral District. The petitioners, Viliami Uasike Latu (Dr. Latu) and 'Aisea Silivenusi, had stood unsuccessfully for election in the same constituency. This is an election petition under section 25 of the Electoral Act 1989 (the Act) challenging Mr. Lavulavu's election. The petition alleges that Mr. Lavulavu committed bribery in breach of section 21(1)(a) of the Act and spent more than the permissible sum of TOP$10,000 on his election campaign in breach of section 24(1) of the Act. The petition seeks to have the election of Mr. Lavulavu declared void under section 32 of the Act.

The second petitioner and the delayed start of the trial

[2] On 23 October 2015, before the trial of the petition commenced, the second petitioner, 'Aisea Silivenusi, filed a notice of his intention to withdraw his petition. He made no appearance before the Court on that application or at the trial. Because the petition was filed jointly with Dr. Latu, I refused his application to withdraw it. The petition was advanced by Dr. Latu.

[3] The trial was scheduled to commence on 25 November 2015. Two adjournments were granted to Mr. Lavulavu to allow his Counsel, who had only latterly been instructed, to prepare for the trial. By consent, the witness Uinifou Fili gave her evidence on 25 November 2015 as she was to travel overseas on 26 November 2015. The trial proper commenced on 1 December 2015. Over the course of 11 days I heard from a total of 26 witnesses with 11 witnesses being called to give evidence by Dr. Latu and 15 witnesses being called to give evidence by Mr. Lavulavu.

Amendment of the pleadings

[4] Both parties applied to amend their pleadings during the trial.

[5] In opening Dr. Latu's case Mr. Edwards applied to amend subparagraphs v, vi, vii, viii and ix of the third particulars of paragraph 5 of the petition and to add a new subparagraph x. The amendments related to the scope and value of road works that it is alleged Mr. Lavulavu undertook as part of his election campaign. The detail of those amendments is set out in paragraph 25 of Mr. Edward's opening submissions. The amendments were not opposed by Mr. Lavulavu and I allowed them accordingly.

[6] Mr. Lavulavu sought to amend his defence during closing submissions. The amendments are set out in paragraphs 7(ii), 8(ii) and 10(ii) of Mr. Tu'utafaiva's closing submissions. The amendments reflect a significant change in Mr. Lavulavu's position, particularly in relation to the road works to which I have just referred. Specifically, in his statement of defence Mr. Lavulavu had admitted that he was the owner of a quarry at Ta'anea which supplied the coral rocks for the road works. He also admitted that he had since 2008 planned to pave roads in the Vava'u No. 16 Electoral District with the coral rocks and that he had given coral rocks to be used by the people for roading purposes. The proposed amendments, in effect, denied what was formerly admitted and added a pleading that the road works were undertaken by the Vava'u Road Works Council, Inc. After hearing from Counsel I reserved my decision on whether I would allow these amendments.

[7] An amendment to pleadings should be allowed, even at a late stage, if it exposes the true issue to be resolved between the parties and will not cause any prejudice or injury to the opposing party that cannot be compensated in costs. Mr. Edwards did not argue that Dr. Latu would suffer prejudice should the amendments be allowed although I consider that undoubtedly there will be some prejudice as the line of Mr. Edward's questioning of some witnesses reflected the admissions Mr. Lavulavu now resiles from. However, I understood Mr. Edwards to be saying that Dr. Latu's ability to prove his case was not reliant upon those admissions. Mr. Edwards did not apply for an adjournment or to call any further evidence to respond to Mr. Lavulavu's changed position. On balance I have decided to allow the amendments.

The real justice and merits

[8] In my consideration of the evidence I have noted section 35 of the Act which provides:

> On the trial of any election petition —
>
> (a) the Court shall be guided by the substantial merits and justice of the case without regard to legal forms or technicalities;
> (b) the Court may admit such evidence as in its opinion may assist it to deal effectively with the case, notwithstanding that the evidence may not otherwise be admissible in the Supreme Court.

[9] I have also reflected upon the comments of Hampton CJ in *Fusitu'a v Ta'ofi & 'Aho* [1996] Tonga LR 102, 104 – 105 that section 35 is a sensible provision in an area where "the smallest of actions tend to be, or can be, put under the most powerful magnification."

[10] The briefs of evidence contained much hearsay and opinion, which would not otherwise be admissible, along with irrelevant material. This was particularly so with the briefs of Mr. Lavulavu's witnesses. A further issue was that Mr. Lavulavu failed to provide proper discovery and produced and relied upon documents which were not disclosed before the trial and which were submitted to the Court in tranches as the trial progressed. He blamed his former lawyer for the inadequate discovery but also said that he had signed his affidavit of documents without reading it. In many cases the provenance of the documents that Mr. Lavulavu has produced is uncertain and their authenticity disputed.

[11] Notwithstanding all that, and consistent with section 35, I have considered all that was put before me.

Credibility

[12] I have had to make assessments as to the credibility of many of the witnesses before arriving at my conclusions. I have been very mindful that the concept of credibility encompasses the two principal notions of truthfulness and error and that a witness can be truthful but mistaken (New Zealand Law Commission 'Evidence Law: Character and Credibility' Preliminary Paper No. 27, 28 April 1997). I have been slow to conclude that any witness was intending to mislead the Court but I believe in some instances that this was the case.

[13] Of the parties I have formed very different impressions. Dr. Latu's evidence was within a relatively small compass. His credibility was never undermined and he impressed me as an intelligent, considered and honest witness. I am of the view that Mr. Lavulavu was not a credible witness. Whilst I do not reject all that he has said, I consider that his intention throughout this trial was to dissociate himself from his own conduct and to obfuscate rather than inform.

[14] Often Mr. Lavulavu's evidence was simply implausible. His assertion that he had stopped campaigning well before the election because he was certain he would win is an example. His answers to questions in cross examination were evasive. On occasions I had reason to consider that he was being untruthful. As an example, he denied having referred to himself using the title of Professor. In the course of the trial documents were produced showing that he had used that title. He denied knowledge of matters when his knowledge could not seriously be in doubt. For example, Mr. Lavulavu denied knowing whether he was a Minister and he denied knowing if he had been invited to visit the house of a witness, Mrs. Kika Melekiola, when it was plain from his own evidence that he had not been invited. There are many other examples. Mr. Lavulavu offered explanations by reference to documents that were not discovered and not put before the Court and could not therefore be subject to any effective challenge. He asserted, for instance, that he had a photograph with Mrs. Kika Melekiola and others at a meeting of the Leimatu'a Growers and Women Development Association but it was never produced. He said that the records of the Vava'u Road Works Council, Inc were up to date and kept according to law but no such records were produced. Again, these are just examples. On a surprising number of occasions Mr. Lavulavu accused other

witnesses of lying. Uinifou Fili, Mateaki Guttenbeil, Lolotonga Sekeni and Foaki Fanua were all said to be liars. Given the frequency of the accusation this left a very poor impression with me.

Some context

[15] In this section I will briefly identify three entities which feature in this case.

UTRI

[16] In 2003 Mr. Lavulavu founded the 'Unuaki 'o Tonga Royal University. It was incorporated in 2006. In 2010 he founded the 'Unuaki 'o Tonga Royal Institute which was incorporated that same year. Both are non-profit educational organisations and they go under the acronym UTRI. Mr Lavulavu's wife, 'Akosita Lavulavu, is the Dean of UTRI. Mr. Lavulavu says he has not been involved with UTRI since early 2014. UTRI is alleged to have put its resources behind Mr. Lavulavu's election campaign.

Leimatu'a Growers and Women Development Association

[17] In September 2014 the Leimatu'a Growers and Women Development Association (the Association) was formed by Lolotonga Sekeni, Mr. Lavulavu and others. The *raison d'etre* of the Association was to find overseas markets for the crops of the local growers. At an early meeting a decision was made that the Association would also improve the roads in the district. From September 2014 until the evening of 26 November 2014 (the eve of the General Election) 47 roads (eight kilometres) were ploughed, rolled and paved in the eight villages of Feletoa, Ta'anea, Holeva, Koloa, Mataika, Houma, Leimatu'a and Tu'anekivale. Those villages are within the Vava'u No. 16 Electoral District. Dr. Latu asserts that the road works were carried out by Mr. Lavulavu and that the Association was a vehicle for Mr. Lavulavu's election campaign

The Vava'u Road Works Council, Inc

[18] In September 2008 Mr. Lavulavu made an application to incorporate the Vava'u Road Works Council, Inc (the Council). It was incorporated on 10 November 2008. The object of the Council was stated in its Rules to be to "solely focus on work conducted on Public Roads". Mr. Lavulavu says that in October 2009 variations were passed to the Rules of the Council as a result of which there was a new Board and he took charge of the Council as its Chief Executive. Mr. Lavulavu also says that it was the Council, and not him personally, that carried out the road works to which I have referred.

Areas of controversy

[19] There are three broad areas of controversy which I describe below under the headings 'Cash payments', 'The Growers Association' and the 'Coral rocks and spending on road works'.

Cash payments

[20] On the eve of the 2014 General Election, that is 26 November 2014, Mr. Lavulavu gave a cash payment of TOP$50 to Kika Melekiola and Vai Lau'i and of TOP$100 to the Sei 'o Lepuha Weavers Group. Dr. Latu says those gifts were bribes in breach of section 21(1)(a). In the alternative, he says those sums were election expenses under section 24 that Mr. Lavulavu failed to include in his return to the Supervisor of Elections. Mr. Lavulavu says that the gifts were for refreshments in accordance with Tongan custom and were not bribes.

The Growers Association

[21] On 26 November 2014 the Association held a social gathering and prize giving (the prize giving). 'Akosita Lavulavu gave TOP$4,000 to be used that evening for cash prizes. In total eighty prizes of TOP$50 were awarded. Dr. Latu argues that the money was a pretext for promoting Mr. Lavulavu's election campaign and was a bribe in breach of section 21(1)(a). In the alternative, Dr. Latu says that the TOP$4,000 was an undeclared expense spent on Mr. Lavulavu's election campaign. Mr. Lavulavu denies the money was given as part of his election campaign or on his behalf and says it was not a bribe.

Coral rocks and spending on road works

[22] Dr. Latu argues that the coral rocks used to pave the 47 roads was a valuable gift given by Mr. Lavulavu to the electors to induce them to vote and was therefore a bribe in breach of section 21(1)(a). Mr. Lavulavu denies that he donated the coral rocks as part of his election campaign (or at all) and says they were not a bribe. Dr. Latu also argues that money spent on the road works for the hire of a bulldozer, the purchase of fuel and for the wages of heavy machine operators (as well as the value of the coral rocks if they were not given as a bribe) were Mr. Lavulavu's undeclared election expenses which exceeded, by a considerable margin, the permitted sum of TOP$10,000 under section 24(1). Mr. Lavulavu has adopted a scattergun approach in defence. Mr. Lavulavu says the road works were undertaken by the Vava'u Road Works Council, Inc and were not part of his election campaign. He also denies paying any costs associated with the road works and says that they were paid from money gifted by Saia Moehau. He denies gifting the coral rocks and says they were gifted by Sione Tui. He disputes the value of the coral rocks and says that Dr. Latu's valuation of TOP$68,160 is substantially wrong. In the alternative, Mr. Lavulavu argues that any sums expended were for charitable purposes and are not to be brought into account in calculating his election expenses.

[23] In this ruling I deal first with the allegations of bribery and then the allegation that Mr. Lavulavu overspent on his election campaign.

Bribery

[24] Dr. Latu relies upon section 21(1)(a) which provides:

> (1) Every person commits the offence of bribery who, directly or indirectly, by himself or by any other person on his behalf —

> (a) gives any money or valuable gift to or for any elector, or to or for any other person on behalf of any elector or to or for any other person, in order to induce any elector to vote or refrain from voting...

[25] Also relevant for present purposes are sections 21(2) and (3) which are in the following terms:

> (2) In this section, a reference to giving money or valuable gift includes a reference to giving, lending, agreeing to give or lend, offering, promising or promising to procure or try to procure, any money or valuable gift.
>
> (3) For the purposes of this section, any money or valuable gift given or offered or agreed to be given (in the absence of good consideration) to any person (except a person named in section 24(3)) within 3 months of any election by or on behalf of a candidate, shall be deemed to have been given or offered or agreed to be given for the purpose of influencing the vote, unless the contrary be proved.

[26] There are four allegations of bribery against Mr. Lavulavu. Under section 32(1) any one of the allegations of bribery, if proved, will result in the automatic avoidance of Mr. Lavulavu's election and the Court will not be concerned to weigh the relative importance of the conduct or allow any excuse (*Halsbury's*, 3rd Ed, Vol 15 paragraph 780).

[27] The words "in order to induce any elector to vote or refrain from voting" in section 21(1)(a) are directed to actions taken to influence an elector or electors in the exercise of their voting rights. It is not necessary to prove that such actions did in fact produce any effect on the election (*Scott v Martin* (1988) 14 NSWLR 663, 670 and *Henslow v Fawcett* (1835) 3 Ad & El 51, 58).

[28] A candidate for election may make a payment or valuable gift for mixed motives. He may, for instance, make a gift for charitable purposes. There is nothing wrong with that. But he may also make a gift to buy votes. That is bribery. There is no requirement that a wrong motive must be the dominant one. It will be sufficient for the purposes of section 21(1)(a) if one significant motive was to influence the vote (*Director of Public Prosecutions v Luft* [1977] AC 962, 983, *Scott v Martin* at 672 and *Wigmore v Matapo* [2005] CKCA 1 at [37]).

[29] As to the burden and standard of proof, Mr. Tu'utafaiva relied upon *Fusitu'a* (supra) which is authority that the burden is upon the petitioner to prove what he alleges and given the gravity of allegations of bribery, and the very serious consequences that flow from such a finding, the proof required, although on the balance of probabilities, is to a higher level than in the ordinary civil case (*Fasi v Pohiva* [1990] Tonga LR 79, 81 per Martin CJ). This does not mean that the standard of proof is any different than in other civil cases. The standard of proof does not fluctuate, rather the quality of the evidence required to meet what is a fixed standard may differ in cogency depending on what is at stake (*Kalsakau v Principal Electoral Officer* [2013] VUSC 99, *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1 at [101] per McGrath J).

[30] There is an exception to the general burden of proof contained in section 21(3) that has an important role to play in this case. Where a candidate (or any person on their behalf) has given money or any valuable gift within three months of the election, that money or valuable gift shall be deemed to have been given to influence the vote, unless the contrary is proved. This is subject to some exceptions which are not relevant to this case. I again refer to the judgment of Martin CJ. in *Fasi* (supra) where he said, at page 81:

> It is for the Respondent to prove that a gift made within 3 months of the election was innocent; any other gift is presumed innocent until the petitioner proves otherwise.

[31] The standard of proof in a case where section 21(3) applies is the ordinary civil standard of on the balance of probabilities (*Fusitu'a* (supra) at page 105).

[32] There will rarely be an acknowledgement from a candidate that some payment or valuable gift was given to buy votes and so it is in this case. Such intention, if established, will usually only be gathered from acts viewed against all the circumstances of the case. In *Launceston* (1874) 2 O'M & H 129, 133 Mellor. J said:

> I cannot go into any intention of the respondent, I must be governed by what he said and what he did, and by inferences I ought to draw therefrom.

[33] I refer also to *Kingston-upon-Hull* (1911) 6 O'M & H 389 where Bucknill J. said:

> You cannot allow a man to say 'I did not intend to do that which amounted to bribery' if when you look at all of the things which he did there is only one conclusion to draw and that is that he has done that which he said he did not intend to do.

First allegation of bribery - TOP$50 to Kika Melekiola and Vai Lau'i

The facts

[34] Kika Melekiola and her mother, Vai Lau'i, are registered voters in the Vava'u No. 16 Electoral District. On Wednesday, 26 November 2014 at between 3pm and 4pm they were weaving on the veranda of their home at Leimatu'a. Mrs. Melekiola said she was surprised when she looked up and saw Mr. Lavulavu standing in front of her. She knew Mr. Lavulavu as he had formerly been the representative for Vava'u and had made visits to the village and she knew he was standing for election. He had not been invited to the house. Mr. Lavulavu threw TOP$50 to them. He said that they should use the money for refreshments. They had not asked for any money. Mr. Lavulavu invited them to attend the prize giving. He then left.

[35] Under cross examination Mrs. Melekiola denied that she had grown up with Mr. Lavulavu in Leimatu'a. She denied also that there was any conversation with Mr. Lavulavu about his family, her family or growing up together. She was clear, and I accept, that these events occurred on 26 November 2014 as she knew she was to vote the next day.

[36] It was put to Mrs. Melekiola that it was Tongan custom to take some refreshments or food if visiting a person that you had not seen for a long time. She did not accept that proposition and said that she did not randomly give out money to people and when visiting somebody she offered her prayers. She also said that she felt burdened by the gift from Mr. Lavulavu as the only reason he had given the money was because of the election and she did not want the money because she had not decided who to vote for. She did not take the money. It was left for some children who were playing in the backyard.

[37] In his evidence Mr. Lavulavu said that whilst driving he had seen Mrs. Melekiola and Mrs. Lau'i and had stopped to remind them to attend the prize giving. He said Mrs. Melekiola had attended a "great number" of meetings of the Association and that he had a photograph taken with her "where we are all sitting around after the meeting was held with all the members, Kika and I and several other women". Mr. Lavulavu's evidence was that he had been neighbours with Mrs. Melekiola and Mrs. Lau'i when growing up and that they were well acquainted but he had not seen Mrs. Lau'i for over ten years. He also said that both women said that they would attend the prize giving but only Mrs. Melekiola went.

[38] Mr. Lavulavu admits that Mrs. Melekiola and Mrs. Lau'i were registered electors in the Vava'u No. 16 Electoral District. He acknowledges that he gave them TOP$50. The requirements in section 21(1)(a) that money or other valuable gift be given to or for any elector are proved. The only matter in issue is whether Mr. Lavulavu gave the money intending to influence the vote or for refreshments in accordance with Tongan custom.

Custom and elections in the Pacific

[39] I have had regard to case law in other Pacific Island Countries which provide guidance as to the considerations that arise when there is tension at the interface between custom and modern electoral processes. I have reminded myself that I must approach such cases with a degree of caution. Electoral statutes vary between countries. Customs vary between countries and even within countries. Furthermore, custom is given less recognition in the written laws of Tonga than elsewhere in the Pacific.

[40] *Posala v Su'a* [2006] WSSC 29 involved a challenge to an election result alleging bribery and treating. In relation to the observance of customary practices the Supreme Court of Samoa noted at [14]:

> Samoan culture is steeped in ritual with gift giving or exchange, its return and the obligations created, central to that culture. Matai is a proud title of status and respect. But gifts made during and in the run-up to an election in the guise of culture and tradition and the payment of moneys during the same period, are capable of corrupting the election process and poisoning both culture and the nation.

[41] In Vanuatu the Supreme Court in *Salemalo v Tari* [1998] VUSC 46 recognised the risks of both ignoring custom and in upholding it for all actions in an electoral context. Lunabek ACJ said:

> … A genuine intention to perform a custom ceremony is not an intention to induce electors to vote or procure the election of a candidate and is not contrary to election laws. There is no law in Vanuatu which requires custom to be suspended at election time. A custom either exists or it does not. If it exists then it ought to be respected at all times. Any custom that can be ignored at will is meaningless.
>
> ...
>
> It is clear from the lessons of history that the price to be paid for failure to cherish and uphold the customs and traditions of Vanuatu, is a heavy one: the loss forever of a national identity and way of life.
>
> The Representation of the People's Act [CAP 146] does not present an obstacle to the showing of due respect for custom. The two are not inconsistent. A candidate in an election cannot be found guilty of a corrupt practice if his only intention was to perform custom ceremonies. No inference of a corrupt intention ought to be drawn solely because a candidate received or offers custom mat in a custom ceremony.

[42] In the Solomon Islands in *Ha'apio v Keniasina* [2011] SBHC 177 the High Court said:

> What is said in general terms by the Respondent is the cash and other items were handed out in accordance with custom and/or to close family members or supporters. The implication seems to be if "gifts" are handed out for reasons of custom or to family members or supporters they cannot in any circumstances be said to be corruptly given. I do not accept that. The, admittedly obiter, comments of Ward CJ in *Haomae v Bartlett* [1988-1989] SILR 35, seem to have been forgotten.
>
> > "In an election, any candidate will be subject to customary pressures to make gifts which he will feel he is obliged to observe. However, the giving of money is always likely to be misconstrued. In this case the sum was not large but, in the context of an old village man who had little other access to cash, its effect could be substantial. No hard and fast rule can be read into the provisions of section 70 but any candidate would be wise to try and avoid any gifts of money during an election campaign and, in all cases where the circumstances of the giving themselves do not do so, he should make it clear that the gift is made in custom and ensure it is appropriate in scale to such gifts."

[43] And finally in the Cook Islands in *Electors of the Constituency of Matavera v Cowan* [1983] CKHC 5 Speight CJ said:

> The imminence of political election does not require that, that man or any other candidate should modify his previous way of life by becoming a hermit. For example a man who is a political candidate may have been a prominent member of a sporting organisation. He may from year to year have made a generous donation such as the presentation of a competition trophy and it would not be expected of him that he was debarred from repeating such generosity because it is election year. At the same time of course, it would be expected that he should not make extra capital of that occasion because he was hoping to encourage voters to take a friendly view of him. Similarly, a man may be a donator to his church and no improper conclusions could be made if he continued at the same level as previously; a vigorous social worker who goes and helps people for no reward should not be deterred from his ordinary behaviour by the imminence of the ballot box.
>
> On the other hand any suggestion that extra exertion has been expended which would not otherwise have been present but for the need to court the favour of the voters if it is raised comes under close scrutiny in Electoral courts. So too, what might ordinarily be regarded as generosity and kindliness typical of the nature of the individual becomes suspect if it is coupled with exhortations to vote for the particular person. Consequently, the gifts given or kindness offered may at such a time be scrutinised. Typical questions which will be asked are: "Is this typical of the man's way of life?" "Has he done it before?" or is this a sudden advent of generosity? Or again "Has he attempted to convert his usual kindness into a special occasion by drawing the attention of those to whom benefit is offered to the fact that he needs their vote?" It is a question of looking at all the circumstances with an understanding eye.

Was the gift made to influence the vote?

[44] Martin CJ. said in *Fasi* at page 106:

> When a gift has been made by a candidate, the court has to determine why he made it – what his intention was. If it was made with the intention of persuading people to vote for him, it was a bribe. If it was made with some other intention, it was not a bribe.

[45] As the money was given to Mrs. Melekiola and Mrs. Lau'i within three months of the election it is presumed that Mr. Lavulavu intended to influence the vote, unless he can prove otherwise.

[46] Mr. Lavulavu says that Tongan custom requires a gift of refreshments to be offered on certain occasions which include when visiting a friend one has not seen for a long time or visiting a weaving house. He likened the offer of refreshments (or money in lieu) to the ma'u kava expected of men when taking part in a faikava. He said "I interpret it as my ma'u kava" and:

> The spirit in which I made this offering was meant for just small refreshment liken to the ma'u kava for the men. For the women it is called refreshment. But they both refer to the same thing.

[47] He went on to say that:

> There are some things that you take with you to the kava drinking or greeting a friend or family or a gathering and you do not just walk in without taking with you one of these things.

[48] Mr. Lavulavu also claimed that during the election Dr. Latu and 'Aisea Silivenusi had offered refreshments in the form of food, drinks and money on a number of occasions and he gave various examples where he understood this had occurred but he had not personally observed any of them.

[50] The existence of such a custom is not accepted by Dr. Latu. In his evidence Dr. Latu recognised the 'age-old social practise of ma'u kava' but stressed that the practice involved the presentation of kava, usually in the form of dried kava sticks or pieces or kava powder, at kava drinking 'gatherings' such as funerals, weddings and church meetings. He said that the presentation of ma'u kava was part of a gift giving and gift receiving practise where "people are expected as a group to collectively help each other by giving and receiving". He did not accept that the giving of a gift of money could be construed as Tongan custom and said that the gifting of money during election time would be understood to be an attempt to entice or influence the vote. This was because the gifting of money could only mean that a favour was expected in return. There was support for that view in the evidence of Mrs. Melekiola that she felt burdened by Mr. Lavulavu's gift and in the evidence of Livingi Katoa, who refused to collect his prize at the prize giving because he thought it was wrong and had he done so he would have owed Mr. Lavulavu a favour.

[51] In cross examination Dr. Latu denied that during his election campaign he had visited weaving halls and left refreshments but did acknowledge that he had held a campaign meeting on 24 November 2014 at the Leimatu'a Town Hall where there had been speeches and free food and kava drinking. He said that the food had been provided because the attendees were there for a long time and that the cost of the gifts of food and kava had been declared to the Supervisor of Elections.

[52] Relevant to the existence of custom, there was also the evidence of Mrs Melekiola, to which I have already referred, and from Uinifou Fili and 'Alilia Talakai, who are weavers and had been present when on 26 November 2014 Mr. Lavulavu gifted TOP$100 to the Sei 'o Lepuha weavers. Uinifou Fili and 'Alilia Talakai both said that they believed that the gift was intended to influence their vote and not made by custom.

[53] Mr. Lavulavu called as witnesses Olivia 'Afu, Selai 'Afu, Tomitila Paea and Maumi Lau'i who are also weavers and gave evidence that candidates, including Dr. Latu, had visited their weaving houses during the election and had left refreshments of food and drink. The four witnesses were of the view that the giving of refreshments was the Tongan way and not an attempt to influence their votes.

[54] Dr. Latu's denial that he had offered refreshments at the weaving houses gained some support from the evidence of 'Alilia Talakai who is in the same weaving group as Olivia 'Afu and recalled Dr. Latu visiting the weaving house but said that he did not come with food and refreshments. I accept the evidence of Dr. Latu and 'Alilia Talakai. I found the evidence of the weavers unconvincing. I was concerned that they were prepared to unnecessarily accuse Dr. Latu of jealousy, hatred and malice. This suggested personal animosity. Their briefs of evidence contained an unacceptable number of errors and Olivia 'Afu, Selia 'Afu and Tomitila Paea all blamed those errors on the person who had prepared their briefs. Of particular note in this regard was the brief of evidence of Olivia 'Afu. The most relevant paragraphs relating to Tongan custom (paragraphs 12, 13, 14 and 15) were shown to be substantially untrue.

[55] My assessment is that the evidence of the weavers sheds little light on the existence of a relevant Tongan custom.

[56] There was also evidence from Mr. Mapa Hafoka. He is 83 years old and a talking chief of Ha'alaufuli. He was called as a witness for Mr. Lavulavu on matters of fact but also expressed views on Tongan custom. He said that he had a large knowledge of Tongan values and culture but nothing was presented to establish his expertise or an evidential foundation for the views he expressed.

[57] Mr. Hafoka stated in his evidence in chief that presenting ma'u kava was the same as presenting refreshments (or fakamokomoko) when visiting a weaving house and that no one should go empty handed to a weaving house but should take a 'presentation' and that nowadays money was the best thing for a presentation. However, when answering questions from both Mr. Tu'utafaiva and Mr. Edwards he said that ma'u kava and refreshments where offered when attending a 'ceremony' and that the purpose of the offering is to "give you an opportunity to give a speech or allow yourself to participate in the discussion" as well as providing assistance and promoting respect and good relations. When asked whether a candidate in an election should visit with ma'u kava Mr. Hafoka agreed with Mr. Edwards that there was no custom or "way of life" about that. He said that it is a matter where each person is free to do as they wanted. Mr. Hafoka said it would be wrong for a candidate to give money if an election was to be held the next day and that was influencing the vote.

[58] If the Court is to recognise custom it must be accurately and definitely established and the onus to do so is on the party who asserts its existence. In this case that is Mr. Lavulavu. Custom might be proved in a number of ways. It might be proved by calling evidence from an independent and impartial expert or from persons who could be expected to know that the custom is generally observed or was observed on particular instances in circumstances directly relevant to the facts of the case or by reference to authoritative texts or judicial decisions. In this case there was an absence of such evidence.

[59] The Supreme Court of Samoa noted in *Ah Him v Amosa* [2001] WSSC 16:

> The Court will be particularly astute in scrutinizing evidence of custom to see that custom is not used as a veil to obscure what is in actual fact an intention to induce or influence an elector to vote for a candidate at an election time.

[60] An Election Court should be especially mindful of this when the custom advocated for is expressed in such wide terms that it could easily be abused. That is the case here. How mischievous and damaging to the electoral system of Tonga would it be if the wholesale distribution of cash payments by candidates to voters could be defensible as gifts to old friends? Bribery would very soon be justified upon the ground that it was the custom to "take a coin for a vote" (*Great Yarmouth Borough Case* (1906) 5 O'M & H 176, 193 per Channell J. referred to in *Halsbury's* (supra) at paragraph 782 fn 17).

[61] Tongan custom does recognise rituals involving gift giving and exchange. There does not seem to be any doubt that a ma'u kava is usually offered when participating in a kava drinking ceremony but, as Mr. Edwards submitted, it does not follow that the payment of cash can be equated with a ma'u kava. I accept also that there would be an expectation that one will give a gift or make an offering when attending a wedding or funeral. However, the evidence presented goes nowhere near satisfying me that Tongan custom requires the offering of refreshments (or money) when one visits a friend one has not seen for some time.

[62] It was not proved either that there is an obligation arising from custom to make an offering of refreshments when visiting a weaving house. It may be the case that some candidates do offer refreshments when visiting a weaving house. It may also be the case that an offer of modest refreshments to be consumed immediately would not, depending on all the circumstances, be regarded as a bribe (*Halsbury's* (supra) at paragraph 769). I express no particular view on that. Certainly one can expect that a candidate for election who wishes to address a weaving house will be more favourably received if he offers some food or drink to the weavers. As Mr. Hafoka said, the offering of refreshments provides you with an opportunity to make a speech and also that:

> ... when you visit a weaving group, they do not care that you visited but if you bring with you lemonade then the weaving group of the women would be very pleased and very happy to see you.

[63] Whether such an offering is made is up to the candidate. In visiting a weaving house he is not attending a custom ceremony and providing an offering is not something that he is required to do. There is much force in the view that a custom that is optional or may be ignored is meaningless (*Salemalo* (supra)).

[64] Mr. Lavulavu has failed to establish the existence of a relevant Tongan custom that required the gifting of refreshments (or cash in lieu) to Mrs. Melekiola and Mrs. Lau'i.

Factors other than custom

[65] In support of his submission that Mr. Lavulavu had made the gift for refreshments, Mr. Tu'utafaiva referred me to the evidence of Mr. Lavulavu that he had long finished his campaign at the time the gift was made because he knew he would win the election. He also relied upon Mr. Lavulavu's evidence that he knew the law and would not have been fool enough to break the law. Finally, he submitted that it was relevant that Mr. Lavulavu admitted to having made payments for refreshments on other occasions.

[66] Mr. Lavulavu was unclear as to when he finished his campaign. At one point he said that he was satisfied that he was going to win the election before any roads were paved. That would suggest his campaign ended during September 2014 with the election still two months away. His evidence defies common sense and is contrived. The circumstances were that Mr. Lavulavu was seeking re-election having failed to be elected to the Legislative Assembly in 2010. The election was of great importance to him. He said that he had been planning his campaign for three years and had visited over 700 homes, as well as all the churches, kava drinking and kavatonga clubs, schools and weaving houses. He had placed advertisements on the radio, he had raised posters and banners and advertised on a bus. I do not accept, in those circumstances, that Mr. Lavulavu would have risked all that and stopped campaigning well before election day and I do not believe that he did so.

[67] The argument that Mr. Lavulavu would not be so foolish as to break the law and that therefore it should be assumed he did not do so is a hackneyed one. It invites the obvious response that, if correct, there would be no work for the Courts or the prisons.

[68] That Mr. Lavalavu made payments for refreshments on other occasions does not of itself suggest a relevant custom, or of his innocent intent, in the absence of some evidence of the circumstances under which those payments were made. There was no evidence of Mr. Lavulavu having made an offering of refreshments (or cash in lieu) when visiting a friend he had not seen for a long time. To the contrary, there was evidence that Mr. Lavulavu had visited over 700 houses during his campaign and he offered them no refreshments or cash.

[69] There are factors that lead to a clear inference that Mr. Lavulavu made the gift intending to influence Mrs. Melekiola and Mrs. Lau'i in their votes. It is significant that the gift was made on the eve of the election. The closer that a gift is made to an election the stronger must be the inference that it is intended to influence the vote of an elector (*Kingston-upon-Hull, Central Division, Case* (1911) 6 O'M & H 372 referred to in *Halsbury's* (supra) at paragraph 774 fn5).

[70] The amount of the gift is also a relevant consideration. Whilst TOP$50 is not a large sum of money, Mrs. Melekiola said that she felt burdened by the gift. In *Ha'apio v Keniasina* (supra) the High Court of the Solomon Islands (at paragraph 30) thought it not at all fanciful that a cash gift of $50 might make a voter feel compelled to vote for a person who gives him the cash and I think that is also the case here. I heard evidence of hardship in Vava'u and that TOP$50 was one day's wages for an operator of a heavy machine working on the road works. I also heard the evidence of Olivia 'Afu that eight weavers of the Sei 'o Lepuha Weavers Group, to whom Mr. Lavulavu gifted $TOP100, had spent just TOP$20 of that sum on their refreshments and divided the balance of the cash between them. It appears to me that TOP$50 was more than Mr. Lavulavu could ever have considered was reasonably required for refreshments.

[71] Another relevant factor is that Mr. Lavulavu's evidence conflicts with Mrs. Melekiola's evidence in important respects. I found Mrs. Melekiola to be devout woman and an honest witness. She was clearly mistaken, but I believe honestly so, when she said that Mr. Lavulavu was at the house for 20 minutes but in all other respects I found her evidence convincing. I do not accept Mr. Lavulavu's evidence that he grew up next door to Mrs. Melekiola and Mrs. Lau'i or that Mrs. Melekiola was a member of the Association or that she said she would attend the prize giving and did in fact attend. Mr. Lavulavu failed to produce the photograph that he said had been taken with her at an Association meeting. It was very clear to me that Mrs. Melekiola had no interest in the Association. I do not believe she attended the prize giving.

[72] My assessment of Mr. Lavulavu's evidence is that he was attempting to create a false impression of a long bond with Mrs. Melekiola and Mrs. Lau'i to provide an innocent explanation for his visit to their home.

[73] Finally, I note that the gift was accompanied by an invitation to the prize giving. For reasons I will give later in this ruling, I consider the prize giving was used by Mr. Lavulavu as part of his election campaign. That the invitation was made makes it even more likely that the gift was intended to influence Mrs. Melekiola's and Mrs. Lau'i's votes. I hasten to add that I would have found this allegation of bribery proved even if there had been no invitation to the prize giving accompanying the gift.

My finding

[74] It has been established that on 26 November 2014 Mr. Lavulavu gave Mrs. Melekiola and Mrs. Lau'i a gift of TOP$50. They were registered electors. Mr. Lavulavu has failed to discharge his burden to prove that the gift was made for some reason other than to influence their votes. I therefore find that the allegation that the gift was a bribe under section 21(1)(a) is proved.

[75] As I have found that the gift was a bribe there will be no need for me to consider Dr. Latu's alternative argument that it was undisclosed spending on Mr. Lavulavu's election expenses.

Second allegation of bribery - TOP$100 to Uinifou Fili and Sei 'o Lepuha Weavers Group

The facts

[76] On Wednesday, 26 November 2014 the Sei 'o Lepuha weaving group was at the Roman Catholic Church Hall of Leimatu'a. Between 3pm and 4pm Mr. Lavulavu arrived uninvited. He asked for a member of the group by the name of Naomi Kavamo'unga and then threw T$100 to Uinifou Fili, who was closest to the door, and said "This is for refreshments". Mrs Fili was a registered elector in the Vava'u No. 16 District. She said in her evidence that Mr. Lavulavu then invited the members of the group to attend the prize giving. She said that the weaving group did not belong to the Association. She had attended just one meeting of the Association and did not consider herself a member. She did not attend the prize giving.

[77] 'Alilia Talakai was also a registered elector in the Vava'u No. 16 Electoral District and a member of the weaving group. She gave evidence that the money gifted by Mr. Lavulavu had not all been used for refreshments but that Olivia 'Afu had changed the money at the shop and purchased some refreshments and each weaver was given TOP$10 cash. She said that there were nine people in the weaving house so it follows that the refreshments cost just TOP$10. Another witness, Olivia 'Afu, agreed that each weaver had received TOP$10 cash but said that there were only eight weavers present. Olivia 'Afu said that the remaining money, which would have been TOP$20, was used for refreshments.

[78] Mr. Lavulavu admits that Uinifou Fili and 'Alilia Talakai are registered voters. He accepts that he visited the weaving house and gifted TOP$100. He said that he was not sure if this occurred on 25 or 26 November 2014 but I find that it occurred on 26 November 2014 and that Mr. Lavulavu had gone from the home of Mrs. Melekiola and Mrs. Lau'i to the weaving house. The requirements in section 21(1)(a) that money or other valuable gift be given to or for any elector are proved. Again, the only matter in issue is whether Mr. Lavulavu gave the money according to custom or intending to influence the vote. The burden of proof is upon Mr. Lavulavu.

Was the gift made to influence the vote?

[79] Mr. Lavulavu has failed to satisfy the burden that is upon him. For reasons I have set out earlier in this ruling he has failed to prove a relevant Tongan custom which required the making of the gift upon visiting the weaving house. That is his only explanation for having made the gift. However, other factors weigh with me also and lead me to the clear view that he made the gift intending to influence the votes of the weavers. There is the fact that the election was imminent, my rejection of Mr. Lavulavu's explanation that he had long since finished his campaign, the fact that the amount of the gift was substantially more than what was reasonably and actually required for refreshments and the fact that the gift was accompanied by an invitation to the prize giving.

My finding

[80] It has been established that on 26 November 2014 Mr. Lavulavu gave the Sei 'o Lepuha Weavers a gift of TOP$100. Of the weavers present it was proved that Uinifou Fili and 'Alilia Talakai were registered electors. Mr. Lavulavu has failed to discharge his burden to prove that the gift was made for some reason other than to influence their votes. I therefore find that the allegation that the gift was a bribe under section 21(1)(a) is proved.

[81] As I have found that the gift was a bribe there will be no need for me to consider Dr. Latu's alternative argument that it was undisclosed spending on Mr. Lavulavu's election expenses.

Third allegation of bribery - TOP $4,000 to Leimatu'a Growers and Women Development Association

The facts

[82] The Association made a decision to hold a social gathering and prize giving and to award prizes to those people who had planted new crops of pandanas and mulberry trees in sufficient numbers on their tax allotments. The evidence of Mr. Lavulavu and other witnesses was that the Association had no money for prizes. Sione Lisala said he asked 'Akosita Lavulavu to find money for the prizes. There are also Committee minutes produced by Mr. Lavulavu that record that the same request was made of Mrs. Lavulavu by the Womens' Development Committee on around 9 October 2014. Mrs. Lavulavu gave evidence that she had been asked by the Chairman to find money for the prizes and that she agreed. She said she had obtained money from an aunt in Australia. This evidence was not challenged and I accept it.

[83] On the evening of 26 November 2014 the Association held the prize giving at the Sila Ki Vai Hall at Leimatu'a. At least 120 people attended although Livingi Katoa said that there were more than 200 people present. There was free food and free kava drinking which for some attendees went on all night. All the meat for the evening was donated by Mr. Lavulavu's nephew, Li'ekina Lavulavu, and some food was supplied by others. The food was prepared, plated and taken to the hall from Li'ekina Lavulavu's home which is also where Mr. Lavulavu was living during his election campaign. Mr. Lavulavu's uncle, Reverend Veikoso, awarded the prizes and led the prayers and hymns. There was a presentation in which Mrs. Lavulavu took part and 80 cash prizes of TOP$50 were awarded. The total value of the cash prizes was TOP$4,000. The entire TOP$4,000 had been given by Mrs. Lavulavu.

[84] Dr. Latu argues that the TOP$4,000 was an indirect gift to electors made on behalf of Mr. Lavulavu to influence the electors' votes and therefore a bribe. Mr. Lavulavu denies that his wife gave the money on his behalf or to influence votes or that the payment had anything whatsoever to do with his election campaign. I regard the issues arising to be:

> [84.1] Did Mrs Lavulavu give the TOP$4,000 for the purposes of section 21(1)(a)?
> [84.2] If so, did she give the money 'to or for any elector'?
> [84.3] Was the TOP$4,000 given 'on behalf' of Mr. Lavulavu?
> [84.4] If so, was it given in order to induce any elector to vote or refrain from voting?

Did 'Akosita Lavulavu give the TOP$4,000?

[85] Section 21(1)(a) requires that a candidate or any other person on their behalf "gives any money or valuable gift". Under section 21(2) the giving of money or other valuable gift includes "giving...agreeing to give...offering, promising or promising to procure or try to procure, any money or valuable gift". Mrs. Lavulavu gave the money in the sense that she offered it, promised to procure and tried to procure it (*Scott v Martin* (supra)). She also gave the money in an ordinary sense. The word 'give' simply means to voluntarily hand over or part with possession of something to another (Collins Concise English Dictionary, Seventh Edition 2008). Mrs. Lavulavu certainly voluntarily handed over possession of the TOP$4,000. It does not matter that the money had come from

her aunt. I am satisfied that for the purposes of section 21(1)(a) Mrs. Lavulavu gave the $TOP4,000.

Was the money given to or for an elector?

[86] The money was given to be used by the Association for cash prizes and that is what it was used for. The prize winners were all people who had planted new crops on their tax allotments in the district. It can be safely assumed that all, or at least a good number, of the prize winners were registered electors. No argument was addressed to me otherwise. In any event, there was acceptable evidence from Livingi Katoa and Lolotonga Sekeni, who were awarded prizes, that they were registered electors in the Vava'u No. 16 Electoral District. It was therefore proved that the money was given 'indirectly' (that is by way of the Association) 'for an elector' for the purposes of section 21(1)(a).

Was the donation made on behalf of Mr Lavulavu?

[87] The starting point must be that Mr. Lavulavu will be responsible for the conduct of his agent. In an election context the case law establishes that a person may become a candidate's agent by either actual appointment or employment or by recognition and acceptance of their actions by the candidate. In determining whether agency is established all the circumstances should be taken into account (*Bay of Islands Election Petition* [1915] 34 NZLR 578, *Petaia v Pa'u* [2007] WSSC 15 January 2007 referred to in *Faitua v Vaelupe* [2011] WSSC 50). Personal intimacy is evidence of agency. In the case of a candidate's wife, where she concerns herself in her husband's election she is *ipso facto* regarded as his agent and is taken to have acted on his behalf (*Halsbury's* (supra) at paragraph 703, *Faitua v Vaelupe* [2011] WSSC 50 and *Hastings Election* (1869) 1 O'M & H 217).

[88] The following facts were proved to my satisfaction. First, that Mr. Lavulavu used the Association as a vehicle for his election campaign. Secondly, that Mrs. Lavulavu actively participated in her husband's election campaign. Thirdly, that Mrs. Lavulavu made the donation for the purposes of Mr. Lavulavu's election campaign and, fourthly, that the donation was made with Mr. Lavulavu's knowledge and consent. It must follow that Mrs. Lavulavu made the donation on behalf of Mr. Lavulavu. I will now set out the evidence that has a bearing on these matters.

Mr Lavulavu's use of the Association for his campaign

[89] The decision to form the Association was made in early September 2014 at a kava drinking session at the Leimatu'a Wesleyan Hall. Mr. Lavulavu attended that meeting. Within a period of a few days there were two further meetings at which a Committee was appointed and the objectives of the Association were agreed upon. Decisions were made to extend the Association beyond Leimatu'a and to include women weavers. From the beginning Mr. Lavulavu took a prominent role in the Association. Sione Lisala said that it was left to Lolotonga Sekeni and 'Etuate Lavulavu to take care of overseas marketing and to establish the laws for the Association and registration to become a legal body. However, Lolotonga Sekeni left the Association after the second meeting feeling disenchanted with its direction and, he said, because Mr. Lavulavu was using the Association for his political campaign.

[90] It was also decided in these first meetings that the Association would improve the roads in the district. The state of the roads in Vava'u had been a matter of public concern for many years and there was little Government money to maintain or improve them. There was evidence that a petition had been presented to Parliament in 2008 seeking money to buy heavy machines for road works from New Zealand but it was not until 2013 that machines were provided by China Aid. Lolotonga Sekeni said that Mr. Lavulavu promoted the idea of improving the roads and said that they could start work while looking for markets and that they could use rocks from his quarry to pave the roads. Sione Lisala's evidence was that Mr. Lavulavu was asked to find a way to fill the roads and that he said he would do what he could to fulfil the request. There was evidence from Mr. Lavulavu and Mapa Hafoka that well before this, in February 2014, Mr. Lavulavu had agreed to a request by Mapa Hafoka and Paea Uasike, who were both District Officers, to obtain financial assistance to resurface the local roads but no work had been done. Mr. Lavulavu said that he and Felengili Tauelangi, who was one of the Association's secretaries, were responsible for looking after the maintenance and pavement of the plantation roads, the cutting down of trees and obtaining funds to pave the roads. Mr Tauelangi did not say anything about that in his evidence. It was Mr. Lavulavu who assumed the sole responsibility for the road works.

[91] From at least 23 September 2014 until 26 November 2014 Mr. Lavulavu was engaged on the road works in all of the villages of Feletoa, Ta'anea, Holeva, Koloa, Mataika, Houma, Leimatu'a, Tu'anekivale. During that period more than forty seven roads were formed and paved. This was over eight kilometres of roads. To put this in the context of the election, the road works were undertaken during the entire period between the issue of the writs of election on 30 September 2014 until the evening before the election. There was a clear sense of urgency about the work and a great deal of work was completed within a relatively short period of time. Dr. Latu described standing outside his Church at 7pm on the evening before the election watching the road works in Leimatu'a. Livingi Katoa and Kulisitofa Sekeni gave evidence to similar effect.

[94] The evidence established that Mr. Lavulavu personally negotiated the use of all the heavy machines (bulldozer, loader, roller, plough and trucks) from the Ministry of Infrastructure to do the road works, paid for or organised the payment of the cost of the hire of the bulldozer to dig out the coral rocks from the quarry (the use of the other machines was provided without charge by the Ministry of Infrastructure), donated the coral rocks to pave the roads, paid for or organised the payment of the cost of fuel for the heavy machines and personally organised and oversaw the road works. I will deal with the evidence that supports these findings when considering the allegation of overspending later in this ruling.

[95] Through the Association Mr. Lavulavu was able to publicise his good works and establish himself as a generous and able man who was concerned for the people and was a good leader. There was unchallenged evidence of radio and television programmes about the road works. A newspaper article was produced about a lorry that went into the sea on its way from the quarry and reporting comments of Mr. Lavulavu. Although Mr. Lavulavu denied speaking to that particular newspaper he acknowledged that he had spoken to another about the same incident. Mr. Lavulavu was also able to make use of the community support generated for his road works to obtain a supply of free labour. Mr. Lavulavu said that all the people of the villages helped out with the

road works by cutting down the bushes and clearing the trees, planting signs to mark boundaries of each tax allotment, clearing rocks and preparing food for all the workers.

[96] Lolotonga Sekeni, Foaki Fanua, Mateaki Guttenbeil and Loni Uatahausi all gave evidence that Mr. Lavulavu told them that the road works were part of his election campaign. Mr. Lavulavu said they were liars. I believe them to be honest witnesses. However, I have exercised caution when relying on the evidence of Lolotonga Sekeni and Foaki Fanua. Lolotonga Sekeni appeared to harbour some resentment over the matters that led him to leave the Association. Foaki Fanua has reason to feel unkindly towards Mr. Lavulavu having received, in very recent times, a letter from the Ministry of Infrastructure signed by Mr. Lavulavu terminating his daily paid contract as a driver/operator. I have no reservations at all about relying on the evidence of Mateaki Guttenbeil and Loni Uatahausi. Mateaki Guttenbeil works at Gateway Petroleum Services. I was much impressed by her as a witness. She was forthright and I believe she was entirely honest. Her evidence was that on 19 November 2014 Mr. Lavulavu had paid a bill for petrol and diesel used by the heavy machines and he told her that the fuel was for road works during his election campaign. She maintained this in cross examination. Loni Uatahausi is a road foreman with the Ministry of Infrastructure with over 32 years' experience. He gave evidence that Mr. Lavulavu had asked him to make available the Government's heavy machines to carry out the road works for his election campaign. Mr. Uatahausi believed this was an inappropriate use of the machines but the decision to allow Mr. Lavulavu to use them was made by his superiors. He was strongly cross examined but maintained "... I was the person whom 'Etuate had approached and asked to help him with his campaigning work that he was doing". Nothing led me to doubt his evidence.

[97] Another way that Mr. Lavulavu promoted his campaign was through the Association's website. The evidence was that Mrs. Lavulavu was asked to create the website for the Association and she agreed. The minutes of the meeting of the Womens' Development Committee of 9 October 2014 record that the responsibility for the website was handed over to Mrs. Lavulavu and Muna Nasilai, who worked at UTRI and assisted the Association in a secretarial role, 'together with the school'. The words 'the school' can only be a reference to UTRI. The website was subsequently built by students at UTRI as part of a Youth in Business competition.

[98] Dr. Latu referred in detail to the website, which was http://www.leimatuagrowerandwomen.com/index.html and also to Mr. Lavulavu's facebook account http://www.facebook.com/etuate.lavulavu?fref=ts. He produced the web pages as exhibits (PPD 100-103). Dr. Latu referred to features of the website which promoted Mr. Lavulavu's election campaign.

[99] On PPD 100, is a photograph of a woman and some children getting off a bus. On the side of the bus are written the words 'Unuaki o Tonga Royal' which is referring to UTRI. Mr. Lavulavu's association with UTRI was well known. The contact telephone numbers of the Association (both land and cell phones) are Mr. Lavulavu's personal telephone numbers. The first quick-link is 'Home' and the second is 'Etuate Lavulavu'. There does not appear to be any photograph or name or contact details of any other officer of the Association on the website. On PPD 100 also there is a large heading "Vahenga 16" (District 16), which is the electoral district for which Mr. Lavulavu was seeking election. Under that heading are a list of villages in the district. At the bottom right of the page there is a picture of Mr. Lavulavu. This is one of his election campaign photographs and directly below the picture there is the name of the Association in

Tongan. The impression is that the Association is the *alter ego* of Mr. Lavulavu or, at the very least, that he is in control of the organisation.

[100] On PPD 101 there is a list of community needs and projects which includes 'Road Maintenance & New Roads'. That must be a reference to the road works Mr. Lavulavu was undertaking. There is a photograph on the page of Mr. Lavulavu with villagers of Leimatu'a during the road works. This is an almost identical photograph to one that Dr. Latu produced which was taken from Mr. Lavulavu's facebook account. There is also on this page a direct reference to the upcoming election with the statement:

> Separate interview of folks from Holonga in connection with the way they are seeing the general election of 2014.

[101] The reference to the General Election is incongruous on a website for a Growers Association as is the call for unity amongst the "electorate to find a good leader" which appears on PPD 102. It contains the following sentence:

> We must stand up and support our electorate to find a good leader full of love and good governance with fair and equal distribution of opportunities and to ensure that there is no discrimination or favouritism to anyone and to work together in peace.

[102] On PPD 102 also there are photographs of weavers and below that is a statement which in English reads "A group of weaving women from different areas in Vava'u 16 "Go Lavulavu". "Go Lavulavu" was Mr. Lavulavu's election campaign slogan.

[103] The website was manifestly political in nature. It had the semblance of being the Association's website but I accept Dr. Latu's submission that in large measure it was a promotion of Mr. Lavulavu and his election campaign. In February 2015, after both the election and the filing of the petition, the website was removed. This is despite some witnesses saying that the Association still continues its work. There was no explanation provided by any witness as to why the website was removed or by whom.

[104] As far as Mr. Lavulavu's facebook account is concerned, Dr. Latu produced many photographs that were downloaded from the account. The photographs often feature Mr. Lavulavu upon the roads under construction with the heavy machines of the Ministry of Infrastructure or with villagers who were assisting him with the road works.

[105] Mr. Lavulavu denies any knowledge of the website's content. I do not accept this. His evidence was that his knowledge of computers was limited to the use of email but in cross examination he accepted that he did know how to get to websites on the computer. I note his use of a personal facebook account which would suggest at least a degree of computer literacy. He also said that the website was created to "find markets overseas for the produce of the growers and also the weavers to export overseas especially to Leimatu'a people who are living overseas...". He was the person in charge of marketing the Association and could be expected to be concerned with the content of the website created for marketing purposes. Furthermore, the website was created under his wife's direction. It was clear that Mr. and Mrs. Lavulavu work very closely together. In her evidence she emphasised her commitment to his work. The evidence of Muna Nasilai was that Mrs. Lavulavu told her to supply materials for the website including photographs. As I have noted, the photographs included Mr. Lavulavu's campaign photograph and a photograph of the road works which is very similar to one

from his facebook account. It is simply not believable that these would have been supplied without Mr. Lavulavu's knowledge or consent.

Mrs Lavulavu's participation in the campaign

[106] Mrs. Lavulavu actively supported and participated in Mr. Lavulavu's election campaign. She said in her evidence that because of Mr. Lavulavu's love for the people of Vava'u she was committed to do whatever the people asked of her. She became involved in the Association, attended its meetings and oversaw the creation of the website. Mrs. Lavulavu was also involved in the road works. She said that both she and Mr. Lavulavu had asked Mr. Moehau for money to finance the road works (which for reasons I will come to I do not accept) and that she managed the money to pay for the fuel for the heavy machines and the wages of the heavy machine operators. Importantly, given her position as Dean, the resources of UTRI were put behind Mr. Lavulavu's road works project. Mrs. Lavulavu said that the road works were to count as a UTRI project and there were photographs on Mr. Lavulavu's facebook account of Mr. Lavulavu with UTRI vehicles at the villages of Mataika and Tu'anekivale. In addition, Muna Nasilai worked at UTRI but helped Mrs. Lavulavu organising payment for the fuel and machine operator's wages. Mr. Lavulavu's nephew, Li'ekina Lavulavu, also worked for UTRI but he made payments for fuel and wages and said he did other physical work such as checking that the heavy machines had fuel and driving the trucks from the quarry with coral rocks.

The donation as part of the campaign

[107] It is against the background of Mr. Lavulavu's use of the Association as a vehicle for his election campaign and Mrs. Lavulavu's participation in his campaign that the donation for the prizes must be considered. The prize giving was held on the eve of the General Election. The imminence of the election cannot have been lost on Mr. and Mrs. Lavulavu. It was made known at the prize giving that Mrs. Lavulavu had donated the prize money. Two witnesses, Livingi Katoa and Kulisitofa Sekeni, said there was an announcement made at the prize giving that the prize money was donated by 'Akosita Lavulavu "the wife of 'Etuate Lavulavu". Mrs. Lavulavu said that if there was an announcement she could not remember it but said that she thought she was thanked for finding the money. The Reverend Veikoso and Li'ekina Lavulavu were also involved in the programme that night. The prize giving would not have been possible but for the contributions of the Lavulavu family from which association Mr. Lavulavu could expect to derive admiration and gratitude. This might have been quite enough to induce some voters to vote for him at the election the next day (*Ha'apio v Keniasina* (supra) at [29]). Mr. Lavulavu was not directly involved in the formal programme or in selecting the prize winners but he supported the event by his attendance and by extending invitations to attend to others including Mrs. Melekiola, Mrs. Lau'i and the Sei 'o Lepuha weavers. It is not without significance that the invitations were accompanied by gifts of money that were bribes. Mr. Lavulavu knew that his wife had donated the TOP$4,000 and took no steps to distance himself from the payment. He was fully complicit in the payment and his wife must be taken to have made it on his behalf.

[109] At any other time Mr. Lavulavu could expect to receive praise for the road works, the work he did in the Association and the donation for the prizes. But this was no ordinary time and his were not common acts of generosity. It was an election time where what passes for charity is often really electioneering "following in the steps of charity, wearing the dress of charity and mimicking her gait" (*Wigan Case; Spencer & Presst v Powell* (1881) 4 O'M & H 1 at 14 referred to in *Scott v Martin* at 673).

Was the money given to influence the vote?

[110] It is for Mr Lavulavu to prove that the money was not given to influence the vote (Section 21(3) of the Act). I have already rejected Mr. Lavulavu's main argument that he had ceased to campaign well before election day. It was also argued that it is significant that there was no active campaigning at the prize giving or any other meetings of the Association. The argument appears to be that if Mr. Lavulavu said nothing to those present about voting for him then he must be taken to have innocent intent. I accept that there were no political speeches and that no exhortations to vote for Mr. Lavulavu were made at the prize giving but there was no need for there to have been any. Bribery must often be implied from the circumstance of the case and the Court must "strip the proceeding in each case of every colour, every dress and every shape to discover its real and true nature" (*Halsbury's* (supra) paragraph 780 fn 8 referring to *Belfast Borough Case* (1869) 1 O'M & H 281, 284). In this instance the act of giving TOP$4,000 as a donation to be distributed amongst a significant number of potential voters on the eve of the General Election speaks for itself. The only inference that can be drawn is that it was an attempt to buy votes.

My finding

[111] It has been established that on 26 November 2014 Mrs Lavulavu indirectly gave, on behalf of Mr. Lavulavu, TOP$4,000 to electors of the district at the prize giving. Mr. Lavulavu has failed to discharge his burden to prove that the money was given for some reason other than to influence the electors' votes. I therefore find that the allegation that the payment was a bribe under section 21(1)(a) is proved.

[112] As I have found that the gift was a bribe there will be no need for me to consider Dr. Latu's alternative argument that it was undisclosed spending on Mr. Lavulavu's election expenses.

Fourth allegation of bribery - Coral rocks to the electors.

[113] The quantity of coral rocks used to pave the 47 roads was substantial. Sione Tui said that around 850 truckloads of coral rocks were taken from the quarry for the road works. I understand him to be referring to trucks with the capacity to carry 3.8 cubic metres of coral rocks. Mr. Uatahausi estimated that 284 truckloads were used but he was referring to trucks with the capacity to carry 11.4 cubic metres of coral rocks. These estimates result in a surprisingly similar quantity of around 3,230 cubic metres of coral rocks.

[114] In his final submissions Mr. Edwards did not actively advance the argument that the donation of the coral rocks was a bribe, but he did not withdraw it. He argued that the donation of the coral rocks had to be taken into account as an election expense that Mr. Lavulavu had failed to disclose in his return to the Supervisor of Elections.

[115] Section 21(1)(a) requires the giving of money or a valuable gift "to or for any elector, or to or for any other person on behalf of any elector". I consider that the words "any elector" mean some identifiable elector or electors but not voters generally. I note the contrary view in *Fasi v Pohiva* (supra) at page 82 where Martin CJ. said that for the purposes of section 21 "*It would suffice if there is an intention to influence voters generally*". I am not bound by that decision and do not follow it. I note the, admittedly tentative, reservations about the decision expressed by the Court of Appeal in *Fasi v Pohiva (No. 2)* [1990] Tonga LR 156, 157.

[116] Although the coral rocks were undoubtedly donated it cannot be said that they were given to or for any identifiable elector or electors. The roads paved with the coral rocks benefit and are available for use by everyone in Vava'u. For that reason I find that the allegation that the donation of the coral rocks was a bribe is not proved.

[117] I will therefore need to consider Dr. Latu's alternative argument that the donation of the coral rocks was an undisclosed election expense.

The allegation of overspending

[118] I now turn to the allegation that Mr. Lavulavu spent more than the permissible TOP$10,000 on his election campaign in breach of section 24(1).

[119] Section 24 provides:

> (1) No candidate may spend, on any election campaign, more than the sum of $10,000.
>
> (2) Without prejudice to the generality of subsection (1), the following payments are deemed to be spending on an election campaign - unless contrary to section 21 —
>
> (a) any donation made within 6 months of an election, either by a candidate or on his behalf;
>
> (b) the cost of any entertaining (including food, drink or paid by or on behalf of a candidate within 6 months of an election;
>
> (c) travelling or transportation expenses paid by or on behalf of a candidate, to enable people to travel to a polling station.

(3) For the purposes of this section any sum expended by a candidate for his personal expenses, or those relating to his spouse, parents, grandparents, grandchildren, the brothers and sisters and half-brothers and half-sisters of his parents, spouse's parents, brothers and sisters and half-brothers and half-sisters or their children, or the brothers and sisters and half-brothers and half-sisters of his spouse or their children, or in relation to a church or for a charitable purpose; shall be disregarded.

(4) Within 14 days of an election, every candidate shall deliver to the Supervisor a signed statement of his election expenses in Form 7 of the Schedule, itemized and complete in all respects.

(5) It is an offence for any candidate to spend on an election campaign more than the sum of $10,000 or to fail to deliver the statement referred to in subsection (4) or to deliver a false statement, and any person found guilty shall be liable to a fine not exceeding $10,000.

(6) If a person convicted under subsection (5) was elected at the election, and if the Court considers that the circumstances of the offence are sufficiently serious, the Court may declare the candidate's election to be void and if he has already taken his seat in the Legislative Assembly he shall be unseated by the Assembly.

[120] No submissions were directed to me as to what spending "on any election campaign" means. Having regard to the words and purpose of the section in the context of the Act as a whole, and subject to the sums that are to be expressly disregarded under section 24(3), I consider that those words mean all spending, either before or after an election, in respect of the conduct or management or promotion of a candidate's election campaign.

[121] Under section 24(2) any payment of a donation made by a candidate, or on his behalf, within six months of an election is deemed to have been spent on an election campaign (except in the case where it is found to have been a bribe in breach of section 21). I have considered whether this applies only to donations of money. Upon reflection I am of the view that the use of the word 'payments' in section 24(2) is quite wide enough to include payments of money or in kind. I would doubt that donations of time and services are included but that circumstance does not arise here (*Re Wairarapa Election Petition* (supra) at page 111).

[122] I note also that by section 24(3) any sum expended by a candidate for a charitable purpose is to be disregarded. This is an important provision to which I shall return.

[123] Section 32(1) speaks of the Court being satisfied on the trial of an election petition that a candidate has "been guilty of an offence". This raises an issue as to the correct classification of the offence in section 24(1) and whether the offence is one where *mens rea* is required. In this case I have no doubt that Mr. Lavulavu knowingly and intentionally made the payments and so the issue is not one that need concern me but for future cases I note the discussion on the issue in *Re Wairarapa Election Petition* (supra) at page 114-119.

[124] Finally, I note that before the Court shall declare the election of a candidate void for breaching section 24(1) the Court must be satisfied that "the circumstances of the offence are sufficiently serious".

Mr. Lavulavu's return

[125] In his return to the Supervisor of Elections Mr. Lavulavu declared that his spend on his election campaign was TOP$6,360. Dr. Latu argues that the return should have included payments made in the course of the road works for fuel, wages, hire of the bulldozer and donated coral rocks. The specific amounts in issue are:

> [125.1] TOP$3,454.87 paid to Sitiveni Pongi for fuel.
> [125.2] TOP$2,255.20 paid to Gateway Petroleum Services for fuel.
> [125.3] TOP$6,250 paid to the operators of the heavy machines as wages/overtime.
> [125.4] TOP$7,590 paid to the Ministry of Infrastructure for the hire of a bulldozer.
> [125.5] TOP$68,160 for the coral rocks.

[126] There is no dispute that the amounts in subparagraphs 125.1, 125.2, 125.3 and 125.4 were expended on the road works. Payment of them was proved with the production of receipts and the acknowledgment of payment by 'Akosita Lavulavu and Li'ekina Lavulavu. Those sums amount to TOP$19,550.07. It is not in dispute either that coral rocks were donated and used to pave the roads. The value of the coral rocks is disputed.

[127] Mr. Lavulavu raises many defences to the allegation that he overspent on his campaign. He argues that he did not spend these amounts because the fuel, wages and hire charges were paid for from TOP$20,000 gifted by Saia Moehau and the coral rocks were donated by Sione Tui. He says that the payments were not made on his election campaign as the road works were carried out by the Vava'u Road Works Council, Inc. He argues also that the coral rocks had a value of just TOP$1 per truck load. Finally, Mr. Lavulavu argues, in the alternative, that the payments were for a charitable purpose and are to be disregarded in calculating his election spend. The issues that arise are:

> [127.1] Were the payments made from TOP$20,000 donated by Saia Moehau, and, were the coral rocks donated by Sione Tui?
> [127.2] Were the payments made on Mr. Lavulavu's election campaign or were, as he says, the road works carried out by the Vava'u Road Works Council, Inc?
> [127.3] What was the value of the coral rocks?
> [127.4] Were the payments made for a charitable purpose?
> [127.5] If it is established that Mr. Lavulavu breached section 24(1), were the circumstances of the offence sufficiently serious such that the Court ought to declare his election to be void?

The donations of the money and the coral rocks

[128] Mr. Lavulavu's evidence was that he asked Mr. Moehau for money to pave the roads and that Mr. Moehau gave TOP$20,000 through UTRI and from there it went to Muna Nasilai and Li'ekina Lavulavu to pay for the fuel, bulldozer hire and labour. Mrs. Lavulavu gave different evidence. She said that both she and Mr. Lavulavu had asked Mr. Moehau for the money and that it was decided that she would manage the money. I do not believe that Mr. Moehau donated TOP$20,000 or any other sum. Saia Moehau was not called to give evidence to confirm he had donated the money. That might not be of major significance if, for instance, evidence of the donation was given by credible witnesses or supported by some documentary evidence. In this case neither applies. There was no documentary evidence that Mr. Moehau had donated TOP$20,000, or any other sum. Mrs. Lavulavu said that Mr. Moehau was given a receipt for the money but neither the receipt nor any copy of it was produced. She also gave the quite implausible evidence that she carried the money around with her in cash even though both she and UTRI had a bank account. Muna Nasilai said she was directed to "differentiate the money coming from Saia Moehau from the financial books and money of UTRI" which simply makes no sense when viewed against Mrs. Lavulavu's evidence that this was to be considered a UTRI project and she carried the money around in cash. Furthermore, if what Muna Nasilai says is true there should be some record of the money.

[129] Likewise, I do not believe that the coral rocks were donated by Sione Tui. He said that he owned and solely controlled the Ta'anea quarry, from where the coral rocks were taken, until April 2015. No documentary evidence of his ownership was produced. That takes on some significance as the only document of title that was put before the Court was a registered lease of the quarry granted to Mr. Lavulavu and effective from April 2015. Mr. Lavulavu offered no explanation as to the circumstances under which he came to own the lease.

[130] Mr. Tui also said, as did Mr. Lavulavu, that he had initially offered to supply the coral rocks to Mr. Lavulavu at TOP$1 pa'anga per truck load but that he later told Mr. Lavulavu that the gravels would be given free of charge. I do not accept that this is what happened. The evidence established, in my view, that Mr. Lavulavu was entitled to take the coral rocks pursuant to an arrangement that he had made with Mr. Tui's father. Mr. Tui's father was said to have owned the quarry until his death in 2006 and to have entered into an arrangement with Mr. Lavulavu that Mr. Lavulavu could take the coral rocks for free to pave roads. Mr. Tui said that "'Etuate was the one who started the quarry with my dad..." and that when he took over the quarry he had not tried to make any new arrangement with Mr. Lavulavu. He also gave evidence that he had offered to share a donation of money, food and Tongan koloa that he was given for supplying coral rocks on the Ha'alaufuli road construction project with Mr. Lavulavu. This only makes sense if Mr. Lavulavu had an interest in the quarry. In response to questions from the Court, Mr. Tui stated that Mr. Lavulavu did not need his permission to take the coral rocks and that he was managing the quarry for Mr. Lavulavu. The relevant exchange was:

> Court: In paragraph 8 of your brief you say that your father and Mr. Lavulavu had an agreement.
>
> Witness: Yes
>
> Court: Do I understand you correctly that the agreement was, that the rock in the quarry could be used for free to construct roads?
>
> Witness: Yes
>
> Court: So did Mr. Lavulavu need to ask you for the rock or was he simply entitled to use it as he chose?
>
> Witness: He was entitled to the rocks but he had asked me to manage the rocks and up to a time where he would need the rocks according to Mr. Lavulavu's agreement with my father

[131] I find that both the money to pay the costs of the road works and the coral rocks were provided by Mr. Lavulavu. I note also that the case that I understand Mr. Lavulavu to be advancing, which is that he did not spend the amounts in issue because the money and coral rocks were donated by a third party, is misconceived. It is not a requirement of section 24(1) that any payment comes from the candidate's own funds just that the candidate spends "on any election campaign."

Were the road works carried out by the Vava'u Road Works Council, Inc?

[132] Mr. Lavulavu's argument is contained in his evidence as follows:

> The allegation that states that the pavement of the roads was part of the campaign of 'Etuate Lavulavu is not true. The Road Council and Growers Council of Vava'u was already established since 2008 and was later changed from the Road Council to 'Etuate Lavulavu and assisted by Netane Tonga in 2009 to 2015 and it is still operating well. At the moment there are no funds and it only operates when there is aid received and funds from someone and also aid from the Government or any other individual enterprises..."

[133] Mr. Lavulavu is saying that he is the Chief Executive of the Council and Netane Tonga is a Board member and that in those capacities they had the Council undertake the road works. There are considerable difficulties with this evidence and I do not accept it.

[134] First, neither Mr. Lavulavu nor Mr Tonga had any authority to bind the Council or have it undertake road works for the reasons that follow.

[135] Upon its incorporation in 2008 the Rules of the Council provided for a Board of eight members. Mr. Lavulavu was an *ex officio* member by virtue of his holding office at that time as the Peoples No. 1 Representative for Vava'u. Mr. Lavulavu says that on or around 13 October 2009 variations were passed to the Rules of the Council as a result of which there was a new Board appointed and he became its Chief Executive with overall control of the Council. Netane Tonga was not on the Council prior to 2009. He gave evidence that he is now on the Board and is the Secretary as a result of the 2009 variations to the Rules. Mr. Lavulavu produced a document that he said was the 2009 variations to the Rules of the Council. The document appears to have affixed to it the seal of the Registrar of Incorporated Societies and below that an unidentified signature and a date '08/03/10'. The variations plainly had not been passed in accordance with the Rules of the Council which required that any variations have the approval of a majority of the Council or 50% of the Board. In addition, Marcienne Fukofuka, who is the Principal Assistant Registrar for Incorporated Societies, gave evidence that the variations were never registered. She also produced the Registrar's file which showed that no documents had been filed by the Council since it was incorporated in November 2008. There was no evidence from any person that they had filed the variations with the Registrar. Netane Tonga said he did not file them. I do not know, and will not speculate, how what appears to be the Registrar's seal became affixed to the document but given the requirement in section 21(2) of the Incorporated Societies Act that the Registrar must be "satisfied that the alteration has been duly made" it is extremely unlikely that the document would have been accepted for registration. I find that the variations were never registered and cannot have taken effect (Section 21(3) of the Incorporated Societies Act). It follows that Mr. Lavulavu and Netane Tonga were never validly appointed and have no authority to represent the Council.

[136] The second reason I reject Mr. Lavulavu's evidence is that there was nothing put before the Court to give me the least cause to consider that the Vava'u Road Works Council, Inc took any part in the road works. Whilst it was repeatedly asserted that the Council had planned the road works as long ago as 2009 or 2010 the plans were not produced into evidence. Neither Mr. Lavulavu nor Mr. Tonga produced any minutes of meetings, resolutions, correspondence, or bank statements from which it might be inferred that the Council had been active at any time in recent years. This was despite both claiming that such documents exist. I note that Mr. Lavulavu produced three substantial reports which purport to have been prepared by or for the Council. In each case they were prepared after the issue of the petition. It was apparent that Mr. Lavulavu and Mr. Tonga had very little, if any, knowledge of the compliance requirements of the Incorporated Societies Act or even of such prosaic matters as who are the members. I was not satisfied that since its incorporation the Council has undertaken any substantial road works and certainly not for some years. Netane Tonga did say that in 2009 the Council had paved Tefisi and started filling some potholes but that was some years ago and I heard of no other work that had been done.

[137] The Council certainly did not contribute any money for the road works nor was it suggested that the Council had any role in arranging payments for the fuel, wages and the bulldozer hire. The heavy machines themselves were provided free of charge by the Ministry of Infrastructure except for the bulldozer. The Council did not supply any labour either. Apart from the operators of the heavy machines, who were paid for their work, all the labour appears to have been provided by the villagers for free. All the planning and oversight of the work on a daily basis appears to have been undertaken by Mr. Lavulavu personally. This is well demonstrated by the numerous photographs that appeared on his facebook account. Mr. Hafoka, who said that he understood that Mr. Lavulavu was the Chairman of the Council and also claimed to be a member of the Council himself, said in cross examination of Mr. Lavulavu's contribution to the work as follows:

> Edwards: You said you were part of the Vava'u Road Council
>
> Witness: Maybe the answer I gave you earlier is the answer but what I remember is that the work continued.
>
> Edwards: But who managed these works?
>
> Witness: I believe that 'Etuate was responsible for everything so that is my answer?
>
> Edwards: That is your recollection that 'Etuate performed all the works and you were not a part of it?
>
> Witness: Yes

[138] There was evidence from Auto Tupou, who works for the Ministry of Infrastructure and has been closely associated with Mr. Lavulavu, that he had worked with the Council since 2009 and had assisted the Council with its mapping and engineering needs. Again no documents were produced to substantiate that. He also said that a letter had been received by the Ministry of Infrastructure from the Vava'u Road Works Council, Inc signed by Mr. Lavulavu and Mr. Tonga requesting that the Council be allowed to use the Ministry's heavy machines for the road works. I do not believe any such letter was ever sent by the Council or received by the Ministry. The letter was not produced and Mr. Tupou was the only person to refer to it. Mr. Lavulavu and Mr. Tonga made no mention of the letter in their evidence, as they would undoubtedly have done had it existed.

[139] I see the position in very simple terms. Mr. Lavulavu was in total control of every aspect of road works. He cannot hide behind the Council or the Association and attribute what he did to them. His degree of control can be illustrated by the following. It was proved that Mr. Lavulavu provided the money to pay for the fuel, wages and hire charge and donated the coral rocks. There is no question that Mr. Lavulavu personally negotiated the use of the Ministry of Infrastructure's heavy machines. At least on that matter the witnesses for both sides agree. There was evidence from Mrs. Guttenbeil that Mr. Lavulavu negotiated credit terms for the supply of fuel. There was evidence also, which I accept, from Mrs. Guttenbeil and Mr. Uatahausi respectively, that Mr. Lavulavu personally made payments for fuel and the bulldozer hire. Receipts were issued by the Ministry of Infrastructure in Mr. Lavulavu's name and this corroborates Mr. Uatahausi's evidence that he directed Mr. Lavulavu to the cashier to pay the hire charges before the bulldozer could be taken. Although Li'ekina Lavulavu said he made all the payments, when asked to identify the receipts that were produced into evidence he said could not really recall them. Furthermore, whilst on the one hand he said he was concerned to tell cashiers to issue receipts in the name of UTRI he could not provide an adequate explanation for why some receipts were made out to Mr. Lavulavu. He also said some receipts had been issued in the name of Takiama & Associates Limited but when asked who had issued those receipts he could not remember and Mr. Lavulavu's evidence was that he has had no association with Takiama & Associates Limited since 2011. I do not accept Li'ekina Lavulavu's evidence that he made all the payments.

[140] The contention from Mr. Lavulavu that the road works were performed by the Council is of most recent origin. There was evidence that at the time the road works were being undertaken Mr. Lavulavu claimed them as his own and as part of his election campaign.

[141] I find that the Vava'u Road Works Council, Inc had no part to play in the road works.

What was the value of the coral rocks?

[142] The result of this petition will not hinge on the value of the coral rocks but for completeness I will set out the evidence and what I make of it.

[143] Loni Uatahausi presented two valuation methods. The first method calculated the value of the coral rocks as the product of the number of truckloads of coral rocks (284) multiplied by the rate of TOP$240. This rate is what Mr. Lavulavu charges the Ministry of Infrastructure for coral rocks from his quarry. On this basis the value of the coral rocks is TOP$68,160. The second method applied the Ministry of Infrastructure's guidelines for the cost of paving roads, which was $6,000 to $7000 per kilometre. On this basis the value of the coral rocks was said to be between TOP$48,000 and TOP$56,000.

[144] Mr. Tu'utafaiva challenged Mr. Uatahausi's estimate of the quantity of the coral rocks. In one sense this was surprising as the evidence of Sione Tui would suggest that the estimate was broadly correct. Mr. Lavulavu did not dispute Mr. Uatahausi's evidence that coral rocks were supplied from his quarry at that rate of TOP$240 per truck load nor did he challenge the fact of the Ministry of Infrastructure's guidelines of roading costs. He did give evidence that he had agreed to pay TOP$1 for the coral rocks from Sione Tui but I have found that there was no such agreement. There was also

some evidence from Mr. Tui that he had charged the 'Otumohemohe company TOP$5 per truck load of coral rocks but that was in 2011 and 2012 and was considered to be very cheap.

[145] Upon reflection Mr. Tu'utafavia may well be correct that Mr. Uatahausi has overestimated of the quantity of the coral rocks. This is because the assessment was based on a number of variables that are open to challenge and Mr. Uatahausi's first valuation method produces a value of the coral rocks which substantially exceeds the Ministry's guidelines and this is surprising.

[146] Recognising that Mr. Uatahausi's evidence that Mr. Lavulavu supplies coral rocks at the equivalent of TOP$240 per truck load is not disputed, I put the value of the coral rocks at TOP$48,000. That makes a very substantial allowance for the possibility that the quantity of coral rocks used was less than both Mr. Uatahausi and Mr. Tui believe. It is also the lowest value arrived at by applying the Ministry's guidelines.

Were the payments made for a charitable purpose

[147] Mr. Lavulavu's statement of defence does not expressly plead that his spending was for a charitable purpose. In his closing submissions Mr. Tu'utafaiva stated that the "road works were for charitable purposes within the meaning of section 24(3) of the Act" but presented no arguments to advance the submission. Mr. Edwards did not refer to the issue at all.

[148] There is no definition of 'charitable purposes' in the Act but section 2 of the Charitable Trusts Act provides that 'charitable purpose' includes every charitable purpose, whether it relates to relief of poverty, the advancement of education or religion, or any matter beneficial to the community". I accept that a "matter beneficial to the community" may include the repair of causeways and highways (See the useful discussion in the New Zealand Supreme Court in *Re Greenpeace* [2014] NZSC 105; *Halsbury's* 3rd Ed. Vol 5 paragraph 538 and *Attorney-General v Day* [1900] 1 Ch 31).

[149] In this case the payments were not made for a charitable purpose. They were made for the purpose of Mr. Lavulavu's election campaign. When a payment is made for a mix of charitable and non-charitable purposes it will not be sufficient if the charitable purpose is merely "ancillary in the sense that it was secondary, subordinate or incidental" to a non-charitable purpose (*Re Education New Zealand Trust* [2010] NZHC 1097). This is consistent with the object of section 24. The reason why candidates' spending is limited is to provide a level playing field. It also prevents "excess and to avoid unfair competition and unfair advantage simply because of the more ready availability of money in one case than another." (*Re Wairarapa Election Petition* at page 116). Support in an election should be the product of the candidate demonstrating good character, ability and appropriate experience. The restriction on spending may also operate as a check on bribery due to the requirement that election expenses be disclosed (*Halsbury's* (supra) at paragraph 707). The exclusion of expenses for charitable purposes recognises that a candidate may have made donations for charitable purposes in the past and it would not be expected, and would be harmful to society, if he could not continue to do so because he is standing for election. However, it cannot be expected that a candidate may make extra exertions or spend more than would otherwise be the case but for the desire to obtain favour with the electors. The payments made by Mr. Lavulavu were extraordinary and in no sense can they be regarded as having been made for a charitable purpose.

Are the circumstances sufficiently serious?

[150] I find that it is proved that Mr. Lavulavu failed to disclose spending on his election campaign amounting to $67,550.07. This is the sum of the amounts in subparagraphs 125.1, 125.2, 125.3 and 125.4 of TOP$19,550.07 and $48,000 for the coral rocks. When one takes account of the amount he declared in his return to the Supervisor of Elections Mr. Lavulavu's spend on his campaign amounted to TOP$73,910.07. There is no doubt that Mr. Lavulavu made these payments knowingly and intentionally and I am satisfied that it has been established that he committed an offence against section 24(1).

[151] I must consider whether the circumstances of the offence are sufficiently serious that the Court ought to declare Mr. Lavulavu's election to be void. There is no guidance as to what is meant by "sufficiently serious" in the Act but I have no doubt that an order should be made declaring Mr. Lavulavu's election void. The relevant circumstances are the amount by which Mr. Lavulavu overspent on his campaign (which was very significant), that the spending was in relation to a major roading project for which Mr. Lavulavu must have obtained significant kudos and support, that there is a very real prospect that the road works had a major and even decisive effect on the result of the election and that Mr. Lavulavu knowingly and intentionally made the payments.

My finding

[152] The allegation that Mr. Lavulavu spent more than TOP$10,000 on his election campaign in breach of section 24(1) is proved. I am satisfied that he did so knowingly and intentionally. The circumstances of his offence are sufficiently serious as to require the making of a declaration that his election is void.

Recrimination

[153] For completeness I should record that Mr. Lavulavu called evidence of a recriminatory nature alleging, as I have noted earlier, that Dr. Latu had himself given refreshments to the weaving halls and also that he had conducted his own road works during the election period by paving the Talahele and Ha'anofu roads. I extended to Mr. Lavulavu some latitude in allowing this evidence to be called. Whilst I accepted Mr. Tu'utafaiva's submission that evidence of other candidates giving refreshments might be relevant to the issue of Tongan custom, the allegation about road works was of little or no relevance to any issue that I had to decide as Dr. Latu was not claiming the seat for himself or anyone else (Section 31(5) of the Act). In any event, I find the allegations were unproven. I have dealt with the allegation that Dr. Latu provided refreshments earlier in my ruling and will not repeat myself about that. As far as the allegation about road works is concerned, I am satisfied that those road works were carried out by the Leimatu'a Village Committee and paid for with Government money and that they had no part to play in Dr. Latu's election campaign.

The conclusions

[154] I make a declaration that in accordance with the findings in this judgment 'Etuate Sungalu Lavulavu committed bribery on three occasions in breach of section 21(1)(a) of the Electoral Act 1989. I make a further declaration that in accordance with the

findings in this judgment 'Etuate Sungalu Lavulavu overspent on his election campaign in breach of section 24(1) of the Electoral Act 1989.

[155] In respect of each matter, pursuant to section 32 of the Electoral Act 1989 I make a declaration that the election of 'Etuate Sungalu Lavulavu on 27 November 2014 as the Peoples' Representative for the Vava'u No. 16 Electoral District is void.

[156] Pursuant to section 37 of the Electoral Act 1989 I shall forthwith certify this result to the Speaker of the Legislative Assembly.

Costs

[157] The parties are invited to reach agreement on costs. I will hear the parties on costs if they cannot agree and each party is to file any submissions if not agreed within 42 days.

R v 'Ahoafi

Supreme Court, Nuku'alofa
Cato J
Cr 103/2013

5 February 2016

Sentencing – manslaughter – mental disability taken into account – 4 years' imprisonment with treatment order under Mental Health Act

On about 23 May 2013 at around 12am, the prisoner had come back from drinking kava and had entered a small dwelling he lived in. The deceased lived with his wife and other family members in the main house that was also on the property. The deceased was the paternal granduncle of the prisoner who then was aged 30. The prisoner entered the main house and saw the deceased standing at his granddaughter's bed holding his penis in her presence. He went back outside quietly and found a metal pipe in the verandah of the house. He then proceeded to approach the deceased from behind him and struck him numerous times on his arms and legs intending him to fall to the ground. He did not do so. The prisoner then went back outside and got a plank of wood. He hit him on the side of the face causing him to fall to the ground. By then he was unconscious. He then tried to wake him up by kicking him numerous times. The accused called the police. The deceased was rushed to hospital where he was pronounced dead. He died of brain herniation secondary to traumatic brain injury. The prisoner pleaded guilty to manslaughter. The Crown accepted the plea in discharge of its indictment for murder to which the accused had pleaded not guilty.

Held:

1. A Court was entitled to take a prisoner's mental disability in determining the level of his culpability. The trigger for his action was his belief that the deceased was likely to seriously abuse his granddaughter. However even if he acted in defence of another, his retaliation was disproportionate. He did not simply assault him with a weapon around the body but went further and hit him around the head which led to his death. The court concluded that the prisoner acted with limited premeditation in a situation where he had found the deceased in a serious situation with his granddaughter. The accused was sentenced on the basis that he was an impaired person mentally and his responsibility was assessed in that light.
2. A starting point of eight years imprisonment was appropriate to reflect the circumstances of the homicide (one violent blow to the head) and to deter others from using weapons to inflict injuries to the head from which death not uncommonly results.
3. In mitigation the following circumstances were taken into account: the provocation of finding the deceased, his paternal uncle and long-time

caregiver, in a situation where he threatened to sexually abuse his granddaughter; the prisoner's impaired mental state may have affected his judgment so that whilst he knew that what he was doing was wrong, he did not reason as lucidly as might have been expected of a person who was not suffering from mental unsoundness; he pleaded guilty to manslaughter in a timely manner; he apologised to the family and this was accepted; and he rang the police and stayed with the deceased afterwards. The appropriate discount for the mitigating factors was four years.

4. The court imposed a sentence for manslaughter of 4 years imprisonment. As part of the sentence the court made a treatment order under section 67(1) of the Mental Health Act.

Cases considered:

Fa'aoso v R [1996] TLR 42 (CA)
Taufa v R AC 17/04
Vaomotou v R [2014] Tonga LR 62 (CA)

Statutes considered:

Criminal Offences Act (Cap 18)
Mental Health Act 2001

Counsel for the Crown	:	Mr Lutui and Mr Finau
Counsel for the accused	:	Mr Pouono

Sentence

[1] The Prisoner Tevita 'Ahoafi, pleaded guilty to manslaughter contrary to sections 85, 86(1) (a) and (2), 92 and 91 of the Criminal Offences Act, in that he did cause the death of Sione Puku 'Ahoafi when he unlawfully struck his body repeatedly with a metallic pipe and a piece of wood causing serious injuries to his body which led to his death. The Crown accepted this plea which was entered on the 11th December 2015 in discharge of its indictment for murder to which the accused had pleaded not guilty on the 10th June 2014.

[2] The agreed summary of facts were that, on or about the 23rd May 2013 at around 12am, the prisoner had come back from drinking kava and had entered a small dwelling he lived in. The deceased was living with his wife and other family members in the main house that was also on the property. The deceased was the paternal granduncle of the prisoner who then was aged 30.

[3] On arriving in his dwelling, the prisoner noticed a light on in the main house. Thinking that there was a burglary, he went over to the house to check up. As he did this the lights were turned off. When he entered the house, he saw the deceased standing at his granddaughter's bed holding his penis in her presence.

[4] He went back outside quietly and found a metal pipe in the verandah of the house. He then proceeded to approach the deceased from behind him and struck him numerous times on his arms and legs intending him to fall to the ground. He did not do so. The prisoner then went back outside and got a plank of wood. He hit him on the side of the face causing him to fall to the ground. By then he was unconscious. He then tried to wake him up by kicking him numerous times.

[5] The granddaughter woke up and found the deceased bleeding and she went to a neighbour's house. Whilst there, a sound like another assault was occurring came from the deceased's house.

[6] They then heard the accused outside the deceased's house calling the police. After a short while, the police arrived and the deceased was rushed to hospital where he was pronounced dead. According to the post mortem report he died of brain herniation secondary to traumatic brain injury.

[7] Part of the reason for the delay in this matter progressing more quickly was because the prisoner had been placed under the care of Dr Puloka, a specialist psychiatrist. The prisoner had a history of admission to the mental health facility of Vaiola hospital the most serious of several admissions in 2009, being that he had assaulted his uncle by hitting him in the mouth and causing injury. He had on those occasions been prescribed antipsychotic drugs. A diagnosis of substance related disorder and psychotic disorder not otherwise specified was made at the time. Dr Puloka confirmed that on his recent assessment the prisoner was a person with a cannabis dependence disorder and schizophrenia. He formed the view that, although he was suffering from a mental illness, he was fit to plead and he knew the nature of what he did, and, although he did not have the intent to kill him, he knew that to some degree what he was doing was wrong. He did not consider that he was legally insane although, before the incident, there is mention in his record of interview that he was hearing voices. It would seem, on this basis, that earlier but at a time proximate to the incident he may have suffered from an episode where his mental condition was disordered. This may have clouded his judgment although not to the point where according to the Doctor he could avail himself of a defence of insanity.

[8] I sentence the accused consistently with his plea to manslaughter on the basis that he did not know that what he did was likely to kill the prisoner (a basis which the Crown accepted), although he plainly intended to seriously harm and disable the deceased when he hit him about the head with a plank. I also sentence him on the basis that he was an impaired person mentally and assess his responsibility also in that light. A Court is entitled to take another prisoner's mental disability in determining the level of his culpability. *Fa'aoso v R* [1996] TLR 42, at 45. *Taufa v R* AC 17/04.

[9] In my view, the trigger for his action was his belief that the deceased was likely to seriously abuse his granddaughter. Plainly, even if he acted in defence of another, his retaliation was disproportionate. He did not simply assault him with a weapon around the body but went further and hit him around the head which led to his death. The Crown confirmed that there was only one relevant blow in this case. Cases on manslaughter vary considerably. In this case, I am prepared to conclude that the prisoner acted with limited premeditation in a situation where he had found the deceased in a serious situation with his granddaughter. Although he acted with violence, I do not consider the violence was prolonged and nor did it involve a number of blows to the head. I am prepared also to accept after, reading the report from Dr Puloka, that he was a person suffering from a mental disability and may well have suffered an episode reasonably proximate to the incident. Just how much his judgment was affected by his medical condition is unclear but I am prepared to make some allowance for this in mitigation as it affects his culpability for reasons I explain further below.

[10] The deceased died plainly from a blow inflicted with a weapon to the head and in these circumstances the starting point must reflect the fact that death has arisen unlawfully (that is without lawful justification or excuse) and the prisoner is responsible for his death. On the evidence, whilst there was a high measure of violence, I do not find there was extreme or prolonged violence as is seen in some of the cases where there have been very high starting points, such as *Vaomotou v R* [2014] Tonga LR 62 (CA). It was, the Crown accepts, provoked by the actions in masturbating in the presence of this granddaughter and in his belief she would be raped. In my view, a starting point of eight years imprisonment is appropriate to reflect the circumstances of this homicide (one violent blow to the head) and to deter others from using weapons to inflict injuries to the head from which death not uncommonly results. The provocation is, in my view, a factor which should be taken into account as mitigation. Neither Mr Lutui nor Mr Pouono expressed objection to this starting point.

[11] In mitigation, however, I take the following circumstances into account. It is plain that what triggered him to act as I have said was finding the deceased, his paternal uncle and long-time caregiver, in a situation where he threatened to sexually abuse his granddaughter. This, in my view, significantly reduces his culpability that evening. It must have been a rather devastating discovery to find his paternal grand uncle behaving in this way in the presence of his granddaughter. Further, his impaired mental state may have affected his judgment so that whilst he knew, as Dr Puloka said the nature of what he was doing and by his plea that it was wrong, he did not reason as lucidly as might have been expected of a person who was not suffering from mental unsoundness. He had told Dr Puloka that he had used violence to prevent the deceased becoming stiff (it seems sexually erect and raping his granddaughter), a thought process described by Dr Puloka as bizarre. Dr Puloka said his judgment was poor and there was a decreased ability to process information, a "poverty of thought" he wrote.

[12] I also note that he has pleaded guilty to manslaughter. Whilst this was not an early plea, in the circumstances of the involvement of Dr Puloka and the need for a careful assessment and hospitalization, I accept his plea was entered in a timely manner. I have also read, in addition to the report of Dr Puloka, a probation report. It seems that the prisoner, who is the eldest of 9 children in his family, and now aged 32, comes from a good family with a church background. He had been brought up by the deceased and adopted by he and his wife in a customary way. He was the prisoner's paternal granduncle. He was schooled to form six and then joined the Tongan defence force in 2003. He married in 2005 and had two children. It appears that he was discharged from the Army because of behavioural reasons. The probation report indicated that his wife and children left him in 2007, and went to live with her family because of her concerns about him when he is "sick in the head". The Crown indicates that he has apologised to the family (the widow and other relatives) and this had been accepted by them. He had also been responsible for ringing the police and stayed with the deceased afterwards. These are all matters that justify a significant discount.

[13] For all these factors, I consider an appropriate discount is four years imprisonment. Accordingly, I impose a sentence for manslaughter (for which he is convicted) of 4 years imprisonment which is backdated to the date of his remand in custody which I am informed was the 30th May 2013. This I consider adequately reflects the fact that human life was taken unlawfully by the prisoner but in circumstances which, as Mr Lutui put it, reflects a lower end sentence for manslaughter resulting from the violent use of a weapon.

[14] I consider, however, that given he takes his medication (which is problematic) that he is a prospect for rehabilitation. Dr Puloka's report is somewhat pessimistic about his future, however. His addiction to cannabis will he says always cause a relapse of schizophrenia. He considered there was treatment for the prisoner's psychiatric condition based on medication and a strict monitoring of his compliance to the treatment. The difficult part of the treatment is his addiction to cannabis. It is a dual diagnosis and the prognosis according to Dr Puloka was poor. Other psychosocial treatment that would benefit the prisoner is to attend the Salvation Army Drug and Alcohol Program. Mr Lutui confirmed that he was currently undergoing such counselling whilst under Dr Puloka's care.

[15] Mr Lutui advised that he had spoken to Dr Puloka earlier today concerning a treatment order and application was made for this. A treatment order under section 67(1) of the Mental Health Act can be made as part of a sentence of imprisonment. It is plain that with the prisoner's diagnosis and history it would be inviting further problems to keep him in the prison regime where I am informed by Mr Lutui there were some problems concerning behaviour, in any event. He has been in Vaiola Hospital under Dr Puloka for several months now and I consider it is necessary that his treatment be closely monitored and medication taken to minimise any repeat of this kind of offending. I am informed that Dr Puloka may, after the period of imprisonment and this treatment order has elapsed, seek a further order that he be detained further as an involuntary patient. That may be the only viable option if he cannot be placed with persons who can ensure he takes his medication.

[16] The sentence I imposed upon him for manslaughter is 4 years imprisonment backdated to the date of his remand in custody which includes any period confined in Vaiola hospital for assessment and treatment, that period I am informed commencing on the 30th May 2013.

[17] In addition to, or as part of this sentence, I make a treatment order under section 67(1). A certificate under section 68 has been delivered to the Court, this morning. As part of this treatment the prisoner is to undertake an appropriate program of drug and alcohol rehabilitation under the Salvation Army, under the direction of Dr Puloka.

R v Pale

Supreme Court, Nuku'alofa
Cato J
Cr 150/2016

5 February 2016

Sentencing – rape charge – had previously been sentenced for other charges out of same incident – totality principle applied

The prisoner pleaded guilty to charges of robbery, conspiracy to housebreak, serious housebreaking, and conspiracy to theft arising out of an incident on 10 June 2014. He was sentenced to six years imprisonment with the final 18 months of his sentence suspended on conditions, two years imprisonment, three and a half years imprisonment, and two years imprisonment respectively. He had also been charged with rape after that same incident and had pleaded not guilty. Shortly before the trial was due to commence he changed his plea to guilty. He appeared for sentence.

Held:

1. Ordinarily a starting point of five years was appropriate for rape in Tonga after a defended hearing. The aggravating features were that it happened at night after a break-in, the victim was tied up and threatened, and then after the robbery the prisoner returned to the house and raped her. The starting point was fixed at seven years.
2. The mitigating factors considered were his guilty plea, he was a first offender, and he was married with a large family. Two years imprisonment was allowed by way of mitigation. He was sentenced to five years imprisonment.
3. In considering what the overall sentence should be in light of his previous sentence, the court applied the totality principle that the overall sentence should not be crushing, despite the accumulation of the sentences, to reflect the combined effect and seriousness of the offending.
4. It was appropriate to accumulate in part the sentence for rape with that of robbery being that they arose out of the same criminal enterprise, yet being discrete offences. Additional to the sentence for robbery of six years imprisonment with the final 18 months being suspended a further period of two years of the five years' imprisonment imposed for the rape should be served before the prisoner was released on suspension. He had to serve a combined prison sentence of six and half years (less any remission) for both offences and only then will the 18 months suspension of the robbery portion of his sentence operate to allow for his release. The court considered in fixing the additional period, the serious nature of the sexual offending which required a meaningful accumulation in the public interest, but refrain from

imposing any longer period because he had pleaded guilty, was a first offender and to assist further with his rehabilitation. When the additional period had been served he would be released under suspension on conditions.

Cases considered:

Fa'aoso v R [1996] TLR 42 (CA)
Latu v R AC 3 of 2014

Counsel for the prosecution	:	Mr Lutui
Counsel for the defendant	:	Mr Niu

Sentence

[1] The prisoner, Sisi Pale, pleaded guilty on the 5th January 2015 and was convicted of a number of charges arising out of an incident at Sopu on the 10th June, 2014.

[2] He was convicted of robbery for which he was sentenced to six years imprisonment with the final 18 months of his sentence suspended on the following terms;

a. He was not to commit any offences punishable by imprisonment for a period of two years;
b. He was placed on probation for 12 months to live where directed;
c. He was to undergo a course under the direction of probation on alcohol and drug abuse.

[3] He also pleaded guilty to conspiracy to housebreak and was convicted and sentenced to two years imprisonment to be served concurrently with the robbery charge.

[4] He was also convicted of serious housebreaking to three and half years imprisonment to be served concurrently with the robbery sentence.

[5] On a charge of conspiracy to theft he was convicted and sentenced to two years imprisonment to be served concurrently also.

[6] These sentences were all ordered to be backdated to the date of his remand in custody on these charges.

[7] On the 1st February, 2016, his trial for rape, which also arose out of this incident and to which he had pleaded not guilty on the 5th February 2015 and had elected trial by Judge alone, was due to commence. Shortly before the trial commenced, Mr Niu SC informed the Court that he had instructions from his client to change his plea. The prisoner was re-arraigned and pleaded guilty. His sentence was adjourned until today's date.

[8] The circumstances of his offending are serious. On the 10th June, 2014, Mr Pale, together with five other young men, were driving around the Sopu area at about 11:00pm in a truck belonging to the prisoner. During this period, one of the men had pointed out a house where he was sure goods could be located and said the residents were elderly. The man, who had provided this information, was dropped off at his residence whilst the others returned at about 3:00am and entered the house. The prisoner climbed up a pipe and entered the house on the first floor. He then opened the entrance door to allow the others in. Four others entered and went upstairs. The victim was still asleep in her bedroom. She was the only person in the house. Three men including the prisoner entered with their faces covered. Two of the men tied her up and Pale threatened her not to make noise. She was tied to the bed whilst they proceeded to remove goods from the house. A large amount of property was removed from the house and place in Mr Pale's truck. He then returned alone into the house and told the victim that he wanted to have sex with her. He proceeded then to digitally abuse her. She found this painful and asked the accused to stop doing this as it was painful but to have sex with her if he wanted it. He then untied her bonds on her feet, removed her pants and had sexual intercourse. He had, when he came into the room, been carrying a screw driver but the Crown advised that he put this down and had not threatened her with its use. After the rape, the prisoner left the house with the complainant still having bound hands. She managed to free herself and seek assistance. The prisoner admitted his offending to the police.

[9] Ordinarily, a starting point of 5 years has been said to be appropriate for rape in Tonga, after a defended hearing. That starting point was fixed in 1996, and might seem to be rather low for such a serious crime in recent times. However, Parliament has not seen fit to increase the maximum penalty for rape in Tonga which is still 15 years whereas in other jurisdictions such as New Zealand, the starting point is significantly higher, the maximum sentence there being 20 years. See the discussion in *Fa'aoso v R* [1996] TLR 42, at 44. In my view, however, there are present here circumstances of aggravation which justify a higher starting point than 5 years, as Mr Lutui submitted. These are the fact it occurred at night following a break in by a number of disguised young men into the victims' residence, her being tied up at the insistence of Pale and then threatened by him, and then, after the robbery, was nearing completion, Pale returned alone into the house and raped her whilst she was still tied up. This must have been a terrifying ordeal for the complainant who was a woman alone in the house, at the time. The facts tend to suggest that whilst she may have submitted to intercourse as a consequence of what had gone before, the fact she was bound and had found the digital abuse painful, her submission was not consent. Mr Niu SC candidly stated that the prisoner's delay in pleading was on legal advice, but the plea was altered after Mr Niu appreciated that the victim's submission could not in law be regarded as consent.

[10] It is offending which must be marked with a higher than usual starting point to condemn the callous, and violent nature of the offending, to deter others from doing similar acts and to protect woman from predatory behaviour. Mr Lutui submitted that the aggravating features would justify a starting point between 6 and 8 years. Mr Niu cited to me *Latu v R* AC 3 of 2014, where the Court of Appeal had reduced a sentence of 14 years for the rapes to one of 8 years with the last two suspended where there had been multiple rapes and assaults and effective where there had been multiple rapes and assaults and effective detention of the victim for about 24 hours and the use of a knife to threaten her. The victim had been a virgin and the appellant continued to maintain his innocence after he was convicted. The present case does not involve a series of rapes and nor was a weapon used to intimidate the victim and for that reason objectively may be less serious than *Latu*. However, the fact that the rape was proceeded by a home invasion with the victim being disabled by a number of men including Pale means that it was still very serious. I fix a starting point of 7 years.

[11] I have had resort again to consider the probation report filed earlier in relation to Mr Pale when considering mitigation. He is now aged 34. He was, however, older than the other offenders. He is married with 8 children. He lived at Lapaha with his wife and was a leader for a daily labour work group and also hired out a truck and tractor to earn income. Unlike many offenders, he was in gainful employment earning about $300.00 per week. He was also a first offender. The rape appears to have been an opportunistic attempt by him to take advantage of the victim, in the absence of the others. His offending that night had, Mr Niu submitted, been the product of a large amount of alcohol being consumed by the group. That might explain his aberrant conduct which was out of character for Pale but the fact that his behaviour may have been induced by excessive alcohol consumption is not a factor that can mitigate his offending.

[12] In my view, the most significant factor in mitigation is his guilty plea late though it was for reasons which Mr Niu has explained. By pleading guilty he has at least saved the victim from having to relive the ordeal although the lateness of his plea diminishes the discount because she has had to live with the prospect of having to give evidence for a very long time, an ordeal in itself. Mr Lutui informed me that the victim had resigned herself to what had occurred and was pleased not to have had to give evidence. She and her husband had left these premises, after the incident. It is implied at least that he is remorseful for his conduct and he has assumed responsibility for his actions. I take into account also that at the time of his offending he was a first offender. I also take into account, although to a lesser extent, that he is married and with a large family. They are also, in a sense, victims of his criminality they being deprived of his income and support for what will be a considerable time. I was informed by Mr Niu that they now live on charity and are still supportive of the prisoner visiting him in prison. I allow him a discount by way of mitigation of 2 years imprisonment. In my view, an appropriate sentence for rape is 5 years imprisonment.

[13] I now reflect on what should be the overall sentence in the light of his previous sentence for robbery of 6 years with the last 18 months suspended as above imposed by me on the 28th April, 2015. In doing so, I apply the totality principle that the overall sentence should not be crushing despite the accumulation of the sentences to reflect the combined effect and seriousness of the offending. In my view, it is appropriate to accumulate in part the sentence for rape with that of robbery arising as they do out of the same criminal enterprise, yet being discrete offences. I consider additional to the sentence of robbery of six years should imprisonment with the final 18 months being

suspended a further period of two years of the 5 years imprisonment imposed now for the rape should be served before Mr Pale is released on suspension. This means that he will have to serve a combined prison sentence of six and half years (less any remission) for both offences and only then will the 18 months suspension of the robbery portion of his sentence operate to allow for his release. I have considered in fixing the additional period, the serious nature of the sexual offending which, in my view, requires
170 a meaningful accumulation in the public interest, but refrain from imposing any longer period because he had pleaded guilty, is a first offender and to assist further with his rehabilitation, it is in my view advantageous that he be reunited with his family when this additional period has been served, and he will then be able to be released under suspension on the terms set out in paragraph 2.

R v Holani

Supreme Court, Nuku'alofa
Cato J
Cr 1/2016

7 March 2016

Sentencing – rape and housebreaking – early guilty plea – four years and nine months imprisonment with one year suspension

Samuela Holani was found guilty of one count of housebreaking and one count of rape. He was aged 21 with no previous convictions and he pleaded guilty to the offending. He appeared for sentencing.

Held:

1. The starting point for rape after a defended hearing in Tonga was said by the Court of Appeal to be five years. However, there were aggravating circumstances in that the prisoner unlawfully entered the complainant's residence in the early hours of the morning and raped her. A woman was entitled to expect she was safe in her house from predatory sexual offending. The starting point was increased to seven years imprisonment by way of this aggravating factor.
2. The court allowed mitigation of two years and three months imprisonment for his early guilty plea that saved the complainant having to give evidence, his previous good character, and also the fact that some compensation has been paid by his family. He was sentenced to four years and nine months imprisonment. The final year of his sentence was suspended with conditions because he pleaded guilty, expressed remorse, was a first offender and was co-operative.
3. On the offence of serious housebreaking he was convicted and sentenced to three years imprisonment to be served concurrently with the offence of rape. The sentences were backdated to the date of his remand in custody.

Case considered:

R v Fa'aoso [1996] Tonga LR 42

Statute considered:

Criminal Offences Act (Cap 18)

Sentence

[1] The prisoner, Samuela Holani, who is unrepresented, appears for sentence on one count of serious housebreaking contrary to section 173(1) (b) and 5 of the Criminal Act and one count of rape contrary to section 118 (1) (a) of the Criminal Offences Act.

[2] The prisoner, at about 1am on the 18th July 2015, broke into the unlocked residence of the complainant and entered the bedroom where the complainant was sleeping. She woke up and recognized the prisoner as a construction worker who was building a fence at her neighbour's house. She was frightened and tried to escape but the prisoner held her and forced her onto the bed. He removed her pants and inserted his penis into her and copulated. She cried and struggled but he proceeded to have intercourse with her. She later left the room and escaped to a neighbour's for assistance. The neighbour rang the police. Later, the prisoner was located in the complainant's home, behind a freezer and asleep. He was arrested by police and later admitted to the offending. He was aged 21 at the time of the offending. He has no previous convictions.

[3] The starting point for rape after a defended hearing in Tonga has been said by the Court of Appeal to be 5 years. *R v Fa'aoso* [1996] Tonga LR 42. However, here there were aggravating circumstances in that the prisoner unlawfully entered the complainant's residence in the early hours of the morning and raped her. A woman is entitled to expect she is safe in her house from predatory sexual offending. I increase the starting point to one of 7 years imprisonment by way of this aggravating factor.

[4] The prisoner is young and has no previous convictions. He co-operated with police and has expressed remorse. He claims to have been drunk that evening but whilst that may explain in part his behaviour it does not justify it and cannot be regarded as mitigation. I have read the probation report also. The report suggests that the offending was out of character. He is involved in community activities, sporting activities, is a youth choir master for his church and assists his father in the plantation. I have received good testimonials about him from the Longolongo Poto He Laukau Club, as to his community work, the President of the Youth of Free Wesleyan Church of Longolongo, and his Church Minister. His parents attribute his offending to drunkenness and apologise as they have to the Victim's mother and have given her a gift of money and a large pig.

[5] I allow him mitigation of two years and 3 months imprisonment for his early guilty plea that saved the complainant having to give evidence, his previous good character, and also the fact that some compensation has been paid by his family. He is sentenced to four years and nine months imprisonment. Because he pleaded guilty and has expressed remorse, is a first offender and has been co-operative he should have part of his sentence suspended. I suspend the final year of his sentence on the following conditions;

a. He is not to commit any further offence punishable by imprisonment for the period of his suspension.
b. He is placed on probation for the period of his suspension;
c. He is to live where directed by his probation officer;
d. He is not to consume alcohol or drugs during the period of his suspension;
e. He is to attend a course on alcohol and drug abuse under the direction of the Salvation Army and Probation.

80 He is warned that any failure to abide by these conditions may mean that he is recalled to serve the remainder of his prison sentence.

[6] On the offence of serious housebreaking he is convicted and sentenced to three years imprisonment to be served concurrently with the offence of rape. The sentences are backdated to the date of his remand in custody.

R v Mahe

Supreme Court, Nuku'alofa
Cato J
Cr 145/2015

8 March 2016

Sentencing – indecent assault on male child under 12 – deterrence important – mitigating factors considered – 1 year and 10 months imprisonment with final year suspended

The prisoner was a 24-year old school teacher at a primary school. He had four male students between 9 and 11 in his care at the time of the offending. His offending consisted of being responsible for instructing one of the boys to sexually violate the anus of another, and he himself engaged in this activity with another child. He indecently assaulted others by ordering their pants to be removed and for other boys touching them on the buttocks with a banana. The prisoner pleaded guilty to five counts of indecent assault on a male child under 12 years of age.

Held:

1. The sentence imposed must be one which protected young and vulnerable people from any kind of sexual exploitation, and deterred others minded to use their authority, such as being a school teacher, for such a purpose. A starting point which adequately reflected the breach of trust and the serious nature of the offending involving anal violation of children under the age of 12 and in the presence of others was 3½ years imprisonment. The starting point would have been higher had there been evidence of injury to either of the boys where there had been anal interference.
2. The prisoner was otherwise of good character, he had no previous convictions and by pleading guilty he saved the boys from any further humiliation. He expressed contrition and apologised. The court allowed mitigation of 20 months. The sentence imposed was, on each of counts 4 and 5, one year and ten months. On the other counts of indecency (counts 1, 2 and 3), the sentence imposed was 4 months imprisonment on each to be served concurrently with one another and with the sentences on counts 4 and 5.
3. The court considered the part of the sentence could be suspended after taking into account the prisoner's early guilty pleas, his co-operation with police and his expression of remorse and with no previous convictions and the fact that the offending was out of character and he was a good candidate for rehabilitation. The court suspended the final 12 months of his imprisonment on both counts four and five on conditions.

Case considered:

R v 'Atonio Tavake CR152/11

Statute considered:

Criminal Offences Act (Cap 18)

Counsel for the prosecution	:	Ms Moa
Counsel for the defendant	:	Mr Tu'utafaiva

Sentence

[1] The prisoner Tevita Mahe, pleaded guilty to five counts of indecent assault on a male child under 12 years of age contrary to section 125 of the Criminal Offences Act for which the maximum sentence is 7 years imprisonment.

[2] At the relevant time of the offending, the prisoner was aged 24, was a first offender, and was a school teacher at a primary school. He had only occupied this position for a short period. The offending took place in the presence of and with other primary school students in his care.

[3] The facts are as follows. At the time of the offending, he had in his care four primary school students aged between 9 and 11. On the 14 September 2015, at about midday they went with him and another teacher to a tax allotment to get produce, coconuts and bananas. The prisoner and the other students were on the back of the truck. The other teacher was in the cab of the truck. On the return journey, the prisoner discovered that some of the boys drank the coconut and he became frustrated. Whilst they were driving along the prisoner told the complaints to lie down on coconut fronds that had been collected. He told one of the complainants A to take of his pants and instructed another boy B to rub a banana on A's buttocks. He did so because he was scared of the prisoner. The prisoner gave his mobile phone to a third boy C to take photos and record the incident. He then told B to take off his pants and for A to rub the banana on his buttocks. Again A complied with the instruction because he was afraid to do so. He then ordered a fourth boy D to take his pants off and for B to rub his buttocks. The accused then took the banana and inserted it into D's anus. After this, he told another boy E to take off and for B to rub his buttocks. The accused then took the banana and inserted it into D's anus. After this, he told another boy E to take off his pants and he told B to place the banana in E's anus which he did because he was afraid. The complainants reported the matter to Police on the 16th September 2015. The prisoner was co-operative and admitted to the offending.

[4] By his offending, the prisoner has admitted that his actions amounted to sexual assaulting the boys who were all under the age of 12. At the relevant times they were in his care. During the course of the offending, he was responsible for instructing one of the boys to sexually violate the anus of another, and he himself engaged in this activity with another child. Others were also indecently assaulted by ordering their pants to be removed and other boys touching them on the buttocks with a banana. I consider these are serious departures, from what could be viewed by members of the Tongan community or for that matter any other community, of the ordinary standards of decency and conduct that would not be expected of a school teacher having care of boys still of a young age. It was to say the least humiliating conduct. It involved not merely an assault on the buttocks of boys but sexual violation of the anal areas of two

of his young students. I was informed by his counsel there was no injury to the boys and by counsel for the Crown that the boys did not make complaint but the prosecution arose through another boy telling his parents what had happened. I was also advised that one set of parents of a boy who was violated were talking of taking their child out of this school. I do not consider this is conduct which as the probation report opined was for fun's sake that the boys would shame each other.

[5] The Court has an obligation to protect children against conduct of this kind. It is impossible to assess what, if any, long term effect this kind of offending will have on the boys but the sentence imposed must be one which protects young and vulnerable people from any kind of sexual exploitation, and deter others minded to use their authority, such as being a school teacher for such a purpose. The Crown cited to me a decision of *R v 'Atonio Tavake* CR152/11 where an accused pleaded guilty to five counts of indent assault on girls aged between 8, 9 and ten years old respectively. The defendant was a first offender and aged 31. These incidents involved at different times fondling the breasts and vagina of the children. The trial Judge regarded the sexual offending as worthy of a starting point of 5 years. He sentenced the defendant there to 4 years in prison with the last 18 months suspended. Because of the plain breach of trust that was involved here and the fact that the sexual activity involved actual anal penetration on two occasions, and also the fact that the conduct was humiliating and in the presence of other boys, I consider a sentence of imprisonment is required; however I consider the offending was not marked with the same degree of premeditation as in *Tavake* where the offending was engaged in over different periods. A starting point which adequately reflects the breach of trust and the serious nature of the offending involving anal violation of children under the age of 12 and in the presence of others is in my view 3 and half years imprisonment. The starting point would have been higher had there been evidence of injury to either of the boys where there had been anal interference.

[6] I have read the probation report which suggests that the prisoner was otherwise a person of good character. Indeed, he came from a good family with parents involved in teaching and in religion and he had done well at school in Niuafo'ou before also doing well at school in Tongatapu and working for a bank before embarking on teaching. He has also been extensively engaged in various community works and as a youth leader. The references I have read suggest his conduct was aberrational and an unlikely event to be repeated. That said any sexual offending with children by a person in trust is serious and must be responded to by the Courts appropriately. He has no previous convictions and by his plea he has saved the boys any further humiliation. He has expressed contrition for his offending and I am informed has rendered an apology. His counsel, Mr Tu'utafaiva placed before me all the mitigation factors I have mentioned. Taking into account all the factors I have mentioned and also his inexperience as a teacher at the time, I allow mitigation of twenty months imprisonment.

[7] I impose, accordingly, on each of counts 4 and 5 sentences of one year and ten months. On the other counts of indecency (counts 1, 2 and 3), I imposed sentences of 4 months imprisonment on each to be served concurrently with one another and with the sentences on counts 4 and 5. The sentences of imprisonment are backdated to his period on remand in custody prior to sentence.

[8] I now turn to the issue of suspension. Mr Tu'utafaiva submitted that I should fully suspend his sentence but Ms Moa for the Crown expressed concern with this. Mr

Tu'utafaiva emphasised his youth, lack of experience and expressed the view that the offending was out of character and unlikely ever to reoccur. In my view, it would not, however, be appropriate or send the correct message to the community to fully suspend the sentence bearing in mind that this is sexual offending with children by a person in trust. I consider, however, the prisoner by his early guilty pleas, his co-operation with police and his expression of remorse and with no previous convictions and the fact that the offending was out of character is a good candidate for rehabilitation and qualifies for part of the sentence to be suspended. I accordingly suspend the final 12 months of his imprisonment on both counts four and five on the following conditions that he;

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a. Commit no further offences punishable by imprisonment for the period of suspension;
b. He is placed on probation for that period;
c. That he attend a course on child abuse under the direction of probation and the Women and Children's Crisis Centre during the period of his suspension.

R v Naeata

Supreme Court, Nuku'alofa
Cato J
AM 1/2016

18 March 2016

Appeal against dismissal of charges – Magistrate did not act unreasonably, misdirect himself and was not plainly wrong – appeal dismissed

The respondent had been charged with housebreaking and theft. The Magistrate dismissed the charges on the ground that the Crown had not convinced him beyond a reasonable doubt that the respondent was the person responsible for the offending. The Crown appealed against the dismissal.

Held:

1. On an appeal against conviction, a Court of Appeal could interfere with a verdict convicting an appellant only if a jury acting reasonably must have entertained a doubt as to the guilt of the appellant. Likewise, it could only be in a clear case where a Magistrate had acted unreasonably or plainly misdirected himself so that his verdict was clearly wrong that a Magistrates' verdict acquitting an accused should be the subject of a successful appeal. Where the finding depended on credibility of witnesses, it was even more difficult for an appellate Court to intervene and quash a verdict of acquittal.
2. The Court was not able to say that the Magistrate, in arriving at his verdict dismissing the charges, acted unreasonably or misdirected himself, or was plainly wrong. Accordingly, the appeal was dismissed.

Cases considered:

R v Ramage [1985] 1 NZLR 392 (CA)
R v Smythe 72 Cr App R 8 (CA)

Statute considered:

Magistrates' Court Act (Cap 11)

Counsel for the Crown : Mr 'Aho
The respondent did not appear on the appeal

Crown appeal against dismissal of charges

[1] The Crown appealed against the dismissal of charges against the respondent who did not appear on the appeal. He had been charged with housebreaking and theft. Senior

Magistrate Mafi had dismissed the charges on the ground that the Crown had not convinced him beyond a reasonable doubt that the respondent was the person responsible for the offending.

[2] I gave an oral judgment on the 14th March, 2016 having heard Mr 'Aho for the appellant who was also the prosecutor at trial. I summarise my reasons here for dismissing the appeal because the Chief Magistrate has asked that Magistrates would welcome written judgments. I do not intend to do that on every occasion, but on this appeal issues of principle are involved.

[3] The evidence put before me reveals that at approximately 6.00am on the 25th August, 2013, Melisa Tefalo saw a car swerving past near where it seems she was parked by Narottams' building on the Bypass Road. It crashed into a fence behind them. Her husband at the time was working as a Security man and was nearby. She woke him up. He said that this was at the breaking of dawn. He said he went to the crashed vehicle and saw the respondent was in the passenger seat and there was nobody in the driver's seat. He said his vehicle was parked about 3 meters away from the crashed car. He said he did not see anyone go away from the vehicle. Melisa said that the person in the passenger seat was in great pain and he was the only one in the car. The complainant said that his house had been broken into and had been awoken by his car being reversed. He resided at the 'Apifo'ou College in Bypass Road. He searched for his keys and found they had gone. He identified his car as the one involved in the crash. The respondent gave evidence that he and a friend had been drinking in the early hours it seems of the morning near a Chinese shop. They had gone to buy cigarettes and had noticed a vehicle that was parked near the Chinese store facing the waterfront. He said that his friend had told him someone from the car was calling him. He said the driver knew me but I did not know him. He said the driver invited him to have a drink and he got in the car but his friend did not join them. He said he recalled driving along the waterfront but could not recall the time when the accident happened. He was very drunk but said he did not steal the van. He said he had been knocked unconscious and severely injured. He said his friend, with whom he had been earlier, was overseas and was not returning to Tonga.

[4] The Crown, Mr Aho at trial had contended that there was only a short time between the theft and break and enter and the crash. He mentioned times as being 6 am for the break and enter and 6.15am for the crash although these times do not appear in the evidence. The principal submission of the Crown was that if anybody else had been present the witnesses would have seen them. The Crown submitted that the location of the vehicle and the keys and stolen property in the car shortly after the burglary were sufficient to convict the accused. Later, the Crown explained this on appeal as recent possession.

[5] Senior Magistrate Mafi dismissed the charges on the ground that the prosecution had not established before him that the respondent had committed the offences. There was no evidence given as to the lighting at the time. He considered it would be difficult for a person, said to be highly intoxicated, to move seats before the police arrived. He was it seems unconvinced another person could not have escaped from the car. He was also critical of the Police for not carrying out fingerprint tests at the house, and was also concerned that a statement taken from the accused had not been produced. Mr Aho later confirmed the respondent had told police that he denied the offending.

[6] Mr Aho acknowledged, in a competent memorandum filed in this Court, that, on an appeal against conviction, a Court of Appeal could interfere with a verdict convicting an appellant only if a jury acting reasonably must have entertained a doubt as to the guilt of the appellant. *R v Ramage* [1985] 1 NZLR 392 (CA). Likewise, it could only be in a clear case where a Magistrate had acted unreasonably or plainly misdirected himself so that his verdict was clearly wrong that a Magistrates' verdict acquitting an accused should be the subject of a successful appeal to this Court by the Crown under section 74 of the Magistrate's Court Act. Where the finding depends on credibility of witnesses, it is even more difficult for an appellate Court to intervene and quash a verdict of acquittal.

[7] Mr Aho based his case on recent possession. He argued that the location of the driver in the passenger seat with stolen goods and indeed the car so shortly after it had been stolen, was sufficient for conviction beyond a reasonable doubt. He cited Archbold (2004) edition at para 21-125, and *R v Smythe* 72 Cr App R 8 (CA) citing Cross on Evidence 5th ed, p 49 (now 9th ed p 38) to this effect;

> "If someone is found in possession of goods soon after they have been missed and he fails to give a credible explanation of the manner in which he came by them, the jury are justified in inferring, that he was either the thief or else guilty of dishonestly handling the goods, knowing or believing them to be stolen."

He also submitted that there was no time for the driver to escape and witnesses did not see anyone escape from the car.

[8] In this case, however, the respondent did give an innocent explanation for his presence in the car, denied he had been the driver and also denied he was responsible for the theft. Senior Magistrate Mafi had heard the respondent and had not dismissed his explanation as unworthy of belief. Moreover, he had not felt that it had been established clearly that there had been no opportunity for the driver to have escaped the car. In these circumstances, the doctrine of recent possession, which is no more than an application of a rule of common sense as Archbold states, has been displaced. I am not able to say that the Magistrate, in arriving at his verdict dismissing the charges acted unreasonably or misdirected himself, or is plainly wrong. Accordingly, I dismiss the appeal. I do not think it an appropriate case for him to have considered alternative charges a further submission Mr 'Aho made.

Fusitu'a anor v Minister of Public Enterprises

Supreme Court, Nuku'alofa
Paulsen CJ
CV 45/2013

9 March 2016; 29 March 2016

Judicial review – directors' appointments terminated by Minister – improper purpose and predetermined – Minister's decision quashed

The plaintiffs were directors of the Tonga Broadcasting Commission (TBC). On 16 October 2015 the Minister of Public Enterprises, the Hon. Poasi Tei (the Minister), terminated the plaintiffs' appointments with effect from 19 October 2015. The plaintiffs sought judicial review of the Minister's decision on the grounds that he exceeded his powers, did not observe the requirements of natural justice, acted in bad faith, failed to take into account relevant considerations and had regard to irrelevant considerations. The plaintiffs sought an order quashing the Minister's decision.

Held:

1. The court was satisfied that the only reason the plaintiffs were removed from office was because they would not resign to allow for the introduction of the public enterprises reforms. The Minister and the Government considered their removal was necessary for the good of the country but the Minister had no power to remove the plaintiffs under section 14(6) or 14(7) on this ground. In doing so the Minister acted unlawfully requiring the court's intervention.
2. The court was satisfied that the Minister's decision to remove the plaintiffs from the board was predetermined and for that reason unlawful.
3. It was fundamental that fairness required that a person who may be adversely affected by a decision was given an opportunity to be heard. In a disciplinary context this necessarily included specific particulars of the charges and the particular conduct that was relied upon. Without that a person accused would not have a fair opportunity to respond in their own defence. The Minister failed to provide the plaintiffs with sufficient particulars of both the charges and the conduct relied upon. Allowing sufficient time to respond to an adverse allegation was also a requirement of natural justice. The Minister plainly did not give the plaintiffs sufficient time to respond to his allegations.

4. The court found that the Minister's decision to remove the plaintiffs was made for an improper purpose and was predetermined. It follows from that that the Minister's failures to observe natural justice were not material in the sense that they did not actually affect the decision making process. Had the court not been of the view that the decision was unlawful on other grounds, it would have considered the Minister's breaches of natural justice both substantial and material requiring the court's intervention.
5. The court's power to grant relief was discretionary. In deciding whether to grant relief the court must take into account all the circumstances of the case including any events that occur after the making of the impugned decision and any conduct of the plaintiffs, such as delay, a lack of clean hands or the availability of alternative remedies. The starting point was that the court should vindicate rights and when a plaintiff made out substantial grounds for relief there must be good reason for refusing it.
6. There was no reason not to grant the plaintiffs their chosen remedy. The Minister's decision of 16 October 2015 removing the plaintiffs as directors of the TBC was quashed.

Cases considered:

Air Nelson Ltd v Minister of Transport [2008] NZAR 139
Attorney-General v De Keyser's Royal Hotel Ltd [1920] AC 508
Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374
Fonua v Tonga Communications Corporation Ltd [2006] Tonga LR 278
Lower Hutt City Council v Bank [1974] 1 NZLR 545 (CA)
Lloyd v McMahon [1987] AC 625
Minister of Canterbury Earthquake Recovery v Fowler Developments Limited [2013] NZCA 588
New Zealand Fishing Industry Association Inc v Minister of Agriculture and Fisheries [1988] 1 NZLR 544 (CA)
New Zealand Maori Council v Attorney-General [1996] 3 NZLR 140
Osborn v Parole Board [2014] AC 1115
R v Brixton Prison Governor; Ex parte Soblen [1963] 2 QB 243 (CA)
R v Lancashire County Council; Ex parte Huddleston [1986] 2 All ER 941
Ridge v Baldwin [1964] AC 40
Royal Australasian College of Surgeons v Phipps [1999] 3 NZLR 1
SCI Operations Pty Ltd v Commonwealth of Australia (1996) 69 FCR 346
Sebel Products Ltd v Commissioners of Customs and Excise [1949] 1 Ch 409
Skogman v R [1984] 2 SCR 93
Solicitor-General v Miss Alice [2007] 2 NZLR 783
Treaty Tribes Coalition, Te Runanga O Ngati Porou and Tainui Maori Trust Board v Urban Maori Authorities [1997] 1 NZLR 513
Tweed v Parades Commission for Northern Ireland [2007] 2 All ER 273

Statutes considered:

Public Enterprises Act 2002
State Owned Enterprises Act (NZ)

Counsel for the plaintiffs : Mr W C Edwards
Counsel for the defendant : Mr 'A Kefu SC

Ruling

What is being alleged and sought

[1] The plaintiffs were directors of the Tonga Broadcasting Commission (TBC). On 16 October 2015 the Minister of Public Enterprises, the Hon. Poasi Tei (the Minister), terminated the plaintiffs' appointments with effect from 19 October 2015.

[2] The plaintiffs seek judicial review of the Minister's decision on the grounds that he exceeded his powers, did not observe the requirements of natural justice, acted in bad faith, failed to take into account relevant considerations and had regard to irrelevant considerations. The plaintiffs seek an order quashing the Minister's decision.

[3] There is also in the statement of claim a cause of action for wrongful dismissal but at the commencement of the hearing I was advised that the plaintiffs were not pursuing that cause of action (at least not in this proceeding) and I need not consider it further.

The facts

[4] TBC carries on business as a news broadcaster on radio and television focused primarily on broadcasts of current news and matters of national and public interest in the Kingdom of Tonga. TBC is also a public enterprise under the Public Enterprises Act 2002.

[5] Both plaintiffs had served as directors of TBC prior to their last appointments.

[6] On 16 November 2013 Cabinet approved the re-engagement of the second plaintiff as a director of TBC for a period of up to three years.

[7] On 4 May 2014 the first plaintiff was re-engaged as a director and the Chairperson of the board of TBC for a period of up to three years.

[8] In 2015 the Ministry of Public Enterprises (the Ministry) gave consideration to reforms to restructure the boards of the public enterprises in the expectation that this would improve governance, financial and non-financial performance and reduce costs. The heft of what was proposed was that the public enterprises would be categorized into sectors (Utilities, Information, Communication and Technology (ICT), Transport, Agriculture and Others) and that the public enterprises in each sector would have shared directors. The existing directors were to be removed. They would be replaced by new shared boards following a recruitment and selection process.

[9] In April 2015 a presentation on the reforms was made at a Ministers' retreat. Power point slides of the presentation were produced into evidence. They contain a rudimentary cost/benefit analysis of the reforms which included the need to provide severance packages to the existing directors. There was to be a period of further analysis and development of a policy framework. Between 1 July 2015 and 31 July 2015 the existing directors in the ICT and Utilities sectors would be advised on the reforms, consultation would occur, the new directors positions would be advertised and directors recruited so that the shared boards for the ICT and Utility sectors would be effective from 1 August 2015.

[10] Cabinet decided to implement the reforms to combine the boards in the ICT and Utilities sectors by Cabinet decision No.608 dated 12 June 2015. Cabinet's approval of the reforms pre-dated any consultation with the boards of public enterprises. A letter was circulated to all Chairpersons of public enterprises inviting them to a special meeting to discuss the Government's proposal for reform of the public enterprises but that meeting did not take place until 19 June 2015.

[11] On 1 July 2015 the Minister wrote to the first plaintiff, in her capacity as the Chairperson of the board of TBC, in the following terms:

> *Letter of Notification – Shared Board for the Public Enterprises (PEs) under the Utilities and Information and Communication Technology Sectors.*
>
> "I write to inform and to notify you that Government (shareholder) has approved for the Ministry of Public Enterprises to implement major reform to the existing fifteen (15) Public Enterprises in the form of shared board of directors. The Cabinet in its decision No.608 dated 12/06/2015 approved specifically to commence the implementation of the shared board from the utilities and information and communication technology sectors.

[12] The letter went on to state the rationale of the reforms and to give tentative timelines for their implementation. This included notifying and consulting with the existing directors and advertising the new positions between 1 and 31 July 2015, the appointment of new directors between 10 and 14 August 2015 and by 1 September 2015 the existing directors would be removed from office with the commencement of the term of new shared boards.

[13] On 3 July 2015 the Ministry issued a press release on the subject of the "Shared Board for the Public Enterprises (PE) under the Utilities and Information and Communication Technology Sectors" which stated:

> Major reform has been approved by the government (shareholder) for the Ministry of Public Enterprise to implement shared board of directors amongst the existing fifteen (15) Public Enterprises...
>
> The primary purpose of this major reform is to improve Public Enterprises performance and enhance good governance. The implementation will commence with the shared board from the utilities and information & communication technology sectors...
>
> The tentative timelines for the formation process of these shared Boards is outlined below...
>
> **1st September**: End of term for the existing Directors and commencement of term of new shared boards.

[14] On 16 July 2015 the Ministry placed an advertisement in the newspaper inviting applications from suitable persons to apply for appointment as a 'Public Enterprise Director'. The advertisement stated that the applicants were sought for, inter alia, the boards of the Information and Communication Technology (ICT) Sector Public Enterprises which were identified as Tonga Communication Corporation, Tonga

Broadcasting Commission (TBC), Tonga Post and Fast Print Limited 'on a shared basis'. Applications were required by 10 August 2015. The advertisement was also emailed to the Chief Executive Officers of the Public Enterprises although not, it seems, to the directors.

[15] On about 20 July 2015, that is after the reforms were both publicly announced and the new directors' roles advertised, a meeting was held where the directors of TBC were informed of the proposed reforms and the process that was going to be undertaken to implement them. Whilst it is not altogether clear it appears that the directors were then invited to voluntarily resign their positions and told also that there would be some compensation payable for their loss of office.

[16] A complaint was made to the Commissioner for Public Relations on behalf of the board of TBC alleging that there had been no consultation with the TBC directors before the decision was made to create the shared boards and that the Ministry of Public Enterprises had acted unlawfully in advertising the positions on the board of TBC as vacant when the existing directors were currently serving. The Commissioner for Public Relations informed the then Acting Chief Executive Officer of the Ministry of Public Enterprises of the complaint by letter dated 24 July 2015.

[17] Also on 24 July 2015 Cabinet met and issued its Decision No.745 noting the Public Enterprise Ownership, Divestment and Performance Improvement Policy and requiring the Ministry of Public Enterprises to implement the reforms. That same day Cabinet also passed Decision No.746 which contained Cabinet approval of the recommendations relating to the implementation of the reforms as follows:

> "Recommendations are approved, as amended, i.e.:
>
> 1. That the Cabinet approve the skills based selection and appointment process for Public Enterprise directors and the relevant provisions of the Public Enterprises Act must be followed in the selection of shared directors for the Utility, ICT Public Enterprises and other sectors.
> 2. For Cabinet to note that the Minister for Public Enterprises will appoint an independent Selection Committee to assist him in the task of selecting and appointing directors for the Utility and ICT Public Enterprises.
> 3. That Cabinet to note the proposed timetable for the selection of suitable candidates to act as shared directors on the Utility and ICT Public Enterprises.
> 4. That Cabinet to note that redundancy payments may be considered to be paid to the directors who resign as part of this process.
> 5. That the Hon. Minister for Public Enterprises to provide a list of the persons he proposes to appoint as shared Directors for the Utility and ICT Public Enterprises, plus brief curriculum vitae, in accordance with the timetable in Appendix 1, for Cabinet consent.

[18] On 27 July 2015 Mrs. Petunia Tupou, acting for the board of TBC, wrote to the Minister advising him that the directors were not inclined to accept the verbal offer that they voluntarily resign in return for a compensation payment. Mrs. Tupou noted that the directors understood that an official offer in writing was to be put to them and that they would wait for that before making any decision.

[19] The Commissioner for Public Relations processed the complaint. Correspondence was received by the Commissioner from the Deputy Chief Executive Officer for Public Enterprises in response to the complaint dated 3 August 2015, 7 August 2015 and 12 August 2015.

[20] The letter of 3 August 2015 sought a response from the Commissioner as to why it was considered that the decision of the Minister to advertise the positions for directors of public enterprises was unlawful.

[21] The letter of 7 August 2015 was more substantial and addressed the merits of the complaint. There was an acknowledgement on behalf of the Ministry that by Cabinet's decision No. 608 Cabinet had initiated the establishment of shared boards in respect of the Tonga Water Board, Waste Authority Limited, Tonga Communication Corporation and TBC.

[22] The Ministry did not accept that the advertisement seeking applicants for the boards of public enterprises implied that the positions of the existing TBC directors were vacant. The Ministry's stance was that the advertisement concerned vacant positions in the Utility and Information and Communication Technology sectors 'shared boards' only. As there were no directors then sitting on the newly implemented shared boards the Ministry contended that there could be no suggestion that the positions of existing directors were being advertised as vacant.

[23] In response to an allegation in the complaint that on 3 July 2015 the Minister had called the meeting and informed the board of TBC that they "must resign" from their positions to enable the shared boards to be introduced, the Ministry said that the Minister had asked for the co-operation of the directors by way of voluntary resignation and had offered compensation and extended invitations to the directors to apply for the shared boards.

[24] In response to the allegation that there had been no consultation with the existing directors about the reforms the Ministry appeared to accept that this was indeed the case stating:

> There was no intention to establish the shared boards without consulting relevant BoDs. Regrettably, the policy was prematurely announced by a third party. The MPE currently has limited information on the above and shall provide so at the earliest convenience.

[25] On 12 August 2015 the Deputy Chief Executive Officer for Public Enterprises sent a further letter to the office of the Commissioner for Public Relations responding further to the allegation that there had been no consultation. In this letter the Ministry's position was as follows:

> Please allow me to withdraw the previous comment and submit the following:
>
> In spite of CD No.608 (Annex 1), dated 12th June 2015, it is not to mean relevant Board of Directors (BoD) were not intended to be informed nor consulted in due course. The Hon. Minister of Public Enterprises' (Minister) letter (Annex 2), dated 1st July 2015, and press release (Annex 3) simultaneously show that there was an intention to inform and consult relevant BoD on 1 July 2015 to 31 July 2015.
>
> Despite CD No.608, the Ministry of Public Enterprises (MPE) Cabinet Submissions, 'Ownership, Divestment and Performance Improvement Policy' (Annex 4) and 'Seeking Cabinet Endorsement of the Shared Directors Implementation Plan' (Annex 5) were submitted on 21 July 2015. The responding CD No.745, "Re: Public Enterprises – Ownership, Divestment & Performance Improvement" (Annex 6), and CD No.746, "Re: Seeking Cabinet Endorsement of the Shared Directors Implementation Plan" (Annex 7), were passed on 24 July 2015, subsequent to the first recorded consultation, dated 19th of June 2015 (Annex 8), between the Minister and relevant BoD Chairpersons.
>
> Furthermore, irrespective of CD No.608, it was not intended to undermine relevant BoD interests. As previously stated, the Minister humbly requested relevant BoD co-operation by way of voluntary resignation. Further, he has undertaken measures in offering compensation, CD No. 746(4) states, *"That Cabinet to note that redundancy payments may be considered to be paid to the directors who resign as part of this process"*. In addition, he has encouraged relevant BoD to tender for positions in the Utility Sector Public Enterprises and, Information and Communication Technology Sector Public Enterprises shared boards."

[26] On 12 August 2015 the Minister sent letters to the board of TBC requesting that they resign from their positions as directors of TBC. The letters received by the first and second plaintiff (and I can infer the other directors) were substantially the same and noted that in order to facilitate the implementation of the public enterprise reforms the Minister was formally requesting the directors' resignations, in return for a one-off compensation payment by 4.30pm on Friday, 14 August 2015, with resignation to take effect from 1 September 2015. The Minister also encouraged the directors to apply for an advertised position on the new shared board. The letter read:

> "As such, I hereby formally request and offer for your voluntary resignation from your position as a current Director of the Board of Directors of the Tonga Broadcasting Commission to be effective by 1 September 2015 upon the term and condition that a compensation payment is to be paid to you in

> accordance with the remaining term of your current appointment. Director with one (1) year and less than two (2) years balance to be completed will be payable of six (6) months of the annual basic Director fee/remuneration. This compensation payment will only be paid out once and it will be the only payment received from Tonga Broadcasting Commission.
>
> You are also indeed encouraged to apply for the position of the new shared Board of Directors which is currently being advertised. Please find enclosed the appropriate position description to assist you should you wish to apply for the positions.
>
> I sincerely hope for your favourable consideration of my request and offer, and do submit your voluntary resignation letter to me no later than 4:30pm on Friday, 14 August 2015.
>
> Upon tendering your resignation by 14 August 2015, your resignation will not be deemed effective until 1 September 2015."

[27] On 14 August 2015 Mrs. Tupou again wrote to the Minister, this time on behalf of all of the board of TBC apart from Mr. 'Ahongalu Fusimalohi, and acknowledged receipt of the Minister's letters. She advised again that her clients were not inclined to tender their voluntary resignations. The letter was critical of the tone of the Minister's letters and of the requirement that resignations be given within 24 hours. It was also critical that the concerns, objections and dissatisfaction with the proposal for a shared board had largely been ignored whilst the reforms were publicly announced and proceeding.

[28] After conducting his investigation the Commissioner for Public Relations issued his report on 27 August 2015.

[29] The Commissioner's findings included, at paragraph 3.1.1 of his report, that the request for the voluntary resignation of the directors within a fixed deadline was contrary to the spirit of the terms of their appointments, unreasonable, and, in the Commissioner's view, unlawful.

[30] At paragraph 3.1.2 of his report the Commissioner noted the lack of consultation with the directors before Cabinet made its decision to proceed with the reforms and that this was accepted by both parties. Again, at paragraph 4.2, the Commissioner recorded that the Ministry had agreed that there had been a lack of consultation. The Commissioner expressed the view, at paragraph 3.1.1, that "There is a lot of consultation needed for the smooth implementation of this reform proposal approved by Cabinet."

[31] At paragraph 4.1(b) of his report the Commissioner stated that the term of the appointments of the directors of TBC were binding "unless violation is proven under the Public Enterprises Act and endorsed by Crown Law and the Attorney General".

[32] The Commissioner's recommendations were:

> "That unless individual members of the complainant agree otherwise –
>
> (i) The individual members of the complainant:-

(a) be paid the balance of their basic salary for the remaining period of their current respective terms;
(b) receive other accrued benefits as TBC Board member;
(c) vacate their respective roles as Chairperson/Director, effective from date of settlement of (a) and (b)."

[33] At paragraph 35 of his affidavit Mr. Sione 'Akau'ola, the Chief Executive Officer for the Ministry of Public Enterprises, says that "in implementing the report of the Commissioner of Public Relations, the Ministry presented a submission to Cabinet to review the redundancy package by considering the compensation policy". If this is intended to suggest that the Ministry (or Cabinet) sought to implement the Commissioner's recommendations it is not correct. They did not do so. There is no evidence as to why the Commissioner's recommendations were not accepted by the Minister or Cabinet but it is clear that they were not.

[34] On 28 August 2015 Cabinet passed Decision No.842 and approved compensation payments based on the term of the director's appointment still remaining to directors who voluntarily resigned as follows:

That the following compensation will apply:-
"a. A Director with less than one (1) year balance to be completed = payable of three (3) months of the annual basic salary.
b. A Director with one (1) year and least than two (2) years balance to be completed = payable of six (6) months of the annual basic salary.
c. A Director with two (2) years and more to be completed = payable of full annual basic salary."

[35] On 18 September 2015 Cabinet passed Cabinet Decision No.1114. It is clause 5 which is most relevant to this case but I set out all the resolutions as follows:

"A. Recommendations 1, 2, 3, 4, 5, and 6 are approved, as amended, i.e.:
1. That the update Report for the Recruitment & Selection Process of the shared directors be noted and that the effective date of the new directors appointed for the shared directors be extended to the 1st October 2015.
2 That the Ministry to advise directors on the approved package involving CD No.842 on August 28th 2015 and total existing benefits (gratuity).
3 That the payment method for (2) above be decided jointly by the Ministry (MPE) and the Public Enterprises considering the affordability implication.
4 That the Hon. Minister of Public Enterprises to issue a letter to the remaining directors that are yet to resign, informing them that Tonga Broadcasting Commission (TBC) will also pay their existing benefits (gratuity) as per the TBC current relevant policies.
5 That if the two remaining directors decline to resign from the board of TBC by October 1st 2015 as per requested by the Ministry of Public Enterprises (MPE), then the Hon.

Minister for Public Enterprises may consider exercising the following option:

- That the contract of the two remaining directors that have not resigned from the TBC Board of Directors be terminated base on the appropriate clause in the Public Enterprises Act, if they do not accept the offer in recommendation (2) and (4) above.

6 That Dr. Siotame Havea's term as a Director of TBC Board of Directors be terminated effective from the date he migrated abroad."

[36] The reference in clause 5 of Cabinet Decision No.1114 to two remaining directors is to the first plaintiff and second plaintiff. It appears (although the evidence did not address in any detail the individual circumstances of other TBC directors) that all the other directors of TBC apart from Dr. Havea, who had migrated, and the plaintiffs had tendered their resignations.

[37] On 25 September 2015 the Minister wrote to the plaintiffs calling upon them again to voluntarily resign. The letters were in substantially identical terms stating that such voluntary resignations would be effective from 4pm on Wednesday, 30 September 2015 and in return for their resignations they would receive compensation consistent with Cabinet Decision No.842 of 28 August 2015, consisting of six months remuneration, as well as any existing benefits that were payable as a gratuity under the TBC existing policies.

[38] In a letter sent on 27 September 2015 (but incorrectly dated 12 August 2015) the plaintiffs maintained that they would not resign and they sought from the Minister a letter confirming that their tenure would remain intact or they would seek injunctive relief.

[39] Reflecting Cabinet Decision No.1114 the Minister then gave notice to the plaintiffs in letters dated 29 September 2015 that "[b]ecause you did not accept to voluntarily resign I am considering the option of exercising sections 14(6) and 14(7) of the Public Enterprises Act...". Those sections, which I will set out later in this ruling, provide the Minister with the power to remove a director of a public enterprise from office but only in certain specified circumstances. The Minister stated that he was considering exercising his power based on five grounds, which were in general terms as follows:

"1. The poor financial performance of the TBC in recent years indicates that as a Director and the Chairlady of the TBC, you have been unable to perform your roles that are required under section 13(1) of the Public Enterprises Act. Under your leadership, the financial performance of the Tonga Broadcasting Commission has been unable to improve into a commercially viable and profitable public enterprise.

2. There has been great concern from the Acting Auditor General on the recently conducted TBC audit (30th April 2015) on the "going concern" of TBC. This expresses the Auditors' lack of confidence in the ability of TBC to be able to meet their financial obligations without reasonable payments/settlement agreements with its Creditors, firm

debt collection/recovery from its Debtors, and financial assistance from Government. This verifies a critical business management environment that needs to be remedied as soon as possible.

3. TBC has failed to pay any dividend to Government in the past years, which is a requirement under Section 21 of the Public Enterprises Act.
4. TBC have failed in numerous occasions throughout the past years to meet the timeline requirements of the Public Enterprises Act with the submissions of TBC's statutory reports such as Draft Business Plans, Half Year Reports, Audited Financial Reports and Annual Reports.
5. TBC had recently pursued Government's approval for a Government Policy Obligation of over $700,000 for services rendered without properly and responsibly seeking out prior approval as per the requirements under section 4A of the Public Enterprises Act. Failure to seek prior Government's GPO approval before carrying out non-viable services contradicts the requirements of carrying out the roles of Directors diligently as of Section 13(1) of the Public Enterprises Act."

[40] The plaintiffs responded on 29 September 2015, both denying any wrongdoing and requesting further information in order to respond to the Minister's allegations. On 1 October 2015 the Minister responded to this letter, purporting to give the particulars requested. In fact, for the reasons that follow, the Minister's response substantially failed to engage with any of the plaintiffs' requests for further information of the allegations. For ease of reference, details of the plaintiffs' requests and Minister's response are set out below in relation to each of the Minister's five allegations.

[41] In relation to the first allegation made by the Minister, concerning the poor performance of TBC, the plaintiffs asked the Minister to identify what was meant by the poor financial performance of the TBC in recent years, why it was said that the plaintiffs were unable to perform their roles as required by the Public Enterprises Act and what was meant by the allegation that TBC was unable to improve into a commercially viable and profitable public enterprise. In response, the Minister simply referred the plaintiffs to TBC's Financial Statements for "the past financial Years" (without stating which years) and "[a]n example" that the revenue of TBC in 2009 was 2.4 million but in 2014 had decreased to 2 million, a decrease of 16%. The Minister stated "This is the same for all the other profitability indicators such as the Net Profit After Tax (NPAT)."

[42] In relation to the second allegation, as to concerns said to have been expressed by the Acting Auditor General following the TBC audit, the plaintiffs requested a copy of the audit report and that the Minister identify where in that report the Acting Auditor General had expressed a lack of confidence in TBC's ability to meet its financial obligations. The plaintiffs also asked for detail of the specific facts and circumstances supporting the allegations that there had been an inability by TBC to meet financial obligations without "reasonable payment/settlement agreements with its creditors" and "firm debt collection/recovery from its debtors" and "financial assistance from

government". The Minister's response was limited to a direction to the plaintiffs to refer to the Independent Auditor's Report dated 30 April 2015.

[43] In relation to the third allegation, that TBC had failed to pay dividends, the plaintiffs asked the Minister to advise when and in what circumstances the Government had protested a failure by TBC to pay a dividend or had enquired as to why a dividend was not paid. The Minister somewhat cryptically responded by providing a definition of dividend and asserting that TBC's lack of profitability might explain why TBC and the Government agreed not to pay or receive a dividend. He did not identify any occasion when Government had protested a failure by TBC to pay a dividend or had enquired as to why a dividend was not paid.

[44] In response to the fourth allegation, that TBC had failed to meet the timeline requirements in the Public Enterprises Act for the submission of statutory reports, the plaintiffs asked that the Minister identify the specific occasions when it was said that there had been a failure to submit statutory reports on time and any correspondence highlighting TBC's failure to provide such reports on time. The Minister stated in response that in the last two financial years "with the exception of the Business Plan, almost all of the other reports were received after the set timeline in the Public Enterprises Act."

[45] In response to the fifth allegation, that TBC had failed to seek prior Government's GPO approval before supplying non-viable services, the plaintiffs sought particulars of what was being referred to including any notice from Government to the board highlighting any breach of the Public Enterprises Act. The Minister failed to respond at all to the plaintiffs' request for information regarding the fifth allegation.

[46] The Minister's letter of 1 October 2015 also dealt with one further issue upon which the plaintiffs placed reliance. The Minister stated:

> Please note that Mr. 'Ahongalu Fusimalohi's appointment as a TBC Director will continue from today, until further notice, and after I have considered and made my decision in this matter".

[47] Mr. 'Ahongalu Fusimalohi was a member of TBC's board who had previously voluntarily resigned in accordance with the Minister's request. It appears that following his resignation he had been re-appointed to the TBC shared board. No further explanation was provided in the Minister's letter for that.

[48] On 2 October 2015 the plaintiffs wrote in response to the Minister's letter of 1 October 2015. The letter is largely a protest at the Minister's failure to properly particularise his allegations and a restatement of the plaintiffs' position. However, in relation to the fourth allegation, that statutory reports were not filed in a timely manner, the plaintiffs attached 19 separate reports or items of correspondence to support their stance that there had never been any failure to meet time line requirements.

[49] In response to the Minister's advice that Mr. Fusimalohi had been reappointed to the board of TBC the plaintiffs wrote:

> Equally we are confronted with the bizarre development, as recently as 1 October 2015 where a former director of the Board, namely Ahongalu Fusimalohi, who purported to resign, and soon after 27 August when the

> Ombudsman's Report was published he sought to return to the TBC Board. He then resigned on 30 September indicating to the TBC Board that he had been appointed to the "...new combined Board of the TBC, Tonga Communications and Tonga Print" in the expectation that that "Super Board" would meet on 1 October.
>
> Despite this development on 1 October 2015....we were advised by you Ministry that Mr. Fusimalohi was again re-appointed to the TBC Board until further notice.

[50] It appears that after receiving the plaintiffs' letter of 2 October 2015 the Minister reported to Cabinet and by decision No.1116 dated 2 October 2015 Cabinet referred the plaintiffs' response to a Cabinet sub-committee consisting of the Minister of Public Enterprises, the Minister of Justice and the Minister of Police. In his affidavit Mr. 'Akau'ola says that the Ministry handed over the relevant correspondence to the sub-committee to review but there is before the Court no evidence as to the proceedings before the sub-committee nor is there any report that they may have made to Cabinet in evidence either. All that the evidence reveals is that on 16 October 2015 Cabinet again met and had before it for its approval a draft of a letter terminating the appointments of the plaintiffs "who have not yet resigned". The draft letter apparently contained an effective termination date for the plaintiffs' appointments of 1 October 2015 because Cabinet resolved:

> That Cabinet note the effective date of termination, changing from 1st October 2015 as stated in recommendation Number (5) of Cabinet Decision No. 1114 on 18th September 2015 to 19 October 2015.

[51] The same Cabinet decision approved a recommendation to rescind recommendation 6 of Cabinet Decision No.1114 of 18 September 2015, that Dr. Havea's appointment be terminated from the date he migrated overseas, as Dr. Havea had also tendered his resignation since that Cabinet decision had been made.

[52] On that same day, that is 16 October 2015, letters were delivered to the plaintiffs from the Minister terminating their appointments on the TBC Board but stating that the Minister would still accept their resignations with the payment of compensation should the plaintiffs voluntarily resign before 4.30pm on 19 October 2015. The letters were in substantially identical terms. The letter to the first plaintiff reads:

> "After careful and thorough consideration of your response to my letter of and the relevant documentations, I regret to advise that I have decided, with the consent of Cabinet, to terminate your appointment as a Director of the Board of Directors of the Tonga Broadcasting Commission, with effect from 4:30pm on Monday 19 October 2015.
>
> The grounds for this decision is based on my determination that:
>
> (1) under section 14(6) of the Public Enterprises Act, you have neglected your duty as a director; and

(2) under section 14(7) of the Public Enterprises Act, you failed to meet your obligations under Part V of the Public Enterprises Act.

I hold these views on the basis that whilst you were a Director of the Board of Directors of the Tonga Broadcasting Commission, you were responsible for the following:

(1) The poor financial performance of the Tonga Broadcasting Commission, with decreasing profitability in recent years and down to actual Net Losses in two of the past three financial years (Financial Years 2011/12-2013/14).

(2) The Acting Auditor General's concerns that the Tonga Broadcasting Commission could not continue to operate as a "going concern", and the Auditor's recommendation to set up reasonable settlement agreements with creditors, commence firm process of debt collection and to seek financial assistance from Government.

(3) The inability of the Tonga Broadcasting Commission to pay a dividend to Government, as required under section 21 of the Public Enterprises Act;

(4) The consistent failure of the Tonga Broadcasting Commission to provide before the statutory deadline, the reports that are required under sections 18 (business plan), 19 (half yearly reports) and 20 (annual reports) of the Public Enterprises Act; and

(5) The treatment of expenses of the Tonga Broadcasting Commission, amounting to $730,000 (approx.), to claim as a Government Policy Obligation (GPO), when clearly no such arrangement was ever directed or agreed upon by Government in accordance with section 4A of the Public Enterprises Act.

Despite this adverse decision against you, His Majesty's Cabinet also directed that, in order to demonstrate that this decision was made in good faith, with the public's interest in mind at all relevant times, I wish to inform you that if you re-consider and decide to voluntary resign before 4:30pm on Monday 19 October 2015, you will be entitled to receive the compensation package that was approved under Cabinet Decision number 842 of 28 August 2015, which consists of the equivalent of your current remuneration for six (6) months, and also any existing benefits that is payable to you as a gratuity under the Tonga Broadcasting Commission existing policies. If you do not voluntary resign by then, then no compensation package will be made available to you.

In conclusion, I sincerely hope that you will accept this decision, and that we all move forward and continue to contribute to the development of the Government and the country as a whole."

[53] The plaintiffs did not voluntarily resign, rather they filed this proceeding. They initially sought and obtained injunctive relief restraining the Minister from terminating their positions as directors of TBC until further order of the Court, but the interim orders made by Cato J were subsequently discharged by Scott J after a hearing. An appeal was filed against Scott J's ruling by the plaintiffs but rather than proceed with the appeal the parties agreed that it would be better for the substantive proceeding to be heard on an early date and that is how the matter has been progressed.

The plaintiffs' pleading

[54] The plaintiffs have pleaded three causes of action based on conventional chapter headings of judicial review (*Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 (HL) per Lord Diplock). The recognised grounds of review are not exhaustive and they overlap. Whilst the Court must base its decision on the recognised grounds of review in a case such as this, the substantive principles of judicial review can be adequately summarised in simple terms. A decision-maker must act fairly and reasonably and in accordance with the law and this three-fold duty merges rather than being discrete (Sir Robin Cooke "Third Thoughts on Administrative Law" [1979] NZ Recent Law 218 and *New Zealand Fishing Industry Association Inc v Minister of Agriculture and Fisheries* [1988] 1 NZLR 544 (CA), 552).

Illegality

The Minister's request for resignations

[55] The first of the plaintiffs' principal arguments is that the Minister exceeded his powers under the Public Enterprises Act when he requested that the plaintiffs voluntarily resign. They argue that there is no power in the Public Enterprises Act for the Minister to request voluntary resignations from directors who have been validly appointed and that such requests amount to a constructive dismissal by analogy with employment law principles relying on *Fonua v Tonga Communications Corporation Ltd* [2006] Tonga LR 278.

[56] The Minister argues that that there is nothing in the Act to prohibit the Minister making a request of directors of public enterprises that they resign in pursuit of a Government Policy to make public enterprises more profitable by establishing shared boards. The Minister's counsel, also makes the point that principles of constructive dismissal have no role to play in this case where the plaintiffs never resigned in response to the request that they do so.

[57] I consider the submission that the Minister acted unlawfully when requesting the resignations of the plaintiffs is a distraction in that it fails to focus on the real issue in this case.

[58] Executive authority is derived from powers conferred by statute, prerogative powers and from a third source, being the residual freedom to do anything that does not conflict with positive law (*Minister of Canterbury Earthquake Recovery v Fowler Developments Limited* [2013] NZCA 588 at [75] to [85] referring to BV Harris "The 'Third Source' of Authority for Government Action" (1992) 109 LQR 626). Examples of powers that might be exercised under the authority of the residual freedom are said

to include the publication of information, the entering into of contracts, and the making of ex gratia payments.

[59] In *Fowler Developments*, at [78] and [79], the Court of Appeal noted that the residual freedom cannot authorise acts which conflict with the legal rights and liberties of citizens or where the field is covered by statute and referred to Lord Atkinson in *Attorney-General v De Keyser's Royal Hotel Ltd* [1920] AC 508 (HL), 539-540:

> It is quite obvious that it would be useless and meaningless for the Legislature to impose restrictions and limitations upon, and to attach conditions to, the exercise by the Crown of powers conferred by a statute if the Crown was free at its pleasure to disregard those provisions, and by virtue of its prerogative do the very thing the statutes empowered it to do..

[60] The plaintiffs' submission appears to be based on the false premise that the Minister can only do what is expressly authorised by statute and no more.

[61] I do not see anything in the Act that could be said to restrict or limit or impose conditions upon the Minister's residual freedom to request the resignation of directors in circumstances where they are free to accept or reject the request or, if they wish, negotiate terms.

[62] However, that does not take matters very far in this case. Had the Minister accepted the plaintiffs' refusals to voluntarily resign and recognised their tenure for the balance of their terms it is inconceivable that any challenge would have been taken to the Minister's action. He did not do so. What is in fact being challenged is the Minister's decision to terminate the plaintiffs' appointments following their refusal to resign. The preliminary actions, by which I mean the Minister's request for resignations and the Cabinet decisions authorising the introduction of the reforms, and thereby the removal of directors from the boards, which may not be reviewable in themselves (*New Zealand Maori Council v Attorney-General* [1996] 3 NZLR 140, 160) only take on legal significance upon the Minister exercising the power to terminate the plaintiffs' appointments.

The Minister's decision to remove the plaintiffs

[63] The plaintiffs are on stronger ground when they argue that the Minister's decision to terminate their appointments was not based on any of the grounds set out in sections 14(6) and 14(7) of the Act. It was predicated, they say, upon their refusal to resign so that the public enterprise reforms could be introduced. The plaintiffs are advancing the argument that the Minister exercised his power for an improper purpose.

[64] Decision makers must always act within the parameters set by their empowering statute. Statutory powers are given for a purpose and their exercise must always promote that purpose. A decision maker, even one acting in good faith, abuses its statutory power by exercising it for an improper purpose (P. A. Joseph "Constitutional and Administrative Law in New Zealand", 4th Edition at 23.2.2 and page 941). Joseph at page 940 of his text says:

> The Court must ascertain the scope of the power in question and ask whether the impugned decision complied with the statutory purpose, the mandatory statutory criteria, and any implied mandatory criteria as might arise from the statutory scheme or the context of the decision making. Judicial review is wholly contextual, making all of the ingredients of the case at hand relevant. The instinctual question. "Has something gone wrong?", throws light on the "controlled" subjectivity that characterises the application of administrative law principles.

690 [65] The Minister's case is that the decision to terminate the plaintiffs' appointments was not automatic upon their refusal to resign. The Minister's counsel argued that the decision was made under sections 14(6) and 14(7) of the Act and that a process was adopted whereby the issue of the plaintiffs' removal was referred to a Cabinet sub-committee who looked at their representations independently of the Minister before a decision was made by the Minister and Cabinet to remove them.

[66] Before considering the parties' competing contentions I turn to consider the terms of the Public Enterprises Act and also a decision maker's obligation of candour when defending its decisions.

The statutory context

700 [67] The long title to the Public Enterprises Act states that it is "An act to establish the objectives, rules and procedures relating to Public Enterprises". Section 4 states:

> The principal objective of every public enterprise...shall be to operate as a successful business and, to this end, to be as profitable and efficient as comparable businesses that are not state owned.

[68] It will be noted that the success of a public enterprise is measured against narrow criteria. The term successful business is followed by the words 'to this end' which plainly introduce the measures of success, namely "to be as profitable and efficient as comparable businesses that are not state owned". Compare this with the more holistic approach in section 4 of the State Owned Enterprises Act (NZ). The principal objective
710 of each state owned enterprise is also to operate as a successful business but this is measured in terms which include whether the state owned enterprise is a good employer and an organisation that exhibits a sense of social responsibility.

[69] The roles of directors are set out in section 13. Directors are required to act in good faith and in the best interests of the public enterprise. Under section 13(1)(a) directors must also ensure that the public enterprise conducts its business and all decisions of the board are made, in accordance with the principal objective.

[70] The Minister's powers to appoint and remove directors are contained in section 14. Under section 14(1) the Minister may, with the consent of Cabinet, appoint such persons as directors who in the opinion of the Minister will assist the public enterprise
720 to achieve its principal objective under section 4. The powers of removal are in sections 14(6) and 14(7) of the Act.

[71] Section 14(6) states:

> A director may be removed from office by the Minister for incompetence, incapacity, bankruptcy, neglect of duty, misconduct, or failing to assist the public enterprise to act in accordance with the principle objective.

[72] The focus of section 14(6) is upon the performance, conduct or status of '[a] director'. The preposition 'for' (which appears after the word Minister) clearly means 'because of' so that the grounds for removal are only those stated. Broadly speaking, the removal of a director must be because of an inability of the director to perform his or her duties (incompetence and incapacity), disqualification of the director from holding office (bankruptcy) or dereliction of duty (neglect of duty, misconduct or failing to assist the public enterprise to act in accordance with its principal objective). The listed grounds are not synonymous.

[73] The purpose of section 14(6) then is to provide a means of removal of a director who is no longer suitable to hold that position by reason of their unsatisfactory conduct, performance or status. It does not confer on the Minister the power to remove a director irrespective of those matters. Specifically, it does not authorise the Minister to dismiss a board, or non-compliant members of a board, to advance a Government policy to establish shared boards for Public Enterprises.

[74] Section 14(7) states:

> Where a public enterprise fails to comply with its obligations under Part IV and Part V, a director as a member of the board of the enterprise concerned may be removed from the board by the Minister

[75] The power to remove under section 14(7) can be exercised only for cause; in this context upon a failure by the public enterprise to comply with an obligation imposed under Part IV and Part V of the Act. As with section 14(6), it is not enough for a Minister to remove a director in the furtherance of a Government policy to establish shared boards.

[76] A Minister whose decision to remove a director is subject to challenge must identify which ground/s stated in sections 14(6) or 14(7) are relied upon and the circumstances which support the exercise of the power in the particular case. The Minister's power cannot be exercised for an ulterior purpose.

The duty of candour

[77] The Court is not bound to accept what appears on its face to be the reason for a decision. In appropriate cases the Court must go behind a decision to find the dominant or true reason for the exercise of a power (Joseph at 23.2.2 at page 944 and *R v Brixton Prison Governor; Ex parte Soblen* [1963] 2 QB 243 (CA)).

[78] The Court recognises that it should not trespass on the legitimate policy sphere of Ministers but in some cases, and this is one in my view, the real reasons for a decision do not appear in the decision itself but may emerge inferentially from other evidence.

[79] Less than full and candid disclosure by a decision maker may lead the Court to draw adverse inferences. Generally, of course, it should be unnecessary for the Court to draw inferences because decision makers, especially Ministers of the Crown, are expected to show candour and file affidavits which disclose all the relevant facts, the content of the decision making process that was adopted to arrive at the decision challenged and the full reasons for the decision (*Tweed v Parades Commission for Northern Ireland* [2007] 2 All ER 273, 285 at [31] per Lord Bingham).

[80] In *R v Lancashire County Council; Ex parte Huddleston* [1986] 2 All ER 941, Sir John Donaldson MR said at 945:

> Counsel for the council submits, and I fully accept, that there has been no conscious attempt to conceal the thought processes of the chairman of the further education subcommittee when he decided to reject the application for a discretionary grant. But she has two further submissions.
>
> First, she says that it is for the applicant to make out his case for judicial review and that it is not for the respondent authority to do it for him. This, in my judgment, is only partially correct. Certainly it is for the applicant to satisfy the court of his entitlement to judicial review and it is for the respondent to resist his application, if it considers it to be unjustified. But it is a process which falls to be conducted with all the cards face upwards on the table and the vast majority of the cards will start in the authority's hands.

[81] In the same case Parker LJ at 947 said:

> In the vast majority of cases authorities whose decisions are challenged will no doubt put before the court all that is necessary to enable justice to be done, for I agree that they have, or should have, a common interest with the courts in ensuring that the highest standards of administration are maintained and that, if error has occurred, it should be corrected. I agree, therefore, that when challenged they should set out fully what they did and why, *so far as is necessary, fully and fairly to meet the challenge*.

[82] The obligation of public authorities, and in particular the executive, to act as an exemplar litigant and provide full and candid disclosure to the Court has been recognised in decisions of the Court of England, Canada, Australia and New Zealand (*Sebel Products Ltd v Commissioners of Customs and Excise* [1949] 1 Ch 409, 413; *SCI Operations Pty Ltd v Commonwealth of Australia* (1996) 69 FCR 346, 368; *Skogman v R* [1984] 2 SCR 93, 109 and *Solicitor-General v Miss Alice* [2007] 2 NZLR 783 at 796-797) and there is no reason why it should not equally be the case in Tonga.

[83] In relation to the particular position of Ministers, Joseph at page 931 of his text has this to say:

> Ministers of the Crown bear a special responsibility. Although ministers may not be compelled to swear affidavits, they are expected to discharge fully their duty to the court: [T]he Crown must act, and be seen to act, as a model litigant. The Crown as executive must be an exemplar of high standards of conduct in litigation before the courts. It would be "regrettable" observed the Court of Appeal were a minister to make no affidavit. Ministerial candour is a constitutional obligation coupled with a correlative duty of judicial restraint

Why did the Minister remove the plaintiffs?

[84] I now turn to consider the reason why the plaintiffs were removed from their positions as directors of TBC. Was it, as the Minister argues, for poor performance and neglect of duty, or as the plaintiffs contend, because they would not voluntarily resign to allow for the implementation of the public enterprise reforms.

[85] The starting point is that the Minister did not make an affidavit. There is no statement from him whatsoever, apart from that contained in the letter to the plaintiffs of 16 October 2015 terminating their appointments, as to the reasons for his decision. There is also an absence of evidence about key aspects of the decision making process.

[86] There is no record of the matters which were considered by Cabinet on 18 September 2015 when it resolved that the Minister might exercise the option of terminating the plaintiffs' appointments. There is no explanation for the Minister's substantial failure to respond to the plaintiffs' requests for further particulars of the allegations made against them or confirmation that the Minister did in fact consider the plaintiffs' responses to the allegations and, if he did, his reasons for rejecting them. The statement in the Minister's letter of 16 October 2015 to the effect that he had given their responses careful and thorough consideration falls well short of satisfying me that such consideration was in fact given when the Minister has chosen not to give evidence and the letter contains no further reference to anything advanced by the plaintiffs on their own behalf. There is no evidence of the proceedings before the Cabinet sub-committee that is said to have considered the plaintiffs' responses to the Minister's allegations. The Minister has not produced any record of the Cabinet sub- committee's conclusions/recommendations. There is no evidence of the matters that Cabinet considered on 16 October 2015 when it approved the letter to be sent to the plaintiffs terminating their appointments or as to why the Minister offered the plaintiffs the further opportunity to resign and receive compensation if, as he contends, they had neglected their duty and failed to meet their obligations under Part V of the Public Enterprises Act to such an extent as to justify their summary removal. All of this casts considerable doubt over the veracity of the avowal in the Minister's letter of 16 October 2015 that the plaintiffs were being removed for performance reasons.

[87] The plaintiffs had been reappointed to the board by the Minister's predecessor in 2013 and 2014 respectively from which it can be taken that the then Minister was satisfied as to their performance as directors. In the Minister's statement of defence, at paragraph 18, it is pleaded that upon coming into office the Minister reviewed the financial performance and position of TBC and considered that the option of terminating the plaintiffs was justified because of the poor financial performance and non-compliance with the Public Enterprises Act. There is no evidence about any of that before the Court and in the absence of such evidence I cannot accept it.

[88] The evidence proves that the Government was on an intractable course to remove all the directors in the ICT and Utilities sectors. Cabinet gave its approval to the reforms by Cabinet Decision No.608 on 12 June 2015 despite an expected high level of resistance from the affected directors. The reforms were then announced (both to the Chairpersons of Public Enterprises and publicly in a press release) and an advertisement placed seeking applicants for the new directors' roles before there was any consultation with the existing directors. In the letter of 1 July 2015 from the Ministry of Enterprises to the first plaintiff it states that 1 September 2015 marked the "End of the term of existing directors...". This was repeated in the public advertisement of 3 July 2015.

[89] In Cabinet Decision No.746 dated 24 July 2015 Cabinet approved "...the skills based selection and appointment process for Public Enterprises directors..." and noted that redundancy payments "maybe considered to be paid to the directors who resign as part of this process." The Minister was to "provide a list of the persons he proposes to appoint as shared directors for the Utility and ICT Public Enterprises."

[90] In the Minister's letters to the plaintiffs of 12 August 2015 he formally requested that they resign but the letter is notable for the absence of any suggestion of performance issues or of any offer to engage in discussions on alternatives to the proposed reforms and he required the resignations within just two days.

[91] In Cabinet Decision No. 842 Cabinet approved compensation payments to the directors "from the restructured Public Enterprises Board of directors for ...Tonga Broadcasting Commission..." with no suggestion but that all the directors would be removed.

[92] By the time that Cabinet met on 18 September 2015 it was obvious that the plaintiffs did not intend to resign. There had been correspondence from Mrs. Petunia Tupou to the Minister on behalf of the board of TBC stating that they would not resign and the Commissioner of Public Relations had substantially found in favour of the complaint. Whilst other directors of TBC had tendered their resignations the plaintiffs had not.

[93] The real reason the plaintiffs were to be removed from the board was grounded on the plaintiffs' resistance to the reforms and refusals to resign, and is reflected in the words of Cabinet Decision No. 1114 and the Minister's own correspondence. Cabinet Decision No. 1114 states that the Minister may consider terminating the plaintiffs "base[d] on the appropriate clause in the Public Enterprises Act…" if the plaintiffs refused to resign by 1 October 2015. The Minister's letter to the plaintiffs of 29 September 2015, putting the plaintiffs on notice that the Minister was considering removing them, states "Because you did not accept to voluntarily resign...I am considering...to terminate your appointment...". The requests for the plaintiffs'

resignations were sought on one ground alone; that was so the reforms could be implemented and had nothing whatsoever to do with the plaintiffs' performance as directors of TBC (see the Minister's letter to the plaintiffs of 25 September 2015).

[94] I am satisfied, and indeed it is plainly obvious in my view, that the only reason the plaintiffs were removed from office was because they would not resign to allow for the introduction of the public enterprises reforms. I have no doubt that the Minister and the Government considered their removal was necessary for the good of the country but the Minister had no power to remove the plaintiffs under section 14(6) or 14(7) on this ground. In doing so the Minister acted unlawfully requiring the Court's intervention.

Predetermination

[95] The plaintiffs also argue that the Minister's decision to remove them was not made in good faith and was predetermined. It was a decision, the plaintiffs say, predicated entirely on their refusal to resign. A decision which is predetermined, in the sense that the decision maker has a closed mind to any other result and is not amenable to persuasion, may be set aside (*Lower Hutt City Council v Bank* [1974] 1 NZLR 545 (CA) and Joseph at 25.5 and page 1089).

[96] In my view, there is more than sufficient evidence that the decision to remove the plaintiffs was predetermined. All of the matters in paragraphs 77-94 above are relevant but there are additional matters also. These prove a lack of any proper consideration by the Minister of either the limits on the exercise of his powers under sections 14(6) and 14(7) of the Act and of the matters raised by the plaintiffs in defence of the allegations made against them.

[97] It appears from the terms of Cabinet Decision No.1114 that it was simply assumed that the Minister could remove the plaintiffs pursuant to powers contained in the Act. There is nothing to suggest that Cabinet, or the Minister, gave any consideration to the actual terms of sections 14(6) and 14(7) of the Act (and indeed the use of the words 'appropriate clause' in Cabinet Decision No. 1114 when referring to the power of removal is highly suggestive that there was not) or to whether there was in fact any basis for regarding the performance of TBC and/or the plaintiffs as directors unsatisfactory.

[98] Having put the plaintiffs on notice in his letter of 29 September 2015 that he was considering removing them, the process the Minister then adopted was in my view flawed, unfair and perfunctory, congruous in my view with a predetermined outcome.

[99] The time frames within which the plaintiffs were to respond to the allegations were unreasonably brief, consistent with the Government's intentions that the effective date for the appointment of the shared directors was to be 1 October 2015 (Cabinet Decision No.1114 dated 18 September 2015). There was therefore little time to meaningfully engage with the plaintiffs on any genuine performance concerns.

[100] In his letter of 29 September 2015 the Minister set out five reasons for considering the removal of the plaintiffs but failed to specify which particular grounds in section 14(6) and (7) he relied upon. This is not just a matter of form but of substance. The scope of any response the plaintiffs could make to the allegations would depend substantially upon the manner in which the allegation was framed.

[101] When the plaintiffs requested particulars of the allegations the Minister's response provided almost none of the information that had been sought.

[102] In relation to the first allegation, the Minister failed to provide a satisfactory response to the plaintiffs' request for further explanation of the poor financial performance of TBC and in fact, fallaciously correlated revenue and profit. The plaintiffs could not be expected to undertake an analysis of all the financial statements of TBC and all the profitability indicators within those reports, for an unspecified number of years in order to respond to such a vague allegation. Furthermore, in framing this allegation, the Minister appears to have paid no regard to the primary objective of public enterprises, which requires profitability and efficiency to be measured, not in a vacuum, but as against comparable businesses that are not state owned.

[103] The Minister failed to give any meaningful response to the plaintiffs' request for particulars of his second and third allegations and failed to respond at all to the request for particulars of his fifth allegation.

[104] As to the fourth allegation, the Minister narrowed the scope of the allegation, but not in any meaningful way. In his letter of 29 September 2015 the Minister alleged that "TBC have [sic] failed in [sic] numerous occasions throughout the past years to meet the timeline requirements ...with the submission of TBC's statutory reports...". However, in his response to the plaintiffs' request for particulars he stated that "In the last two years, with the exception of the Business Plan, almost all of the reports were received after the set timeline in the Public Enterprises Act...". The use of the words "almost all" meant that the Minister failed to identify any specific statutory report/s that were not filed within the statutory time requirements. All that can be inferred from his response is that the Minister was referring to some unspecified reports, not including the Business Plans, and within the last two years.

[105] As I have noted earlier, there is no satisfactory evidence before the Court that the Minister or the Cabinet sub-committee did in fact consider the information provided by the plaintiffs in defence of the allegations made against them. I do not accept that Mr. Akau'ola can speak on behalf of the Minister or on behalf of the Cabinet sub-committee of which he was not a member. The significance of this failure is obvious when one considers just one of the Minister's allegations. The plaintiffs provided the Minister with 19 reports or items of correspondence to refute his fourth allegation that statutory reports were not submitted on time. The Minister does not refer to any of these documents in the letter terminating the plaintiffs' appointments except to refer to "your response ...and the relevant documentation...". In his decision to terminate the plaintiffs' appointments the Minister referred to the consistent failure of TBC to provide statutory reports, yet the Minister did not identify, in that letter or indeed at any stage, any specific report that was not provided in a timely manner. Furthermore, in the annexure to his letter of 1 October 2015 the Minister acknowledged that TBC business plans had all been provided on time yet, in contradiction of this, one of his reasons for terminating the plaintiffs' appointments was stated to be the consistent failure of TBC to provide "before the statutory deadline, the reports required under sections 18 (business plan)...".

[106] There is a further matter. In respect of two other TBC directors, Mrs. Fiu and Mr. Fusimalohi, the Minister had, upon receiving their resignations, written thanking them for their ideas and expertise "which has greatly contributed to the improvements of the Public Enterprises performance over the years...". The Minister then appointed Mr. Fusimalohi to the shared board of TBC from 1 October 2015. Both had been directors of TBC since 22 May 2014 and would share responsibility for some of the alleged failings of the board. It is incongruous that the Minister would terminate the plaintiffs for reasons of poor performance and neglect of duty while rewarding two other directors with praise, and, in the case of Mr. Fusimalohi, reappointment to the TBC board.

[107] I am satisfied that the Minister's decision to remove the plaintiffs from the board was predetermined and for that reason unlawful.

Natural justice

[108] The plaintiffs also plead that when deciding whether to remove them as directors the Minister was required to observe the requirements of natural justice but did not do so in the following respects:

> [108.1] He failed to give the plaintiffs sufficient particulars of the allegations made against them.
>
> [108.2] He did not give the plaintiffs adequate time to respond to the allegations made against them.
>
> [108.3] He did not give the plaintiffs reasonable opportunity to be heard before making his decision and, specifically, that the plaintiffs were not aware of the appointment of a Cabinet sub-committee to consider the plaintiffs' case nor were they afforded an opportunity to appear before the sub-committee.

[109] The Minister did not argue that he did not have to observe the rules of natural justice in making his decision. He was right not to do so (*Ridge v Baldwin* [1964] AC 40; *Royal Australasian College of Surgeons v Phipps* [1999] 3 NZLR 1, 16; *Lloyd v McMahon* [1987] AC 625, 702 per Lord Bridge).

[110] The Minister argues that the plaintiffs were not denied natural justice because he provided adequate particulars of the allegations and sufficient time to respond to the allegations. It was argued that the fact that the plaintiffs were able to, and did, respond was evidence that sufficient particulars were provided by the Minister, as the plaintiffs should not have responded if it were the case that insufficient particulars of the allegations were provided. Finally, it was argued that the plaintiffs had no right to appear before the sub-committee and that in any event, the final arbiter was the Minister from whose decision there were no rights of appeal.

[111] It is fundamental that fairness requires that a person who may be adversely affected by a decision is given an opportunity to be heard. In a disciplinary context, which is what this case is concerned with, this necessarily includes specific particulars of the charges and the particular conduct that is relied upon. Without that a person accused will not have a fair opportunity to respond in their own defence (*Royal Australasian College of Surgeons* (supra) at 14, 16). In this case the Minister failed to

provide the plaintiffs with sufficient particulars of both the charges and the conduct relied upon, for the reasons that I have already set out above.

[112] I accept that allowing sufficient time to respond to an adverse allegation is a requirement of natural justice also (*Treaty Tribes Coalition, Te Runanga O Ngati Porou and Tainui Maori Trust Board v Urban Maori Authorities* [1997] 1 NZLR 513) and that in a case such as this, where the plaintiffs had put the Minister on notice that they did not consider that they had sufficient information to address the allegations and there were clearly disputed questions of fact arising, the plaintiffs were entitled, as a matter of fairness, to be heard before the Minister to present their case (*Osborn v Parole Board* [2014] AC 1115).

[113] The Minister plainly did not give the plaintiffs sufficient time to respond to his allegations. In his letter of 29 September 2015 he gave the plaintiffs until 2 October 2015 (a period of less than 3 days) in circumstances where serious allegations were being made against the plaintiffs, without supporting documents, for the very first time. That would have been unreasonable even if the Minister's allegations had been sufficiently particularised (which they were not). Upon providing his particulars on 1 October 2015 the Minister required any further submissions from the plaintiffs by 4.00pm on 2 October 2015, which was again wholly unreasonable. The Minister did not offer the plaintiffs any opportunity of a hearing at any stage either before himself or the Cabinet sub-committee.

[114] I regard as glib the arguments that if the plaintiffs did not have sufficient particulars they should not have responded and that they must have had sufficient time as they did in fact respond. The plaintiffs' correspondence to the Minister, although occasionally in bombastic and pejorative terms, could hardly have been clearer that they were responding under protest and did not consider that the requirements of fairness were being observed.

[115] However I have found that the Minister's decision to remove the plaintiffs was made for an improper purpose and was predetermined. It follows from that that the Minister's failures to observe natural justice were not material in the sense that they did not actually affect the decision making process. Had I not been of the view that the decision was unlawful on other grounds, I would have considered the Minister's breaches of natural justice both substantial and material requiring the Court's intervention.

Relevant and irrelevant factors

[116] The plaintiffs also argue that the Minister failed to take into account relevant factors and considered irrelevant factors when making his decision. In light of my findings that the Minister's decision was unlawful on other grounds it is not necessary for me to consider this further.

Relief

[117] The plaintiffs seek an order quashing the Minister's decision.

[118] The Court's power to grant relief is discretionary. In deciding whether to grant relief the Court must take into account all the circumstances of the case including any

events that occur after the making of the impugned decision and any conduct of the plaintiffs, such as delay, a lack of clean hands or the availability of alternative remedies.

[119] The starting point however is that the Court should vindicate rights and when a plaintiff makes out substantial grounds for relief there must be good reason for refusing it (*Air Nelson Ltd v Minister of Transport* [2008] NZAR 139 at [60]-[61]).

[120] Before me there is no pleading that relief should be refused on discretionary grounds, nor did the Minister advance any arguments that there were circumstances that would make it inappropriate to grant the plaintiffs the relief that they seek or would disentitle the plaintiffs to relief in the exercise of the Court's discretion.

[121] In those circumstances I can see no reason not to grant the plaintiffs their chosen remedy and I will quash the Minister's decision removing them as directors of TBC.

Result

[122] The Minister's decision of 16 October 2015 removing the plaintiffs as directors of the TBC is quashed.

[123] The plaintiffs are entitled to their costs which are to be fixed by the Registrar if not agreed.

R v Fotofili

Supreme Court, Nuku'alofa
Cato J
Cr 174/2014

7 April 2016

Sentencing – carnal knowledge with girls under the age of 12 – late guilty plea – 16 years' imprisonment with 18 months suspended on conditions

The prisoner was charged with two counts of carnal knowledge of a child under the age of 12 in relation to one victim and one count of carnal knowledge of a child under the age of 12 in relation to the other, and 12 counts of indecent assault on a child. The girls were 10 and 11 years old and were the daughters of the prisoner's de facto partner. The prisoner had pleaded not guilty on all counts and had maintained his pleas on arraignment before the trial commenced on the 29 February 2016. After the first complainant, the younger girl, had given her evidence and had been cross-examined on the first day of the trial, the prisoner changed his plea on the second day to one of guilty on all counts. This was shortly before the second complainant, the older girl, was to give her evidence. The prisoner appeared for sentencing.

Held:

1. The starting point for the offending was 8 years imprisonment. The prisoner was aged 39 and was a serious candidate for an indeterminate sentence of life imprisonment. He represented a serious threat to girls and there was no certainty that, even when released after a long period of time in custody, he would not still represent a serious threat.
2. The prisoner indicated some remorse and an appreciation of the enormity of his offending. He pleaded guilty, although only very belatedly.
3. Each of the three counts of carnal knowledge for which the prisoner was convicted carried sentences of 10 years imprisonment reflecting the serious breach of trust and emphasizing the need to both deter and denounce this kind of offending against vulnerable victims and protect children. Counts 1 and 3 should be served cumulatively. Applying the totaling principle, the court ordered that six years of the sentence of ten years imprisonment on count 3 in relation to the second victim be served cumulatively on the sentence of 10 years imprisonment imposed on count one in relation to the first victim. The overall sentence was 16 years. The sentence of 10 years imprisonment on count 5 was to be served concurrently with count one. All sentences on the indecent assault on a child, counts 7-18, were to be served concurrently with count one and with one another. The final 18 months of the 16 year sentence were suspended on conditions.

4. Under the Family Protection Act the court ordered that the prisoner should have no contact whatsoever with the victims and nor with the girls that were the children of his relationship.

Cases considered:
Fa'aoso v R [1996] Tonga LR 42 (CA)
R v Hu'akau [2008] TOSC 5
R v K (1990) 6 CRNZ 210 (CA)
R v Leitch [1998] 1 NZLR 421 (CA)
R v Patrick Unga Cr 84/2014
Sosefo Kolo CR 52 of 2012
Veen v The Queen [1987-88] 164 CLR 465

Statutes considered:
Criminal Offences Act (Cap 18)
Family Protection Act 2013

Counsel for the Crown : Mr Lutui
Counsel for the defendant : Mr Fili

Sentence

There is to be no publication of this judgment which directly or indirectly identifies either of the complainants in these proceedings.

[1] The prisoner was charged with two counts of carnal knowledge of a child under the age of 12 in relation to one victim and one count of carnal knowledge of a child under the age of 12 in relation to the other, the girls being sisters contrary to section 121(1) of the Criminal Offences Act and 12 counts of Indecent Assault on Child contrary to section 125(1) of the Criminal Offences Act. These assaults were perpetrated against both victims.

[2] He had pleaded not guilty on all counts and had maintained his pleas on arraignment before the trial commenced on the 29th February 2016. After the first complainant, the younger girl had given her evidence that she had been the victim of carnal knowledge in the home when her mother was absent and in a bush area which she was taken to by the prisoner, and had been cross-examined by Mr Fili on the first day of the trial, the prisoner changed his plea on the second day to one of guilty on all counts. This was shortly before the second complainant, the older girl, was to give her evidence. Mr Fili had only recently been instructed to represent the prisoner after an earlier counsel had withdrawn. I am grateful to him for taking the case on at short notice and in his submissions on sentence.

[3] The sisters were the children of the prisoner's defacto partner whom he had lived with since about 2012. There were also two very young infants in the household from his relationship with the victims' mother, both girls. The prisoner and his wife had lived with the victims in various locations in Tongatapu before the offending took place. The victims were aged 11 and 10 years respectively, at the time of the offending. The prisoner is aged 39. Plainly, he was in a position of a trust with the victims.

[4] The present offending took place in Lapaha where they had accommodation in a tax allotment.

[5] During this period, in January 2014, the prisoner had carnal knowledge of the older girl once; and twice with the younger girl. These offences took place without the knowledge of the children's mother at the home and in the bush area of the allotment. The prisoner admitted to his probation officer that the offending had in fact been extensive over a two-week period. He admitted he caused pain to the victims, especially when trying to insert his fingers or penis into their vagina. He saw he had blood on his fingers. He admitted he did not stop on any occasion until he was sexually satisfied. Some of the offending took place in the day and at times at night. He told the girls not to tell anyone. He admitted to it happening almost every day for two weeks, and said he did not expect the children to tell anyone because of their age. I gave Mr Fili the opportunity of discussing the report with his client and after he had done so he did not seek to dispute anything that had been said in the report about the offending.

[6] The offending is very serious. Carnal knowledge of a child under the age of 12 is an offence for which the maximum sentence is life imprisonment. In *Sosefo Kolo* CR 52 of 2012, I consider a suitable starting point for this offending and determined that 8 years imprisonment was appropriate taking into account that in *Fa'aoso v R* [1996] Tonga LR 42 the Court of Appeal decided that a starting point of 5 years was appropriate for rape where the maximum penalty is 15 years imprisonment. In the case of *Kolo* the offending had occurred several times with a ten year old girl, she having been taken in a car to isolated area in Sopu, and on one occasion threatened with a gun. Kolo was aged 63. There was also evidence that she had been given small sums of money. Kolo had a previous conviction for indecent assault on girls in 2006 and had been given a sentence of two years imprisonment with six months suspended. Although there was no trust relationship, as there is here, the evidence indicated that Kolo had been involved with the victim over a period of time and may have groomed her to participate. Kolo had pleaded not guilty and the complainant gave evidence for more than a day I considered that the circumstances of the offending in *Kolo* justified a sentence of 12 years imprisonment. I considered that this was in keeping with an earlier level of sentence in *R v Hu'akau* [2008] TOSC 5 where the prisoner had been sentenced after a guilty plea to eight years for carnal knowledge of a child. There, the Chief Justice had indicated that had it not been for the guilty plea he would have imposed a sentence of between 10 and 11 years. In my view *Kolo* was a worse case of repeated offending by a much older man who had been involved in grooming the child with payments of money and serious threats. He also had a previous conviction for indecent offending with children.

[7] Mr Fotofili also has a previous conviction but, in his case, it is more serious being the rape of a victim aged 12 in 2007. He was sentenced in that case to six years imprisonment after the defended hearing. In that case, the victim was staying in the house with an elderly sister of her foster mother where the prisoner, who was her grandson, was also staying, at the time. The victim complained he had raped her, which he had denied. The prisoner raised an alibi and said he had been elsewhere at the time. The grandmother gave evidence for the defence. This was rejected by the trial Judge who sentenced the prisoner to 6 years imprisonment. It is to be noted that the prisoner was released in 2012, and met the victims' mother and commenced this relationship it seems shortly after. He had, according to the probation report, been married at the time of committing this offence and had one child. His former wife reported to probation an

unhappy union accompanied by violence. This had ceased when he went to prison. The prisoner, the probation report records was born in Tongatapu but had lived with his maternal grandmother and had been brought up in Ha'apai, until they moved to live in Tongatapu where the rape offending had taken place.

[8] The girls, in the present case, were also disbelieved by their mother, the prisoner suggesting the allegations were made up because of pressure placed upon them by their father who allegedly, according to the probation report, resented the prisoner's involvement with his wife. A recent guardian ad litem report indicates that the children have been placed with family caregivers in Ha'apai and that their progress appears to have been satisfactory receiving counseling from the Woman's refuge. The girls' father has filed an application for custody and a custody hearing is anticipated. It is too soon to know what the outcome of this offending will be in so far as long term effect on the victims is concerned, but the report suggests both are putting the offending behind them. Plainly, the offending has been both injurious mentally and physically, as well as dislocating of the children's lives and living conditions. Sadly, it has also meant that their relationship with their mother has been damaged.

[9] I have heard both counsel. I was grateful to Mr Lutui for appearing on this application because I viewed this sentencing as one that was very serious and had the potential for a sentence of life imprisonment. I took the view that the offending was worse here than in *Kolo* and with a previous serious offence of rape of a young person, the prisoner now aged 39 was a serious candidate for an indeterminate sentence of life imprisonment. I consider that he represents a serious threat to girls and there is no certainty that, even when released after a long period of time in custody, he will not still represent a serious threat. It is for this reason that I thought an indeterminate life sentence might be appropriate. There is no sentence of preventive detention in Tonga. Mr Lutui, however, for the Crown did not support a life sentence in this case. He submitted that it would be manifestly excessive tending to suggest that offending of this kind was not in the same category as murder. Parliament has determined, however, that the life sentence is available for carnal knowledge offending against young children. It may, I consider, sensibly be imposed where the offender demonstrates a propensity for this kind of offending, and presents a continuing future danger to children. Those who chose to offend in this way must appreciate that they risk being imprisoned for life. The Courts will protect young children from this kind of offending. Their security is the paramount sentencing consideration, here.

[10] I have reflected on the matter at the hearing and further over the weekend. The prisoner, through his counsel Mr Fili and in the probation report, has indicated some remorse and perhaps come to an appreciation of the enormity of his offending. He has pleaded guilty, although only very belatedly. I consider the matter can be disposed of by way of lengthy finite sentence appropriate to the serious nature of the offending in regard to two victims.

[11] I do not see any mitigating factors of any consequence here aside, however, from the belated plea and perhaps some remorse. I consider that each of the three counts of carnal knowledge for which the prisoner is convicted should carry sentences of 10 years imprisonment reflecting the serious breach of trust and emphasizing the need to both deter and denounce this kind of offending against vulnerable victims and protect children. I consider that counts 1 and 3 should be in a significant part served cumulatively. Applying the totaling principle, I order that six years of the sentence of ten years imprisonment on count 3 in relation to the second victim be served

cumulatively on the sentence of 10 years imprisonment imposed on count one in relation to the first victim. The overall sentence will be one of 16 years. The sentence of 10 years imprisonment on count 5 is to be served concurrently with count one.

[12] In relation to the indecency counts charged in relation to the older victim, attempting to insert his penis (counts 7, 13) he is convicted and sentenced to 2 and half years imprisonment on both counts. For digital penetration (counts 8, 11), he is convicted and sentenced to two and a half years imprisonment on both counts. For licking her vagina (counts 9, 12) he is convicted and sentenced to two and half years imprisonment on both counts. For taking her clothes off (count 10) he is convicted and sentenced to 12 months imprisonment.

[13] In relation to the younger victim, licking vagina (count 14) he is convicted and sentenced to two and half years imprisonment; for digital penetration (count 15) he is convicted and sentenced to two and half years imprisonment, for kissing her mouth and sucking her tongue (count 16) he is convicted and sentenced to 18 months imprisonment; for massaging penis around vagina, (count 17) he is convicted and sentenced to two and a half years imprisonment; for taking off her clothes (count 18) he is convicted and sentenced to 12 months imprisonment. All sentences on counts 7-18 are to be served concurrently with count one and with one another. All sentences are to be backdated to the date the prisoner was remanded in custody on these charges.

[14] Finally, in relation to the overall sentence of 16 years, I suspend the final 18 months. The fact that the prisoner has expressed some remorse and pleaded guilty suggests he may rehabilitate. However, more important, in my view, is that when he is released it should be with restrictions and supervision to better ensure the risk of further offending is reduced. The final 18 months is suspended of the overall sentence of 16 years (counts 1 and 3) on the following conditions;

a. He is not to commit any offences punishable by imprisonment for a period of three years;
b. He is placed on probation for the period of his suspension;
c. He is not live in any residence where other girls or young women reside;
d. The probation officer is to arrange suitable counseling for him from the appropriate authority relating to sexual abuse during the period of his suspension.

[15] I record that I have not had resort to the approach in *Veen v The Queen* [1987-88] 164 CLR 465 at 477 (applied in *R v Patrick Unga* Cr 84/2014) which recognizes the court's power to order an extended period of imprisonment in the case of a recidivist prisoner for the protection of society. Nor have I adopted that line of New Zealand authority which allows for longer finite sentences for the protection of society where the courts have decided not to impose indeterminate sentences such as a life sentence or preventive detention. *R v K* (1990) 6 CRNZ 210 (CA) and *R v Leitch* [1998] 1 NZLR 421 (CA). However, these approaches to what can be a very difficult aspect of sentencing (namely better ensuring the protection of society where offenders have demonstrated they have recidivist tendencies) may be important in future cases of this kind. In this case, the fact that there were two victims allowed me to impose a partly cumulative sentence which adequately reflected the seriousness of his overall offending and protected society.

[16] Finally, I accept the submission and request of the Crown that under section 11 of the Family Protection Act, the prisoner should have no contact whatsoever with the victims in this case, and nor with the girls that are the children of his present relationship. They will still be teenagers when he is released.

[17] A copy of this judgment is to be sent to the Commissioner of Prisons and also to the Victims' mother so that she is fully aware of the orders made by this Court in relation to her children. I also direct the Crown to provide the mother, the Victims' father, and the Commissioner of Prisons with a copy of this judgment. The Guardian
230 Ad Litem is to arrange with the Court a suitable time for the father's custody application to be determined.

Tu'ifua anors v Public Service Tribunal anor

Supreme Court, Nuku'alofa
Paulsen CJ
CV 45/2013

29 February 2016; 8 April 2016

Employment law – legislation prevailed over inconsistent contract – presumption against retrospectivity

On 21 March 2013 the Public Service Tribunal (the Tribunal) allowed an appeal by the second defendant, Mr Busby Kautoke (Mr Kautoke), from the decision of the Public Service Commission (the Commission) terminating Mr Kautoke's contract of employment as Chief Secretary and Secretary to Cabinet. The Tribunal held that the decision of the Commission was invalid and it was set aside. The plaintiffs were the chairman and the four members comprising the Commission and they brought an action for judicial review of the Tribunal's decision. At issue was whether the Tribunal made an error of law when it held that the failure by the Commission to obtain Cabinet's approval to the termination of Mr Kautoke's employment, in accordance with clause 24 of his employment contract, was a procedural flaw that was fatal to the Commission's defence of its decision to terminate Mr Kautoke's employment. The Commission argued that in making its decision the Tribunal failed to have regard to the Public Service Act 2002 (the Act) and made an error of law in that pursuant to section 13(5) of the Act it could, after consultation with the Minister, remove Mr Kautoke from his employment and did not require the approval of Cabinet to do so.

Held:

1. Section 13(5) of the Act and clause 24 of the employment contract were inconsistent with one another. Under section 13(5) it was the Commission that had the power to dismiss for reasons of non-performance or misconduct subject only to it first consulting with the Minister. Under clause 24 the power of the Commission to dismiss Mr Kautoke was circumscribed by the requirement that Cabinet's approval be obtained. Section 12 of the Act provided that all terminations in respect of public service employees should be made in accordance with the Act or any written policies of Government as directed by Cabinet. The Legislature's intention was that section 13(5) would prevail over the inconsistent clause 24 of Mr Kautoke's employment contract.
2. Section 13(5) was introduced in amendments made in 2010. While the conduct of Mr Kautoke occurred before 2010, no action was taken until after 2010. The presumption against retrospectivity was directed against legislation which when interpreted retrospectively impaired an existing right acquired under existing laws or created a new obligation or duty or

attached a new disability in regard to past events. The issue was whether Mr Kautoke had acquired an existing right under his employment contract requiring the consent of Cabinet before he was dismissed. The court did not consider that he had acquired any such right. Since the purpose of legislation was to alter existing rights, there was no presumption that it would not alter mere rights which have not been exercised. Section 13(5) applied to the circumstances of Mr Kautoke's dismissal and the presumption against retrospectivity has no application.

3. The Tribunal was in error when it failed to have regard to the Act in relation to Mr Kautoke's dismissal as the Chief Executive Officer of the Prime Minister's office.

Cases considered:

A Solicitor's Clerk, Re [1957] 3 All ER 617
Abbott v Minister for Lands [1895] AC 425
Dental Council of New Zealand v Bell [1992] 1 NZLR 438
L'Office Cherifien v Yamashita-Shinnihon Steamship Co Ltd [1994] 1 AC 486
Martin v Perrie [1986] 1 R.C.S 41
Maxwell v Murphy (1957) 96 CLR 261
R v Vine [1875] LR 10 QB 195
Secretary of State for Social Security v Tunnicliffe [1991] 2 All ER 712
Wilson and others v Secretary of State for Trade and Industry [2003] 3 WLR 568
Wright v Hale (1860) 6 H & N 227
Yew Bon Tew v Kenderaan Bas Mara [1983] AC 553

Statutes considered:

Dental Act 1988 (NZ)
Public Finance Management Act 2002
Public Service Act 2002

Counsel for the plaintiffs	:	Mrs D Stephenson
Counsel for the second defendant	:	Mr D S Laurenson QC and Mrs 'A N Taumoepeau SC

Ruling

The issue

[1] On 21 March 2013 the Public Service Tribunal (the Tribunal) allowed an appeal by the second defendant, Mr. Busby Kautoke (Mr. Kautoke), from the decision of the Public Service Commission (the Commission) terminating Mr. Kautoke's contract of employment as Chief Secretary and Secretary to Cabinet. The Tribunal held that the decision of the Commission was invalid and it was set aside. This is an action for judicial review of the Tribunal's decision.

[2] At issue is whether the Tribunal made an error of law when it held that the failure by the Commission to obtain Cabinet's approval to the termination of Mr. Kautoke's employment, in accordance with clause 24 of his employment contract, was a procedural flaw that was fatal to the Commission's defence of its decision to terminate Mr. Kautoke's employment.

[3] The Commission argues that in making its decision the Tribunal failed to have regard to the Public Service Act 2002 (the Act) and made an error of law in that pursuant to section 13(5) of the Act it could, after consultation with the Minister, remove Mr. Kautoke from his employment and did not require the approval of Cabinet to do so.

The facts

[4] The plaintiffs are respectively the chairman and the four members comprising the Commission which is a statutory body formed pursuant to the Act. The principal functions of the Commission include the discipline and dismissal of employees in the public service and the resolution of employment disputes (section 6(f) of the Act as amended by the Public Service (Amendment) Act 2010).

[5] The Tribunal is a statutory tribunal formed pursuant to section 21A of the Act (as amended by section 20 of the Public Service (Amendment) Act 2010) with the function of hearing appeals regarding any decision made by the Commission concerning an employee of the public service under the Act or any regulations made under the Act (section 21A(2) of the Act as amended by the Public Service (Amendment) Act 2010).

[6] Mr. Kautoke was on 14 April 2009 employed by the Commission in the posts of Chief Secretary and Secretary to Cabinet. There is no dispute that the Chief Secretary was a Head of Department under the Act and a Chief Executive Officer following the 2010 amendments to the Act (section 3 of the Act as amended by the Public Service (Amendment) Act 2010). The designations Head of Department and Chief Executive Officer mean:

> any person in charge of the administration of a Ministry, who is employed under a fixed contract of employment under this Act.

[7] Mr. Kautoke had a written contract of employment with the Commission dated 8 May 2009. His appointment was for an initial period of two years with an option to extend exercisable by the Commission, subject to satisfactory performance, for a further period of three years. The contract provided that the Commission was required by 14 December 2010 to advise Mr. Kautoke in writing whether his contract would be renewed and if it was to be renewed, a new contract was to be signed by the parties by 14 March 2011.

[8] Clause 24(b) of Mr. Kautoke's employment contract provided:

> *Misconduct*
>
> The Commission shall, in consultation with the responsible Minister and with the approval of Cabinet, subject to any prescribed disciplinary procedures, terminate this Contract without notice where:
>
> (a) the Appointee has breached the Public Service Code of Conduct; or
>
> (b) the Appointee's conduct is such that he should be dismissed under the Public Service Act 2002, Public Finance Management Act 2002 or any Public Services Regulations.

[9] Clause 28 of Mr. Kautoke's employment contract provided that the provisions of the Act, the Public Service Regulations and the Public Finance Management Act 2002 applied to the parties to the contract.

[10] During the initial term of Mr. Kautoke's employment contract, amendments were made to the Act which were effective from 20 September 2010 and included the deletion and replacement of section 13. I will set out the original and replacement wordings in full later in this ruling. The amendments included the introduction of section 13(5) which provided that the Commission shall remove a Chief Executive Officer of a Ministry from office for non-performance or misconduct after consultation with the relevant Minister.

[11] In a letter dated 13 December 2010 the chairperson of the Commission advised Mr. Kautoke that his contract was to be extended for a further three years from 14 April 2011 to 14 April 2014. The extension of Mr. Kautoke's contract was confirmed by a decision of the Commission dated 21 February 2011 but a new contract was never provided by the Commission. It was submitted for the Commission, and I accept, that Mr. Kautoke's employment on the terms and conditions contained in the agreement of 8 May 2008 was simply extended to 14 April 2014. Mr. Kautoke was then employed under a fixed contract of employment for a term of three years from 14 April 2011.

[12] On 5 April 2012 the Commission suspended Mr. Kautoke pending an investigation into allegations against him under the Public Finance Administration (Public Funds) Regulations 1984 (the Regulations) relating to a failure to provide vouchers. He was sent a letter that same day by the Commission advising him that by its Decision No. 126 of 5 April 2012 his suspension was to be without pay and that serious disciplinary charges were to be laid against him.

[13] In a letter dated 3 May 2012 the Commission advised Mr. Kautoke that he was charged under clause 24(b) of his employment contract with two charges of failing to provide vouchers during the period 15 May 2009 to 9 July 2010 contrary to regulation 10(1) of the Regulations. It will be noted that the charges relate to events that occurred prior to the introduction of the 2010 amendments to the Act but the charges were not laid until well after those amendments were effected.

[14] Mr. Kautoke remained in his employment until 8 August 2012 when he received a letter from the Commission advising him that by Commission Decision No. 362 of 8 August 2012 his employment was terminated with effect from 6 April 2012. The approval of Cabinet to the termination of Mr. Kautoke's employment was not obtained.

[15] An internal memorandum dated 17 August 2012 from the Acting Chief Executive Officer of the Commission to the Prime Minister gave a report to Cabinet Ministers of the action taken by the Commission in terminating Mr. Kautoke's contract of employment. The report ended with the recommendation that the "termination of the Chief Executive Officer's contract … with effect from 06 April 2012 be noted." The Cabinet deferred its consideration of that report in a decision dated 17 August 2012 and then withdrew the report in a decision dated 24 August 2012.

[16] Mr Kautoke appealed the decision to dismiss him (that is, Commission Decision No. 362) to the Tribunal pursuant to section 21A of the Act. The Tribunal issued its decision on 21 March 2013 in which it allowed Mr. Kautoke's appeal and held that the decision to terminate Mr. Kautoke's employment was invalid and set it aside.

[17] For present purposes three important matters appear from the Tribunal's decision.

[18] First, that Mr. Kautoke challenged the Commission's decision by refuting the substantive merits of the charges. The grounds of challenge did not include that the Commission had not consulted with the Minister or that Cabinet's approval had not been obtained before terminating Mr. Kautoke's employment.

[19] Secondly, before the appeal hearing began on 21 March 2013, the Solicitor General, who appeared as counsel for the Commission, drew the Tribunal's attention to clause 24 of Mr Kautoke's contract of employment and submitted that because the decision to terminate the contract was made without Cabinet approval there was a procedural flaw in the process that proved fatal to the Commission's defence of Mr. Kautoke's appeal. The Tribunal (and Mr. Kautoke's counsel) accepted the Solicitor General's submission and accordingly the appeal was allowed without any consideration of the substantive grounds advanced by Mr. Kautoke in support of his appeal.

[20] Thirdly, that in reaching its decision the Tribunal was not referred to, and did not give any consideration to, the provisions of the Act (except its own decision making power under section 21F) and in particular did not consider sections 12 (to which I shall shortly refer) or 13(5).

[21] Something of the flavour of the Tribunal's decision, which was critical of the Commission, can be gleaned from paragraph 13 which reads:

> It became abundantly clear from paragraph 24 of the Appellant's contract of service that Cabinet approval is required before the contract can be terminated. This was not done. In the first instant referred to in para 10 above, the Prime Minister was asked to table the report in Cabinet **to note.** The recommendation in the report to Cabinet is that it **be noted.** Cabinet first deferred its consideration of the report and then it was withdrawn from consideration without giving any reason. Clearly the report to Cabinet with the decision to terminate the contract of the Appellant needed the **approval** of Cabinet to comply with paragraph 24 of the contract but this was not recommended. It was recommended only to **be noted** and it was eventually withdrawn**.**

[22] Mr. Kautoke has filed a counterclaim in this action in which it is alleged that his dismissal was wrongful and unfair and he seeks damages representing lost income and benefits as well as punitive damages and costs. Mr. Kautoke's counterclaim is duplicated in a separate action that he has filed under CV 66/13. This ruling is not concerned with the counterclaim, it having been agreed that any issues arising from it should be dealt with once the court's decision on the judicial review application is known.

The terms of the Act and the contract

[23] Section 12 of the Act (which was not subject to any amendment in 2010) states:

> *Employee matters to be under the Act*
>
> All appointments, promotions, disciplinary matters and terminations in respect of the Public Service shall be made in accordance with this Act and any written policies of Government as directed by Cabinet.

[24] Section 13 of the Act as enacted in 2002 read:

> *Appointment of Heads of Department*
>
> (1) The Commission, with the consent of Cabinet, shall make all appointments to the position of Head of Department.
>
> (2) Subject to section 26, Heads of Department shall be employed under a fixed contract of employment for a term of up to 5 years and may be eligible for reappointment.

[25] Following the 2010 amendments to the Act section 13 now reads:

> *Chief Executive Officers*
>
> (1) There shall be a Chief Executive Officer(s) for each Ministry.
>
> (2) The Commission shall, after consultation with the relevant Minister, appoint in writing, a person to be the Chief Executive Officer of a Ministry.
>
> (3) An appointment made under subsection (2) shall, as soon as practicable after it is made, be notified in the Gazette.
>
> (4) The Chief Executive Officer shall be employed under a fixed contract of employment for a term of up to 4 years. At the end of the contract, the position shall be re-advertised and filled through the normal process. The present CEO may re-apply and may be re-appointed if successful in the recruitment process.
>
> (5) The Commission shall, after consultation with the relevant Minister, remove a Chief Executive Officer of a Ministry from Office due to non-performance or misconduct.

[26] Also of relevance is section 17 of the Act which reads:

> *Notice of resignation*
>
> The Commission may dismiss an employee at any time for cause.

[27] It is apparent that the headings of sections 16 (which deals with the resignation of public service employees) and 17 of the Act have been incorrectly substituted for one another. The heading of section 17 ought to read 'Dismissal for cause'.

[28] Finally in this review of the Act is section 27 which has not been subject to any amendment and reads:

> *Act to prevail*
>
> Subject to the Constitution, the provisions of this Act shall prevail when any of its provisions conflict with the provision of any other law.

[29] I have previously set out clause 24 of Mr. Kautoke's employment agreement and I also noted clause 28 of the agreement which reads:

> *Application of Public Service Act, Public Finance Management Act and Regulations*
>
> The provisions of the Public Service Act 2002 any Public Service Regulations and the Public Finance Management Act 2002 shall apply to the parties to this Contract.

The ordinary and natural meaning of section 13(5)

[30] The first issue is whether according to its natural and ordinary meaning and in its statutory context section 13(5) applies to the circumstances of Mr. Kautoke's dismissal.

[31] Section 4, as amended, states the objects of the Act. These include, at section 4(c), *inter alia*, defining the powers of the Commission. At section 6(f) the functions of the Commission include the power to discipline and dismiss employees of which section 13(5) is an example in respect of the specific class of public service employees who are Chief Executive Officers.

[32] There is no dispute that Mr. Kautoke was employed as the Chief Executive Officer in charge of the administration of a Ministry; namely the Prime Minister's Office (see the definitions of public service, Chief Executive Officer and Ministry in section 3 and Schedule 1 of the Public Service (Amendment) Act 2010).

[33] There is nothing in the words used in section 13(5) or in any other section of the Act that expressly or by implication suggests that the Commission's power to dismiss a Chief Executive Officer under section 13(5) is abridged so that it can be exercised only in respect of conduct occurring after the 2010 amendments came into force.

[34] Section 12 of the Act clearly mandates that all appointments, promotions, disciplinary matters and, importantly, terminations in respect of the public service shall be made in accordance with the Act and any written policies of Government as directed by Cabinet. When read together with section 27 of the Act it must clearly have been the intention of the Legislature that in relation to such matters the provisions of the Act (and any written policies of Government) would prevail over the terms of an employment contract or the provisions of conflicting law.

[35] I consider that semantically section 13(5) is, as the Commission submits, an example of a uniform statutory policy surrounding the employment of Chief Executive Officers by which Parliament intended and enabled the Commission to remove a Chief Executive Officer of a Ministry for non-performance or misconduct after consultation with the relevant Minister.

[36] Applying this to the decision of the Tribunal it would appear, subject to the arguments raised for Mr. Kautoke to which I shall presently turn, that the appeal before the Tribunal proceeded on the basis of an erroneous concession by the Solicitor General that the failure to obtain the consent of Cabinet was fatal to the Commission's case. The concession was erroneous because the Tribunal was required by section 12 (and clause 28 of Mr. Kautoke's employment contract) to give consideration to the provisions of the Act, particularly section 13(5), and its failure to do so was an error of law.

Was section 13(5) engaged?

[37] Although this was the second of Mr. Kautoke's arguments it is logical to deal with it now. Mr. Kautoke contends that clause 24 was a term of his employment contract agreed to by the Commission in the exercise of its statutory powers to determine the terms and conditions of employment of Chief Executive Officers and that those terms should be honoured and complied with. He argues that section 13(5) created a new statutory ground for dismissing Chief Executive Officers as it encompasses a wider range of conduct than would fall within the particular circumstances specified in clauses 24(a) or (b), where if non-performance or misconduct was established it was mandatory that the Chief Executive Officer be removed subject only to consultation with the relevant Minister first taking place. As the charges against Mr. Kautoke were expressed to have been brought under clause 24(b) he submits it was a fundamental requirement for establishing that the conduct was sufficiently serious to justify dismissal that the approval of Cabinet was obtained.

[38] I do not accept this submission. It is not the case that section 13(5) created a new statutory ground for dismissal. Clause 13(5) is concerned with dismissal for both non-performance and misconduct. Dismissal for non-performance is the subject of clause 23 of Mr. Kautoke's employment contract. Clause 24 is headed 'misconduct' and deals with wrongdoing of a serious type justifying termination of the contract without notice. As well as stating particular circumstances that shall lead to dismissal (such as breach of the Public Service Code of Conduct) clause 24 also provides that the Commission shall, in consultation with the Minister, terminate the contract where "[Mr. Kautoke's] conduct is such that he should be dismissed under the Public Service Act 2002". It is in fact section 17 of the Act coupled with the provisions of the Public Service (Disciplinary) Procedures Regulations that provide the statutory and regulatory basis for dismissal for cause of public service employees. Section 17 provides that a public service employee might be dismissed "at any time for cause".

[39] The conduct that would constitute non-performance or misconduct under clause 13(5) is conduct of the same nature that would fall within the particular circumstances specified in clauses 23 and 24 of Mr. Kautoke's employment contract.

[40] Section 13(5) and clause 24 are inconsistent with one another for the very reason that is acknowledged by Mr. Kautoke. Under section 13(5) it is the Commission that has the power to dismiss for reasons of non-performance or misconduct subject only to it first consulting with the Minister. Under clause 24 the power of the Commission to dismiss Mr. Kautoke is circumscribed by the requirement that Cabinet's approval be obtained (paragraph 4(d) of second defendant's submissions of 10 March 2016). There is no room in those circumstances to interpret section 13(5) consistently with clause 24 (paragraph 39 of the second defendant's submissions of 29 February 2016).

[41] Section 12 of the Act provides that all terminations in respect of public service employees shall be made in accordance with the Act or any written policies of Government as directed by Cabinet. Clearly the Legislature's intention was that section 13(5) would prevail over the inconsistent clause 24 of Mr. Kautoke's employment contract.

Retrospectivity

[42] Mr. Kautoke's primary argument is that the decision of the Tribunal was not wrong because based on the presumption against retrospectivity section 13(5) did not apply when the misconduct alleged against Mr. Kautoke took place prior to the provision coming into force.

[43] The presumption against retrospectivity is concerned with statutory changes to the substantive law which attach prejudicial consequences to a prior event. A retrospective statute operates for the future by imposing new consequences upon past events or transactions. The presumption against retrospectivity is not concerned with statutes which attach benevolent consequences to a prior event or to the imposition of a penalty by reference to a past event where the penalty is not the consequence of that event. *Re A Solicitor's Clerk* [1957] 3 All ER 617 and *R v Vine* [1875] LR 10 QB 195 are examples where statutes attached an adverse consequence to a person's status as a convicted person and not to their illegal act which was the offence.

[44] *Dental Council of New Zealand v Bell* [1992] 1 NZLR 438 concerned whether disciplinary provisions contained in the Dental Act 1988 (NZ) applied to conduct which was the subject of a complaint against a dentist that had occurred before the introduction of the Act. Tipping J held that the disciplinary provisions were to apply retrospectively. At page 444, Tipping J quoted with apparent approval the passage from *Maxwell on Interpretation of Statutes* (12th Ed 1969) at p 215 as follows:

> Upon the presumption that the legislature does not intend what is unjust rests the leaning against giving certain statutes a retrospective operation. They are construed as operating in cases or on facts which come into existence after the statutes were passed unless a retrospective effect is clearly intended. It is a fundamental rule of English law that no statute shall be construed to have a retrospective operation unless such a construction appears very clearly in terms of the Act, or arises by necessary and distinct implication.

[45] In *Wilson and others v Secretary of State for Trade and Industry* [2003] 3 WLR 568 Lord Rodger of Earlsferry expressed the view that the test and underlying rationale for whether Parliament intended an enactment to apply to past events and transactions was simply one of fairness. He said at paragraphs 200 and 201:

> [200] Although, at a general level, the distinction between matters of substance and matters of pure procedure is readily understandable, in practice it has not always proved easy to apply, especially in relation to legislation on limitation or prescription. For that reason, in *Yew Bon Tew v Kenderaan Bas Mara* [1983] AC 553, 558H - 559A Lord Brightman cautioned against the potential dangers lurking in the description of a measure as "procedural". In *L'Office Cherifien v Yamashita-Shinnihon Steamship Co Ltd* [1994] 1 AC 486, 527G - 528C Lord Mustill went further and suggested that a single criterion of fairness should be applied to all provisions. He added, at pp 525F - H:
>
> > 'Precisely how the single question of fairness will be answered in respect of a particular statute will depend on the interaction of several factors, each of them capable of varying from case to case. Thus, the degree to which the statute has retrospective effect is not a constant. Nor is the value of the rights which the statute affects, or the extent to which that value is diminished or extinguished by the retrospective effect of the statute. Again, the unfairness of adversely affecting the rights, and hence the degree of unlikelihood that this is what Parliament intended, will vary from case to case. So also will the clarity of the language used by Parliament, and the light shed on it by consideration of the circumstances in which the legislation was enacted. All these factors must be weighed together to provide a direct answer to the question whether the consequences of reading the statute with the suggested degree of retrospectivity are so unfair that the words used by parliament cannot have been intended to mean what they might appear to say."

This is an application of the "true principle" identified by Staughton LJ in *Secretary of State for Social Security v Tunnicliffe* [1991] 2 All ER 712, 724f –g….

> 'that Parliament is presumed not to have intended to alter the law applicable to past events and transactions in a manner which is unfair to those concerned in them, unless a contrary intention appears. It is not simply a question of classifying an enactment as retrospective or not retrospective. Rather it may well be a matter of degree - the greater the unfairness, the more it is to be expected that Parliament will make it clear if that is intended.'

[201] On Lord Mustill's approach an appropriate test might be formulated along these lines: Would the consequences of applying the statutory provision retroactively, or so as to affect vested rights or pending proceedings, be "so unfair" that Parliament could not have intended it to be applied in these ways? In answering that question, a court would rightly have regard to the way the courts have applied the criterion of fairness when embodied in the various presumptions.

[46] Statutes which regulate matters of procedure will normally be construed as being retrospective in their operation (*Dental Council* at page 446). Wilde B stated the position in *Wright v Hale* (1860) 6 H & N 227, 232 as "where the enactment deals with procedure only, unless the contrary is expressed, the enactment applies to all actions, whether commenced before or after the passing of the Act." In *Maxwell* v *Murphy* (1957) 96 CLR 261, 267 Dixon CJ put the matter thus:

> But given rights and liabilities fixed by reference to past facts, matters or events, the law appointing or regulating the manner in which they are enforced or their enjoyment is to be secured by judicial remedy is not within the application of the presumption. Changes made in practice and procedure are applied to proceedings to enforce rights and liabilities, or for that matter to vindicate an immunity or privilege, notwithstanding that before the change in the law was made the accrual or establishment of the rights, liabilities, immunity or privilege was complete and rested on events or transactions that were otherwise past and closed. The basis of the distinction was stated by Mellish L.J. in Republic of Costa Rica v. Erlanger "No suitor has any vested interest in the course of procedure, nor any right to complain, if during the litigation the procedure is changed, provided, of course, that no injustice is done" [(1876) 3 Ch. D. 62, 69.]

[47] The distinction between substantive and procedural law is not always easy to make and whether a statutory provision is regarded as substantive or procedural will always depend on the facts of the instant case (*Bennion on Statutory Interpretation*, Second Edition at page 218). By way of example, in *Maxwell v Murphy* (supra) at pages 277-278 (referred to and relied upon by the Supreme Court of Canada in *Martin v Perrie* [1986] 1 R.C.S 41, 47) Williams J said:

> Statutes of limitation are often classed as procedural statutes. But it would be unwise to attribute a prima facie retrospective effect to all statutes of

> limitation. Two classes of case can be considered. An existing statute of limitation may be altered by enlarging or abridging the time within which proceedings may be instituted. If the time is enlarged whilst a person is still within time under the existing law to institute a cause of action the statute might well be classed as procedural. Similarly if the time is abridged whilst such person is still left with time within which to institute a cause of action, the abridgment might again be classed as procedural. But if the time is enlarged when a person is out of time to institute a cause of action so as to enable the action to be brought within the new time or is abridged so as to deprive him of time within which to institute it whilst he still has time to do so, very different considerations could arise. A cause of action which can be enforced is a very different thing to a cause of action the remedy for which is barred by lapse of time. Statutes which enable a person to enforce a cause of action which was then barred or provide a bar to an existing cause of action by abridging the time for its institution could hardly be described as merely procedural. They would affect substantive rights.

[48] Also in *Maxwell v Murphy* (supra) *at* pages 267-268 Dixon CJ said in relation to the distinction between procedural and substantive law:

> The distinction is clear enough in principle and its foundation in justice is apparent. But difficulties have always attended its application. In some cases they have been due to the discovery in the nature or context of the legislation or in its subject matter of indications, whether faint and conjectural or strong and persuasive, of a desire to cover situations already existing. In other cases the difficulty has been traceable to the inveterate tendency of English law to regard some matters as evidentiary or procedural which in reality must operate to impair or destroy rights in substance. Again, enactments in truth conferring or denying rights are not seldom expressed in terms of remedy.

[49] In Thurman Arnold's article '*The Role of Substantive Law and Procedure in the Legal Process'* 45 Harv. L. Rev. 617 1931-1932 at 643 the author wrote:

> The difference between procedure and substantive law is a movable dividing line which may be placed wherever an objective examination of our judicial institutions indicates is necessary.

[50] This leads me to the kernel of Mr. Kautoke's case which is that section 13(5) is a substantive amendment which was materially different from what was contained in clause 24 of his employment contract (paragraph 3 of the second defendant's submissions of 10 March 2016). It was submitted for Mr. Kautoke that applying section 13(5) to conduct which took place before section 13(5) came into force was detrimental and unfair. The material differences relate to the prerequisites for mandatory dismissal under section 13(5) and clause 24 of Mr. Kautoke's employment contract. It is said that these differ in two ways. First, that section 13(5) creates a new statutory offence as it is concerned with non-performance and misconduct which encompasses a wider range of conduct than would fall within the particular circumstances specified in clauses 24(a) or (b) of Mr. Kautoke's employment contract. Secondly, section 13(5) does not contain the requirement in clause 24 of Mr. Kautoke's employment contract that Cabinet approval be obtained before terminating his contract.

[51] I have already dealt with the first matter, which I do not accept, at paragraphs 38 to 41 of this ruling and need not say any more about it. As to the second matter, section 13(5) simply introduced a statutory requirement that the Commission first consult with the relevant Minister before removing a Chief Executive Officer from office. That was also a requirement of clause 24 of Mr. Kautoke's employment contract and was not in any way prejudicial to Mr. Kautoke. But Mr. Kautoke argues that section 13(5) substantively disadvantaged him as under clause 24 it is Cabinet, with which Mr. Kautoke had significant contact, and not the Commission that would ultimately set the threshold for conduct that was serious enough to warrant dismissal.

[52] In a case where Cabinet gives its approval to the Commission's decision to dismiss, section 13(5) would take nothing away from clause 24 of Mr. Kautoke's employment contract. In a case where Cabinet refuses to give its consent all that has happened is that it is Cabinet rather than the Commission that has made the decision that the particular conduct does not justify dismissal. Importantly however, it is section 17 of the Act that describes the circumstances under which a public service employee shall be liable to dismissal and the enquiry and range of factors that may be taken into account in determining whether the threshold for serious misconduct to warrant dismissal has been reached must be the same whether the decision is ultimately made by the Commission or by Cabinet. For this reason section 13(5) is simply procedural in nature.

[53] In any event, the presumption against retrospectivity is directed against legislation which interpreted retrospectively impairs an existing right (sometimes called a vested right) acquired under existing laws or creates a new obligation or duty or attaches a new disability in regard to past events (*Yew Bon Tew v Kenderaan Bas Mara* [1982] 3 All ER 833, 836). The issue here is whether Mr. Kautoke had acquired an existing right under his employment contract requiring the consent of Cabinet before he was dismissed. I do not consider that he had acquired any such right. Since the purpose of legislation is to alter existing rights, there is no presumption that it will not alter mere rights which have not been exercised (*Abbott v Minister for Lands* [1895] AC 425, 431 per Lord Herschell). That is the case here. No charges were laid against Mr. Kautoke until well after the introduction of the 2010 amendments. He had not exercised or acquired any existing right under clause 24 before the law was changed. Accordingly the presumption against retrospectivity does not apply to this case.

[54] In any event there are other factors also which in my view show with sufficient clarity that the Legislature must have intended that the 2010 amendments were to have retrospective effect. I have already mentioned the natural and ordinary meaning of the words in the 2010 amendments.

[55] In addition the 2010 amendments are regulatory provisions exercisable for the public benefit. The primary purpose of the amendments was to regulate the management and operation of the public service to ensure that it was apolitical, effective and efficient in serving the Government and the public of Tonga (section 4 of the Act as amended by the Public Service (Amendment) Act 2010). The amendments are not penal in nature and do not, contrary to the submissions for Mr. Kautoke, create a new offence, in which case the court can be expected to be reluctant to find that the presumption against retrospectivity has been displaced (*Dental Council* at page 445).

[56] It is a little ironic that this action arises out of Mr. Kautoke's successful appeal to the Tribunal. The Tribunal was established by the 2010 amendments and in filing his appeal to the Tribunal (rather than seeking the intervention of Cabinet) Mr. Kautoke must have regarded Part VA of the Act as having retrospective effect. I accept that it does not follow that section 13(5) must necessarily have retrospective effect for that reason but as section 13(5) was also introduced by the 2010 amendments one would expect, subject to contrary indications, that the Legislature would take a consistent approach

[57] In the *Dental Council* case Tipping J stated that the absence of any transitional provisions bearing on the question of whether the Act in question was to have retrospective effect must have been a signal that Parliament intended that the disciplinary provisions of the new Act were to have retrospective effect. There are no transitional provisions in the 2010 amendments other than in relation to the reappointment of Chief Executive Officers and Commissioners (section 26 and 27 of the Act as amended by the Public Service (Amendment) Act 2010) which are of no relevance to this case.

[58] One of the principal reasons for the Court holding in the *Dental Council* case that the new disciplinary provisions applied to conduct pre-dating the coming into force of the amending legislation was that Parliament could not have intended that two parallel disciplinary systems would be running in tandem over a period of years when the conduct which formed the subject matter of a complaint straddled the old and the new Acts. The same consideration applies in this case indicating an intention that the 2010 amendments were to apply retrospectively. It cannot have been the intention of the Legislature that the Public Service Tribunal could only hear appeals from the Commission regarding events which occurred following the introduction of the amendments with other appeals being directed to Cabinet (section 21(2) of the Act as enacted and regulation 13 Public Service (Disciplinary Procedures) Regulations 2003). Mr. Kautoke and his advisors plainly did not think so. It would make no sense either if in the case of Chief Executive Officers the Commission was only required to consult with the Minister in respect of its intention to dismiss for conduct which occurred after the introduction of the 2010 amendments and not before, particularly when the decision to dismiss might be based on the cumulative effect of such conduct

[59] For the reasons I have given I am of the view that section 13(5) applied to the circumstances of Mr. Kautoke's dismissal and that the presumption against retrospectivity has no application to this case or has been displaced.

Consultation with the Minister

[60] The third submission for Mr. Kautoke was that there was no evidence before this Court that the Commission had ever consulted with the Minister before terminating Mr. Kautoke's employment and so, it is argued, if section 13(5) applies one of its fundamental requirements has not been met. It was submitted that this was a matter pleaded by Mr. Kautoke in his statement of defence and in respect of which no evidence was adduced by the Commission to counter the assertion.

[61] In my view the Commission did not need to counter the assertion. Mr. Kautoke did not raise as an issue before the Tribunal that there had been no consultation before the Minister. The Tribunal did not turn its mind to that question. It is not therefore appropriate or required in this proceeding for the court to embark upon an inquiry into questions of fact that were never considered by the Tribunal in arriving at the decision under review.

[62] It was also argued that Mr. Kautoke was employed not only as the Chief Executive Officer of the Prime Minister's Office but also as the Secretary to Cabinet, which is not a Chief Executive Officer as defined in the Act, and therefore the Act does not apply to the termination of his contract insofar as it relates to his position as Secretary to Cabinet (paragraph 47 of the second defendant's submissions of 29 February 2016). It is not clear what the court is supposed to make of this submission. It is sufficient for present purposes that the Tribunal was in error when it failed to have regard to the Act in relation to Mr. Kautoke's dismissal as the Chief Executive Officer of the Prime Minister's office.

Discretionary relief

[63] At the conclusion of the hearing I directed counsel to file further submissions on, *inter alia*, whether the decision of the Tribunal was in fact reviewable on the application of the Commission when that decision was made at the behest of the Commission's counsel. I subsequently received those submissions.

[64] For the Commission it was argued, with reference to an article that appeared in the New Law Journal (UK) in January 2013 (http://www.newlawjournal.co.uk/nlj/content/conceding-point) and the cases referred to in it, that it did not matter how an error of law was made. The fact that an error of law was made as a result of a concession by counsel did not fetter the Tribunal's obligation to rule on all the relevant issues in the claim or require it to adopt an objectively wrong analysis of the law. The Commission submitted that the Tribunal's decision was wrong and the court should not be constrained in judicially reviewing and correcting the error. I accept that as a correct statement of the position.

[65] For Mr. Kautoke it was submitted that the New Law Journal (UK) article and the cases referred to only considered whether a tribunal is bound by a concession on a point of law made by one party to that tribunal. It was submitted that is not relevant to the issue which Mr. Kautoke advances in this case. I was referred to *Taylor Judicial Review: A New Zealand Perspective* at [541] as follows:

> Acquiescence, estoppel and waiver are not independent defences to a claim of invalidity, they operate only in relation to the discretion whether to grant a remedy

[66] Mr. Kautoke's position is that if it was to be found that the concession made by the Commission's counsel to the Tribunal was incorrect (and I believe that it was incorrect) the court should in the exercise of its discretion and in the exceptional circumstances of this case decline to grant relief. It was submitted that courts might decline relief when the grant of relief would be futile or the conduct of the plaintiff is such as to disentitle him to relief due to "acquiescence in the irregularity complained of or waiver of the right to object..." (Halsbury's Laws of England, Judicial Review at [692]).

[67] Mr. Kautoke's counsel responsibly and correctly accepted that the scope for exercising the discretion to refuse relief when a decision reviewed has been held to have been made unlawfully is narrow. Recently in *Fusitu'a and another v Minister of Public Enterprises* (Supreme Court Tonga, CV 65/2015, 29 March 2016 Paulsen LCJ) I noted that the courts should vindicate rights and when a plaintiff makes out substantial grounds for relief there must be good reasons for refusing it.

[68] I was also referred to the New Zealand Court of Appeal decision in *Wendco (NZ) Limited v Auckland City Council* [2015] NZCA 617 at [65] where the Court referred with approval to an extract in *Taylor Judicial Review: A New Zealand Perspective* as follows:

> The scope for exercising a discretion to refuse a remedy is "very narrow", "exceptional", "narrow [or] exceptional", "there must be extremely strong reasons to decline to grant relief", it is rare to refuse relief...

[69] In the recent report *Judicial Review and the Rule of Law: An Introduction to the Criminal Justice and Courts Act 2015*, Part 4, Bingham Centre for the Rule of Law, JUSTICE and the Public Law Project, London, October 2015 the authors write in relation to the position that has prevailed in the United Kingdom at paragraph 1.16 as follows:

> Courts have always had the discretion to refuse permission for judicial review, and to deny relief, in appropriate circumstances. However, there are strong constitutional imperatives in favour of granting relief unless there are strong reasons against doing so, not least the interest in ensuring that public bodies act lawfully. Enforcing fair decision-making not only ensures that better decisions are reached in the future, but it also helps to avoid any sense of injustice on the part of the person subject to the decision. As Bingham LJ stated in R v Chief Constable of the Thames Valley Police, ex p Cotton, the instances where a court would deny an individual the opportunity to put his or her case should be "of great rarity". At common law, the courts normally would be expected to grant a remedy if there is any doubt as to whether the same decision would have been reached absent the error.

[70] Mr. Kautoke advances six grounds which he contends amount to exceptional circumstances justifying the refusal of relief. Broadly the grounds fall into three categories; that the conduct of the Commission caused or contributed to the error made by the Tribunal; that Mr. Kautoke has and will be prejudiced further by the delay in having this matter resolved if the appeal is sent back to the Tribunal and; the granting of relief will be futile.

[71] In relation to the conduct of the Commission, it is the case that section 13(5) was not specifically referred to by the Commission as the basis for dismissing Mr. Kautoke or before the Tribunal. I also accept the submission for Mr. Kautoke that it is not surprising that the Tribunal accepted the Solicitor General's concession as being correct. However it is also the case, as the Tribunal's decision records, that Mr. Kautoke's counsel accepted the Solicitor General's erroneous concession (paragraph 15 of the Tribunal's decision). There is nothing to suggest that the concession was anything other than an error or made otherwise than in good faith and the Commission moved

promptly to review the Tribunal's decision following the engagement of other counsel. It appears to me that absent other factors the court should be very slow to decline relief in a case such as this on this ground.

[72] In relation to delay I note that in *Taylor Judicial Review: A New Zealand Perspective* at 5.36 it states in relation to delay:

> Every case will depend on the individual mix of relevant factors. Of them the effect of delay on third parties is likely to be critical. If third parties have been adversely affected by the delay, then a remedy that may adversely affect the third party will probably be refused. If there is no adverse effect, delay is unlikely to be fatal all other factors being equal; however, delay by itself will seldom, if ever, result in relief being refused.

[73] It is certainly the case that Mr. Kautoke's case has taken too long to resolve but the Commission cannot be blamed for that. It filed its proceedings promptly and there is much force in its submission that such delay has been substantially contributed to by steps taken by Mr. Kautoke in the proceedings, particularly in making his unsuccessful application to have counsel for the Commission disqualified and in duplicating his counterclaim in two different actions. The adverse effects of the delay on Mr. Kautoke are no different than are experienced by most litigants and there is no issue in this case that delay has affected third party rights.

[74] Finally it is argued that the granting of relief would be futile because the Commission has provided no evidence that there was any consultation with the Minister as required by section 13(5), so that if section 13(5) had been raised before the Tribunal Mr. Kautoke's appeal would in any event have been allowed. I do not accept this submission. The Tribunal made no ruling on that issue and the Commission did not in this proceeding have to adduce evidence of consultation with the Minister.

[75] Having weighed up all the matters put before me I find no grounds to refuse the Commission relief in the exercise of discretion.

[76] I would also add as a matter which bears on my discretion that I consider that referring this matter back to the Tribunal is likely to be the most time and cost effective method by which Mr. Kautoke can have his case finally determined on its merits, which is what he desires. This case has been beset by procedural manoeuvring which has caused the delay of which Mr. Kautoke now complains and no doubt has added considerably to the costs of both parties. The court can only hope that Mr. Kautoke's grievance shall now be aired in the specialist forum which was established for that purpose.

The result

[77] The Commission's application for judicial review is successful.

[78] The decision of the Tribunal allowing Mr. Kautoke's appeal from the decision of the Commission terminating his employment is set aside.

[79] I direct that the Tribunal is to reconvene and rehear Mr. Kautoke's appeal on the first available date.

[80] The Commission has sought costs. I expect that Mr. Kautoke would oppose costs. I would invite counsel to try to reach agreement but if they cannot do so they should file memoranda within 42 days.

Yang v Manoa anor

Court of Appeal, Nuku'alofa
Moore, Handley, Blanchard, and Tupou JJ
AC 22/2015

29 March 2016; 8 April 2016

Land law – legality of agreement concerning occupation and use of building

See the earlier decisions at *Yang anor v Manoa anor* [2014] Tonga LR 165 and *Yang v Manoa anor* [2015] Tonga LR 329.

This is an appeal from an interlocutory judgment of Scott J of 7 August 2015 given in the Supreme Court answering questions that had arisen in proceedings commenced by the appellant and another. Those questions raised an issue about the legality of an agreement concerning the occupation and use of a building. Scott J had earlier given a judgment, on 6 June 2014, in related proceedings involving the same parties in the Land Court concerning the jurisdiction of the Land Court.

Held:

1. It was highly likely that there were many commercial arrangements existing in Tonga that were based on the decisions of the Courts including the Court of Appeal about the status of buildings and agreements concerning their occupation and use. A fundamentally important feature of any legal system was the creation of certainty and predictability. It was for that reason that courts and, in particular, final courts of appeal should be slow to alter the direction of the development of the law or the law itself especially where people have relied upon what the Courts have said about property rights.
2. The Supreme Court Rules authorised the Court to conduct a separate trial of a preliminary question. It was common for rules of court to contain such a provision. However it was necessary for judges to approach the decision whether to conduct a separate trial with considerable caution and be mindful of the fact that while such a procedure might, superficially, appear to provide a quick and short route to a final resolution of litigation, it often did not. The trial of a separate question could have the effect of prolonging litigation and increasing the costs for the parties.
3. The appeal succeeded. The Court answered the preliminary question and decided that section 13 of the Land Act did not apply to the October 2007 tenancy agreement. The matter was remitted to the Supreme Court for trial of all issues.

Cases considered:
Bass v Perpetual Trustees Co Ltd [1999] HCA 9; (1999) 198 CLR 334
Cowley v Tourist Services Ha'pai Ltd and Fund Management Ltd [2001] Tonga LR 183
Gnych v Polish Club Limited [2015] HCA 23
Kolo v Bank of Tonga [1997] Tonga LR 181
Mangisi v Koloamatangi [1999] TOCA 9
Niu v Takealava [2013] Tonga LR 55
Westpac Bank of Tonga v Fonua [2014] Tonga LR 94

Statute considered:
Land Act (Cap 132)

Rules considered:
Supreme Court Rules 2007

Counsel for the appellant	:	Mr L Niu SC
Counsel for the first respondent	:	Mr S Fonua
Counsel for the second respondent	:	Mrs P Taufaeteau

Judgment

Introduction

[1] This is an appeal from an interlocutory judgment of Scott J of 7 August 2015 given in the Supreme Court answering questions that had arisen in proceedings commenced by the appellant and another. Those questions raised an issue about the legality of an agreement concerning the occupation and use of a building. Scott J had earlier given a judgment, on 6 June 2014, in related proceedings involving the same parties in the Land Court concerning the jurisdiction of the Land Court.

The factual background

[2] The first respondent is the registered owner of a town allotment at Haveluloto Tohi 376 Folio 39 with an area of 759.6 m². The second respondent is his wife. He built, on the allotment, a retail shop measuring approximately 10' x 20' with a small room above it at the front part of his allotment abutting the street. He continued to live in his house on the allotment but operated a retail business from the shop and a taxi business from the room above.

[3] In 1998 he was approached by Meng Sen Tsay who wanted to rent the shop which by then had been extended. To that end, they executed a document entitled "Tenancy Agreement" on 29 June 1999. In terms, the agreement ran from 2 June 1999 to 1 June 2008. The word "premises" governed much of the operation of the agreement and was described in the following way: "The landlord is desirous of renting out a retail store at the frontage of land at Haveluloto opposite to Vaiola Hospital to the tenant for the purposes of retail store". The agreement identified the use that might be made of the premises by the tenant. It could not be used for any illegal purpose and the tenant could "not .... cause or permit a nuisance". The tenant was obliged to use the premises only for the purpose of a retail store. There was a clause dealing with alterations and

additions to the premises which prevented the tenant from attaching any fixture or renovating, altering or adding to the premises unless he had the landlord's permission.

[4] In his reasons for judgment of 7 August 2015, Scott J said he was attaching a copy of his reasons for judgment of 6 June 2014 and indicated he would not repeat what was said in those reasons about "several aspects of the circumstances and law which [were] relevant to the matter". His Honour was, in substance, incorporating by reference what he had said in the earlier judgment into his judgment of 7 August 2015. Much of the earlier judgment was a recitation of what the appellant and the first respondent had said in their affidavits. Some of what was said in those affidavits was probably not controversial though some appeared to be and reflected factual disputes that the court would need to resolve. However no findings of fact have been made by the trial judge accepting or rejecting either in whole or in part the affidavit evidence. Nonetheless we will refer to some of this evidence on the assumption that it is uncontroversial or that findings of fact will be made in due course.

[5] The trial judge recounted in his judgment of 6 June 2014, affidavit evidence of the first respondent that the appellant telephoned him in the United States, where he was apparently living, seeking his permission to build on top of the retail shops "for her own business as diners and restaurant". This appears to have happened and, in addition, the shop was enlarged by Meng Sen Tsay though precisely when these events occurred is not presently relevant. It also appears that for a period, the appellant used and occupied the premises while paying rent to Meng Sen Tsay. That money was, in turn, paid to the respondents. On the appellant's affidavit evidence, this was because Meng Sen Tsay had sub-let the premises to her.

[6] By 2005, the relationship between the appellant and respondents concerning the use and occupation of the premises was more direct and in June 2005 they signed a document entitled "Tenancy Agreement" which, while expressed differently, appears to be to the same general effect as the agreement between the respondents and Meng Sen Tsay dated 29 June 1999. This agreement was for a term of 5 years from 9 June 2008 to 9 June 2013.

[7] Also in evidence was a further tenancy agreement dated 20 October 2007 ("the October 2007 tenancy agreement"). That agreement, in terms, ran from June 2013 to end in June 2023. There may be an issue about who signed this document but the document itself identifies the parties as the appellant and the respondents. It provided that the tenant had the right to transfer the tenancy to a third party during its currency. In her affidavit, the appellant said she sub-let the retail store and accommodation facilities downstairs to Zhufu Wei and he moved in with his family, lived there and carried on his retail business there. There was documentary evidence that this arrangement was reflected in a sub-tenancy agreement entered into in June 2013 operating for a period of five years.

[8] The trial judge recounted that the first respondent said in his affidavit that he returned to Tonga in May 2010 and discovered that the appellant lived upstairs and there was no "diner or restaurant business" and that the appellant had let the downstairs as a retail shop to Zhufu Wei. The first respondent said that neither the appellant nor Zhufu Wei had a business license as required by the Business Licence Act 2002, their activities on the premises were accordingly illegal and also that the appellant used the premises for illegal gambling.

[9] Also when the first respondent returned to Tonga in 2010, a dispute arose between him and the appellant about money she allegedly owed him. Other issues arose concerning the occupancy of the premises. By June 2013 the relationships had deteriorated and the first respondent locked up the premises. In the result, the appellant could not get upstairs and Zhufu Wei could not operate the shop. Police became involved.

[10] One fact noted by the trial judge in his judgment of 6 June 2014 was that the premises the subject of the dispute between the parties occupied one third of the land to which the first respondent had title.

The course of the litigation

[11] In June 2013, the appellant and Zhufu Wei commenced proceedings against the first and second respondents in the Land Court seeking interim injunctive relief, effectively restraining them from interfering with the conduct of the business on the premises including by locking the store. They also sought damages. This application was opposed by the respondents who raised in opposition, amongst other things, the illegality of the October 2007 tenancy agreement having regard to s13 of the Land Act.

[12] Those proceedings led to the judgment of 6 June 2014 in the Land Court in which Scott J held that he did not have, as a judge of the Land Court, jurisdiction to deal with the controversy.

[13] The proceedings were recommenced in the Supreme Court in June 2014. The second judgment of Scott J directly challenged in this appeal was given on 7 August 2015. With the consent of the parties, his Honour decided to try separately an issue which was described in his reasons as "the preliminary issue [of] the legality or effectiveness of an agreement dated 20 October 2007". In a concluding paragraph to those reasons entitled "Result", his Honour said "In my opinion the agreements reached between the parties herein were either illegal or ineffective or both". The way this conclusion was expressed indicates his Honour considered that the October 2007 tenancy agreement was illegal as well as ineffective but even if was not illegal it was nonetheless ineffective. The reason for this latter conclusion is not explained.

The status of buildings as chattels and s13

[14] Section 13 of the Land Act provides:

> Unlawful agreements
>
> Any landholder who enters or attempts to enter into any agreement for profit or benefit relating to the use or occupation of his holding or a part thereof other than in the manner prescribed by this Act or as approved in writing by the Minister shall be liable on conviction to a fine not exceeding $200 or to imprisonment for any period not exceeding 12 months or both.

[15] The answer to the question of whether tenancy agreements or analogues of tenancy agreements required the approval of the Minister or Cabinet in certain circumstances and, if they have not been approved, whether such agreements are caught by s13 has emerged through Court decisions particularly in the last two decades.

[16] In our opinion, such agreements are not caught by s13 if they simply relate to the occupation and use of a building and its curtilage. This general statement would, of course, be subject to any specific and clear statutory exceptions. The foundation of this conclusion is the acceptance in Tongan law that buildings erected on land do not form part of the land and are chattels. Decisions of this Court recognising this status of buildings include *Kolo v Bank of Tonga* [1997] Tonga LR 181, *Mangisi v Koloamatangi* [1999] TOCA 9, *Cowley v Tourist Services Ha'pai Ltd and Fund Management Ltd* [2001] Tonga LR 183, *Niu v Takealava* [2013] Tonga LR 55 and *Westpac Bank of Tonga v Fonua* [2014] Tonga LR 94. In *Mangisi v Koloamatangi* this Court said s13 did not apply to an agreement dealing with the occupation and use of a building. Though the Court spoke of "short term tenancy agreements", the duration of the agreement cannot have a decisive effect on its legal character for the purposes of s13.

[17] It is highly likely that there are many commercial arrangements now existing in Tonga that are based on the decisions of the Courts including the Court of Appeal about the status of buildings and agreements concerning their occupation and use. A fundamentally important feature of any legal system is the creation of certainty and predictability. It is for that reason that courts and, in particular, final courts of appeal should be slow to alter the direction of the development of the law or the law itself especially where people have relied upon what the Courts have said about property rights.

[18] Different considerations arise in relation the alteration of the law by Parliament. It has the capacity to ameliorate the effect of change through transitional and other provisions. This whole question of agreements authorising the use and occupation of a building and so called "tenancy agreements" more generally was addressed in the 2012 report of the Royal Land Commission which also contained draft legislation. It is a matter for Parliament whether it wishes to act on those recommendations.

The effect of illegality on a contract

[19] Even if the trial judge had been right and the October 2007 tenancy agreement was illegal because of s13, it did not necessarily follow that it was unenforceable by the

appellant. While it is not necessary to decide this issue in this appeal, it may be desirable to briefly explain why.

[20] It should be noted at the outset that s13 exposes the landholder to a criminal sanction for entering into an agreement of the prescribed type. It does not expose the other party to the criminal sanction. Accordingly it is necessary to ascertain whether, as a matter of statutory construction, s13 is intended to render the agreement illegal and unenforceable by both parties.

[21] A very similar situation was recently addressed by the High Court of Australia in *Gnych v Polish Club Limited* [2015] HCA 23. That case concerned the status of a lease of part of licenced premises as a restaurant where the grant of any such lease had to be approved by a statutory authority that administered the gaming and liquor legislation. Specifically, the legislation prevented the grant of such a lease by the lessor without that approval. Approval for the lease had not been given and the lessor, a club, sought to avoid its obligations under the lease alleging the lease was illegal. The trial judge made orders enforcing the lease in favour of the lessee. Those orders were set aside by the Court of Appeal of New South Wales on the footing that the lease was illegal and unenforceable but the orders were reinstated by the High Court. In substance, the High Court concluded the lessee was entitled to enforce the lease even though it was illegal. The High Court made the following statements of general principle:

> [35] In *Equuscorp Pty Ltd v Haxton* French CJ, Crennan and Kiefel JJ explained that an agreement may be unenforceable for statutory illegality in three categories of case, where:
>
> "(i) the making of the agreement or the doing of an act essential to its formation is expressly prohibited absolutely or conditionally by the statute;
> (ii) the making of the agreement is impliedly prohibited by statute. A particular case of an implied prohibition arises where the agreement is to do an act the doing of which is prohibited by the statute;
> (iii) the agreement is not expressly or impliedly prohibited by a statute but is treated by the courts as unenforceable because it is a 'contract associated with or in the furtherance of illegal purposes'.
>
> In the third category of case, the court acts to uphold the policy of the law, which may make the agreement unenforceable. That policy does not impose the sanction of unenforceability on every agreement associated with or made in furtherance of illegal purposes. The court must discern from the scope and purpose of the relevant statute 'whether the legislative purpose will be fulfilled without regarding the contract or the trust as void and unenforceable'." (footnotes omitted)
>
> [45] As a matter of legislative construction, the likelihood of adverse consequences for the "innocent party" to a bargain has been recognised as a consideration which tends against the attribution of an intention to avoid the bargain to the legislature. That consideration is consistent with the general disinclination on the part of the courts to allow a party to a contract

> to take advantage of its own wrongdoing. There may be cases where the legislation which creates the illegality is sufficiently clear as to overcome that disinclination; but it is hardly surprising that the courts are not astute to ascribe such an intention to the legislature where it is not made manifest by the statutory language. And in the present case, this unattractive aspect of the Club's argument is compounded by the circumstance that, as its counsel acknowledged, the Club was obliged to take steps to seek the approval of the Authority for the grant of the lease and did not do.

250 [22] The law in England concerning the rights of a party where the statute only penalises the other party is to the same general effect: Chitty on Contracts Vol 1, 29th edition (2004) at para 16 – 153.

[23] The last observations in *Gnych v Polish Club Ltd* would support a conclusion that a party to an agreement with a landholder which should not have been made because of s13, could nonetheless enforce the agreement against the landholder.

[24] Because these issues remained for determination even if the October 2007 tenancy agreement had been correctly determined by Scott J to be illegal, it was undesirable for his Honour to have raised and answered a separate and preliminary question which solely addressed illegality.

260 **The determination of separate questions**

[25] Order 25 rule 4 of the Supreme Court Rules authorises the Court to conduct a separate trial of a preliminary question. It is common for rules of court to contain such a provision. However it is necessary for judges to approach the decision whether to conduct a separate trial with considerable caution and be mindful of the fact that while such a procedure might, superficially, appear to provide a quick and short route to a final resolution of litigation, it often does not. The trial of a separate question can have the effect of prolonging litigation and increasing the costs for the parties. The High Court of Australia said in *Bass v Perpetual Trustees Co Ltd* [1999] HCA 9; (1999) 198 CLR 334 at 357:

270 > Since the relevant facts are not identified and the existence of some of them is apparently in dispute, the answers given by the Full Court may be of no use at all to the parties and may even mislead them as to their rights. Courts have traditionally declined to state — let alone answer — preliminary questions when the answers will neither determine the rights of the parties nor necessarily lead to the final determination of their rights. The efficient administration of the business of courts is incompatible with answering hypothetical questions which frequently require considerable time and cause considerable expense to the parties, expense which may eventually be seen to be unnecessarily incurred.

280 **Conclusion**

[26] For the preceding reasons, the appeal should succeed. The Court orders:

1. The appeal is allowed.
2. The Court answers the preliminary question:

Question: Does s13 of the Land Act apply to the October 2007 tenancy agreement?

Answer: No

3. The matter is remitted to the Supreme Court for trial of all issues.
4. The respondents pay the appellant's costs of the appeal.
5. The respondents pay the appellant's costs of the trial of the separate question in the Supreme Court.

ANZ Banking Group Ltd v Hon Lasike trading as Sandyboys Motel

Court of Appeal, Nuku'alofa
Moore J, Handley J, Blanchard J, and Tupou J
AC 12/2015

29 March 2016; 8 April 2016

Civil appeal – appeal from jury trial – set aside verdict – ordered judgment for the plaintiff

The Bank brought an action to enforce a debt resulting from eight loan agreements it claimed the defendant entered into between 5 October 2004 and 30 October 2006. It also sought to enforce a further agreement between the parties relating to the use of an EFTPOS machine in the defendant's motel. This enabled the defendant and his staff to debit the credit and debit cards of customers and transfer the proceeds to the defendant's overdraft account with the Bank. In the Supreme Court hearing, the difficulties faced by the trial Judge and the jury arose because six of the eight loan agreements and inferentially the agreement relating to the use of the EFTPOS machine were said to have been destroyed when the Bank's premises in Nuku'alofa were burned down in the riot on 16 November 2006. The difficulties were compounded by the decision of the Bank to sue on the eight loan agreements instead of on a common money count for money lent. The jury found for the Bank on the two agreements that were preserved because they had been in the Bank's strongroom and therefore had survived the fire. However, the jury found for the defendant on the rest. The judge gave judgment for the defendant dismissing the action. The Bank appealed from the verdict and claimed that the adverse verdicts were against the weight of the evidence and were perverse.

Held:

1. At common law the Court had inherent jurisdiction to review the verdict of a jury, and to set it aside if it was against the evidence and the weight of the evidence. The inherent jurisdiction was an element in the rule of law now embodied in s 83A of the Constitution. Section 91(1) of the Constitution and s 10(1)(a) of the Court of Appeal Act should be interpreted so as to allow the Court of Appeal to supervise the verdicts of juries in civil cases and to set aside those found to be perverse. The Bank's appeal was competent and the Court could set aside the verdict of a civil jury in whole or in part that was found to be perverse.
2. The verdict of the jury could only be set aside if it was one which the jury, viewing the whole of the evidence reasonably, could not properly find. The court considered that the special verdict of the jury, other than their answers to question 2(c), (d) and 3 could not stand, and to that extent it must be set aside.

3. The appellate court could do complete justice between the parties so that if the Court had all the facts before them they had power, instead of merely making an order for a new trial, to order that judgment should be entered for the plaintiff. The court could do so when they were satisfied that no jury could properly come to a different conclusion. In particular the court could enter judgment for the plaintiff where there was conflicting evidence in a case, but an overwhelming balance of it on one side.
4. The Court was fully justified in exercising its powers under order 8 r 1 and entering judgment in favour of the Bank for money lent excluding the drawbacks of $153,475.50 [27] and interest thereon.
5. The Court made the following orders: appeal allowed; judgment of the Supreme Court was set aside; in lieu thereof entered judgment for the Bank for $986,153.72 with effect from 28 March 2016, such judgment to carry interest at the rate of 10% per annum from that date; and the respondent was to pay the appellant's costs of the trial and in the appellate Court.

Cases considered:

Banbury v Bank of Montreal [1918] AC 626
Browne v Dunn (1894) 6 The Reports 67 (HL)
Hocking v Bell [1945] HCA 16; (1945) 71 CLR 430
Mechanical and General Inventions Co v Austin [1935] AC 346
Metropolitan Railway Co v Wright (1886) 11 App Cas 152
Tu'i'onetoa v Pohiva (2001) Tonga LR 58

Statutes considered:

Constitution of Tonga Act (Cap 2)
Court of Appeal Act (Cap 9)
Judicature Act (UK)

Rules considered:

Court of Appeal Rules 1990

Counsel for the appellant	:	Mr AH Waalkens KC and Mrs P Tupou
Counsel for the respondent	:	Mr WC Edwards SC

Judgment of the Court

[1] This is an appeal from the judgment of Cato J entered pursuant to the verdict of a jury. The action was brought by the Bank to enforce a debt resulting from 8 loan agreements it claimed the defendant entered into between 5 October 2004 and 30 October 2006. It also sought to enforce a further agreement between the parties relating to the use of an EFTPOS machine in the defendant's motel. This enabled the defendant and his staff to debit the credit and debit cards of customers and transfer the proceeds to the defendant's overdraft account with the Bank.

[2] The difficulties faced by the trial Judge and the Jury arose because six of the eight loan agreements and inferentially the agreement relating to the use of the EFTPOS machine were said to have been destroyed when the Bank's premises in Nuku'alofa were burned down in the riot on 16 November 2006. The difficulties were compounded by the decision of the Bank to sue on the eight loan agreements instead of on a common money count for money lent.

[3] The loan agreements dated 5 October 2004 (no.1) and 22 October 2004 (no. 2) had been in the Bank's strongroom, survived the fire and were produced. The defendant admitted signing those agreements. The Bank was able to produce copies of the other 6 agreements from the records on its backup computer but these copies had not been signed by the defendant.

[4] The Bank relied on its general system, proved by Mrs Leilani Va'enuku (Pw1) and Mr Sosaia Sefesi (Pw2), that money would not be lent to a customer on a loan account or overdraft unless and until the Bank had received a copy of the relevant agreement signed by the customer. There was also evidence from Pw2, who managed the account from late 2005 until early 2008, that he had sighted in the Bank's file signed copies of agreements nos 1 to 3, and 5 and had seen the Defendant actually sign agreements no 6 and 7 which he had prepared.

[5] At the end of the trial the Judge left 4 questions to the Jury. Question 1 asked whether they found that the Defendant entered into agreement no 7 (10 March 2006) or agreement no 8 (30 October 2006) either by signing those agreements or that entry into those agreements might be inferred. The Jury answered those questions in favour of the Defendant. If those questions had been answered favourably to the Bank it would not have been necessary for the jury to consider the questions relating to the other loan agreements because agreements nos 7 and 8 incorporated the loans made pursuant to the earlier agreements.

[6] Thus the Jury had to answer questions 2 (c), (d), (e), (f), (g) and (h) relating to loan agreements nos (1) to (6). The Defendant admitted agreements nos (1) and (2) which the Bank produced in signed form because those had been in its strongroom and had survived the fire. The Jury found for the Bank on those two agreements but found for the Defendant on the rest.

[7] Question 3, which asked whether the Bank was authorised to debit certain charge back amounts to the Defendant's overdrawn cheque account, was answered in favour of the Defendant. The Jury answered question 4 by finding that the Defendant owed nothing to the Bank.

[8] The trial Judge acted, as he was bound to, on the verdicts of the Jury and gave judgment for the Defendant dismissing the action. The Bank appealed from the verdict (AB 272) seeking orders setting aside the answers to the questions other than those to question 2 (c) and (d) asking for a new trial.

[9] The Bank claimed that the adverse verdicts were against the evidence and the weight of the evidence and were perverse. Later the written and oral submissions for the Bank invited this Court to enter judgment for the Bank rather than order a new trial.

Competency of appeal

[10] Mr Edwards SC for the Respondent, in his written submissions received by the Court on the morning the appeal was listed for hearing, took the preliminary point that there was no right to appeal from the verdict of a civil jury. He relied on s.10(1)(a) of the Court of Appeal Act which relevantly provides:

> "(1) An appeal shall lie in any cause or matter ... to the Court of Appeal from a Judge of the Supreme Court sitting in first instance in the following cases –
>
> From all final orders, judgments and decisions ..."

[11] Mr Edwards relied on the difference between s.10(1)(a) and ss.16(a) and 17(1) of that Act which in terms allow this Court to set aside the verdict of a jury in a criminal case which (s. 17(1)) is "unreasonable or cannot be supported having regard to the evidence". This section also distinguishes between a conviction and the verdict on which it was based.

[12] Section 91(1) of the Constitution relevantly provides:

> "Subject to the provisions of any Act ... a party to any proceedings in the Supreme Court who is aggrieved by a decision given in those proceedings by that Court, or a Judge thereof, sitting in first instance may appeal to the Court of Appeal against such decision."

[13] Although s.91(1) is subject to the Court of Appeal Act, s.10(1)(a) should be given a construction which avoids or minimises any inconsistency with the rest of s.91(1).

[14] The Jury "gave" a decision when it delivered its special verdict. Although the right of appeal in s.10(1)(a) is from a Judge of the Supreme Court it is from "final orders, judgments and decisions". The judgment of Cato J was based on the verdict or decision of the Jury. If that verdict is set aside by this Court that judgment must also be set aside.

[15] Section 91(1) of the Constitution mentions "a decision given ... by [the] Court" and one given by "a Judge thereof". When a case is tried by a Judge and Jury the tribunal is divided and the Court comprises the Judge (who decides the law) and the Jury (which decides the facts). The Jury's verdict is therefore either a decision of the Court or part of its decision.

[16] At common law the Court in Banc had inherent jurisdiction to review the verdict of a jury, and to set it aside if it was against the evidence and the weight of the evidence. This inherent jurisdiction was an element in the rule of law now embodied in s.83A of the Constitution. Section 91(1) of the Constitution and s.10(1)(a) of the Court of Appeal should be interpreted so as to allow this Court to supervise the verdicts of juries in civil cases and to set aside those found to be perverse. As we have shown above, the text of these sections supports this conclusion.

[17] In our judgment the Bank's appeal to this Court was competent and this Court can set aside the verdict of a civil jury in whole or in part that is found to be perverse.

The loan agreements relied on by the Bank

[18] The Jury answered questions 1 (e) and (d) in respect of agreements nos (1) and (2) dated 5 October 2004 and 22 October 2004 in favour of the Bank. This was not surprising since the Bank was able to produce the signed originals and the Defendant admitted signing them. The amount lent to the Defendant under these agreements totalled $235,000. Subject to any later payments which reduced the principal debt, this amount would still have been owing when the action was commenced.

[19] The Jury answered question 1(e) in respect of agreement no (3) dated 24 December 2004 adversely to the Bank. The statement of Defence put the Bank to proof of this agreement either by proof of its execution by the Defendant or by inference from circumstantial evidence (AB 38). However, the Statement of Defence admitted receipt of the loan (AB 39 par 11). The statement of claim had alleged that the proceeds of this loan have been credited to the Defendant's loan account 1448269 on 29 December 2004. The amount agreed to be lent was $53,000 (Ex 1 32) making a total of $290,000. The Defendant drew down $54,000 on 29 December 2004 bringing the debt on that date to $290,989.35 (Ex 1 4).

[20] Pw1 gave evidence about agreement no. 3 based on the Bank's documents retrieved from its remote computer and the Bank's system in withholding loan funds until receipt from the customer of the signed agreement for loan. She did not see the Defendant sign the agreement, or sight the original signed documents. As will be seen, Pw2 said in evidence that he had sighted the Bank's copy of this agreement that had been signed by the Defendant.

[21] Pw1 gave evidence, based on the Bank's records (Ex 1 38-9), that the proceeds of agreement no. 4 (22 June 2005) in the form of an agreed overdraft on the Defendant's cheque account were made available to him and were availed of (AB 81-2, 84). Pw2 said in evidence that he had not sighted this agreement signed by the Defendant.

[22] Agreement no 5 (4 August 2005) provided for a further loan to the Defendant of $100,000 making a total debt on his loan account of $405,940. There was also a debt on his overdrawn cheque account of $25,000 (AB 86). The additional loan funds were credited to the loan account and drawn down and deposited to the cheque account. The movement of the funds is shown in the loan account (Ex 1 4) and the cheque account (Ex 1 39). Oral evidence based on these bank records was given by Pw1 who was not involved in the transactions at the time. Pw2 had not been involved in this transaction, but said that he had sighted the original agreement signed by the Defendant after he took over the management of this account for the Bank later in 2005.

[23] Agreement no. 6 (2 November 2005) added $50,000 to the Defendant's loan account making a total of $405,397 plus the overdraft facility of $25,000. Pw1 gave evidence based on the Bank's records that the funds were drawn down into the Defendant's cheque account on 7 November 2005 (Ex 1 5, 45). She also said that the Defendant made the payments due to the Bank in accordance with agreement no 6 in December, January, February and March (AB 88-9).

[24] Pw2, who by this time had charge of the Defendant's accounts at the Bank, prepared this agreement after obtaining approval for the new loan from higher management. He went to the Defendant's motel at his request to get the agreement signed, and saw the Defendant sign it. (AB 151, 154).

[25] Agreement no 7 (10 March 2006) increased the loan account by a further $50,000 making a total of $482,512 and increased the overdraft facility by $25,000 to $75,000. The loan increase was drawn down progressively between 22 March and 13 April and the proceeds credited to the cheque account (Ex 1 4-5, 52-4).

[26] The Defendant's overdraft already stood at $78,203.18 on 10 March 2006 so the increase in the limit to $75,000 was intended to regularise the existing position (Ex 1 52). The Defendant was supposed to pay $25,000 off the overdraft by 31 March 2006 and a further $25,000 by 31 July 2006 in accordance with agreement no 6 (AB 89,91).

[27] Those lump sum payments were not made, partly because the Bank charged back amounts credited to the cheque account for what it claimed were payments to that account which the holders of credit and debit cards had not authorised the Defendant to charge. These charge backs, which reversed earlier credits to the Defendant's cheque account, began in June 2006 and continued. Some of the charge backs were substantial, $28,653.85 on 19 July 2006. $35,801.65 on 31 July 2006, and $29,477.66 on 11 August 2006, when the overdraft stood at $166,435.64. (Ex 1 60-1). The total amount charged back was $153,475.50.

[28] Pw2, who no longer worked for the Bank, said in evidence that he had prepared agreements nos 6 and 7 at the request of the Defendant, had them approved by his manager, and saw them signed by the Defendant at his motel.

[29] He saw signed copies of agreements nos 1-3 and 5 when he reviewed the Bank's file in the course of preparing submissions to higher management on the Defendant's application for further loans from the Bank which led to agreements nos 6 and 7 (AB 150-2, 195).

Defendant's admissions of indebtedness to the Bank

[30] As at 8 September 2006, when the Bank's management took steps to regularise the Defendant's overdraft of $203,000 which was way over the authorised limit of $75,000, the Defendant was up to date with his payments to the loan account (Ex 1 6, 93) but they had not reduced the principal debt on that account following agreement no 6 of 10 March 2006 when the loan account stood at $432,511.57 (Ex 1 5,72).

[31] In other words the $235,000 owing under the loans made pursuant to agreements nos 1 and 2 (ex 1 30) and the additional $53,000 lent under agreement no 3 [19] had not been reduced by the Defendant's payments in the meantime.

[32] The Defendant failed to make the payments due under his loan account in August, September and October 2006, and was already in default when the riot occurred on 16 November 2006. This led to the destruction of the Bank building and affected business at the Defendant's motel although it was not damaged (Ex 1 103).

[33] Following the fire the Bank combined the Defendant's loan and overdraft accounts, as it was entitled to, and the combined debt in December 2006 stood at $719,620.44 (Ex 1 6).

[34] The Defendant made no further payments to the Bank until 22 February 2008 when he made a payment of $100,000 (Ex 1 6) which reduced the debt to $740,450.92. In other words the debt of $719,620.44 shown as due in December 2006 (above) had increased because of the interest and fees which had accrued in the meantime.

[35] The Defendant made no further payments after 22 February 2008 and interest and fees continued to accrue on the combined account.

[36] On 8 December 2006 the Defendant spoke on the telephone to Pw2 with a request for loan payments to be suspended because his business had been disrupted as a result of the fire. Pw2 recorded the request in a diary note (Ex 1 103) and asked the Defendant to put his request in writing which he did (Ex 1 104).

[37] On 17 April 2007 the Defendant wrote to the Bank saying that his new manager wanted "to settle our loan issues as soon as possible" (Ex 1 107).

[38] On 12 June 2007 the Defendant proposed "an Income Sensitive Repayment Schedule" commencing in July 2007 at $2500 a month increasing to $8200 a month after June 2008 (Ex 1 108). He wrote "we are doing everything humanly possible to ... settle our account as smooth as possible" (Ex 1 109). This letter recorded the Defendant's thanks to the Bank for its consideration. He made no complaint. None of these payments were made.

[39] The Bank's attempts to formalise the current position by having the Defendant sign letters of offer in June 2007 and October 2008 (Ex 1 110, 118) were unsuccessful because he refused to sign the letters.

[40] On 6 November 2007 Pw2 recorded in a diary note (Ex 1 126) his conversation with the Defendant who proposed a restructuring of the accounts with interest only repayments and lump sum repayments of $100,000 by 31 January and $500,000 by 31 August 2008.

[41] The conversation on 6 November 2007 recorded in that diary note, on which Pw2 was not cross examined, was an admission by the Defendant that he then owed the Bank at least $600,000 because he was proposing interest only payments in the meantime. This confirmed, in more specific terms, his general admissions of indebtedness referred to in paras [36] – [38] above.

[42] On 16 January 2009 Mr Yeoman, then head of Relationship Banking, recorded in a diary note (Ex 1 130) a meeting with Sandra Schaaf the Manager of the Defendant's motel, during which she stated that the Defendant "believes that the LOO [letter of offer of October 2008] "is varied in comparison to the one he previously signed". In context this could not have referred to the agreement he admitted having signed on 22 October 2004 (no.2). It was an admission that he had signed agreement no 7 of 10 March 2006.

[43] On 20 January Sandra Schaaf wrote to Mr Molisoni of the Bank's lending department stating "we have recently noticed that there were various accounts registered and owned by Sandyboyz and later merged into account no 1489487" (the Defendant's loan account) (Ex 2 147). This appears to be a reference to the bank statements at ex 2 154 – 7 considered below.

[44] On 26 January Mr Yeoman made a note recording a telephone call from the Defendant in which he complained of the credit card charge backs "that formed part of the total lending" (Ex 1 132). The Defendant made no other complaint at that time.

[45] On 28 January the Defendant wrote to Mr Yeoman referring to the latter's letter of 21 January (ex 1 148) stating that "we have respectfully requested our information since 2007" attaching signed copies of his Manager's letters dated 19 April and 3 May 2007 (Ex 2 130, 132). This is the first complaint on the Bank's failure to answer those letters made nearly two years after they were sent.

[46] Mr Yeoman replied to that letter the following day (Ex 2 150). He said that Sandra Schaaf's letters enclosed [45] above were not held on the Bank's file and he had not seen them before.

[47] On 29 January Sandra Schaaf replied in a letter to Mr Dansey of the Bank copied to Mr Yeoman (Ex 2 151.3) in which she "disagreed with your final balance", and complained that she had not received the information in "my letters" of April and May 2007 ([45] above). She referred to the Bank statements [43] above which she claimed showed inconsistent balances.

[48] Sandra Schaaf wrote again to Mr Yeoman on 17 March 2009 (Ex 2 158) attaching a schedule of disputed transactions with a recalculation of the amount due of $453,377.06, after deducting the disputed amounts (Ex 2 160).

[49] At a meeting with Mr Yeoman on 25 March evidenced by his diary note of that date (Ex 1 134) Sandra Schaaf offered to pay the Bank in June 2009 $646,000 representing 85% of the funds due to the Defendant on settlement of some land sales.

[50] Sandra Schaaf sent a lengthy memorandum to Mr Hubbard the General Manager of the Bank on 13 August 2009 (Ex 2 162). This produced a lengthy reply dated 21 September (Ex 2 163) in which Mr Hubbard said that most of the actual cheques and deposits, except many of those in 2006, were stored off site and could be produced for inspection.

[51] He continued by saying that all loans drawn down were debited to Sandyboyz's loan account and credited to the operating account. All payments from the operating account were initialled by Sandyboyz. He offered an explanation of the apparent discrepancy between the letter of offer of 4 August 2005 produced by the Bank and the copy produced by the Defendant.

[52] On 4 September Sandra Schaaf met Mr Hubbard and he recorded the meeting in two diary notes (Ex 1 136, 137). She said that "she had some signed letters which were different from ours ... she agreed to provide those letters to us".

[53] Sandra Schaaf's letter of 9 September (Ex 2 176) cannot be understood without the Index and enclosures which were not included in Ex 2.

[54] Fortunately it appears from Mr Hubbard's memorandum of 11 September (Ex 1 139), that Sandra Schaaf had sent a copy of the Bank's letter of offer of 4 August 2005 referring to an overdraft facility of $25,000 whereas the Bank's copy from its computer referred to a facility of $100,000 (Ex 1 65). He noted that the Bank had granted the $100,000 facility, that the computer noted that the last amendment to the letter had been made on 4 August 2005, that the $100,000 was drawn down and credited to the loan

account, and that the next agreement in November 2005 (Ex 1 68) referred to the existing debt as it had been increased by that $100,000.

[55] On 11 September Mr Hubbard met Sandra Schaaf at the motel and recorded the meeting in two diary notes (Ex 1 138). He made the points outlined in his memorandum of the same day [54].

[56] Sandra Schaaf replied on 16 September (Ex 2 167) saying "we have already proved several variations between our signed records and your unsigned virtual copies", that "we can prove that those cheque book were never order and used by us", questioning "who authorised the loan and who withdrew the money".

[57] On 21 September Mr Hubbard replied (Ex 1 140-3) stating that Sandyboyz had received and disbursed the full benefit of the loan proceeds. He explained that Bank statements were held in electronic form and survived and that most of the cheques and deposits could be produced for inspection.

[58] The Defendant and Sandra Schaaf did not attempt to inspect the cheques and deposits held by the Bank either then or before the trial.

[59] In response to a letter of demand from the Bank's lawyers Mr Clive Edwards wrote on 30/11/09 (Ex 2 170) stating, among other things, that "the soft copies from the computer do not correspond with the signed copies in client's possession".

Alleged discrepancies in Bank statements

[60] One of the Defendant's complaints in his manager's letter of 29 January 2009 [43], [47] above related to alleged discrepancies in the Bank statements (Ex 2 154-7). Three of those statements relate to the Defendant's current account 1448225. They were printed on 8 March 2006 but the information relates to earlier dates. The closing statement (Ex 2 154) records transactions between 7 and 9 February 2005 when the account was closed and the debit balance was transferred to the Defendant's loan account as shown on Ex 1 4.

[61] The number recorded on the closed account for the destination of the debit balance does not correspond with the number of the account where the debit ended up. However the closing balance of $7430.54 for the cheque account recorded on Ex 1 4 corresponds, subject to the deduction of the interest charge of $17.77 with the debit balance on Ex 2 154 ($7448.71 less $17.77 equals $7430.54).

[62] The different balances for the cheque account shown on ex 2 156, 157 relate to different dates before the account was closed. The Defendant did not complain about the alleged discrepancies for 3 years after obtaining copies of these statements and Pw1 and Pw2 were not asked in cross examination to explain them. The closing balance of $323,486.54 shown on Ex 2 155 for the loan account on 29 April 2005, corresponds with the balance on the same date shown on Ex 1 5.

Challenges to the Jury's verdict

[63] A Jury acting reasonably could not have used the bank statements in Ex 2 154-7 as a basis for rejecting the bank statements in Ex 1 relied on by the Bank in its case.

[64] A Jury acting reasonably and giving proper consideration to the undisputed documentary evidence in exs 1 and 2 could not have failed to notice the Defendant's admissions that he held signed copies of loan agreements other than nos 1 and 2 which were admitted and that he had not produced those other agreements. The Defendant's admissions are referred to in paras [42], [52], [54], [56] and [59].

[65] A jury acting reasonably could not have failed to find for the Bank on agreement no 3 of 24 December 2004 when the loan of $53,000 was admitted in the amended statement of defence (AB 39) bringing the admitted debt to $290,000 (Ex 1 32). Similarly a jury acting reasonably could not have found that the Defendant's payments had reduced this debt [30], [31].

[66] A jury acting reasonably could not have failed to find on the unchallenged evidence of the Bank that it was owed a substantial sum of money. Apart from the general admissions of indebtedness referred to in [37], [38], [44] and [47] and the first three loans [65] there were admissions that the Defendant owed specific sums. In [40] and [41] it was $600,000, in [48] it was $453,377.06, and in [49] it was $646,000.

[67] The jury were entitled to reject the Bank's case on the charge backs because the contract relating to the EFTPOS machine was not proved, nor was the Bank's right to charge back, or reverse particular credits to the Defendant's cheque account. Mr Waalkens KC frankly conceded that the jury's answer to question 3 in favour of the Defendant could not be disturbed.

[68] The Defendant did not call any oral evidence, and did not produce the signed copies of the loan agreements in his possession. He did not attempt by oral evidence to support any of his numerous claims in the later years that the loans, the cheques, and the deposits were unauthorised, and that the funds had not been used in the motel business. The Defendant's case at the trial was based on the supposed weakness of the Bank's case.

[69] A Jury, in considering the supposed weakness of the Bank's case, and acting reasonably, was bound to bear in mind that if the case really was weak the Defendant could have gone into the witness box to give evidence that he had not signed the agreements in dispute, to explain the admissions, and to prove that the cheques and deposits were forgeries and that the funds had been misappropriated by others.

[70] A Jury, acting reasonably, were also bound to consider that the evidence of Pw1 explaining the transactions shown in the documents and her evidence about the Bank's system had not been challenged in cross examination. Acting reasonably a jury was also bound to consider that the evidence of Pw2 that he had sighted signed copies of agreements nos 1-4 in the Bank's file, and had seen the Defendant sign agreements nos 6-7 had not been challenged by the Defendant in cross examination.

[71] The failure to cross examine a witness on a particular topic has legal consequences. In *Browne v Dunn*, a decision of the House Lords reported only in (1894) 6 The Reports 67, 70 Lord Herschell LC said that it was:

> "absolutely essential to the proper conduct of a cause, where it is intended to suggest that a witness is not speaking the truth ... to direct his attention to the fact by some questions put in cross examination showing that the imputation is intended to be made ... If you intend to impeach a witness you are bound, whilst he is in the box to give him an opportunity of making any explanation which is open to him".

[72] In the same case Lord Halsbury said at 76-7:

> "To my mind nothing would be more absolutely unjust than not to cross examine a witness ... and ... to ask the Jury afterwards to disbelieve what they have said, although not one question has been directed either to their credit or to the accuracy of the facts they have deposed to ... [He considered the facts of that case and continued at 78] Under those circumstances what question of fact remains? What is there now for the Jury after that? If [counsel] admits before the Jury ... by the absence of cross examination ... that these statements are true, what is there for the Jury. It is impossible ... to dispute ... that that absolutely concluded the question".

[73] In other words in a proper case, such as the present, the failure to challenge the evidence of a witness by appropriate cross examination involves the acceptance of his evidence if it is otherwise credible. *Browne v Dunn* has been followed in Australia and New Zealand.

The legal principles

[74] The principles on which an appellate court acts in setting aside the verdict of a jury are not in doubt. The statement of principle in the *Metropolitan Railway Co v Wright* (1886) 11 App Cas 152, which was adopted by this Court in *Tu'i'onetoa v Pohiva* (2001) Tonga LR 58, 63 is sufficient. The verdict of a jury can only be set aside if it was one which a jury, viewing the whole of the evidence reasonably, could not properly find.

[75] In our judgment, for the reasons we have already given, the special verdict of this jury, other than their answers to question 2(c), (d) and 3 cannot stand, and to that extent it must be set aside. The words of Lord Atkin in *Mechanical and General Inventions Co v Austin* [1935] AC 346, 369 are applicable:

> "... the finding of the jury is inconsistent with and impossible to reconcile with ascertained facts".

[76] There were hundreds of pages of documents in Ex 1 and Ex 2 and it may also be said, in favour of the jury, that the language of Lord Atkin in that case at 370 is applicable:

> "It is the kind of evidence in respect of which any jury is at a disadvantage in a complicated case involving many disputed allegations of fact and a correspondence extending over many months. It can hardly be said that the jury lost sight of the documents because they barely see them. It is not surprising in the circumstances that ... [a jury] may have failed to notice the compelling significance of the written word".

The powers of this Court

[77] At common law an appellate court which set aside a jury's verdict could only enter judgment for the appellant if there was no evidence on which a jury could find for the party with the legal onus of proof.

[78] However in England, following the Judicature Act, rules of court increased the powers of the Court of Appeal when the verdict of a jury has been set aside as unreasonable and perverse. The significance of the "new" rules was referred to by Lord Atkinson in *Banbury v Bank of Montreal* [1918] AC 626, 675-9.

[79] Lord Atkinson said that the "new" rules, which have been adopted in Tonga, enabled the appellate court "to do complete justice between the parties" (p 676), so that if the Court "had all the facts before them they had power, instead of merely making an order for a new trial, to order that judgment should be entered for the plaintiff" (p 676), and to do so when they were "satisfied that no jury could properly come to a different conclusion (p 677). In particular the Court can enter judgment for the plaintiff "where there is conflicting evidence in a case, but an overwhelming balance of it on one side" (679).

[80] These principles were referred to in *Hocking v Bell* [1945] HCA 16; (1945) 71 CLR 430, 441 by Latham CJ and at 497-8 by Dixon J whose judgments were approved by the Privy Council on appeal (1947) 75 CLR 125, 130,132.

[81] The relevant post Judicature Act rules of Court are reproduced in the Court of Appeal Rules. Order 8 r 1 (1) provides that "an appeal shall be by way of rehearing", and r 1 (4) provides that "The Court may draw inferences of fact and give any judgment or make any order which ought to have been given or made, and may make such further order as the case may require".

[82] In our judgment the documentary evidence and the oral evidence of Pw1 and Pw2, for the reasons appearing above, is such that this Court is fully justified in exercising its powers under order 8 r 1 and entering judgment in favour of the Bank for money lent excluding the drawbacks of $153,475.50 [27] and interest thereon.

The orders of this Court

[83] Counsel for the Bank provided the Court with a recalculation of the debt due to the Bank commencing with the Bank statement balance on 30 November 2006, with simple interest thereon at 12.5% (not compound interest with monthly rests which was the Bank's contractual entitlement) allowing credit for the payment of $100,000 on 22 February 2008 including loan administration charges of $17,920 and late payment fees of $5600. The total amount claimed was $986,153.72.

[84] Mr Edwards SC objected to the claim for loan administration fees and late payment fees but did not otherwise challenge the mathematics behind the Bank's claim.

[85] We see no reason for rejecting the Bank's claims for loan administration and late payment fees.

[86] The Court makes the following orders:

1. Appeal allowed;
2. Judgment of the Supreme Court set aside;
3. In lieu thereof enter judgment for the Bank for $986,153.72 with effect from 28 March 2016, such judgment to carry interest at the rate of 10% per annum from that date;
4. The respondent to pay the appellant's costs of the trial and in this Court.

Dandin Group (Tonga) Ltd anor v Australia and New Zealand Banking Group Ltd

Court of Appeal, Nuku'alofa
Moore, Handley, Blanchard, and Tupou JJ
AC 23/2015

29 March 2016; 8 April 2016

Civil appeal – banking – loan agreement – default – appeal dismissed

The defendants appealed from the judgment of the Supreme Court in favour of the Bank for $192,747.24 with interest at the rate of 15% from 22 December 2012 until the judgment on 7 August 2015 (reported at *Australia and New Zealand Banking Group Ltd v Dandin Group (Tonga) Limited anor* [2015] Tonga LR 359.

Held:

1. The Supreme Court rejected the argument that the company was the only party who entered into the April 2007 agreement and held that both defendants were liable for the consolidated debt. There was ample evidence to support that finding and it could not be disturbed.
2. The grounds of appeal in the notice of appeal and the written submissions for the appellants included many which were entirely without merit. A limited liability company is liable for its own debts but its members are not once their shares are fully paid up. It is the liability of the members which is limited. The change in the name of the Company did not affect its liabilities. The memorandum of satisfaction of the Company's debt referred to the debt owed to MBF Bank not the ANZ Bank. The Bank was not obliged "to ensure that the Borrower is well covered by valid insurance". The appellants were not misled about the loss of some of the Bank's records in the riot on 16 November 2006. The Bank was not liable in defamation for publishing the appellant's defaults because under the law of Tonga truth was a complete defence. The allegation that the trial Judge denied the appellants' right to trial by jury was not supported by any evidence. The complaints about the conduct of the Judge during the trial were not supported by anything in the transcript in the appeal book, or other evidence. The submission that the Bank's conduct was unconscionable was without any basis in the evidence. The second appellant, a hitherto successful business man, did not sign the agreement of 10 April 2007 until 2 July after taking legal advice and renegotiating an important term. The Bank's charges were based on its rights under that agreement. The appellants challenged the copy bank statements and documents produced by the Bank from its computer records, but the inability to produce the originals was explained by their loss

in the riot. The trial Judge found no reason to doubt the accuracy of the computer-generated statements and nor did the appellate court.

3. In general a Bank did not owe a fiduciary duty to its customers. The existence of a special fiduciary duty must be based on unusual facts which must be proved. There was nothing fiduciary about the relationship between the appellants and the Bank.
4. The appellants challenged the Judge's assessment of damages for the Bank's breach of the implied term of confidentiality. The Supreme Court held that the purpose of the Bank's implied promise was to prevent the customer suffering vexation. This only applied to the second appellant because a company could not be vexed. The Court of Appeal saw no error of principle in the Judge's award of $7500 and did not consider that it was so inadequate that this Court would have to intervene.
5. The appeal failed on all grounds and was dismissed with costs.

Counsel for the appellants : Mr S Fili
Counsel for the respondent : Mrs P Tupou

Judgment of the Court

[1] This is an appeal by the Defendants from the judgment of Scott J in favour of the Bank for $192,747.24 with interest at the rate of 15% from 22 December 2012 until the judgment on 7 August 2015.

[2] The banker customer relationship had been mutually satisfactory until the appellant Company's business and its valuable stock in trade were destroyed by fire during the riots on 16 November 2006. The business and stock were not insured.

[3] On 30 November 2006 Lisiate Teulilo (2nd appellant) owed the Bank $95,873.59 on his personal loan account, and the Company owed the Bank $84,578.71 on its overdraft. Both accounts had been conducted in accordance with the arrangements with the Bank.

[4] After the fire the appellants were no longer able to make regular payments to the Bank from their own resources. Some payments were made and some were received from the Government as an interest subsidy to assist the Company to recover from the fire.

[5] On 11 April 2007, following his receipt of the Bank's letter of offer of 10 April, the second appellant met 'Ofa Telefoni the bank officer in charge of the accounts to discuss the position. The officer's diary note records "total facilities have been restructured and hardcore OD [overdraft] is to be transferred to existing term loan. LOO [letter of offer] is with customer for acknowledgment and will be provided".

[6] The diary note appears to record the second appellant's agreement to the amalgamation of the two accounts which had the effect of making him personally liable for the overdraft of the Company.

[7] The letter of offer of 10 April was addressed to the second appellant as Managing Director of the Company but both names appeared in the heading and the offer was expressed to be made to both. It provided for the transfer of the Company's overdraft

to the second appellant's loan account, and a revised program of repayments. The Borrower was defined as the two appellants.

[8] The letter concluded "we hereby accept the above terms and conditions" but it only made provision for execution by the Company under its common seal. The second appellant signed but only as Managing Director authorising the use of the common seal.

[9] The second appellant, in the Statement of Defence, denied personal liability for the loan account, for the Company's overdraft, and for the amalgamated account. Viewed in isolation the execution of the Bank's letter of offer by the Company without separate execution by the second appellant provided some support for his denial of responsibility for the Company's overdraft.

[10] The second appellant was clearly liable for the term loan in any event.

[11] However the second appellant's conduct at the meeting with the Bank, on 11 April 2007 and later, evidenced his acceptance of the Bank's offer. The law of Tonga does not require bare loan agreements between banker and customer to be in writing signed by the customer.

[12] On 26 April 2007 the second appellant in his capacity as Managing Director of the Company wrote to the Bank seeking a deferment until July for the first repayment. Following receipt of this letter Mr Telefoni recorded in a diary note dated 9 May that he spoke to the second appellant who said that he had been advised by his lawyer not to sign the letter of offer because it provided for repayments to start in April.

[13] The diary note further records "Have advised Lisiate again that LOO is for the amalgamation of his hardcore OD TL in which he agreed with it but he still needs a letter" about the deferment. The Bank later provided that letter but it was expressed to be subject to return of its LOO duly signed and accepted.

[14] The appellants made the agreed payments of $3630 for some months after July, and some intermittent payments thereafter. The last payment from the appellant's resources was made on 11 September 2008. Payments of the Government's interest subsidy continued to be received by the Bank until January 2010.

[15] On 29 February 2008 Mr Yeoman for the Bank replied to the second appellant's letter of 28 February 2008 complaining of some events in November 2005, which did not feature later in the trial. Mr Yeoman's letter stated "At this stage I would also like to remind you that the loan provided by ANZ Bank is to you personally, and not to your business".

[16] The second appellant replied on 17 March 2008 without challenging the claim that he was personally liable for the debt, Mr Yeoman wrote to him again on 18 March referring to "your outstanding loan repayments, "your facilities", and "your loan".

[17] Mr Yeoman's diary note of 11 September 2008 relating to a meeting with the second appellant that day records his statement to the second appellant that "the Bank will not tolerate any more default in his payments".

[18] The second appellant's letter to Mr Yeoman on 24 September 2008 (pp 2-3) contained many admissions of his personal indebtedness to the Bank.

[19] After the Bank's lawyer sent a letter of demand to the appellants on 11 November 2008 the second appellant wrote to Mr Griffiths of the Bank on 5 December saying that he would "keep on fighting to pay up my due".

[20] The Bank's statements of account record the closing of the Company's account, the transfer of the debt to the second appellant's account and the subsequent history. The second appellant accepted those statements without objection.

[21] The oral evidence of the second appellant did not advance the claim that he was not personally liable for the whole of the combined account. AB 257 "I ... signed the contract", AB 260 "I signed it", "we signed it", AB 261 "my debt", "help me to pay the bank's money and get me out".

[22] Scott J rejected the argument that the company was the only party who entered into the April 2007 agreement and held that both defendants were liable for the consolidated debt. There was ample evidence to support that finding and it cannot be disturbed.

[23] The appellants made an application on notice to call further documentary evidence in the appeal but knew of the documents' existence before the trial, and had them in their possession. The Court heard Mr Fili in support of this application at the outset, but it was without merit and was dismissed without Mrs Tupou being called on. In any event the documents would not have supported the appellants' case.

[24] The grounds of appeal in the notice of appeal and the written submissions for the appellants included many which were entirely without merit. A limited liability company is liable for its own debts but its members are not once their shares are fully paid up. It is the liability of the members which is limited. The change in the name of the Company did not affect its liabilities. The memorandum of satisfaction of the Company's debt referred to the debt owed to MBF Bank not the ANZ Bank. The Bank was not obliged "to ensure that the Borrower is well covered by valid insurance". The appellants were not misled about the loss of some of the Bank's records in the riot on 16 November 2006.

[25] The Bank was not liable in defamation for publishing the appellant's defaults because under the law of Tonga truth is a complete defence.

[26] The allegation that the trial Judge denied the appellants' right to trial by jury is not supported by any evidence.

[27] The complaints about the conduct of the Judge during the trial are not supported by anything in the transcript in the appeal book, or other evidence.

[28] The submission that the Bank's conduct was unconscionable is without any basis in the evidence. The second appellant, a hitherto successful business man, did not sign the agreement of 10 April 2007 until 2 July after taking legal advice and renegotiating an important term. The Bank's charges were based on its rights under that agreement.

[29] The appellants challenged the copy bank statements and documents produced by the Bank from its computer records, but the inability to produce the originals was explained by their loss in the riot. The trial Judge found no reason to doubt the accuracy of the computer generated statements and nor do we.

[30] In general a Bank does not owe a fiduciary duty to its customers. The existence of a special fiduciary duty must be based on unusual facts which must be proved. There was nothing fiduciary about the relationship between the appellants and this Bank.

[31] The appellants challenged the Judge's assessment of damages for the Bank's breach of the implied term of confidentiality. The Judge held that the purpose of the Bank's implied promise was to prevent the customer suffering vexation. This only applies to
170 the second appellant because a company cannot be vexed. We see no error of principle in the Judge's award of $7500 and do not consider that it was so inadequate that this Court would have to intervene.

[32] The appeal fails on all grounds and is dismissed with costs.

Tapueluelu v Attorney General

Court of Appeal, Nuku'alofa
Moore, Handley, Blanchard, and Tupou JJ
AC31/2015

30 March 2016; 8 April 2016

Electoral law – clause 65 interpretation – effect of stay on "outstanding" debt – debtor not in default – not disqualified from holding office – appeal allowed

For the full facts see the Supreme Court decision at *Attorney General v Tapueluelu* [2015] Tonga LR 568.

The Supreme Court made a declaration that Mr Tapueluelu's election on 27 November 2014 as the People's Representative of the Tongatapu 4 Electoral Constituency was in breach of clause 65 of the Constitution and was unlawful and invalid, with the same consequence for his holding of that office. Mr Tapueluelu appealed against the declaration.

Held:

1. In order for clause 65 to operate as it must have been intended, the words "for the payment of a specific sum of money" should be interpreted as if they included judgments for a specific sum of money. The same purposive interpretation should be given to "outstanding". Once a stay has been granted the judgment debtor was not in default (even if the judgment was in the form of an order to pay) because the judge granting the stay, which was likely to be granted only pending the determination of an appeal, has concluded that the debtor should not be compelled by court process to pay until it was decided. For most practical purposes the effect of a stay was that in the meantime the debtor need not make any payment.
2. The purpose of the provision was to prevent someone in default of a court order for payment of money from being nominated, and the judgment debt was not "outstanding" in terms of clause 65 once a stay was ordered. The debtor could not be seen to be in default in the sense that he was simply ignoring the judgment or refusing to give effect to it. He had gone back to the court and it agreed to stay the operation of the judgment so far as court processes were concerned.
3. The court concluded that the appellant was not disqualified by clause 65 as execution of the judgment against him was stayed. His appeal therefore succeeded.

Cases considered:

Attorney General v Fuko [2002] TOCA 9

Attorney General v Tupouniua [1999] Tonga LR 21

Berliner Industriebank Aktiengesellschaft v Jost [1971] 2 All ER 1513

Clifton Securities Ltd v Huntley [1948] 2 All ER 283

Pollack v Commissioner of Taxation (1991) 32 FCR 40

Touliki Trading v Fakafanua and Kingdom of Tonga (No 2) [1996] Tonga LR 145

Statutes considered:

Constitution of Tonga (Cap 2)

Electoral Act 1989

Counsel for the appellant : Mr R Harrison SC

Counsel for the respondent : Mr 'A Kefu SC

Judgment of the Court

[1] Mr. Tapueluelu appeals against a declaration made by Lord Chief Justice Paulsen that his election on 27 November 2014 as the People's Representative of the Tongatapu 4 Electoral Constituency was in breach of clause 65 of the Constitution and was unlawful and invalid, with the same consequence for his holding of that office.

[2] Clause 65 of the Constitution of Tonga is as follows:

> Qualification of representatives
>
> Representatives of the people shall be chosen by ballot and any person who is qualified to be an elector may nominate as a candidate and be chosen as a representative for the electoral constituency in which he is registered, save that no person may be chosen against whom an order has been made in any court in the Kingdom for the payment of a specific sum of money the whole or any part of which remains outstanding or if ordered to pay by instalments the whole or any part of such instalments remains outstanding on the day on which such person submits his nomination paper to the Returning Officer:
>
> Provided that a person resident outside of Tonga who is qualified to be an elector will qualify as a candidate only if he is present in Tonga for a period of 3 months within the 6 months before the relevant election.

The facts

[3] The facts are not in dispute. At the date of Mr. Tapueluelu's nomination, and also when he was chosen as a representative for the constituency, there was a judgment of the Magistrate's Court entered against him. On 17 June 2011 he had been held liable to pay William Clive Edwards $10,000 in damages and $4,500 in costs in a civil action for defamation. Mr. Tapueluelu had lodged an appeal against the Magistrate's decision but his appeal had been struck out by the Supreme Court on the ground of inordinate and inexcusable delay in the prosecution of the appeal. An application for leave to set

aside the Supreme Court's decision and for a stay of execution of the Magistrate's Court's judgment had been dismissed by the Supreme Court. But then on 30 August 2012 a single Judge of this Court had given leave to appeal to this Court and ordered that the Magistrate's Court's judgment be stayed pending the decision of this Court.

[4] That stay remained in force when Mr. Tapueluelu was nominated, registered as a candidate, elected and took his oath of office as a People's Representative.

[5] At a later time, in June 2015, his appeal against the Magistrate's Court's judgment was dismissed by this Court but that is of no relevance to the issue of constitutional breach now before this Court. Clause 65 requires an assessment on the day on which the candidate's nomination papers are submitted. Nor is it relevant that with his nomination Mr. Tapueluelu had submitted letters of clearance from both the lower courts as required by s.9(4) of the Electoral Act 1989. If they were in error they cannot save a candidacy invalidated by clause 65.

The Electoral Act restrictions

[6] This proceeding has been brought by the Attorney General as an ordinary civil action seeking declarations of unlawfulness and invalidity. It is not brought under any provision of the Electoral Act 1989, but in that statute there are some provisions restricting the right to challenge an election as having been unlawful. Those of present relevance are:

> *"25. Method of questioning election.*
>
> No election and no declaration of poll shall be questioned except by a petition complaining of an unlawful election or unlawful declaration (in this Act referred to as an election petition) presented in accordance with this Part of this Act.
>
> ....
>
> *26. Election petitions.*
>
> (1) An election petition may be presented to the Supreme Court by one or more of the following persons –
>
> (a) A person who voted or had a right to vote at the election;
> (b) A person claiming to have had a right to be elected or returned at the election;
> (c) A person alleging himself to have been a candidate at the election.
>
> ....

> *27. Time for presentation of election petition.*
>
> (1) Subject to the provisions of this section, an election petition shall be presented within 28 days after the day on which the result of the poll has been declared.
>
> ....

The issues

[7] The issues considered in the Supreme Court were:

> (a) Whether a Tongan Court's order for payment of a specific sum of money remains "outstanding" if execution of the order has been stayed by that court or a higher court;
> (b) Whether it is possible to challenge the validity of the outcome of an election by a means other than a petition brought under, and within the time limit fixed by, the Electoral Act, in a case raising an issue under cl 65 of the constitution;
> (c) Whether such a challenge can be brought by the Attorney General; and
> (d) Whether the Supreme Court in the exercise of its discretion should, in any event, refuse to grant any relief.

The Supreme Court's judgment

[8] Having reviewed some Tongan authorities on the interpretation of clause 65, none of which was seen as precisely in point, the Lord Chief Justice considered the legal effect of a stay as between creditor and debtor. He concluded that in that circumstance:

> The effect of a stay of execution is to prevent the judgment creditor from compelling payment by use of the processes of the Court, but it does not release the judgment debtor from his present obligation to pay the judgment debt nor does it deprive the judgment creditor of any other rights he may have available to him to obtain payment (such as exercising a right of set off). (At [31])

[9] The Lord Chief Justice said that the fact that the Magistrate's Court's judgment was subject to a stay of execution did not release Mr. Tapueluelu from the obligation to pay the judgment debt. It remained "both unpaid and payable" on the day of his nomination as a candidate. He did not accept an argument that the purpose of the proviso to clause 65 was to ensure that only solvent (and perhaps fiscally responsible) candidates stand for election. It was, he said, the simple fact of indebtedness pursuant to a court order and not insolvency that is the bar to nomination. He was unpersuaded that either the form of the Electoral Act and in particular, the introduction of the s.9(4) clearance procedure by amending legislation in 2010, or the long-standing system of appeals and discretionary stays of execution pending their determination required a different approach to the proviso. Nor did the Lord Chief Justice believe that it was unsatisfactory that the person ordered to pay a money judgment was debarred from standing for election "no matter how unjustified or substantial" the judgment was or

even if it was stayed and ultimately overturned on appeal. He pointed out that the judgment debtor could pay or compromise the debt if wishing to stand for election. Clause 65 was not concerned with whether a judgment was justified or substantial or under appeal or beyond challenge. It did not matter either whether it was ultimately successfully appealed. Mr. Tapueluelu fell within the disqualification and was ineligible for election in the 2014 General Election.

[10] On the second issue, the Lord Chief Justice did not accept that ss.25-27 of the Electoral Act provided the exclusive means of challenging the election outcome. The sections were, he said, inconsistent with the Constitution in the sense that they interfered with its ambit in a respect that the Constitution did not intend. There was no intention that clause 65 would be subject to regulation at the will of the Legislature. It was "proscriptive and absolute in its terms". Sections 25-27 limited the right to bring a challenge to those few persons referred to in s.26(1) and would exclude, for instance, challenge by the Attorney General. The section also limited the time within which a challenge could be made to an election in reliance on cl 65 to just 28 days, even in circumstances where a successful candidate's disqualification was not and could not have been known.

[11] The Lord Chief Justice also rejected the further argument that the Attorney General had no standing to bring a challenge even if the Electoral Act did not bar it.

[12] As to the discretion to decline declaratory relief, the Lord Chief Justice said that although a year had passed since the election it had been conceded that the Attorney General was not aware that Mr. Tapueluelu had an outstanding judgment when he was nominated and had pursued the proceedings urgently when made aware of it. There was no suggestion of prejudice from delay. He accepted that Mr. Tapueluelu had acted in good faith, believing that the stay dealt with any issue concerning clause 65. But he was not prepared to create an exception to the application of the clause based on the existence of good faith. It would introduce uncertainty and encourage non-compliance with the Constitution. A declaration of invalidity would leave the constituency unrepresented in Parliament but the Judge had no doubt that any lacuna in the legislation could be quickly filled allowing for a by-election to be called.

Clause 65

[13] Clause 65 of the Constitution disqualifies as a candidate anyone otherwise qualified to be an elector if on the date of nomination that person has been ordered by a Tongan Court to pay a specific sum of money any part of which "remains outstanding". The question for us to decide is how literally the word "outstanding" should be read in the context of this constitutional provision. The Lord Chief Justice was guided by the approach taken in cases in which it was necessary to decide what steps could be taken by a judgment creditor in the face of an order staying execution of the judgment. These cases, from which the Lord Chief Justice cited *Clifton Securities Ltd v Huntley* [1948] 2 All ER 283 and *Pollack v Commissioner of Taxation* (1991) 32 FCR 40, appear to establish that in such a context the debt remains payable, and that all that the stay does is to prevent the creditor from putting into operation the machinery of the law, as Denning LJ remarked in *Clifton Securities* at p.284. If a self-help remedy such as a set-off is lawfully exercisable the stay does not prevent that.

[14] Gummow J said in *Pollack* at p.56 that enforcement was concerned with the means of compulsion, whether of the debtor or of third parties "such as those to whom orders for a garnishee are directed". In that context Gummow J's statement must be correct. We query the comment to the contrary of the majority of the Court of Appeal of England and Wales in *Berliner Industriebank Aktiengesellschaft v Jost* [1971] 2 All ER 1513, 1519. Possibly the majority may have been influenced by a particular form of stay order then in use in that jurisdiction.

[15] However, the focus in such cases is only on the position as between the debtor and the creditor. Clause 65 has a wider focus on the public interest in the process of choosing of People's Representatives. A different approach is needed to the word "outstanding" where it appears in the context of a constitutional provision concerning suitability to be elected. It should not be construed literally and technically, but, rather, with the evident purpose of the provision in mind.

[16] What is intended by clause 65, we believe, is that a person qualified as an elector should not be able to become a candidate at an election if at the time of nomination he or she is in default in complying with a court order "for the payment of specific sum of money". In fact, even the expression we have just quoted illustrates that the words of the clause must be read purposively and not literally. We say this because in a civil action it would be rare indeed to find a court literally ordering someone to pay a sum of money.

[17] A civil court ordinarily gives judgment for a sum owing by the defendant to the plaintiff (eg. "T is awarded damages in the sum of $100 against Y" or "T will have judgment for $100 against Y"). But such a judgment does no more than create a judgment debt. It is not framed as an order to pay. If the judgment debtor does not pay, he is not in breach of the judgment or order so as to be in contempt, though of course he is liable to the processes of execution if the judgment creditor invokes them, subject to any stay obtained by the debtor.

[18] It is therefore necessary, in order that clause 65 should operate as it must have been intended, to treat the words "for the payment of a specific sum of money" as if they included judgments for a specific sum of money.

[19] The same purposive interpretation should be given to "outstanding" in clause 65. Once a stay has been granted the judgment debtor is not in default (even if the judgment was in the form of an order to pay) because the judge granting the stay, which is likely to be granted only pending the determination of an appeal, has concluded that the debtor should not be compelled by court process to pay until it is decided. It is true that in some situations the creditor may still be able use self-help to get paid but for most practical purposes the effect of a stay is that in the meantime the debtor need not make any payment. In effect, that is what the court has decided in issuing the stay.

[20] Approached in this non-technical way, and bearing in mind what we see as the purpose of the provision – to prevent someone in default of a court order for payment of money from being nominated etc. – the judgment debt is not "outstanding" in terms of clause 65 once a stay has been ordered. The debtor cannot be seen to be in default in the sense that he is simply ignoring the judgment or refusing to give effect to it. He has gone back to the court and it has agreed to stay the operation of the judgment so far as court processes are concerned.

[21] Two further considerations reinforce our view. Firstly, if the correct approach was the technical one found in the case law to which we have referred, a debtor who had tendered the judgment amount to the judgment creditor and had his tender refused (perhaps because of an argument about costs) would be caught by clause 65 because the debt would technically still be payable and therefore outstanding. It can hardly be the intention of clause 65 to prevent someone in that position from being elected as a People's Representative.

[22] And secondly, we are influenced by the stark contrast between the position of someone convicted of a crime and the position of a mere debtor if the technical interpretation that attracted the Supreme Court is given to clause 65. Clause 23 of the Constitution reads as follows:

> Disabilities of convict
>
> No person having been convicted of a criminal offence and sentenced to imprisonment for more than two years, shall hold any office under the Government whether of emolument or honour nor shall he be qualified to vote for nor to be elected a representative of the Legislative Assembly unless he has received from the King a pardon together with a declaration that he is freed from the disabilities to which he would otherwise be subject under the provisions of this clause.
>
> Provided that the operation of this clause shall be suspended in any case until the expiration of 42 days after the date of sentencing; and in cases where notice of appeal or leave to appeal is given within 42 days after the date of sentencing, until the determination of the appeal; and if the conviction is quashed on appeal or the sentence reduced to no more than 2 years imprisonment then this clause shall not have effect.

[23] The proviso suspends any disqualification pending the outcome of an appeal and disapplies it if the appeal is sufficiently successful that the conviction is quashed or the sentence reduced to 2 years or less. Would it really be intended that someone who obtains a stay and wins their appeal against a civil judgment, should be in a worse position? Admittedly, on the construction of "outstanding" that we prefer, an ultimately unsuccessful appellant like Mr. Tapueluelu would also avoid disqualification if granted a stay pending his appeal, but that is a less undesirable result than the penalisation of the successful appellant, who should not be in a worse position than his criminal counterpart.

[24] The Lord Chief Justice was influenced in his conclusion by some Tongan case law on clause 65 but none of the earlier decisions in this Court considered the position if a stay was in place on the day of nomination. It is to be observed also that in *Attorney General v Fuko* [2002] TOCA 9 at [5] this Court said that the word "outstanding" is capable of more than one meaning according to the context. In Fuko the judgment creditors and the debtors had reached agreement for payment of the debts by instalments, all of which were up to date. The Court held that the unpaid balances were not "outstanding". In its more general remarks the Court was simply not addressing the position after the granting of a stay, although we observe that at [3] it said that the exclusion of a candidate for election "strongly suggests some serious default is involved". We agree.

[25] We have, for the foregoing reasons, concluded that Mr. Tapueluelu was not disqualified by clause 65 as execution of the judgment against him was stayed. His appeal therefore succeeds.

The Electoral Act provisions

[26] It follows that he does not need to show that the Lord Chief Justice also erred in holding that ss 25-27 of the Electoral Act were not an exclusive means of challenging an election outcome. As we have heard full argument on the point, however, and have reached the view that the sections did prevent the Attorney General from bringing the present proceedings, we should briefly say why that is our view.

[27] While the Constitution contains some provisions relating to elections it does not flesh them out with a detailed scheme for how an election should be conducted and disputes about its outcome resolved. That is left to the Legislature and the scheme is found in the Electoral Act. The peace, order and good government of Tonga obviously requires as much stability as possible in the membership of the Legislature. Elections, whilst essential in a democratic society, have the potential to create some degree of instability until the composition of the Legislature is settled, especially if the result of an election is generally, or in particular constituencies, a close one. It is highly desirable, therefore, that challenges to an election outcome are made and determined with all due speed. It is accordingly to be expected that any sensible electoral scheme will so provide and, in particular, that there will be a strict time limit within which any challenge must be made.

[28] Section 25 – 27 limit who can bring a challenge and when it can be brought, as well as prescribing the procedure of any challenge. Challenges can be brought only by the individuals listed in s.26(1), who all had a direct interest in the outcome. (Contrary to what the Lord Chief Justice said, they are not just a "few persons" but include all who had a right to vote in that constituency). The challenge must be made within 28 days after declaration of the result (with a limited extension for cases of bribery after the event) and the challenge must be by election petition.

[29] Those restrictions are a reasonable and proportionate limitation upon the disqualification provisions found in the Constitution. They do not "infringe the Constitution", to adopt the expression of this Court in *Touliki Trading v Fakafanua and Kingdom of Tonga (No 2)* [1996] Tonga LR 145, 152. They merely ensure that the bringing of belated challenges does not create instability in Tongan society and that only persons with a direct interest can bring challenges. They therefore further legitimate constitutional goals. Similar provisions are found in other democratic societies.

[30] The Attorney General seeks to stand outside this legislative scheme but we do not consider he is able to do so in the face of the clear words of s.25(1) that "No election ... shall be questioned except by a petition .... presented in accordance with this Part of this Act." The Legislature could have included the Attorney General in the list in s.26(1) but has not done so. We do not regard that absence as any indication that he alone is able to bring a challenge by another means and outside the time limit.

[31] We have been referring to the situation after an election has taken place. Nothing we have said is intended to cast any doubt on the ability of the Attorney General to challenge a candidacy prior to an election, as happened in *Attorney General v Tupouniua* [1999] Tonga LR 21. Sections 25 – 27 operate only after the election.

Result

[32] The appeal is allowed, with costs to the appellant in this Court and the Supreme Court to be taxed if not agreed.

Palu anor v Sete anor

Court of Appeal, Land Jurisdiction, Nuku'alofa
Moore, Handley, Blanchard, and Tupou JJ
AC 18/2015

30 March 2016; 8 April 2016

Land law appeal – Minister cancelled deed of grant – no power to cancel – both appellants ordered to vacate land

The decision of the Land Court is reported at *Sete v Palu anors* [2015] Tonga LR 296.

The issue on the appeal from the Land Court was whether the Minister of Lands was empowered by the Land Act to cancel a deed of grant to the first respondent, Talanoa Sete. If that cancellation was invalid, it would follow that a grant subsequently made to the appellant, Sosefo Palu, was unlawful and so was the occupation of the land by both appellants.

Held:

1. Although the Minister opposed Talanoa's claim in the Land Court, he did not appeal. He should have been named as a respondent to the appeal by Sosefo and Tupetaiki, but was not. The court directed that an amended notice of appeal, including the Minister as a respondent, be filed and served. That was done and the Solicitor General wrote to the court advising that the Minister accepted the decision of the Land Court that he had no power to cancel Talanoa's grant.
2. The Minister was given no express general power to cancel a deed of grant that had not been voluntarily surrendered by the holder with Cabinet consent under s.54. That was understandable as the circumstances in which cancellation might be sought by someone other than the holder were very likely to involve a dispute concerning entitlement to the land. Resolution of such a dispute would take the Minister beyond his administrative role under the Act and might require him in some cases to adjudicate in a dispute involving his own actions or those of a predecessor. Therefore, it was only the Land Court that was empowered by the Act to hear and determine all disputes, claims, and questions of title affecting any land.
3. Certainty of land titles was of the utmost importance. It would be undermined if the Minister could cancel them without reference to the Court and without being controlled by any limitation period.

4. The Minister never had any power to cancel Talanoa's grant and the court affirmed the directions to the Minister made by the Land Court. The Land Court ordered Sosefo and Tupetaiki to vacate the land within 21 days. That time was now to run from the date of delivery of this judgment. The appeal was dismissed.

Cases considered:
Fifita v Minister of Lands (1972) 3 Tonga LR 45
Lew Bon Tew v Kenderaan Bas Mara [1983] 1 AC 553 (PC)

Statute considered:
Land Act (Cap 132)

Counsel for the appellants : Mr S Tu'utafaiva
Counsel for the first respondent : Mrs MTP Palelei
No appearance for the second respondent

Judgment of the Court

[1] The issue on this appeal from the Land Court is whether the Minister of Lands was empowered by the Land Act to cancel a deed of grant to the first respondent, Talanoa Sete. If that cancellation was invalid, it will follow that a grant subsequently made to the appellant, Sosefo Palu, was unlawful and so is the occupation of the land by both appellants, as Lord President Paulsen has found.

The facts

[2] In 1948 a town allotment at Ma'ufanga, known as Mamakoula, was registered in the name of 'Etuate Palu. Sosefo is 'Etuate's son and heir.

[3] 'Etuate died in 1958 when Sosefo was 10 years old. In 1959 the Minister appointed a trustee to hold Mamakoula on trust for Sosefo.

[4] Penisimani Sete, the father of Talanoa, was 'Etuate's younger brother. He and his wife raised Sosefo as if he were their own child and an older brother of Talanoa.

[5] On 26 May 1971, and therefore after Sosefo was of full age, the Minister of Lands directed a subdivision of Mamakoula into two allotments of roughly equal size. One of them, Lot 1, the subject of this case, was to be for Penisimani. The other, Lot 2, was for Sosefo who had already been given a tax allotment at 'Eua by Penisimani.

[6] Sosefo says that neither he nor his trustee consented to the subdivision of Mamakoula in this way. However, he proceeded to build a house on Lot 2 around 1977 and the Lord President noted the absence of any evidence that Sosefo ever used or occupied Lot 1. The Lord President was satisfied that Sosefo was aware of the subdivision and said that his conduct was consistent with having given up rights to Lot 1.

[7] It was the unchallenged evidence of Talanoa that in 1980 Sosefo requested him to let the second appellant, Tupetaiki Manuotalaha, occupy Lot 1, which was also consistent with Sosefo recognising Talanoa's rights as Penisimani's heir.

[8] Although the Minister had allocated Lot 1 to Penisimani, it had not been registered in his name. In 1987, with the written consent of Penisimani who stated that he wished to surrender his interest, Talanoa applied for registration to himself of Lot 1. A deed of grant for Lot 1 was issued to Talanoa on 24 November 1989. At the same time a deed of grant of Lot 2 to Sosefo was prepared but it was not signed by the Minister.

[9] Tupetaiki had continued in occupation of Lot 1 with Talanoa's permission. In 2010 Talanoa asked him to pay rent. Talanoa also did some fencing work. That seems to have led to the current dissension. Sosefo made representations to the Minister who, in May 2013, cancelled Talanoa's 1989 deed of grant. The Minister said he considered that the 1971 subdivision had been unlawful because of the existence of the trust (which was not formally ended until 2003). The Minister told Talanoa that he would find him another allotment. Talanoa indicated his acceptance of the Minister's decisions but it seems to us unlikely that he was properly informed about his rights in the matter when he did so. The Minister then issued a posthumous grant to 'Etuate for the whole of Mamakoula and on 13 January 2014 it was transferred to Sosefo.

[10] In this proceeding Talanoa has successfully challenged in the Land Court the lawfulness of the actions of the Minister in cancelling his grant and issuing a grant to Sosefo. Sosefo and Tupetaiki appeal against the Land Court's order directing the Minister to cancel the deed of grant of Mamakoula held by Sosefo and to re-issue the deed of grant of Lot 1 dated 24 November 1989 to Talanoa.

The position of the Minister

[11] Although the Minister opposed Talanoa's claim in the Land Court, he has not appealed. He should have been named as a respondent to the appeal by Sosefo and Tupetaiki, but was not. We directed that an amended notice of appeal, including him as a respondent, be filed and served. That was done and the Solicitor General has written to the Court advising that the Minister accepts the decision of the Land Court that he had no power to cancel Talanoa's grant.

Discussion

[12] We need not give an account of the Lord President's reasons for concluding that the Minister lacked power to cancel Talanoa's deed of grant as in all essential respects we agree with them.

[13] Section 19(1) of the Act makes the Minister the representative of the Crown in all matters concerning land in the Kingdom. As the Lord President said, it is fundamental that in purporting to exercise a statutory power the Minister must act within the limits of the power conferred upon him.

[14] The Minister is given by the Act an express general power to grant allotments to Tongan subjects duly entitled thereto by law (s.19(2)). His powers are administrative. In making grants of land he performs an administrative function. He also has some express powers or obligations to cancel existing grants exercisable, or required to be exercised, only in particular and limited circumstances. Thus where a new allotment is granted on the removal of a holder from one district to another, s.73 requires the Minister to cancel the deed of grant previously held by that person. And, as occurred in *Fifita v Minister of Lands* (1972) 3 Tonga LR 45, where under s.49 a grant is "null and void" because of excess area the Minister is under a duty to give effect to the section.

[15] But the Minister is given no express general power to cancel a deed of grant that has not been voluntarily surrendered by the holder with Cabinet consent under s.54. That is understandable as the circumstances in which cancellation might be sought by someone other than the holder are very likely to involve a dispute concerning entitlement to the land. Resolution of such a dispute would take the Minister beyond his administrative role under the Act and might require him in some cases to adjudicate in a dispute involving his own actions or those of a predecessor. Therefore, it is only the Land Court that is empowered by the Act, under s.149(1)(b), to hear and determine all disputes, claims, and questions of title affecting any land, which s.150 authorises it to do "on the application by any person claiming to be interested or on the application of the Minister".

[16] It follows that, like the Land Court, we do not accept the submission of the appellants that the Minister must be taken, in the absence of an express power, to have an implied power to cancel a grant that he considers to have been issued unlawfully. Such an implied power, far from being suggested by what is said expressly or being necessary for the Minister to perform the functions given to him would, in our view, be inconsistent with the division of functions and powers under the Act between the Minister and the Court. If the Minister considers that a grant has been made unlawfully, and the holder, fully apprised of his rights, is unwilling to execute a surrender of it, the Minister's proper course is to apply to the Land Court for its cancellation, provided, of course, that such an action is not statute barred by s.170.

[17] Section 170 reads:

> Limitation of action
>
> No person shall bring in the Court any action but within 10 years after the time at which the right to bring such action shall have first accrued to some person through whom he claims, or if such right shall not have accrued to any person through whom he claims then within 10 years next after the time at which the right to bring such action shall have first accrued to the person bringing the same.

[18] The statutory bar applies only to court actions. But an exercise of the asserted Ministerial power of cancellation, if it existed, would, when done more than 10 years after the making of the grant, involve a circumvention of s.170. To take the present case, it would not have been possible for the appellants, or indeed the Minister himself, to challenge Talanoa's title under his deed of grant in an action brought in the Land Court once the 10 year period had elapsed, which it did in 1999. How then can it be

consistent with the statutory scheme for the Minister to have an implied power to cancel the grant, leaving it to Talanoa to review that decision in the Land Court? That would deny Talanoa the protection given to his title by s.170.

[19] As the Lord President remarked, citing *Lew Bon Tew v Kenderaan Bas Mara* [1983] 1 AC 553 (PC) at 563, when a period of limitation has expired, a potential defendant should be entitled to assume that he is no longer at risk of a stale claim. Certainty of land titles is of the utmost importance. It would be undermined if the Minister could cancel them without reference to the Court and without being controlled by any limitation period.

[20] For these reasons, we find that the Minister never had any power to cancel Talanoa's grant and we affirm the directions to the Minister made by the Land Court.

[21] The Land Court ordered Sosefo and Tupetaiki to vacate the land within 21 days. That time is now to run from the date of delivery of this judgment. In all other respects the appeal is dismissed.

[22] The appellants are to pay the first respondent's costs of his appeal, to be taxed if not agreed.

Naulu v Tupou anors

Court of Appeal, Nuku'alofa
Moore, Handley, Blanchard, and Tupou JJ
AC 21/2015

31 March 2016; 8 April 2016

Land law – Minister should make reasonable enquiries whether there was any impediment to grant – inadequate enquiries – appeal allowed

This appeal concerns whether the Minister of Lands, the third respondent, fulfilled his duty to make reasonable inquiries to determine whether there was any impediment to the making of a grant of a tax allotment to the first respondent, 'Amanaki Tupou. The appellant, Fililangi Naulu, claimed that his father, Tevita Naulu, had occupancy of the allotment and that it was not available. Tevita brought this proceeding along with Fililangi but died shortly before the hearing in the Land Court.

Held:

1. A declaration of no impediment was made by the estate holder. There was no competing application from Tevita. If there was nothing else to put the Minister or the officer handling the application on alert it might be reasonable for the Minister to rely upon the estate holder's certification, though better practice would be for an inspection of the allotment to be made in every case and anything of concern it revealed followed up. There was further information available to the Ministry, namely that it had been told by the applicant that Tevita was farming the land. That should have alerted the Ministry to the fact that there was some form of occupancy, which might well involve the growing of crops. The Ministry should have investigated what was happening on the land by way of farming and only then should the Minister have decided whether the land was available. Occupation of land does not necessarily mean it is unavailable. That will depend upon the nature and history of the occupation.
2. The Minister did not discharge his duty to make reasonable inquiries about the availability of the land and consequently the grant to 'Amanaki was invalidly made.
3. The court emphasized that all the court decided was that the Minister failed to make adequate inquiries. There was not any view on whether 'Amanaki or Fililangi should have the grant. That was a matter for the Minister to decide, after hearing from them both, making such further inquiries as may be reasonably necessary and then assessing the competing applications.

4. The appeal was allowed and directions given to the Minister to cancel the grant, and then to make a fresh decision after giving both 'Amanaki and Fililangi the opportunity to be heard.

Cases considered:
Finau v Minister of Lands [2012] Tonga LR 127 (CA)
Tafa v Viau [2006] Tonga LR 287

Statute considered:
Land Act (Cap 132)

Counsel for the appellant	:	Mr LM Niu SC
Counsel for the first and second respondents	:	Mr S Tu'utafaiva
Counsel for the third respondent	:	Mr S Sisifa SC

Judgment

[1] This appeal concerns whether the Minister of Lands, the third respondent, fulfilled his duty, in the circumstances of the case, to make reasonable inquiries to determine whether there was any impediment to the making of a grant of a tax allotment to the first respondent, 'Amanaki Tupou. The appellant, Fililangi Naulu, says that his father, Tevita Naulu, had occupancy of the allotment and that it was not available. Tevita brought this proceeding along with Fililangi but died shortly before the hearing in the Land Court.

The facts

[2] The allotment in question is known as Lokoloko and is in the Lakepa estate. The estate holder, Hon. Lasike, is the second respondent.

[3] Siosaia 'Oto Tupou ('Oto) was granted the allotment in 1948 but lived until 2001 in England. In his absence and, as Scott J found, with his permission Tevita Naulu went on to the land, lived there in a fale and an uncompleted house and cultivated it. Tevita and his family ceased residing on the land in about 1993 but he continued to cultivate it. Fililangi Naulu, Tevita's oldest son, lives in the United States but a younger brother took over the planting from Tevita and is still working the land.

[4] There was evidence that after 'Oto returned to Tonga, Tevita offered to "return" the allotment to him but was told to stay on the land "and continue to carry out your obligation .... to look after your children". 'Oto was not however, willing to surrender the land so that it could be re-granted to Tevita.

[5] 'Oto died in November 2002 without an heir able to claim the allotment. The land reverted to the estate holder. Tevita approached Hon. Lasike who was aware that he had long been cultivating 'Oto's land. He asked Hon. Lasike if the land could be registered in his name but was told that the land had reverted and would be re-granted as provided for in the Land Act. Hon. Lasike's evidence was that he told Tevita that he could plant kava on the land. He denied promising Tevita the land at any time and said he knew nothing at all about Fililangi. He considered that the provisions of the Land Act favoured an applicant who was descended through the male line. 'Amanaki is

related to 'Oto through the male line whereas Tevita was related through the female line.

[6] 'Amanaki grew up on the Lakepa estate. His father's land is alongside Lokoloko. About four years after 'Oto's death, on 5 November 2006, and while Tevita himself was still cultivating the land. 'Amanaki made an application for a grant under s.43 of the Land Act. His application was supported by Hon. Lasike who certified that there was no impediment to a grant of the allotment to 'Amanaki. 'Amanaki met with the Minister of Lands. He told the Minister that Tevita was farming the land. His evidence was that he had looked at the land before making his application and that the fale and the uncompleted house were no longer there. Only a concrete slab remained.

[7] The only application, formal or informal, for the land was from 'Amanaki. The Ministry prepared a brief for the Minister but no inspection was made of the land. A Lands Registration Officer, W. Vea, gave evidence that the Ministry's policy was not to inspect unless some dispute in regard to the land was brought to their attention. Otherwise they relied on the estate holder who in this case had certified that there was no impediment to 'Amanaki's application being granted.

[8] Six days after receiving the Ministry's brief the Minister approved the granting of the allotment to 'Amanaki. A deed of grant was issued to him on 3 March 2007. He had already given Tevita notice to quit, evidently anticipating the grant. Tevita did not cease cultivating the land and on 24 June 2008 the present proceedings were issued.

The case for the appellant

[9] What Scott J described as Mr. Niu's "central submission" for Fililangi, and the only ground pursued in this Court, was that the Minister was in breach of his duty to make reasonable inquiries before issuing the grant to 'Amanaki. If he had done so he would have discovered that Tevita was, as Scott J held, in lawful occupation. Accordingly, it was submitted to Scott J and to us, the land was unavailable to be granted. The grant was vitiated by the failure to make due inquiries and should be set aside. It was submitted that the matter should be remitted to the Minister for reconsideration after giving rival claimants an opportunity to be heard.

The Land Court judgment

[10] Scott J said that lawful occupation by someone other than the potential grantee does not render land unavailable. But the Minister must consider whether it is available before making a grant. The extent of the inquiries he must make depended upon the circumstances. As the Judge said, "where there are competing applications or when the position is not at all clear then a detailed investigation has to be carried out". In the present case, the Judge said, there was only one applicant and the land had reverted to the estate holder. The person cultivating the land (Tevita), who did not himself apply for a grant, was doing so with the consent of the estate holder who had supported 'Amanaki's application. Scott J was satisfied that adequate consideration was given by the Minister to the question of whether the land was available for grant and had correctly concluded that it was.

[11] Fililangi's claim, as heir to Tevita, was therefore dismissed.

Discussion

[12] We consider that Scott J erred in coming to this conclusion. The continued cultivation of the land by Tevita and his occupation of it for that purpose with the consent of Hon. Lasike may have constituted a practical impediment to 'Amanaki's application. The land, upon proper investigation, may have been found not to be available in fact for a grant to him. He certainly had the estate holder's support but s.34(2) makes it clear that, although the Minister must consult the estate holder and hear his objections to a proposed grant, in the event of disagreement the decision is for the Minister to make, subject to review by the Land Court within three months. The Minister can therefore override the estate holder if he considers after proper investigation that the land is occupied by another and in the circumstances should not be treated as available for grant to an applicant who has the estate holder's support.

[13] In this case there was no competing application by Tevita. We do not accept that his approach to Hon. Lasike should be taken to be an informal application. Any application must be directed to the Minister, even if it is not accompanied by a statement of support from the estate holder. However, the absence of an application by Tevita is not fatal as the Minister was still obliged to make such inquiries as the information before him made reasonably necessary.

[14] The leading case on this Ministerial obligation is *Tafa v Viau* [2006] Tonga LR 287. In that case a grant of a town allotment had been made to Tafa when it was in the lawful occupation of the Viaus who had built a house on it. The Minister was not aware of this when he made the grant. This court determined the case on the basis of what it found to be the true construction of the Act. It referred to sections, including s.7 and s.50, in which reference was made to the question of whether a piece of land is "available" to be granted. The scheme of the Act, the Court said, made availability "an essential requirement" before a grant can be made. Therefore the discretion conferred on the Minister (in that case under s.50(e), in the present case under s.50(a)) must take account of availability.

[15] The Court drew attention to two aspects of the Minister's functions and duties which, it said, combined to require him to take steps, which must be reasonable in the particular circumstances, to ascertain whether the land is in fact not subject to some other claim that might be an impediment to a grant or make it unavailable. The first was the need for him to sign a declaration that there was no impediment. He could not do so if he simply did not know because he had made no sufficient inquiry.

[16] In the case of a grant from a hereditary estate, however, the declaration is made by the estate holder. Nevertheless, even if the estate holder supports the application and makes the declaration in Form 11 of Schedule IX, we are of the view that the Minister may be put on inquiry or further inquiry by some other matter that comes to his attention and is in apparent contradiction of the estate holder's declaration.

[17] The second aspect to which the *Tafa v Viau* Court drew attention was that, as it said:

> "... the administrative decision to make the particular grant cannot properly be made in the absence of the same inquiry in any case where the Minister does not actually know whether the land is available, or whether any competing claim has been appropriately resolved." (at [12])

[18] The Court stressed that the Minister does not have to make the inquiries personally and may rely on his officers "but, if he does so, and they fail to perform the task properly, a person affected may have a remedy for that failure as if it were a failure of the Minister." (at [12])

[19] In *Tafa v Viau* reasonable steps had not been taken by or on behalf of the Minister to acquaint him with relevant information about the land so that a most material factor, the occupation of the land and the building of the house, was not taken into account in determining whether the land was available.

[20] In the present case, as we have noted, a declaration of no impediment was made by the estate holder. There was no competing application from Tevita. If there was nothing else to put the Minister or the officer handling the application on alert it might be reasonable for the Minister to rely upon the estate holder's certification, though better practice would be for an inspection of the allotment to be made in every case and anything of concern it revealed followed up. We say this in the hope that such a change of practice may reduce the incidence of litigation challenging the making of a grant.

[21] In this case, there was some further, and we think significant, information available to the Ministry, namely that it had been told by the applicant, 'Amanaki, that Tevita was farming the land. That surely should have alerted the Ministry to the fact that there was some form of occupancy, which might well involve the growing of crops. This might not be a short-term project. We were told from the bar that kava, which the Hon. Lasike had suggested Tevita grow on the land, takes five years to grow. In our view the Ministry should have investigated what was happening on the land by way of farming and only then, in the light of what it found, should the Minister have decided whether the land was available. Occupation of land does not necessarily mean it is unavailable. That will depend upon the nature and history of the occupation.

[22] In the circumstances of the case the Minister did not discharge his duty to make reasonable inquiries about the availability of the land and consequently the grant to 'Amanaki was invalidly made. The Minister is directed to cancel the grant. He must then make a fresh decision after giving both 'Amanaki and Fililangi the opportunity to be heard. If Fililangi wishes to avail himself of this opportunity he should make a formal application for a grant of the allotment, which we understand he has not yet done.

[23] We should emphasize that all we have decided is that the Minister failed to make adequate inquiries. We should not be taken to be indicating any view on whether 'Amanaki or Fililangi should have the grant. That is a matter for the Minister to decide, after hearing from them both, making such further inquiries as may be reasonably necessary and then assessing the competing applications.

[24] We should add also that we are not determining the "real question" left unanswered in *Finau v Minister of Lands* [2012] Tonga LR 127 at [16] concerning whether the Minister's determination as to availability (after due inquiry) is one of fact or law.

Result

[25] The appeal is allowed and directions given to the Minister as set out in para [22] above. The appellant is entitled to his costs in this Court and in the Supreme Court
210 against the first and third respondents, to be taxed if not agreed. No order for costs in either Court is made against the second respondent.

Tapueluelu v Police

Court of Appeal, Nuku'alofa
Moore J, Handley J, Blanchard J, Tupou J
AC 19/2015

1 April 2016; 8 April 2016

Criminal appeal – guilty plea in Magistrates Court – appeal only on point of law to Court of Appeal – appeal dismissed

The appellant pleaded guilty before the Magistrate to two charges of causing grievous bodily harm to different victims. On 28 August 2014 the Magistrate discharged the appellant without conviction. The Police appealed on the ground that the sentence was manifestly inadequate. The appeal was brought pursuant to s 74(1) of the Magistrates Courts Act which enabled any party to appeal on questions of fact and law. On 21 May 2015 the Supreme Court allowed the appeal, convicted the appellant on both charges and adjourned the further hearing for submissions on sentence. On 21 July 2015 he sentenced the appellant to imprisonment for one year ten months on the first charge and one year and four months on the second. The sentences were to be served concurrently but he suspended both on conditions which included 12 months probation and 100 hours of community service. The defendant appealed against the convictions entered by the Supreme Court and the sentence. His grounds of appeal alleged error in failing to give sufficient weight to mitigating factors in imposing sentences that were excessive, and because the Supreme Court was not given the full facts relating to the offences.

Held:

1. The Magistrates Courts Act provided that any party to any appeal under subsection (1) should have a further right of appeal on a point of law to the Court of Appeal with the leave of the Supreme Court or the Court of Appeal.
2. None of the grounds of appeal raised a question of law. Leave to appeal should be refused and the appeal dismissed.

Cases considered:

House v The King (1936) 55 CLR 599
R v Saafi [2004] Tonga LR 250
Ta'ani v Police [1994] Tonga LR 84
Uluilata v The Crown [1999] Tonga LR 166

Statutes considered:
Constitution of Tonga Act (Cap 2)
Criminal Offences Act (Cap 18)
Magistrates' Courts Act (Cap 11)
Supreme Court Act (Cap 10)

Counsel for the appellant : Mr S Tu'utafaiva
Counsel for the respondent : Mr 'A Kefu SC

Judgment

[1] This is an appeal by the defendant, a police officer, from the sentences imposed by the Lord Chief Justice who allowed an appeal by the Police from the decision of a Magistrate. The appellant had pleaded guilty before the Magistrate to two charges of causing grievous bodily harm to different victims contrary to s.107 of the Criminal Offences Act. On 28 August 2014 the Magistrate discharged the appellant without conviction pursuant to s.204 of the Criminal Offences Act.

[2] The Police appealed on the ground that the sentence was manifestly inadequate. The appeal to the Supreme Court was brought pursuant to s.74(1) of the Magistrates Courts Act which enables any party to appeal. That section and section 80 provide for a full appeal on fact and law and the Supreme Court may review the exercise of the Magistrate's sentencing discretion on familiar principles: *House v The King* (1936) 55 CLR 599.

[3] On 21 May 2015 the Lord Chief Justice allowed the appeal, convicted the appellant on both charges and adjourned the further hearing for submissions on sentence. On 21 July 2015 he sentenced the appellant to imprisonment for one year ten months on the first charge and one year and four months on the second. The sentences were to be served concurrently but he suspended both on conditions which included 12 months' probation and 100 hours of community service. The sentences of imprisonment were below the two year threshold in s.23 of the Constitution. In the result the appellant's continuing employment with Tonga Police Service and the benefits from his 30 years prior service were not directly affected, although disciplinary proceedings are pending awaiting the decision of this Court.

[4] The defendant appealed to this Court against the convictions entered by the Lord Chief Justice and the sentence. His grounds of appeal allege error in failing to give sufficient weight to mitigating factors in imposing sentences that were excessive and because the Lord Chief Justice was not given the full facts relating to the offences.

[5] Section 74(2) of the Magistrates Courts Act provides:

> "Any party to any appeal under subsection (1) shall have a further right of appeal on a point of law to the Court of Appeal with the leave of the Supreme Court or the Court of Appeal."

[6] There is a corresponding provision in s.16(c) of the Supreme Court Act which requires the leave of the Court of Appeal for an appeal against the sentence passed on a person convicted on a trial before the Supreme Court. The proceedings before the Lord Chief Justice were an appeal from the decision of a Magistrate, and not a trial. The relevant provision is in s.74(2) of the Magistrates Courts Act.

[7] In our judgment none of the grounds of appeal raise a question of law. Leave to
80 appeal should be refused and the appeal dismissed. However in our opinion the sentences were not at all excessive. The Lord Chief Justice took into account the response of the victims' families to the apologies offered by the appellant. While this was a relevant factor on sentence, its weight and the final decision remain the responsibility of the sentencing court: *Ta'ani v Police* [1994] Tonga L.R 84, 85; *Uluilata v The Crown* [1999] Tonga L.R. 166; *The Crown v Saafi* [2004] Tonga L.R. 250, 254.

[8] The appeal is dismissed.

Fau anor v Fau anor

Court of Appeal, Land jurisdiction, Nuku'alofa
Moore, Handley, Blanchard, and Tupou JJ
AC 28/2015

1 April 2016; 8 April 2016

Appeal – land law – operation of limitation period in section 170 Land Act – period expired – appeal dismissed

Filipo Fau and his son appealed against a judgment of the Supreme Court of 22 September 2015 dismissing their claim for relief against Sililo Fau and the Minister of Lands (the Minister) in proceedings filed in the Land Court in August 2014. The central issue in the appeal was the operation of s170 of the Land Act.

Held:

1. The critical issue was whether s170 of the Land Act operated in the limited way suggested by the appellants. Ownership and possession of land was of great importance in Tonga. The Act should be construed to the extent possible, in a way that creates certainty rather than uncertainty. The apparent intention of s 170 was twofold. The first was to afford a person a lengthy period to pursue a claim asserting, amongst other things, a right to or interest in land under the Land Act. However the second was to ensure certainty about, amongst other things, rights and interests under the Act after the expiration of that lengthy period.
2. The appellant, Filipo, acquired rights to claim interests in two parcels of land in 2001. To obtain those interests by grant required action by the Minister. Filipo became aware, at that time, that the Minister had made a decision not to grant him the tax allotment of Tafasia. It would have been open to Filipo to take legal action at this time to enforce his rights by proceedings against the Minister. It was true that it was not until 2009 that the interest he had in relation to the tax allotment of Tafasia derived from s 82 was, in substance, put beyond his reach by the grant to Sililo subject to any action he might then have taken against both the Minister and Sililo. But the substance of that action would have been to require the Minister to nullify the steps taken to confer an interest on Sililo as a step in a process of recognising Filipo's interest (conditional upon grant) acquired in 2001. Filipo accordingly sought to do indirectly by proceedings involving his brother as a defendant, that which he could have done directly in the 10 years following 2001, namely require in Court proceedings the Minister to recognise and perfect by grant the interest he acquired in that year to the tax allotment of Tafasia.

3. Section 170 served the purpose of creating certainty about the status of that tax allotment in relation to the interest of Filipo by denying him the opportunity in Court proceedings to continue to assert that interest which had arisen a decade earlier.
4. The appeal was dismissed with costs.

Cases considered:

Deputy Commission of Taxation v Moorebank Pty Ltd (1986–1987) 165 CLR 56
Lisiate v Eli [2012] Tonga LR 30
Minister of Lands v Kulitapa [1997] Tonga LR 116

Statutes considered:

Land Act (Cap 132)
Limitation Act 1969 (NSW)

Counsel for the appellants	:	Mr LM Niu SC
Counsel for the first respondent	:	Mr W Edwards
Counsel for the second respondent	:	Mr 'A Kefu SC

Judgment of the Court

[1] This is an appeal by Filipo Fau and his son against a judgment of the Lord Chief Justice of 22 September 2015 dismissing their claim for relief against Sililo Fau and the Minister of Lands (the Minister) in proceedings filed in the Land Court in August 2014. The central issue in the appeal is the operation of s170 of the Land Act.

[2] Filipo is Sililo's older brother. Their grandfather Pataleone Fau died in 1982. Following his death their father, Peauafi Fau, was granted their grandfather's town allotment (Lanutavake) and a smaller share of their grandfather's tax allotment (Tafasia). Their uncle, Sosefo Fau, was granted a larger share of their grandfather's tax allotment (Fononga Hihifo). The two portions of the tax allotment were collectively known as Fononga Hihifo mo Tafasia. During his lifetime, Peauafi surrendered two portions of his tax allotment Tafasia. It had originally been 2 roods and 30.3 perches (approximately 2770 m²) in area and he was ultimately left, at the time of his death, with a small tax allotment of just 30 perches in area (approximately 750 m²).

[3] Peauafi died on 6 April 2001. The Lord Chief Justice made a number of findings about what occurred after Peauafi's death that were not challenged in this appeal. His Honour found that Filipo applied on 23 April 2001 for the town allotment Lanutavake as Peauafi's heir. This led to the registration of the town allotment in Filipo's name following approval by the Minister. His Honour also found the Minister did not approve Filipo's claim to Fononga Hihifo mo Tafasia. As is apparent already, a portion of this tax allotment, Fononga Hihifo, was not available for grant to Filipo as heir to his father's interests in land because that portion was registered in the name of his uncle, Sosefo. His Honour also found that the Minister made his decision not to grant Filipo Tasafia around 30 April 2001; and that Filipo was aware from about 30 April 2001 the Minister had made a decision not to grant his claim to Tasafia. This led the Lord Chief Justice later to conclude that Filipo was clearly on notice from 30 April 2001 that he would need to make some challenge for the land. This conclusion was not contested in the appeal.

[4] On 1 September 2008, Sililo applied for Tafasia as his town allotment apparently on the basis that it should be treated as a town allotment given its comparatively small size at that time. The Lord Chief Justice found that the Minister then proceeded on the basis that the allotment had reverted to the estate holder and was available for grant. The estate holder consented to the application which was endorsed by the Minister and the deed of grant was issued to Sililo on 6 April 2009. The Lord Chief Justice noted that Filipo stated in his statement of claim that he became aware of Sililo's registration in September 2010.

[5] In the proceedings Filipo sought a declaration that the registration of the land as a town allotment under a deed of grant by the Minister to Filipo was unlawful, a consequential order that the deed be cancelled and an order that a deed of grant for the land in question be granted in favour of Filipo's son. This last order was intended to give effect to Filipo's interest in the allotment.

[6] In his reasons, the Lord Chief Justice expressed the view that the Minister had, in 2001, been under a duty to register Filipo as the holder of Tafasia and his decision not to do so had been unlawful. His Honour also said that Tafasia should not have been treated by the Minister as having reverted to the estate holder under s87 because Filipo had lodged "a lawful and proper claim to the Minister for the land". However of decisive importance was the conclusion of the Lord Chief Justice that time began to run against Filipo for the purposes of making a claim to the land in dispute (Tafasia) in April 2001 and that, having regard to s170 of the Land Act, he had 10 years within which to make a claim but did not in fact do so until August 2014. Thus the Lord Chief Justice concluded Filipo and his son's action was "out of time and .... statute barred" which led to the order dismissing their claim.

[7] Section 170 provides:

> No person shall bring in the Court any action but within 10 years after the time at which the right to bring such action shall have first accrued to some person through whom he claims, or if such right shall not have accrued to any person through whom he claims then within 10 years next after the time at which the right to bring such action shall have first accrued to the person bringing the same.

[8] The appellants' argument in the appeal was that under the succession provisions in s82 of the Land Act, Filipo as Peauafi's eldest son, succeeded to Peauafi's interests in any town or tax allotment and he had a right to obtain those interests. Accordingly he could assert that right against his brother Sililo in relation to the interest that Sililo had acquired in 2009, and that the limitation period of 10 years in s170 began to run in 2009. That is to say, Filipo had 10 years from 2009 in which to make a claim against his brother and he was within time when, in 2014, these proceedings were commenced. The argument proceeded on the basis that the expression "such action" in the second part of s170 should be treated as comprehending the action against Sililo.

[9] The critical issue is whether s170 operates in the limited way suggested by the appellants. The Land Act creates a comparatively complex legislative scheme for the creation and devolution of interests in land by grant and otherwise which includes important provisions concerning the succession to interests in land on the death of a person holding such an interest. Ownership and possession of land is of great

importance in Tonga. The Act should be construed to the extent possible, in a way that creates certainty rather than uncertainty.

[10] The apparent intention of s 170 is twofold. The first is to afford a person a lengthy period to pursue a claim asserting, amongst other things, a right to or interest in land under the Land Act. However the second is to ensure certainty about, amongst other things, rights and interests under the Act after the expiration of that lengthy period.

[11] Limitation periods are prescribed in legislation in many jurisdictions and frequently in legislation specifically enacted for that purpose. Ultimately the effect of such provisions will turn on the proper construction of the legislation in question. Nonetheless, an illustration of the effect of a provision in the Limitation Act 1969 (NSW) is found in *Deputy Commission of Taxation v Moorebank Pty Ltd* (1986 – 1987) 165 CLR 56 at 65 in which the High Court said that "..... such provisions will, at least in some circumstances, entail consequences which are substantive in that, by barring a remedy, they will effectively extinguish both rights and liabilities".

[12] In the present case, Filipo acquired rights to claim interests in two parcels of land in 2001. To obtain those interests by grant required action by the Minister. Filipo became aware, at that time, that the Minister had made a decision not to grant him the tax allotment of Tafasia. It would have been open to Filipo to take legal action at this time to enforce his rights by proceedings against the Minister. It is true that it was not until 2009 that the interest he had in relation to the tax allotment of Tafasia derived from s 82 was, in substance, put beyond his reach by the grant to Sililo subject to any action he might then have taken against both the Minister and Sililo. But the substance of that action would have been, and in these proceedings is, to require the Minister to nullify the steps taken to confer an interest on Sililo as a step in a process of recognising Filipo's interest (conditional upon grant) acquired in 2001.

[13] In order to disturb Sililo's grant and have the Court order its cancellation he had to show that he had an interest the Minister must recognize ie. one that remained enforceable against the Minister. Filipo is accordingly seeking to do indirectly by proceedings involving his brother as a defendant, that which he could have done directly in the 10 years following 2001, namely require in Court proceedings the Minister to recognise and perfect by grant the interest he acquired in that year to the tax allotment of Tafasia.

[14] Section 170 serves the purpose, in this case, of creating certainty about the status of that tax allotment in relation to the interest of Filipo by denying him the opportunity in Court proceedings to continue to assert that interest which had arisen a decade earlier.

[15] It is desirable to mention, in conclusion, two judgments of this Court that the Lord Chief Justice considered were in conflict. One was *Minister of Lands v Kulitapa* [1997] Tonga LR 116 and the other was *Lisiate v Eli* [2012] Tonga LR 30. The latter did not refer to the former and the Lord Chief Justice, probably correctly, viewed the second decision as having been made per incuriam and declined to follow it. While the Court's conclusion in *Lisiate v Eli* about the basis upon which the limitation period did not apply may be doubted, it is unnecessary for us to engage in an analysis of both judgments as the answer to the question posed in this appeal is, in our opinion, clear.

[16] For the preceding reasons, the appellants have failed to demonstrate any error on the part of the Lord Chief Justice. The appeal should be dismissed with costs. We so order.

R v Mafi anor

Supreme Court, Nuku'alofa
Cato J
Cr 38 and 40/ 2014

8 April 2016

Criminal law – manslaughter by negligence – reasonable person test applied – not guilty
Wilful negligence – mens rea needed – not guilty

On 30 January 2014 the eight month old child of Ms Mafi and Mr Latu became ill with vomiting and diarrhoea. He was not taken to a doctor or the hospital because the family could not find a car that they could use, they had no money, and no phone. The father had gone fishing to earn some money. The baby died about midday on 2 February 2014. The cause of death was dehydration. The parents were both charged with manslaughter by negligence and in the alternative, wilful neglect of a child. They both pleaded not guilty.

Held:

1. Mr Latu was secondary in the care of the baby. The court was not satisfied beyond a reasonable doubt that his omission to take the baby to hospital fell so short of the standard of care which a reasonable Tongan person would have exercised in the circumstances, which includes the lack of means, and involved such a high risk of death or serious harm that proper thinking members of the Tongan community would regard the degree of negligence as so serious that it should be treated as criminal conduct. Mr Latu was not grossly negligent and was accordingly acquitted of manslaughter by negligence.
2. Ms Mafi was the primary caregiver and was effectively destitute. She did not appreciate how seriously ill the baby was. The court was not satisfied beyond a reasonable doubt that her omission to take the baby to hospital fell so short of the standard of care which a reasonable Tongan person would have exercised in the circumstances, including having her lack of means, proper thinking members of the Tongan community would regard the degree of negligence as so serious that it should be treated as criminal conduct. Ms Mafi was not grossly negligent and was accordingly acquitted of manslaughter by negligence. Also the court did not consider that a very lengthy walk along, in large part, a busy road with no footpath with a sick child or hitch hiking a lift to the hospital was a reasonable alternative as the Crown had submitted.

3. As to the charge of wilful neglect, neither parent, even if they were proven to have known the child's health was at risk and did not see a doctor, had the means to take the child to the doctor. "Wilful" imported a moral element and the offence was not absolute. The court was satisfied that the parents' futile attempts to apply Tongan medicine was for the purpose of assisting the child and in part because they did not have the means to seek the assistance of a doctor or take the child to hospital. Both accused were not guilty of the alternative count of wilful neglect.

Case considered:
R v Shepherd [1981] AC 389

Statute considered:
Criminal Offences Act (Cap 18)

Counsel for the Crown : Ms Moa
The accused were unrepresented

Verdicts and Reasons

[1] Both accused pleaded not guilty to both counts in their indictments; the first being a count of manslaughter by negligence under sections 86(1)(b), 92, 95(2) and 96 of the Criminal Offences Act; the second which the Crown confirmed was laid as an alternative, wilful neglect of a child contrary to section 115 (1) of the Criminal Offences Act.

[2] The trial against Ms Mafi commenced originally on the 29th March 2016 when she appeared alone. A warrant was issued for the arrest of Mr Latu and he appeared voluntarily on the 31st March 2016, he said having forgotten the date of trial. He was apparently no longer living with Ms Mafi. I recommenced the trial against Ms Mafi, which had not involved any evidence being called on the 31st March 2016 when she was tried together with the co-accused Mr Latu. On the 5th April, 2016, I adjourned the case after hearing the evidence and submissions for a verdict to be given on the 7th April 2016. Both accused were unrepresented.

[3] The circumstances of the case are tragic. A child of about 8 months, who was the second child of the relationship of the co-accused, developed an illness, the symptoms being vomiting, diarrhoea, and also sunken eyes. The child had become ill on Thursday 30th January 2014 in the evening and had been unattended by any doctor until he died sometime after midday, on the 2nd February 2014. The cause of death given by a paediatrician from the Vaiola Hospital, a Dr Aho, was dehydration. He was of the opinion that had the child been brought to the hospital as late as 8am on the 2nd February 2014, he could have received liquids, been treated and his death avoided. The Crown's case was that the accused had grossly neglected their child over this period rendering them liable to an offence of manslaughter by negligence or in the alterative had both been guilty of wilful neglect by not seeking medical assistance or taking the child to hospital.

[4] Section 86 (1) of the Criminal Offences Act provides relevantly that culpable homicide consists in the killing of any person

> (b) by omission without lawful excuse to perform or observe towards such person any legal duty…"

Under section 92 of the Act, culpable homicide which does not amount to murder is manslaughter and, if such homicide was caused by negligence, the offence is manslaughter by negligence.

Under section 95(2) of the Act a person having the charge of any other person unable by reason of ... youth ... sickness to withdraw himself from such charge is under a legal duty to supply such person with the necessaries of health and life and any death resulting from omission to do so shall be deemed to be a death caused by omission to perform a legal duty within the meaning of section 86 (1)(b).

Section 95(3) provides that necessaries of health and life; include proper food, clothing shelter, and medical and surgical treatment.

96 (2) provides that a person's death shall be held to have been caused by an act or omission –

> (c) Although the act or omission would not have caused the person's death but for his refusal or neglect to submit to or seek proper medical or surgical treatment or but for his negligent or improper conduct or manner of living…."

[5] In order for me to convict on manslaughter by negligence, I must be satisfied of the following essential matters beyond a reasonable doubt.

i. That the accused was in charge of the baby at the relevant time;
ii. That the accused omitted to supply to the child the necessaries of health and life particularised as being a neglect to seek proper medical treatment for the child.
iii. That the accused by omission to supply the child with proper medical treatment cause child's death.
iv. That the omission to provide the child with proper medical treatment was grossly negligent in the circumstances.

[6] On the issue of whether the accused was grossly negligent, I further direct myself that in order to constitute gross negligence.

v. The omission of the accused must have;
a. Fallen so short of the standard of care which a reasonable person would have exercised in the circumstances; and

b. Involved such a high risk of death or serious harm,

that proper thinking members of the community would regard the degree of negligence involved in the conduct as so serious that it should be treated as criminal conduct.

In this regard, I also direct myself;

vi. "Every person owes a duty to conduct himself that he will not cause injury to another person in circumstances where a reasonable person in his position would have foreseen a risk of injury from such conduct of that person. A person acts in breach of that duty of care where he does not do something which a reasonable person in his position would do in the circumstances."

Further, I direct myself;

vii. The reasonable person with whose conduct I must compare the conduct of the accused in this case must be assumed to possess the same personal attributes as does the accused – being of the same age and experience – and the same knowledge as the accused would have in the circumstances in which he found himself.

Further, I direct myself;

viii. The Crown does not have to establish that the accused had the intention to injure. The offence of manslaughter is complete even if no injury were intended, and even if the accused had not realised that he was exposing the deceased to the risk of injury which would have been foreseen by the reasonable person in his position. The test is whether a reasonable person in this position of the accused would have realised the risk existed.

The evidence

[7] The first witness to give evidence was Dr Siaosi Aho. He was a paediatrician at the Vaiola Hospital and had worked there for about thirty years. He presented a report on the child, Kaliopasi, who had died on the 2nd February 2014 before he reached hospital. He had noted that the mother had informed him that on the 30th January the baby had been vomiting and had diarrhoea. He did not take solid food. He preferred to drink Milo and water. On the 31st of January, she cooked chicken with some breadfruit because he did not have much to eat or drink. The food was masticated for him by mother and he seemed to take more than five mouthfuls. She tried to give him the same food later in the afternoon but, by evening, he was having more diarrhoea and vomiting. The stools were of big volume. They were very watery. She said he had no fever but he seemed to sleep a lot. On Saturday the 1st of February, he had more diarrhoea and more vomiting followed by some cooked chicken and breadfruit. She tried to give him more milo and more water but the diarrhoea was on going. The same evening, she gave the last drop of Milo and as they had no money she went to her sister's home in Popua to ask for more Milo. She was back by 10pm only being away for half an hour. The older sibling made the comment the Milo was stale. The mother's sister suggested they bring him

over in the evening and she thought that he was possessed of demons and suggested applying Nonu leaves. On the 2nd February, the baby's breathing slowed down so the aunt asked a pastor to come and pray for the child with a view to taking him to the hospital because he had a vehicle. She told the doctor the pastor came and applied oil saying the baby had gone to sleep, and this was about 2pm. By the time he turned to go the baby, he was dead. The witness had been told they had thought of taking him to hospital, but there was no vehicle, no money and no phone. Dr Aho suggested they could have gone by hitchhiking. It was confirmed that the father had been fishing. He had returned to find the child had died.

[8] Dr Aho gave evidence that the mother had stopped breast feeding and had given the baby Milo as a substitute. Records and his opinion suggested this was not appropriate and the baby had lost weight. He had been home delivered. Feeding had been poor and the doctor suggested living conditions had also been poor. He said when he examined the baby there were some signs of wasting and the eyes were wildly opened and he said this would have made the family think he could be possessed by demons. He said sunken eyes were a common feature of severe dehydration. The severe dehydration was due to vomiting, diarrhoea and poor intake fluid. He considered the child had been inappropriately fed. He spoke of the baby having a stomach upset and having lived in an impoverished environment. He said also that condensed milk, Milo and chicken was not appropriate at the time of illness. What was required was rehydration fluid. In his opinion, poor fluid and severe dehydration led to the baby's death.

[9] He also said that the attempt to get medical assistance was weak. She could, in his opinion, have walked to the hospital or hitchhiked with the baby from where they lived in Fangaloto which was a distance he said of about 5kms. He said had the baby arrived by 6 to 8 am on the 2nd February, there was the possibility the child could have been saved. To the accused Ms Mafi under cross-examination, he suggested she had been grossly negligent although he did not express such a view to me. Plainly, however, he considered greater efforts should have been made by the accused and others to ensure medical assistance for the child. In a nutshell, he considered she had not made reasonable endeavours for proper health care. He also opined, in a question from me, whether in his opinion the state of the child was such that an ordinary person would know the child was seriously ill and required medical assistance, and he said yes.

[10] Dr Maletino Mafi gave evidence that she was in emergency at the hospital when the baby came in. She observed that the baby had very shrunken eyes, very dry skin and death was likely from severe dehydration. The back of the child was covered with Tongan leaves.

[11] La'aina Mafi, aged 32, lived with her husband in Fangaloto and had 5 children. The accused lived about quarter of a mile away. She said her sister had come over and asked her for help on the evening of the 1st February, 2014 and asked her for money to get a vehicle to take the baby to the hospital because it was sick. She said she told her they were in financial difficulty. She suggested that the accused return and bring the baby back. She saw the baby was sick because he was crying and looked to be uncomfortable and experiencing some difficulty. She did not see the baby vomiting or having diarrhoea, however. They came over at about 9pm and slept the night. The baby was fed with pawpaw and coconut juice. That was about 8am in the morning. She spoke of putting Nonu leaves on the baby because the accused had been living near a cemetery and a spiritual disturbance had affected the child. She said that the accused and her four children all were in the house that night. She said the baby did not cry in the night. It

was peaceful. She, on the Sunday, asked her church pastor to come over and she wanted help from God. The accused Ms Mafi had gone home to get some clothes for the child. La'aina said she told the Minister to say a prayer for the baby before she intended to ask him to take the child to hospital. She said the Minister walked outside. She said she had not asked him to take the baby to hospital. She said that she had picked up the baby after the Minister had gone outside and found that he had died. She then asked her sister to run and get Ms Mafi. She had been away about half an hour. She said later Mr Latu came over and the child was taken to hospital.

[12] She said the Minister was still outside when she observed the baby to be dead under cross-examination. She said she had not asked him to take the baby to hospital because she was waiting for the baby's clothes to be brought before they left. She agreed with Mr Latu in cross-examination that she had never seen him neglect the children. She said that Ms Mafi was in tears when she asked for the money to go to the hospital. She said she did not have money to give her. She said she had no friends who could come over with a car and take the child to hospital. She said she thought the baby was better after he had been fed and gone to sleep on the Saturday morning. Neither she nor her sister had a mobile phone. All she got a week for maintaining the family of 5 children was $150 paanga and it had gone. She said she never thought the child was so ill his life might be in a serious jeopardy.

[13] Leaola Tuiaki, a district nurse, gave evidence that she had been the district nurse who had been involved with routine examinations of the baby since birth. She recorded that the mother had gone off breast feeding and had substituted this with condensed milk. She had told her that was not good. She had told her breast milk and then SMA formula which cost $46 for a can which would last a week and a half should be given to the baby. The baby had lost weight on the 16th December when she last saw him.

[14] Evidence was given by police officers of statements made by both accused. As to Ms Mafi, she was spoken to and made a voluntary statement to Detective Paea Penisoni on the 2nd February at 6.30pm at the Police Station. She said that she had asked Mr Latu to get a vehicle to take the child to the hospital on the 30th January 2014 after the child had been vomiting and unable to eat and had diarrhoea. That was refused by his parents. She asked the co-accused what they could do. He said the weather is rough and he could not go to sea. They had no money. She gave the baby water and Milo to drink. On the Friday he was still sick and she had roasted some Tongan chicken and breadfruit. She fed him about 11am and he took about five mouthfuls. She gave him further food in the afternoon. He continued to have diarrhoea. She had chewed the chicken first.

[15] She said, on the Saturday, Mr Latu went fishing that is to sea. She got some chicken and roasted it with breadfruit. He came back and told her a boat was not confirmed. She said that the baby had not stopped vomiting or diarrhoea. Later, he went fishing. Later in the evening, she went to her sister's La'aina's house, and was told to go back and get her son. She had poured out some Milo she had left earlier because she was told it was stale. She gave the baby water. La'aina had suggested the baby might be possessed of the devil and gave him Nonu leaves. At that point, the child was still discharging diarrhoea and vomiting. She said the vehicle belonging to her sister and husband had no petrol in it. They all slept. When they got up the child was fed pawpaw and coconut juice and went to sleep. He had stopped vomiting and diarrhoea. She then went to get the washing from her home. Later, she was met as she returned by her family to say the baby had died. She said the truth is we fell short in getting the baby

to the hospital. Most of the time, she said she had relied on Mr Latu trying to get a vehicle, and hoping he will get a vehicle to take the child to hospital which his parents had refused.

[16] Detective Oneone took a statement from Mr Latu at 6.40pm on the 2nd February, 2014. He said he and Ms Mafi had two children, a son of three, and the baby born on the 20th July, 2013. He said he had tried to get a vehicle on the 30th January from his parents but they would not give it to him. He said he suggested they try to treat the child with Tongan medicine, and hoped to resolve the illness. He fetched some fig leaves and fekika leaves and they were fed as a drink to the baby. He said he showed some improvement. They stopped giving him food and started to feed him with Milo and he said he improved. He said it went like that to the Saturday which was the first of February, 2014. He thought the baby was getting well and so he went fishing. He no longer worried about getting him to hospital. He had come home on Saturday and went to his parents' home because Ms Mafi and the children had gone to her sisters. He slept at his parents'. He later received a message that his child had passed away. He then waited for a car of his sister to drive to the hospital.

[17] Uikilifi Veikoso aged 51 was the Church pastor who saw the child shortly before he died. He said he went to provide a prayer service. It was about 12pm. He said the baby's face was abnormal. He said he was in great difficulty. His breath and appearance was not normal. He said he did not think of hospital only spiritual assistance which was what he had been asked to give. He said he did not think, at the time, the baby should visit a medical practitioner at the hospital. He said, however, that the reason he did not think so was that the parents would be making all endeavours for the baby. Later, however, he appeared to say that he did not think the baby should be taken to hospital. He said he had left for a long time supposedly before the baby died. He said it did not cross his mind, having seen the baby for about twenty minutes, to say to La'aina this baby should be in hospital or taken to hospital.

[18] Ms Mafi gave evidence. She said she saw the baby was vomiting and had diarrhoea and thought it was normal. She said we were close to a cemetery and could be possessed by demons because they were living close to a cemetery. She shortly summarised the essence of the statement she had made. She confirmed that she had sought help with a vehicle from Mr Latu's parents and her sister. She denied that she knew the child required medical assistance after four days of sickness. Later she admitted when she asked her husband for a vehicle she knew he needed medical attention. She did not have a phone. She used another person's phone to contact Mr Latu on the 2nd February after the baby had died. She saw her sister, who had the phone, after she had returned with the washing. She had no money to buy anything from shops. She said her sister had provided some chicken. There was nobody that could provide her with a car to take the child to hospital. She said she had done what she could fed and given fluids to the child and had not abandoned him.

[19] Vasiliva Mafi, the accused's daughter, confirmed that she had never seen her mother abandon or neglect the baby whilst she went out and enjoyed herself. Another witness Losa said she had a phone and had seen the baby when it died. She said under cross-examination that Ms Mafi had only asked her for a phone on the Sunday and not on the Saturday when she visited as she had said earlier in her evidence.

[20] The accused, Mr Latu told of being very sad at this son's death. He said he had not looked seriously sick to him. He could not get the vehicle from his parents. He had heard from a lady that upset stomach could be treated with fig leaves and he said they fed him a drink and he seemed all right on the Friday. On the Friday afternoon, the weather was very rough and that was the day of the hurricane that had destroyed part for Ha'apai. He went to sea for a time but the fishing was not very good. He said on the Saturday, Ms Mafi had said the baby was improving and he went fishing in the evening. He later returned and the next day saw the baby after he had learned it had died. He was in shock. He maintained that on the Friday before going fishing after the baby had been given Tonga medicine that he thought it had improved. He said he checked on his son before he went fishing. He said he thought the baby was well before he went fishing on the Saturday. He intended to get some money so that money could be spent on what the baby needed and diapers. He said later it never crossed his mind to go back to his parents and ask for the car on the Saturday because the baby had improved he believed after the Tongan medicine. He believed when he went fishing that he was getting better.

Submissions

[21] Mr Latu and Mrs Mafi made short submissions denying gross negligence or wilful negligence. Ms Moa for the Crown said it was a case of gross negligence. They had known as early as the Thursday evening that the child was ill and should be taken to hospital yet they had not done so. She was critical of Mr Latu for not taking other steps to get a car over that period and going fishing when according to Ms Mafi the baby was still displaying illness. She suggested Ms Mafi did have access to a phone namely her sister's and could have walked or hitch hiked to the hospital as the Doctor had stated. In the alternative what had occurred she submitted was wilful negligence.

Findings

[22] I believe Ms Mafi and Mr Latu, that over the period between the 30th January 2014 and 2nd February 2014 they had no money and no means to pay anybody such as a taxi to drive them to the hospital. In fact, these people were practically destitute of means at relevant time and had four children in the household to attempt to feed also. I accept the evidence also from Mr Latu that, on the Friday, a hurricane threatened Tongatapu, and that he spent some time on the Friday getting their accommodation secure for this. Notwithstanding he went out fishing on the Friday and again on the Saturday after apparently the weather had improved to attempt, I have no doubt to make some money to provide for his family who had nothing to live on. I accept they lived in very basic accommodation, were very poor, and would spend time with Ms Mafi's sister La'aina who lived in a house with her large family about a quarter of a mile away. I accept he attempted to obtain a car from his parents who unfortunately denied him the use of the vehicle. I did not hear evidence from them. Although he turned up it seems in a car belonging to her sister after the child had died, I heard no more about this vehicle or his sister and cannot conclude that this vehicle could have been made available to him in lieu of his parents' vehicle during the relevant period.

[23] I accept also that Mr Latu was likely secondary in the care of this baby and, although he may have known that the baby was ill, on the 30th January, 2014 when he went and sought a car to take the child to the hospital, his appreciation of the seriousness of that illness was more problematic. I accept that he did not at any stage consider it was life threatening or serious. It would be somewhat natural for him to have relied on his wife's observations as he said he did in seeking the car and any assertions she may have made that the baby was getting better when he left to go fishing. I accept his evidence confirmed by his statement made soon after the baby had died that the belief he had was the child was improving before he left fishing. Whilst this was likely not to be the case in fact because the medical evidence and the fact the baby died of dehydration suggest otherwise, I cannot conclude beyond reasonable doubt that he must have known the baby was acutely ill and was grossly neglectful of the child when he went out fishing on the Friday and Saturday evenings to provide money for his family. I accept his evidence that he was in shock when he learned the baby had died which would suggest that he did not contemplate the baby was as ill as it was. In short, in his case applying the test of the reasonable Tongan person, I do not consider beyond any reasonable doubt that a reasonable Tongan with whose conduct I must compare the conduct of the accused and who must be assumed to possess the same personal attributes as does the accused – being of the same age and experience – and having the same knowledge as the accused would have in the circumstances in which he found himself, and I add with the same lack of means would have acted differently and taken the child to hospital. Put another way, I am not satisfied beyond a reasonable doubt that his omission to do this fell so short of the standard of care which a reasonable Tongan person would have exercised in the circumstances which includes the lack of means and involved such a high risk of death or serious harm that proper thinking members of the Tongan community would regard the degree of negligence as so serious that it should be treated as criminal conduct. I do not, therefore find, Mr Latu to have been grossly negligent. Accordingly, I acquit him of manslaughter by negligence.

[24] As to Ms Mafi as I have said, during that period was the primary caregiver and she was effectively during that period destitute. I accept that she must have known that her baby was ill otherwise she would not have asked Mr Latu to get a car to take the child to hospital. Having heard from Dr Aho that the symptoms the baby showed vomiting and diarrhoea and perhaps sunken eyes (although the evidence does not suggest Ms Mafi observed this) was suggestive of a very serious condition and indeed one that was in need of close medical attention by at least the Saturday evening, I have doubt whether Ms Mafi appreciated just how seriously ill the child was. Her sister, La'aina does not seem to have appreciated this when she took the child to her late on the evening of the 1st February, 2014, and she was slightly older than the accused with five children. Nor did the minister who arrived to spiritually administer to the child appear to see any obvious need for the baby to be taken to the hospital on the 2nd February, 2016 although he said he had focused on the request for spiritual assistance. In any event, as I have said, I find that Ms Mafi did not have the means to take the child

to hospital. I am satisfied on the evidence she had no access to a vehicle, no means to pay for a vehicle and no phone on hand to ring for emergency even if she knew there to be an emergency number (on which the evidence was silent). I find that she and Mr Latu were unsophisticated and very ordinary Tongan people neither of whom was particularly well educated, lived from hand to mouth by Mr Latu's fishing, and lived in very basic accommodation with four children to support. I find that, like the others, her sister and the pastor, the seriousness of this child's condition in terms of having a life threatening or very serious condition may well not have been obvious to her at any time even though she appreciated the child was ill. Even if, however, by the time she took the child to her sister on the evening of Saturday, the 1st February 2014 her concerns had grown pressing and she did appreciate the dire seriousness of her child's situation, I accept she asked for money to take the child to the hospital, and no money was available. She was said to be in tears by her sister. I am satisfied there was nothing more she could reasonably do and even her partner Mr Latu was not available then because he had gone fishing to provide the family with income. Applying the same test as I applied in relation to Mr Latu, that is whether a reasonable Tongan person possessing the same personal attributes as has the accused – being of the same age and experience – and the same knowledge (and I would add the means available to the accused) had in the circumstances in which she found himself, have taken the baby to hospital, and on this I have doubt. Again, put another way, I am not satisfied beyond a reasonable doubt that her omission to do so fell so short of the standard of care which a reasonable Tongan person would have exercised in the circumstances including having her lack of means proper thinking members of the Tongan community would regard the degree of negligence as so serious that it should be treated as criminal conduct. I do not consider her to have been grossly negligent beyond any reasonable doubt. Accordingly I also acquit her of manslaughter by negligence. I also add in her case, I do not think that a very lengthy walk along, in large part, a busy road with no footpath with a sick child or hitch hiking a lift to the hospital was a reasonable alternative as the Crown had submitted. It is a long way from where the family lived to the hospital, and, especially if at night, hazardous for a woman to undertake.

Wilful neglect

[25] Ms Moa provided me with the judgment of the House of Lords in *R v Shepherd* [1981] AC 389 for which I am grateful. In that case, in a situation involving also a sick infant, the House of Lords considered that an offence of wilful neglect, did not involve absolute or strict liability, but required mens rea to be established. There, the issue was whether the parents had appreciated the extent of the illness of their child and the need for medical treatment. The judge had directed on an objective basis and the appeal was allowed. That is not the issue here. In order for a conviction to be entered, following *Shepherd*, I would have to be satisfied beyond reasonable doubt;

(1) That the child did in fact need medical aid at the time the defendant was charged with failing to provide it and;

(2) Either that the defendant was aware at that time that the child's health might be at risk if medical aid were not provided or that the defendant's unawareness of that fact was due to his not caring whether the child's health was at risk or not.

[26] I do not think, however, that proof of these two ingredients in the circumstances of this case is sufficient for conviction. The offence is one of wilful neglect, and the evidence in this case to my mind established that neither parent, even if they were proven to have known the child's health was at risk and did not see a doctor, had the means to take the child to the doctor. *Shepherd* was factually different from this. I do not think that a parent who is unable to take a sick child to the hospital because he or she did not have the means to do so should be found to have wilfully neglected the child. It seems to me that Ms Mafi's desire was to take the child to the hospital on the 30th January, and on the evening of the 1st February, also but she had no means of doing so. That also applies to Mr Latu on the 30th January 2014 but, he says and I believe him, that he was reliant on the observations of the mother on the Friday and Saturday that the child was improving and went fishing so on that ground alone I would have acquitted him; that is he was believed that the child was getting better and the need for hospitalisation had passed. I am satisfied as I have said that he went fishing only after he thought the child was improving so as to secure money to pay for the baby and his family's needs. However, plainly, in my view, neither party had the means, in any event, on the evidence I heard to get the child to hospital.

[27] The argument of counsel for the appellants however, in *Shepherd* which the House accepted, was that the offence was not one of strict liability, counsel submitting that the word "wilfully" must import a moral element. In my view, it does, and a person should not be convicted of wilful neglect where the accused does not have the means to secure medical help; access to a motor vehicle, money or even a phone. As I have said, the offence is not absolute. I am satisfied that their futile attempts to apply Tongan medicine was for the purpose of assisting the child and in part because they did not have the means to seek the assistance of a doctor or take the child to hospital. In short, I find both not guilty of the alternative count of wilful neglect.

[28] I can well understand why Doctor Aho expressed the view that he was an advocate for the child, and his frustration at the child's death and the lack of appropriate response. This infant's death was clearly avoidable. However, I consider that all concerned, the baby and his parents were victims of poverty, and the parents perhaps lacking also in education and awareness of the child's acute needs. The child's feeding had been disrupted by a shortage of breast milk and the substitution of inadequate liquids instead of formula which in Tongan is expensive and he lost weight. An inadequate diet or hygiene may have caused his stomach ailment, and the vomit, diarrhoea, and crying

which followed. These are all factors that bear upon the poor living conditions in which this baby was cared for. Both parents did not, in my view, wilfully neglect, or abandon their child, but sought a vehicle or money and assistance from the extended family which was not forthcoming. In the absence of the means to take the infant to hospital, they provided Tongan medicine and at the end, the aunt, turned for spiritual help. Even it seems the Minister who came to see the child shortly before his death did not turn his mind to the urgent need for the child to be in hospital. Had he done so, and appreciated the seriousness of the child's position, it is difficult to believe he would not have taken the child there in his car. Perhaps they may have done more over the three day period but taking into account their lack of means it is not clear to me, on the evidence I have heard, what more they could have done. This case, as I said at the commencement of my judgment is very sad and tragic.

Verdicts

[29] Both Accused are acquitted of all counts and discharged.

Folau v Taione anors

Land Court, Nuku'alofa
Paulsen P
LA 6/2015

16 March 2016; 18 April 2016

Land law – competing grants of land – first grant found valid – not available for alleged grant to defendant – registration to plaintiff ordered

The plaintiff alleged that a town allotment at Vaini was granted to him in February 1997. It was never registered in his name. Eighteen years later, in 2015, the second defendant (the Minister) granted and then registered the land in the name of the first defendant. The plaintiff claimed that he was not consulted by the Minister and that the land was not available for grant to the first defendant and accordingly the grant made to him was unlawful and should be declared null and void. The plaintiff sought an order that required the Minister to cancel the first defendant's registration and to register the land in his name.

Held:

1. The court found that the only proper inference to make was that the Minister granted the allotment to Mr Folau on 6 February 1997 and that Mr Folau qualified as the holder of the allotment although registration was, through no fault of Mr Folau, never completed. Mr Folau could rely on the following matters: he had taken all the steps required of him by the Land Act to obtain a grant and the Minister had done everything that he had to do save signing the deed of grant once it was prepared; secondly, the Minister required payment of the survey fee which indicate the Minister's intention to grant the allotment to Mr Folau; thirdly, the Minister's savingram of 6 February 1997 reflected the fact that a grant had been made; and fourthly, it was clear that the Minister expected that registration would follow as a matter of course once the survey was completed. There was no suggestion of further consideration being given to the application before a grant would be made. Also, there was no competing application for the allotment which might require the Minister to consider the comparative merits of the applications before making his decision.
2. The defendants submitted that Mr Folau should have made his claim within 10 years of the date that he said the Minister granted him the land; by 6 February 2007. The court found that time began to run against Mr Folau when he had notice of the fact that the Minister intended to grant his land to Johnny Taione. He did not have such notice until 2014. Therefore his claim was not time-barred.

3. Mr Folau established his entitlement to the land on the basis that it was granted to him in 1997. The Minister had no power to cancel the grant or to make a grant of the land and register it in the name of Johnny Taione. The only appropriate remedy was to cancel the registration of Johnny Taione and to order the registration of the allotment in the name of Mr Folau.

Cases considered:

'Afu v Lebas [1923-1961] Vol II Tonga LR 16
'Ameleki v Nai [2000] Tonga LR 247
Fau v Fau (Unreported, Land Court, LA22 of 2014, 22 September 2015, Paulsen LCJ)
Fau anor v Fau anor [2016] Tonga LR 172 (CA)
Fifita Manakotau v Vaha'i (Noble) Vol II Tonga LR 121
Finau v Maamakalafi [2003] Tonga LR 284 (LC)
Finau v Minister of Lands [2012] Tonga LR 127 (CA)
Folau Tokotaha v Deputy Minister of Lands and Anor [1923-1962] Tonga LR 159
Hakeai v Minister of Lands [1996] Tonga LR 142 (CA)
Havea v Tu'i'afitu, Kava and Minister of Lands [1974-1980] Tonga LR 55
Kaufusi v Taunaholo [1981-1988] Tonga LR 70
Koloi v 'Enele Ongoongotau & Minister of Lands (unreported, Land Court of Tonga, 22 June 2001, Ward CJ)
Lisiate and Anor v 'Eli and Ors [2012] Tonga LR 31
Maamakalafi and Anor v Finau [2004] Tonga LR 218 (CA)
Maka v Minister of Lands and 'Asipa [1923-1961] Tonga LR 155
Manu v 'Aholelei [2015] Tonga LR 135
Mesui Moala v Tu'i'afitu and Anor [1956] Vol II Tonga LR 104
Minister of Lands v Finau [2001] Tonga LR 221 (CA)
Minister of Lands v Kulitapa [1997] Tonga LR 116
Moa v Faka'osita, Ha'alaufuli and the Minister of Lands [1991] Tonga LR 32
Moa v Faka'osita, Ha'alaufuli & Minister of Lands [1991] Tonga LR 195 (CA)
Naulu v Tupou and ors (Court of Appeal, AC21/2015, 8 April 2016)
Ongosia v Tu'inukuafe and Minister of Lands (1981-1988) Tonga LR 113
Project Blue Sky Inc and Ors v Australian Broadcasting Authority 153 ALR 490
Supervisor of Election and Ors. v Sione Tupouniua (Court of Appeal, AC 32/2014, 24 November 2014, Scott, Salmon and Hansen JJ)
Tafa v Viau [2006] Tonga LR 287 (CA)
To'a v Taumoepeau (unreported Land Court LA10/2012, 13 March 2015, Scott J)
Tu'i'afitu and Anor v Mesui Moala [1956] Vol II Tonga LR 155

Statutes considered:

Constitution of Tonga Act (Cap 2)
Electoral Act 1989
Land Act (Cap 132)
Poll Tax Act (1924)

Counsel for the plaintiff	:	Mr L Niu SC
Counsel for the first defendant	:	Mr S Tu'utafaiva
Counsel for the second and third defendants	:	Mr 'A Kefu SC

Ruling

[1] The plaintiff (Mr. Folau) alleges that a town allotment at Vaini (being Lot 5 SP5879) was granted to him in February 1997. It was never registered in his name. Eighteen years later, in 2015, the second defendant (the Minister) granted and then registered the land (Deed of Grant Tohi 354 Folio 93) in the name of the first defendant (Johnny Taione). Mr. Folau says that he was not consulted by the Minister and that the land was not available for grant to Johnny Taione and accordingly the grant made to him was unlawful and should be declared null and void. Mr. Folau seeks an order requiring the Minister to cancel Johnny Taione's registration and to register the land in his name.

The facts

[2] The following is a narrative of the facts as I find them to have been proved.

[3] The allotment is at Vaini. The estate holder is the Noble Ma'afu. In 1997 the holder of the title Ma'afu was the father of the present holder.

[4] The Noble Ma'afu is presently the Minister of Lands.

[5] Mr. Folau is a Tongan national and was born in Vava'u in 1943 but in around 1960 he moved to live at Vaini. He lived with an uncle and attended Beulah College. In 1964 he went to Fiji for teacher training and then returned to Vaini where he taught at Beulah College from 1969 until 1974. During his time living at Vaini he became acquainted with the people and was accepted as a person of Vaini.

[6] Since 1974 Mr. Folau has lived in New Zealand but he has maintained some links with the people of Vaini who live in New Zealand. He has assisted with the establishment of a Tongan branch of the Seventh Day Adventist Church in Auckland and has also assisted people of Vaini to obtain employment in New Zealand.

[7] In addition to this in 1990 the daughter of the former Noble Ma'afu went to New Zealand to raise money for a sound system for the Church. Mr. Folau extended hospitality, accommodation and food to her and the large group accompanying her. The fund raising was not successful. Mr. Folau then did his own fund raising and managed to collect NZ$11,000. As a result the sound system was acquired and installed and presented to the Noble Ma'afu's daughter. The Noble Ma'afu was so pleased that he wanted to gift Mr. Folau land from an area between Beulah College and Hu'atolitoli Prison, which he was in the process of sub-dividing into town allotments. The Noble Ma'afu showed Mr. Folau the area and where his particular allotment would be.

[8] In 1996, after the sub-division had been completed, Noble Ma'afu forwarded to Mr. Folau in New Zealand an application form for the allotment. Mr. Folau was to sign and return it so that it could be lodged with the then Minister of Lands, Noble Fakafanua. The application form was already signed by Noble Ma'afu as estate holder and that signature was dated 8 January 1996. Although it is not without some doubt I am satisfied that there accompanied the application form a hand drawn sketch plan showing the allotment and three other allotments relative to the boundary of Beulah

College and a road running along that boundary connecting with Taufa'ahau Road. The allotment was marked "Required area *". The evidence was that it was common practice at that time for sketch plans to be drawn on the back of application forms to identify the allotment that was being applied for.

[9] The allotment Mr. Folau was applying for was situated between the allotments of Taufa Pulu to the north and Sione Taione to the south. The allotments of both Taufa Pulu and Sione Taione had already been surveyed, pegged and registered. All three allotments are of regular shape and are bordered on one side by a surveyed road and on the other by allotments. This meant that the boundaries of the allotment that Mr. Folau was applying for had effectively been surveyed and pegged.

[10] Mr. Folau signed the application form and forwarded it along with his birth certificate back to Tonga where they were presented to the Land Office. Once received by the Land Office a request was made that the Minister approve that the survey fee be paid. It was the practice at that time that the survey fee was not paid by an applicant until the Minister had approved it to be paid. The request for that approval was made on 20 March 1996 and the Minister gave his approval on 26 March 1996. The survey fee of $40.00 was paid on 30 January 1997.

[11] On 6 February 1997, the Minister signed a savingram giving instructions to the Secretary for Land and Survey to survey and demarcate the town allotment "to this man" (referring to Mr. Folau) as follows:

> This allotment has been given to this man on 8.1.1996. Please subdivide in accordance with the map, and it is 0r.30p in size.
>
> The survey fee has been paid for in Rec. 415888 - $40 on 30.01.1997.
>
> Once the work is ready, please draw up the map so it can be registered.

[12] The witness called to give evidence for the Minister, Mr. Fataua Halatanu, who is a Senior Land Registration Officer of the Ministry of Lands, confirmed that there was nothing more for Mr. Folau to do to progress his application and that after the instructions contained in the savingram were given by the Minister there was nothing more for the Minister to do but to sign the deed of grant once it had been prepared for his signature.

[13] From this point Mr. Folau regarded the allotment as his own. He arranged for a former co-teacher at Beulah College, Vaioleti 'Ofa, to look after the allotment for him and he sent her money to do the cutting and cleaning of the allotment. In 2000, Sione Taione, who owned and was occupying the contiguous allotment to the south, asked Mr. Folau to let him use and maintain the allotment and Mr. Folau agreed. There is some uncertainty as to the reason Mr. Taione wanted the use of the allotment but nothing turns on that. With the consent of Mr. Folau, Sione Taione had the use of and maintained the allotment from 2000 to 2015. Sione Taione was clearly aware that Mr. Folau regarded himself as the owner of the land and recognised his interest in the land by requesting permission to use it.

[14] In December 2013, Mr. Folau retired and he planned to return to Tonga and build a house on the allotment and live on the land during his retirement. In 2014, he came to Tonga to erect a headstone for Vaioleti 'Ofa, who had died in 2013. He visited the allotment on that visit.

[15] On a date that is uncertain, but it appears it must have been after Mr. Folau had returned to New Zealand, he was telephoned by Sione Taione who asked to buy the allotment from him. Mr. Folau said he would not sell the land.

[16] Without Mr. Folau's knowledge, on 24 June 2014 Sione Taione signed and then lodged with the Minister of Lands an application on behalf of his son, Johnny Taione, for the allotment.

[17] On 26 June 2014 Noble Ma'afu signed his consent as estate holder to the grant of the allotment to Johnny Taione.

[18] On 6 August 2014 the Noble Ma'afu, now acting in his capacity as Minister of Lands, wrote to the Secretary of Lands and Natural Resources stating that the Secretary was to cancel Mr. Folau's application for the allotment and to process the application of the first defendant instead. The reasons given were that there was too little land for the people wanting it within his estate, Johnny Taione did not hold a town allotment but had assisted to maintain the subject allotment, Mr. Folau was residing in New Zealand and had not used the land for 18 years and, in the Minister's view Mr. Folau did not value the grant. Mr. Folau was unaware of any of this.

[19] On 21 October 2014 a briefing paper prepared by an Officer of the Ministry to the Minister recommended that the Minister grant the allotment to Johnny Taione and that he sign a draft savingram which was attached to the briefing paper. That briefing paper was checked by another Officer and approved on 22 October 2014. The briefing paper stated, not entirely accurately in my view, as follows:

> Estate holder grant the allotment before to Havea Folau on the 8 of January 1996, he [the Minister] cancel his grant on 6.08.2014 (refer letter attached) and also mention that Havea Folau resides at New Zealand over 18 years. From the day he granted the allotment to Havea he has nothing to do with the land.

[20] On 23 October 2014 the Minister approved the recommendation to grant the allotment to Johnny Taione and he signed the savingram. That savingram instructed the Secretary of Lands and Natural Resources to draw up and prepare the deed of grant of the town allotment, which had been formerly given by the estate holder to the plaintiff, to Johnny Taione as follows:

> This allotment is no. 5 on S/Plan 5879 and its size is 759.1m² and this portion has not been registered to anyone however it was first granted by the Honourable Estate Holder to Havea Folau on 8 January 1996.

> He has cancelled it on 6.08.2014 because this person resides in New Zealand and it has been 18 years from the day of granting his application and he has not done any work to it. Therefore the estate holder has agreed to grant this allotment to this man when he signed his application on 26.6.2014.

[21] The first Mr. Folau knew of these developments was when a staff member of the Lands Office informed him through Facebook. It appears this was her own initiative and that she was motivated out of concern for Mr. Folau. On 28 November 2014, Mr. Folau replied to hold the registration of the allotment in Johnny Taione's name to enable him to travel to Tonga. As it turned out he was not able to get to Tonga until April 2015.

[22] A request was made by Mr. Folau's lawyer for an appointment with the Minister to discuss the matter but the Minister would not agree to any meeting. No explanation was proffered for the Minister's refusal to give Mr. Folau the courtesy of a meeting.

[23] On 20 April 2015 the Minister signed the deed of grant in favour of Johnny Taione and had him issued with a deed of grant and registered as the owner of the allotment.

The parties' positions

[24] Mr. Folau's case is that the allotment was lawfully granted to him on 6 February 1997 when the Minister directed that it be surveyed and a deed of grant drawn up for registration of the land in his name. He argues that on the date he made his application he satisfied all other requirements of the Land Act so as to be entitled to receive a grant of the allotment. He also argues that when the Minister decided to grant him the land there was nothing more for him or the Minister to do but to await the deed of grant for signature and registration. It is said to follow that the grant of the allotment to Johnny Taione was unlawful as the land was not available for grant having already been granted to Mr. Folau. In the alternative, Mr. Folau argues that the grant to Johnny Taione was made in breach of the rules of natural justice as he was given no opportunity to be heard before the deed of grant was issued to Johnny Taione and registered in his name.

[25] Johnny Taione argues that Mr. Folau was never granted the land and it was therefore available to be granted to him. In the alternative he argues that Mr. Folau's claim should have been brought within 10 years of 6 February 1997 and is now time barred under section 170 of the Land Act.

[26] The estate holder also raises the defence that the claim is time barred. He denies that the grant to Johnny Taione was made in breach of the rules of natural justice on the basis that Mr. Folau had no right to be heard on Johnny Taione's application for the land as the land was not registered to him, Johnny Taione's father had maintained the land for 15 years, Mr. Folau had lived in New Zealand for many years and had done nothing to develop the land and also, somewhat surprisingly, that Mr. Folau had not acted on advice of Mr. Halatanu to meet with the estate holder at his residence.

[27] The Minister argues that the land was never granted to Mr. Folau on 6 February 1997 or on any other date and that it was open to the estate holder to withdraw his consent to Mr. Folau's application, and to the Minister to 'implement the wishes of the estate holder,' before the grant [to Mr. Folau] was made. Mr. Kefu submitted that the estate holder was entitled to withdraw his consent to Mr. Folau's application because he was not lawfully resident in the estate of Ma'afu at any relevant time, which he said, is a requirement of sections 8 and 50 of the Land Act and because of Mr. Folau's 'non-use' of the land. The Minister also argues that Mr. Folau's claim is time barred.

The issues

[28] It appears to me that the issues that arise in this case are the following:

> [28.1] Was the allotment granted to Mr. Folau on or about February 1997?
> [28.2] Did section 50 of the Land Act prohibit the making of a grant of the allotment to Mr. Folau?
> [28.3] If the land was not granted to Mr. Folau was the cancellation of Mr. Folau's application and the grant of the allotment to Johnny Taione made in breach of the rules of natural justice?
> [28.4] Is Mr. Folau's claim time barred?
> [28.5] What (if any) are the appropriate remedies?

Was the allotment granted to Mr. Folau?

[29] It is the Minister who has the power to grant land under the Land Act. Mr. Kefu referred me to sections 7, 8, 19(2) and 34 (1) of the Land Act and to *'Ameleki v Nai* [2000] Tonga LR 247 which he submitted make clear that the power to grant an allotment resides with the Minister. He rejected, correctly in my view, any suggestion that the power to make grants within a hereditary estate rests with the estate holder (*Minister of Lands v Finau* [2001] Tonga LR 221 at [29] and *Lisiate and Anor v 'Eli and Ors* [2012] Tonga LR 31, 37).

[30] It is now well established that registration is simply evidence of ownership of land (*Mesui Moala v Tu'i'afitu and Anor* [1956] Vol II Tonga LR 104, *Tu'i'afitu and Anor v Mesui Moala* [1956] Vol II Tonga LR 155, *Fifita Manakotau v Vaha'i (Noble)* Vol II Tonga LR 121, 123 and *Ongosia v Tu'inukuafe and Minister of Lands* (1981-1988) Tonga LR 113). Most recently the Court of Appeal in *Lisiate* (supra) at [31] rejected the view expressed in *Folau Tokotaha v Deputy Minister of Lands and Anor* [1923-1962] Tonga LR 159 that a person claiming title to an allotment must be able to show that he was registered as the holder of the land. The Court preferred the view expressed by Hunter J in *Mesui Moala* (supra) and *Fifita Manakotau* (supra) and quoted with approval the following analysis in *Fifita Manakotau* where Hunter J said at page 123:

> Although registration is very strong evidence of ownership I can find nothing in the Act to say that a person claiming an allotment must be able to show he is registered as the holder of that allotment. Nowhere does the Act make registration the test of ownership. The Intention of the Act is that registration will be a method of proof, nothing more. This was the view taken by the Privy Council in Tu'i'afitu and Anor v Mesui Moala (Privy

> Council 25.1.57). The Privy Council in the course of their judgment said: It was one of the main contentions of the Appellant both in the Land Court and on the hearing of this appeal that the Respondent was not entitled to succeed in his claim because of his failure to become registered as the holder of these allotments. The learned trial judge held that the Respondent had taken all steps required by the Land Act Section 76 and that whilst registration is evidence of ownership it is not always necessary to prove registration before ownership can be established. With this statement of the law we agreed.

[31] Where the positions taken for Mr. Folau and the Minister diverge is in relation to the proper inference that is to be drawn from the established facts and, specifically, whether Mr. Folau has proved to the required standard that the Minister granted the allotment to him. Mr. Kefu submitted that Mr. Folau was never granted the allotment by the former Minister of Lands, Lord Fakafanua. He accepted that following receipt of Mr. Folau's application the Minister had directed that the survey fee be obtained from Mr. Folau and that the land be surveyed and a map drawn up and a deed of grant prepared for registration purposes. Notwithstanding all that, he argued that it could not be properly inferred from those facts that a grant had been made. Mr. Kefu also referred to the internal memorandum of the Minister of Lands of 6 August 2014 in which there is reference to the grant of the allotment having been made to Mr. Folau. In relation to this, Mr. Kefu submitted that the Minister was proceeding on a mistaken belief that the grant had been made by the estate holder when it is only the Minister who can make a grant of land under the Land Act. For this reason, he argued, the memorandum was not evidence of the Minister making a grant.

[32] In *Lisiate* the Court was prepared to infer that a grant of a tax allotment had been made as there was evidence to support that inference in the register of tax allotments along with an uncompleted deed in the register of deeds, which was strongly suggestive that a deed may have issued but been subsequently lost. At [30], the Court of Appeal noted that each case must be decided on its own facts. In *Manu v 'Aholelei* (Unreported, Land Court, LA 13 of 2014, 17 April 2015, LCJ Paulsen) I applied *Lisiate* and held that one Nafetalai 'Aholelei had been the lawful holder of a town allotment although never registered as such. The evidence that supported that finding was set out in paragraphs 6, 7, 9 and 10 of the ruling and included that Nafetalai was to be given the land by the Minister in substitution for other land lost in a Court case, that Nafetalai had moved on to the land and built a shelter there and raised his family on the land, that Nafetalai had made an application for the grant of the land which satisfied the requirements of Land Act, that his name had been written indelibly on the Ministry of Lands survey plan and a deed of grant had been prepared in his name although never signed by the Minister. As I noted at [10] of the ruling:

> It is not known why the deed of grant was not signed by the Minister but the uncontested evidence was that the Minister had made the decision to grant the allotment to Nafetalai in 1980. It was certainly not later allocated to anyone else. It would only have been on the Minister's instructions that names would have been written on the Plan and the deed of grant prepared after a decision to allocate the allotment was made by the Minister.

[33] The facts of the present case are different from both *Lisiate* and *Manu*. There is in this case no evidence from the register of town allotments or by entry on a survey plan nor is there evidence that a deed of grant in favour of Mr. Folau was ever prepared. What Mr. Folau is able to rely on are the following matters. First, it was not disputed that Mr. Folau had taken all the steps required of him by the Land Act to obtain a grant and the Minister had done everything that he had to do save signing the deed of grant once it was prepared (*Tu'i'afitu and Anor v Mesui Moala* [1956] Vol II Tonga LR 155). Secondly, the Minister required payment of the survey fee. As I have noted, the evidence was that at the relevant time survey fees were only payable once a direction to that effect had been received by the Minister. That the Minister required Mr. Folau to pay the survey fee must indicate his intention to grant the allotment to Mr. Folau. Thirdly, there are the terms of the Minister's savingram of 6 February 1997 which I have set out earlier. The content of the savingram is in my view unambiguous. It reflects the fact that a grant had been made. The words "This allotment has been granted to this man on 8.1.1996" are not equivocal. Furthermore, it is clear that the Minister expected that registration would follow as a matter of course once the survey was completed as he stated "Once the works is ready, please draw up the map so it can be registered." There is no suggestion of further consideration being given to the application before a grant would be made. Furthermore, there was no competing application for the allotment which might require the Minister to consider the comparative merits of the applications before making his decision.

[34] I do not accept Mr. Kefu's submission that the Minister's words reflect a mistaken belief that it was the estate holder who made grants of land. It is hard to believe that the Minister of Lands, being the representative of the Crown on all matters affecting the land of the Kingdom (section 19 of the Land Act), would have such a belief. Whilst I accept that the savingram is technically incorrect in so far as its states that the grant was made on 8 January 1996, being the date that the estate holder gave his consent, it is likely in my view that the words used simply reflect the Minister's intention to give effect to the estate holder's wishes and grant the land to Mr. Folau. Certainly the present Minister of Land and the Officers of the Ministry, who had access to the Ministry's entire file, were of the common view that the land had been granted to Mr. Folau. The Minister's internal memorandum of 6 August 2014, the briefing paper to the Minister of 21 October 2014 and the savingram of 23 October 2014 all state that the allotment had been granted to Mr. Folau.

[35] It is also significant that Mr. Folau did take possession of the allotment in the sense that he took responsibility for it and ensured that it was maintained, first with the assistance of Vaioleti Ofa (but at Mr. Folau's expense) and then by granting Sione Taione the use of the land in exchange for its upkeep (*Mesui Moala v Tu'i'afitu and Anor*. [1956] Vol II Tonga LR 104, 105). There was certainly no evidence that at any time between 1997 and 2014 any consideration was given to granting the land to anyone else despite, it appears, there being significant unfulfilled demand for land in the estate of the Noble Ma'afu.

[36] In addition to all those matters there was also the important evidence given by Mr. Fataua Halatanu who in cross examination confirmed that had the survey of the land been carried out as the Minister directed the land would have been registered in the name of Mr. Folau. The relevant exchange was as follows:

> "Niu: Looking back at page 1 again of the Minister's production, page 1 you will see the receipt number is written above the

note of Paula Moala. It says S/fee receipt number the same number on the receipt that you have seen and $40 and the same day.

Mr. Halatanu: Yes.

Niu: So after that was paid, 30 January 1997 the Minister then issued the instructions on page 4.

Mr. Halatanu: Yes.

Niu: That's a direction to survey and sub-divide the town allotment of this person and the final words there [are the] sentence "Once the work is ready please draw up the map so it can be registered."

Mr. Halatanu: Yes.

Niu: And you must say that if the secretary makes sure that was carried out, that deed of grant would have been registered.

Mr. Halatanu: Yes.

[37] As I have noted each case must be decided on its own facts. Looking at the totality of the evidence, particularly the union of the factors that I have set out above, the only proper inference to make is that the Minister did grant the allotment to Mr. Folau on 6 February 1997 and that Mr. Folau qualified as the holder of the allotment although registration was, through no fault of Mr. Folau, never completed.

Did Section 50 of the Land Act prohibit the grant of the allotment to Mr. Folau?

[38] I understood Mr. Kefu to accept that if the Court held that Mr. Folau had been granted the allotment in February 1997 the Minister had no power to cancel that grant in favour of Johnny Taione. I consider that concession was correctly made (*Palu v Sete* (Court of Appeal of Tonga, AC 18 of 2015, 8 April 2016). Strictly speaking then it is not necessary for me to now go on and consider this issue but in deference to the detailed and helpful submissions of Counsel I will express my view.

[39] The argument for the Minister was that Mr. Folau was never entitled to the grant of any land in Noble Ma'afu's hereditary estate because at all relevant times he was resident in New Zealand and not lawfully resident in the estate as required by section 50 of the Land Act. Section 50 provides:

> 50. Rules for taking lands for allotments
>
> Land for allotments shall be taken from the hereditary estates in accordance with the following rules —
>
> (a) an applicant for an allotment lawfully resident in an hereditary estate shall have his allotments out of land available for allotments in that estate;
>
> (b) where there is no land available in the estate in which the applicant is resident, then the allotment shall be taken out of some other estate held by the noble or matapule in one of whose estates the applicant is resident;
>
> (c) if no land is available in any hereditary estate held by the noble or matapule in one of whose estates the applicant is resident then the allotment shall be taken out of the hereditary estate of any other noble who is willing to provide such allotment;

(d) if no land is available under rule (c) then the applicant may have his allotment from Crown Land;

(e) an applicant for an allotment to be granted out of Crown Land shall have his tax and town allotments from such particular portion of Crown Land as the Minister may decide:

Provided that an applicant already resident on Crown Land shall where possible be granted the allotments from the particular area of Crown Land in which the applicant is resident.

[40] Mr. Kefu submitted that section 50 of the Land Act was intended to regulate the granting of land from an hereditary estate and creates 'rules' that must be followed and not simply guidelines or policies and that there is no flexibility about the rules. He submitted that the rules reflect social and customary obligations that exist in Tonga based on community living where people are connected by blood or loyalty to the community or the neighbourhood within which they live. He said that people of blood or neighbourhood interact with each other based on concepts of respect (faka'apa'apa), humility (loto-to) dedication (mamahi'ime'a) and reciprocity (feveitokai'aki) and that these principles are best practiced when kinsfolk live together on land they are tied to for generations. He undertook a comprehensive analysis of the case law on section 50 from which he submitted that it has been accepted that a grant from an hereditary estate can be cancelled if the grantee was not lawfully resident in the hereditary estate because the Minister would be acting on wrong principles to grant an allotment from the estate to someone resident outside of that hereditary estate. He also submitted that non-compliance with section 50 would create disorder in the regime of the Land Act as it has been prescribed by Parliament and also tensions within the community when people not linked to the land move into the estate.

[41] Anticipating Mr. Folau's arguments in response, Mr. Kefu also submitted that Mr. Folau was not lawfully resident at Vaini within the estate of the Noble Ma'afu at any relevant time as he had lived in New Zealand for many years, he had never had any land registered in his name in Vaini, he had no residence in Vaini and "Loyalty and philanthropy for Vaini causes is not residency..".

[42] Mr. Niu provided a summary of relevant provisions in the Electoral Act, the Poll Tax Act (1924), the Act of Constitution and its amendments and the Land Act against which he argued section 50 must be interpreted. Section 50, he argues, does not and was not intended to restrict the grant of allotments out of an hereditary estate to only applicants who are lawfully resident in that estate. He submitted that by its terms the section does not apply to an applicant who is otherwise entitled to apply for a grant of land under the Land Act (i.e. a male Tongan subject by birth, over 16 years of age and not in possession of an allotment) but who resides overseas. He placed special emphasis on *Kaufusi v Taunaholo* [1981-1988] Tonga LR 70 which he said was authority that the Land Act does not require that a grantee of a tax allotment must be resident in the estate out of which the allotment is granted. It follows, he submitted, that section 50 did not prohibit the grant of the allotment from the estate of the Noble Ma'afu to Mr. Folau (if it was to be held that he was not resident in Vaini).

[43] Mr. Niu also argued that in any event Mr. Folau was and is still resident in Vaini. Although Mr. Folau lives day to day overseas Mr. Niu submits that it is quite possible, and indeed common, that Tongans are resident in the districts in which they last lived in Tonga, or with which they continued to maintain contact. He referred me to *Moa v*

Fakaosita, Ha'alaufuli and the Minister of Lands [1991] Tonga LR 32, 34 where the Court of Appeal recognised the possibility of twin residences in Tonga and overseas and submitted that Mr. Folau was a permanent resident in Tonga and Vaini for all the reasons I have set out in paragraph 5, 6 and 7 of this ruling.

[44] Although both Counsel referred me to a number of authorities, and I have read and considered them all, the most relevant for present purposes in my view is *Finau v Maamakalafi* [2003] Tonga LR 284 (LC) and, on appeal, *Maamakalafi and Anor.* v *Finau* [2004] Tonga LR, 218 (CA)). The facts were that the plaintiff became the registered holder of an allotment in the village of Fotua on Foa Island, Ha'apai and sought to evict the defendant from the land. The defendant contended that the land should never have been registered to the plaintiff for reasons that included that the plaintiff had never been a resident in any estate of the estate holder and therefore his application failed to comply with section 50 of the Land Act.

[45] In the Land Court, Ford J rejected this defence and at page 296 he said:

> The defendants also pleaded that the plaintiff had never been a resident in any estate of the estate holder, and, therefore, his application for the allotment failed to comply with rules (a) and (b) of Section 50 of the Land Act which sets out the rules to the allocation of allotments. Even accepting the submission, however, the evidence failed to satisfy me that the situation was not covered by rule (c) and, in any event, there is no evidence of any misinterpretation by the plaintiff or his mother in connection with the applications. The current Hon. Tu'ipelehake said in evidence that he was aware that the Plaintiff was not resident in Fotua at the time his application was presented and the evidence satisfied me that the estate holder knew about the plaintiff's situation in this regard but he was also aware of the plaintiff's historical links, through his mother, with the land in question.
>
> Likewise there was no evidence that the Minister had been misled by the Plaintiff or his mother on any aspect of the plaintiff's application. On the contrary, the Minister was keenly aware of the background giving rise to the dispute and he had full knowledge of the defendants' involvement and their alleged claim through Vaima'ali to the land in question.

[46] On appeal, the Court of Appeal regarded section 50 as setting out rules to guide the Minister when allocating land but that it did not follow that a making of a grant in breach of section 50 necessarily resulted in the invalidity of the grant. The Court stated at paragraphs [15] to [20] as follows:

> [15] But the Appellants made a further attack on the Respondent's registration and grant which, though not pleaded as a ground of invalidity, was dealt with and rejected by the trial judge. They urged that the Minister of Lands, in registering the grant of a town allotment to the Respondent, had acted contrary to s.50 of the Land Act. The contention was that the Respondent did not come within para. (a) or (b) of that section and that, as to para. (c), on which the trial judge relied, he made no application to test the availability of land falling within that paragraph. To assist understanding of the argument, we set out s.50, as follows….

[16] But there are a number of answers to the Appellants' contention.

[17] In the first place, the Minister of Lands was not joined as a party to the proceeding. If the registration and deed of grant were to be set aside on the ground that he acted unlawfully, that would require him to be joined and heard.

[18] Secondly, we agree with the learned Judge that an infringement of s.50 was not shown. In para. (c), the question is whether land "is available" in the relevant hereditary estate, not whether an application has been made for it. The Minister may have more than one way open to him to ascertain the answer to that question. In any case, unless there is proof to the contrary, a presumption of regularity would protect the registration effected and the deed of grant issued: Phipson on Evidence, 14 ed. (1990) 5-15; The Queen v Reynolds [1893] 2 QB 75. It is true the presumption is rebuttable, but it has not been rebutted.

[19] Thirdly, an infringement of a statutory provision regulating the performance of an official act does not necessarily spell invalidity. It depends on the true construction of the Act: Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355 at 388-391. In the course of the discussion in their joint majority judgment, McHugh, Gummow, Kirby and Hayne JJ referred to the distinction sometimes made between mandatory and directory provisions, and said (at 390-391):

> A better test for determining the issue of validity is to ask whether it was a purpose of the legislation that an act done in breach of the provision should be invalid. ... In determining the question of purpose, regard must be had to 'the language of the relevant provision and the scope and object of the whole statute.

[20] In applying this test to s.50, the Court must take account of two other sections in the immediate context of s.50 which expressly provide that disregard of their requirements has the consequence of nullifying any grant: sections 48 and 49. But s.50 contains no rule laying down any such consequence. In our opinion, s.50 is intended to set out rules to guide the Minister, but not to create a ground upon which a third party can attack the validity of a grant.

[47] The Court of Appeal has recently reaffirmed the correct approach for determining whether the infringement of a statutory provision will result in invalidity in *Supervisor of Election and Ors. v Sione Tupouniua* (Unreported, Court of Appeal, AC 32/2014, 24 November 2014, Scott, Salmon and Hansen JJ). The Court of Appeal approved *Project Blue Sky Inc and Ors v Australian Broadcasting Authority* 153 ALR 490 (also followed in *Maamakalafi*) where the High Court of Australia held that the correct approach is to ask whether it was the purpose of the legislation that an act done in breach of such a provision should be treated as invalid and that in determining the question of purpose, regard must be had to the language of the relevant provision and the scope and object of the whole statute.

[48] This is consistent also with *Minister of Lands v Finau* [2001] Tonga LR 221 (CA). In that case the central issue was what Parliament intended to be the consequence if the Minister granted land without consulting the estate holder, as is a requirement of the proviso to section 8 of the Land Act. It will be observed that sections 50 and 8 of the Land Act are closely related in that they share the same subject matter and section 8 provides:

> Subject to the provisions of this Act relating to surrender, the grant, if the applicant be lawfully residing on an hereditary estate, shall be made from the lands in such hereditary estate; and if the applicant is lawfully residing upon Crown Land shall be made from Crown Land:
>
> Provided always that land comprised in an hereditary estate shall not be granted as a tax or town allotment without prior consultation with the holder of the hereditary estate.

[49] In *Finau* the Court of Appeal held that it was not the intention of Parliament that a lack of prior consultation by the Minister would render void the grant of a tax allotment. Included amongst the Court's reasons were the following, at [32] and [33], which are relevant to the present case:

> [32] Secondly, the broad policy of the statutory provisions is that it is the Minister who is given the sole statutory authority to issue a grant of an allotment. The requirement to consult is in the nature of a procedural step to enable the Minister to be informed of the attitude of the estate holder. That attitude may well be relevant to how the Minister exercises his discretion on an application for the issue of a grant. But there are no reasons for finding that the requirement to consult was intended to be a fetter on the Minister's power to make the grant.
>
> [33] Thirdly, the phrase "prior consultation" in the provision to s8 is lacking in the degree of certainty to be expected if non-compliance were intended to invalidate a grant. Had that been the intention it could be expected, for example, that the provision would specify the nature of the consultation with a requirement that the record of the consultation and the consequences of it be in writing signed by the Minister. The absence of specific provisions of this kind supports the view that the proviso is a direction to the Minister on the steps he should take, but is not intended to invalidate the grant if he fails to do so."

[50] Mr. Kefu submitted that *Maamakalafi* was wrongly decided. He submitted it was contrary to previous decisions of the Land Court, Privy Council and Court of Appeal in which, he argued, it had been held that a grant from a hereditary estate could be cancelled if the grantee was not resident within that estate. In my view the submissions advanced for the Minister appeared to be, at least in part, based on a misunderstanding of what the Court of Appeal decided in *Maamakalafi*. It does not follow from *Maamakalafi* that a breach of section 50 will in all circumstances be without consequence. It has for instance been held that when there are competing applications for the same land it is wrong for the Minister to give preference to an application that was later in time and made by an applicant who was not resident in the hereditary estate

and entitled to a grant from Crown Land ('*Afu v Lebas* [1923-1961] Vol II Tonga LR 16). Similarly, the Courts have not interfered in decisions not to grant land to an applicant in breach of section 50 (*Maka v Minister of Lands and 'Asipa* [1923-1961] Tonga LR 155 and *Moa v Faka'osita, Ha'alaufuli & Minister of Lands* [1991] Tonga LR 195 (CA)). That is all entirely proper and not at odds with the principles in *Maamakalafi* to which I have referred.

[51] The Privy Council decisions in *Havea v Tu'i'afitu, Kava and Minister of Lands* [1974-1980] Tonga LR 55 and *Kaufusi v Taunaholo* [1981-1988] Tonga LR 70, which were relied upon by Mr. Niu and Mr. Kefu, do not in my view advance the matter very far but they are not in conflict with *Maamakalafi*. It appears to me that the head notes in both cases go too far and do not reflect what was in fact decided. *Havea* was decided on the basis that that the appellant had failed to establish a breach of section 50 and in *Kaufusi* the Privy Council disposed of the appeal on the basis that the argument advanced had not been taken in the Court below. In other cases relied upon by Mr. Kefu, namely *Moa v Faka'osita, Ha'alaufuli and Minister of Lands* [1990] Tonga LR 32 and *Koloi v 'Enele Ongoongotau & Minister of Lands* (unreported, Land Court of Tonga, 22 June 2001, Ward CJ), the Land Court cancelled grants which it considered were made in breach of section 50 but those Courts did not address the relevant question of whether it was Parliament's intention that the breach necessarily invalidated the grant.

[52] Mr. Kefu argued that non-compliance with section 50 of the Land Act would create disorder. I do not agree. *Maamakalafi* does not promote non-compliance with section 50 it simply decided that it was not the intention of Parliament that a grant made in breach of section 50 would "necessarily spell invalidity". In any event there are circumstances contemplated by the Land Act where grants will be made to a grantee who is not lawfully resident in the hereditary estate from which the land is taken. It was not suggested that this has caused disorder. Section 50(c) contemplates such circumstances. Similarly, section 8 states that "Subject to the provisions of the Act relating to surrender ..." the grant of land shall be from the hereditary estate in which the applicant is lawfully residing. Similarly the rules of succession contain no restriction on inheritance only by those lawfully resident within the hereditary estate. Also of course, a holder of an allotment is free to grant a license to anyone he chooses to live on and use his land regardless of whether that person was lawfully resident in that estate or had any prior connection with it. These are just examples.

[53] Mr. Kefu also argued that the Court's approach in *Maamakalafi* is inconsistent with the Court's insistence that land must be 'available' under section 50 before it is granted. All I need say about this is that the law in this regard is developing (*To'a v Taumoepeau* (unreported Land Court LA10/2012, 13 March 2015, Scott J) at [61]). In *Finau v Minister of Lands* [2012] Tonga LR 127, 133 at [16] the Court of Appeal noted:

> In these reasons we have not sought to determine what 'available" means for the purposes of s 50 ... Also, there is a real question which may have to be determined in another case at a later time. It is whether the Act entrusts to the Minister the determination of the question of whether land is "available" as a matter of fact for the purposes of s 50 having regards to the circumstances of any particular case, or whether "available" has a legal meaning to be determined by the Court in any challenge to a Minister's

> decision which would be of general application or to be determined and applied by a Court on a case by case basis.

[54] In my view the decision of the Court of Appeal in *Maamakalafi* is both correct and binding upon this Court. The result is that section 50 does not of itself render the grant to Mr. Folau invalid or void. I can see no reason on the facts of this case that would justify cancelling Mr. Folau's grant. There is no evidence of any misrepresentation by Mr. Folau in connection with his application. He was invited to apply for the land by the estate holder as a consequence of his close connection to the estate of Noble Ma'afu and the village of Vaini and the services that he had rendered; which clearly benefited the village of Vaini and pleased the estate holder. The estate holder was well aware that Mr. Folau was resident in New Zealand and the application was forwarded to Mr. Folau for his signature in New Zealand. The estate holder was also aware of Mr. Folau's prior links to the village of Vaini. In the absence of any evidence to the contrary the estate holder and the Minister must be taken to have considered that the application was properly and regularly made in terms of the Land Act.

[55] In the circumstances it is unnecessary for me to consider Mr. Niu's alternative submissions that section 50 does not apply to an applicant living outside of Tonga or that Mr. Folau had twin residences in New Zealand and Tonga.

Breach of natural justice

[56] Had I not been of the view that the allotment had been granted to Mr. Folau I would have been required to decide whether the grant and registration of the allotment to Johnny Taione was made in breach of the rules of natural justice. The relevant principle was stated by the Court of Appeal in *Hakeai v Minister of Lands* [1996] Tonga LR 142, 143 as follows:

> It is clear law that a person whose rights, interests or legitimate expectations are imperiled by an official's consideration of some other person's application will generally be entitled to a fair opportunity to be heard before a decision adverse to him is made. This is what is known as natural justice.

[57] In addition the Minister must take such steps as are reasonable in the particular circumstances, to ascertain whether the land is in fact subject to some claim that might be an impediment to the grant or make it unavailable. The decision to make a particular grant cannot properly be made in the absence of some inquiry in any case where the Minister does not actually know whether the land is available or any competing claim has been appropriately resolved (*Tafa v Viau* [2006] Tonga LR 287 (CA) at [12]; *Naulu v Tupou and ors* (Court of Appeal, AC21/2015, 8 April 2016)).

[58] In this case there was no opportunity provided to Mr. Folau to be heard before the Minister decided to grant the land to Johnny Taione and indeed the Minister refused to meet with Mr. Folau and his lawyer to discuss the Minister's intention to cancel Mr. Folau's entitlement and grant the land to Johnny Taione. There was additional information that the Minister should but did not have when deciding to make the grant to Johnny Taione. For instance, there is nothing to suggest the Minister was aware that Mr. Folau had retired and was intended to move to Tonga to build and live on the land. Although the Minister was influenced by the fact that Johnny Taione had assisted to

maintain the land it is not at all clear that he understood that this was under an arrangement between Sione Taione and Mr. Folau in return for the use of the land or that Sione Taione had sought to buy the land from Mr. Folau and had been refused. It is hard to see how, in full knowledge of all the facts, the Minister could ever have arrived at his conclusion that Mr. Folau did not value the grant and should therefore be deprived of it.

[59] The defendants submit that the Minister had no obligation to consult with Mr. Folau. I understand the Minister's argument is that section 50 prohibited the making of a grant to Mr. Folau so that it follows he could have no legitimate interest or expectation that the Minister was required to consider. As I have noted I do not accept that section 50 prohibited a grant to Mr. Folau and reject this argument. As for Johnny Taione and Noble Ma'afu the matters they raise, such as that Sione Taione had maintained the land and Mr. Folau lived in New Zealand for many years, might be thought relevant in the context of a consideration of the merits of competing applications for the same land (which was not the case here as the land had already been granted to Mr. Folau) but would not deprive Mr. Folau of his right to be heard.

[60] Had I been required to decide the matter I would have found that the grant and registration of the land to Johnny Taione was made in breach of the requirements of natural justice and should be set aside for that reason.

Time bar

[61] The defendants have relied upon section 170 of the Land Act and argue that Mr. Folau should have made his claim within 10 years of the date that he says the Minister granted him the land; that is by 6 February 2007. As this claim was not filed until 2015 the defendants argue that it is time barred.

[62] I have recently considered section 170 in *Fau v Fau* (Unreported, Land Court, LA22 of 2014, 22 September 2015, Paulsen LCJ). That decision was upheld on appeal in *Fau anor v Fau anor* [2016] Tonga LR 172 (CA). In *Fau* I held that the plaintiff's right of action against the Minister's decision not to grant him land (to which he was undoubtedly entitled) accrued at the time the Minister's decision was conveyed to him and not when the land was granted to his brother. I noted at [26]:

> Filipo's action is in reality a challenge to the Minister's decision not to grant him Tafasia. It just so happens that with the passage of time, and as the land has since been granted to Sililo, he must also challenge Sililo's registration. His right to bring his action first accrued at the point in time that he became aware that the Minister had decided that he would not accept his claim to Tafasia.

[63] In *Fau* I followed the decision of the Court of Appeal in *Minister of Lands* v *Kulitapa* [1997] Tonga LR 116. It is worthwhile repeating what I said about that case. In *Kulitapa* the Court of Appeal had to consider whether time began to run against a plaintiff in 1967 when he had made a proper application for the land in question or in 1987 when the Minister had expressly refused to grant him the land. The Court held that time began to run when the Minister had given his decision and this was conveyed to the applicant. The Court's reasoning was as follows:

> The proceedings commenced by the respondent sought an order directing the appellant to register the town allotment in the respondent's name. The respondent could not bring such an action until the appellant had given his decision [on] the respondent's application. Had it been commenced before the decision, it would have been met with a plea that it was premature, as the application was still being considered. It was the making of the decision that gave the right to bring the action. That right accrued when the decision was made and conveyed to the respondent. The action was, in effect a challenge to that decision.

[64] In *Fau* the Court of Appeal said at [12]:

> In the present case, Filipo acquired rights to claim interests in two parcels of land in 2001. To obtain those interests by grant required action by the Minister. Filipo became aware at that time that the Minister had made a decision not to grant him the tax allotment of Tafasia. It would have been open to Filipo to take legal action at this time to enforce his rights by proceedings against the Minister

[65] In this case time did not begin to run against Mr. Folau at the time he made his application for the land as the defendants contend. Such a result would be nonsensical and unjust as any claim Mr. Folau might have filed would have simply been answered with the response that his grant had been made and registration would be completed in time.

[66] The cases that come before this Court demonstrate that there have in the past and continue to be systemic delays in the preparation and registration of deeds of grant (as occurred in this case). It is not unheard of for them to be forgotten for long periods. It would be quite wrong for someone in the position of Mr. Folau to be deprived of his land as a result.

[67] Consistent with the decisions of the Court of Appeal in *Fau* and *Kulitapa* time began to run against Mr. Folau when he had notice of the fact that the Minister intended to grant his land to Johnny Taione. He did not have such notice until 2014. His claim is not time barred.

Remedies

[68] Mr. Folau has established his entitlement to the land on the basis that it was granted to him in 1997. In those circumstances the Minister had no power to cancel the grant or to make a grant of the land and register it in the name of Johnny Taione. It follows that the only appropriate remedy is to cancel the registration of Johnny Taione and to order the registration of the allotment in the name of Mr. Folau.

Result

[69] I declare that the grant and registration of the land in Deed of Grant Tohi 354 Folio 93 in the name of Johnny Taione to be unlawful and invalid and I order that it is to be cancelled forthwith. I also order that the said land (Lot 5 SP5879) is forthwith to be registered into the name of Mr. Folau.

[70] Mr. Folau is entitled to his costs against all defendants which are to be fixed by the Registrar if not agreed.

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R v Fanua

Supreme Court, Nuku'alofa
Cato J
Cr 108/2015

21 April 2016

Sentencing – reckless driving causing death – maximum sentence was 15 years and starting point of 4 years – sentence of 3 years imprisonment with the final 18 months suspended

The prisoner was convicted for reckless driving causing death. He had driven in a speed and manner which was dangerous to the public, and had not paid proper care and attention to other users of the road; had tried to overtake the victim's vehicle which was a minibus, and had hit the vehicle causing it to overturn and thereby caused the death of a young man also in his twenties. The prisoner and the other young men in the car did not attempt to render assistance but ran away; one of the group drove the vehicle back to Leimatu'a. The deceased was driving the minibus and was thrown from the bus as it rolled on impact. He later died in hospital. The prisoner defended the charge. He maintained that he was not speeding and that the minibus was not on the right side of the road. The jury did not accept this and returned a verdict of guilty after a four day trial. The prisoner appeared for sentencing.

Held:

1. In the 2010 amendment to the Traffic Act, Parliament imposed a 15 year maximum for reckless driving causing death. The court considered the starting point should be between four and five years' imprisonment. In cases involving highly dangerous driving, where there are multiple victims, or other aggravating circumstances, the starting point may be increased.
2. The starting point was four years imprisonment with an additional 6 months imposed as an aggravating feature because the prisoner chose to drive without a licence. His inexperience and lack of training was a material factor in his losing control with the tragic consequences that followed.
3. Mitigation of 18 months imprisonment was appropriate after considering that he was 20, had limited education, some health problems, and assisted his father in their plantation which was used for commercial and domestic purposes. His mother described him as a quiet person who may have been injuriously led by others in his extended family. He attended church and had no previous convictions. He knew the deceased. Though he chose to plead not guilty, the court accepted he had genuine remorse for what he had done; he and his family apologised and made compensation in the form of a cow and mats to the victims' family which was accepted. There were good references also from his Church Minister and the Town Clerk.

4. He was sentenced to three years imprisonment with the final 18 months of his sentence suspended on conditions.

Statute considered:
Traffic Act (Cap 156)

Counsel for the Crown	:	Mrs Langi
Counsel for the prisoner	:	Mr Taufateau

Sentence

[1] The prisoner, Mr. Vaka Fanua, appeared before me today for sentencing arising out of his conviction for reckless driving causing death contrary to the provisions of section 25(5) of the Traffic Act. The particulars of reckless driving were that he had driven in a speed and manner which was dangerous to the public, and had not paid proper care and attention to other users of the road; had tried to overtake the victim's vehicle which was a minibus, and had hit the vehicle causing it to overturn and thereby caused the death of Mr. Tikisinale Kena, a young man also in his twenties. Mr Kena, who was driving, was thrown from the bus as it rolled on impact and later died in hospital.

[2] The prisoner is aged 20 and is an unlicensed driver. He and a number of other young men had travelled from Leimatu'a to Neiafu to extend the hire of a rental car. On the return journey, the prisoner drove the car having been asked to do so. In the area of Feletoa in mid-afternoon, he went to overtake a minibus on a straight road. I accept that the minibus was travelling over the middle of the road on an unmarked sealed road and there was no oncoming traffic. The prisoner was travelling, however, at a speed which when he was forced to veer out towards the edge of the road caused him to have to drive off the road. I find that it was this swerving movement at a speed which, in the circumstances, was excessive (although not over the speed limit for the area which was given at 70-80 km) that caused him to lose control, he corrected and drove back to the middle of the road impacting with the middle of the bus and possibly also a second time, causing the bus to roll over several times, leave the road with the deceased being thrown out of the bus. The prisoner and the other young men did not attempt to render assistance but ran away, one of the group driving the vehicle back to Leimatu'a.

[3] The prisoner defended the charge. He maintained that he was not speeding and that the minibus was not on the right side of the road. He simply said to the police his vehicle had swayed and he had got into grass at the side of the road and lost control. The jury did not accept this and returned a verdict of guilty after a four day trial. I remanded him in custody for sentence today.

[4] I was informed by the Crown that this is the first case concerning sentence by this provision of the Traffic Act as amended in 2010 for reckless driving where the elements consist of speed and driving in a manner dangerous to the public, rather than being an offence of causing death or serious injury under the influence of alcohol. Parliament imposed a 15 year maximum for reckless driving causing death, as it did for excess alcohol causing death. Formerly, cases such as this would have been the subject of manslaughter by negligence which carried a sentence of ten years imprisonment. Mrs Langi presented me with a comprehensive list of sentencing precedents relating to manslaughter by negligence which formerly involved cases of this kind where death had resulted, and in some of these alcohols was also involved. I indicated at the hearing,

I did not find these very useful, because many did not, in my view, adequately reflect the loss of life involved, with some of the sentences being fully suspended. It may be that this concern was reflected also in Parliament's decision to introduce a new regime under the Parliament's decision to introduce a new regime under the Amendment of 2010 where offences for reckless driving and driving under the influence of alcohol causing death were introduced. In both cases, the penalty is 15 year imprisonment which is a substantial increase in the maximum limit over the ten year maximum for manslaughter by negligence. In my view, this was a clear indication by Parliament that sentences should reflect the fact that very serious cases involving violations of traffic law resulting in death should result in longer sentences of imprisonment. In the absence of a discreet offence of careless driving casing death, the Crown may consider manslaughter by negligence to be an appropriate alternative to the more serious charges now available under the Traffic Amendment, 2010 where death arises.

[5] I consider, by comparison with rape cases where the maximum sentence is 15 years imprisonment also and Court of Appeal has stated that the starting point should be five years, a starting point for this offending should be between 4 to 5 years imprisonment. In cases involving highly dangerous driving, where there are multiple victims, or other aggravating circumstances, the starting point may be increased. Here, in my view, there were aggravating features; first the driver was unlicensed and drove accordingly in wilful disregard of the law, his inexperience being I have no doubt a material factor in the accident, and secondly, he further made off from the scene without rendering assistance. Both counsel agreed with me that these were aggravating features, at least in principle. The prisoner said in his record of interview to the police that he did not remain because he was scared. However, having inquired of Mrs Langi about the driver's condition and assistance given to him at the scene, I am satisfied that an ambulance arrived within a very short time anyway so I do not propose here to treat this as an aggravating factor.

[6] I consider that Courts, in cases of reckless driving where a death or serious injury results, must impose sentences which deter others from driving in this manner and causing death or injury to other members of the public. The sentences must serve as an example to others to ensure the security or safety of the public and to properly reflect the fact that a person has died or suffered serious injury. I accept Mr Taufateau's submission however, here that, whilst reckless (and in this case as particularised dangerous) driving was established, the circumstances of the driving was at the lower end of this offending. In my view, the starting point should be four years imprisonment with an additional 6 months imposed as an aggravating feature because he had chosen to drive without a licence. I have no doubt as I have said, that his inexperience and lack of training was a material factor in his losing control with the tragic consequences that followed.

[7] I have read his probation report and listened carefully to the able submissions of Mr Taufateau which assert that the accused is the second of 6 children. He is aged 20 as I have said, had limited education, some health problems, and assists his father in their plantation which is used for commercial and domestic purposes. His mother describes him as a quiet person who may have been injuriously led by others in his extended family. He attends church. He has no previous convictions. He knew the deceased. Though he chose to plead not guilty, I accept he had genuine remorse for what he had done and he and his family have apologized and made compensation in the form of a cow and mats to the victims' family which has been accepted. This was in essence a

major contribution to the funeral. There are good references also from his Church Minister and the Town Clerk.

[8] I consider mitigation of 18 months imprisonment is appropriate. I also observe that he was one of five young men in the car at the time none of whom showed any objection to his driving if they knew he was unlicensed. However, he is responsible alone for his foolish decision to agree to drive and for the consequences that followed. The sentence I impose is one of three years' imprisonment backdated to the date of his remand in custody.

[9] I consider that, as a first offender, also a young offender, and as Mr Taufatehau submitted a person of otherwise good character, he is likely to be rehabilitated and probably unlikely to reoffend. Accordingly, I suspend the final 18 months of his sentence on the following conditions;

a. He is to commit no offences punishable by imprisonment for two years;
b. On his release, he is on probation for 12 months and must live where directed by his probation officer for that period.

[10] I add that I do not think it appropriate or in the public interest to fully suspend a sentence for offending of this seriousness, which, although at the lower end, has resulted in death.

[11] The prisoner is warned that a failure to meet the conditions imposed may mean that he would be recalled to serve the suspended part of his sentence.

Tapealava anor v Niu anors

Supreme Court, Nuku'alofa
Paulsen CJ
CV 51/2012

11 April 2016; 28 April 2016

Tort – trespass – substantial interference with possession and use – proved – damages $4,000 against three defendants jointly
Battery – intentional, unwelcome touch – proved – damages $500 against one defendant
Intimidation – no coercive or unlawful threat – not proved

There was a dispute as to who was entitled to the land and buildings on a town allotment at Haveluloto. Emma has lived on the property with her family since around the time of the death of Siutoni in 2011. There was also a dental practice operating there which was owned by her brother, William Tapealava. On 24 July 2012 Makineti, Laki Niu, Sauni Tai and security guards came onto the property and entered the house. It was alleged this was an attempt by Makineti to take the property by force. As a result of the events of that day Emma commenced proceedings and sought damages against all defendants for trespass, intimidation and, against Laki Niu, for battery. The sum claimed for each cause of action was not defined and there was simply a pleading for damages of $100,000 from each defendant. Makineti filed a counterclaim and sought a declaration that the land and the house, as well as other structures on the land, belonged to her and for an order for possession of the property.

Held:

1. To bring an action in trespass Emma did not need to establish ownership of the house. There was no doubt that *prima facie* the acts of Makineti in entering into the house uninvited in the presence of her lawyer and security guards, asserting ownership and telling Emma to leave the property and then remaining (with security guards) until removed by order of the court amounted to trespass.
2. That was a substantial interference with Emma's possession and use of the house. Even if Makineti could establish a superior title to the house, that did not justify her forcible entry or provide a defence to an action in trespass. In any event Makineti did not have a superior title to the house. Emma succeeded on her claim in trespass against Mr Niu, Makineti and Sauni Tai.
3. A plaintiff who proved trespass was entitled to nominal damages even if no actual loss was suffered. Compensatory damages could include awards for pain, suffering and distress and may include aggravated damages, the purpose of which was to compensate a plaintiff for injury suffered because of the way, or the circumstances, in which the tort was committed. The

approach must be tempered to reflect the levels of income and value of money in Tonga and general conditions in the Kingdom. An award of damages must reflect the very real hurt that Emma suffered by both the fact of the trespass and the manner in which the defendants sought to enter the home with a show of force intending to intimidate Emma into an acceptance of Makineti's position. An award of damages in trespass of $4,000 was appropriate.

4. The claim of battery was proved. Mr. Niu intentionally touched Emma and in the circumstances the touching was both unwelcome and an affront to her dignity and amounted to battery. The conduct of Mr. Niu, by involving himself in his client's affairs in such a personal and confronting manner and then touching Emma in her own home during a heated exchange was both extremely unwise and, due to his status, was perceived to be threatening and was upsetting to Emma. In all the circumstances an award of modest but more than nominal damages was required, which the court assessed at $500.
5. An essential ingredient of the tort of intimidation was that there was a coercive or unlawful threat. There was no evidence of any such threat and therefore the court did not accept that there was any intimidation.
6. The counterclaims were dismissed. Makineti did not own the house nor did she have any interest in it. The court did not consider Makineti owned any structures on the land. As far as possession of the house was concerned, Emma was in lawful possession and Makineti was not entitled to remove her.

Cases considered:

Attorney-General v Niania [1994] 3 NZLR 106
Bank of Tonga v Tulikihakau [1999] Tonga LR 183
Blades v Higgs (1861) 10 CBNS 713
Devoe v Long [1951] 1 DLR 203
Lambert v Ongley [1924] NZLR 430
Lewis v Andrews and Rowley Pty Ltd (1956) 56 SR (NSW) 439
Manu & Kingdom of Tonga v Muller [1997] Tonga LR 192
McKeown v Cavalier Yachts Pty Ltd (1988) 13 NSWLR 303
Penfolds Wines Pty Ltd v Elliott (1946) 74 CLR 204
Piliu v Satini [2004] Tonga LR 115
Rendell v Associated Finance Pty Ltd [1957] VR 604
Rookes v Barnard [1964] AC 1129
Schaumkel v 'Aholelei [2013] TOCA 1
Slater v Attorney-General [2006] NZAR 664
Taulanga v Kama [2006] Tonga LR 53
Thomas v Robinson [1977] 1 NZLR 385
Toyota Finance Australia Ltd v Dennis (2003) 58 NSWLR 101
Wilson v New Brighton Panelbeaters Limited [1989] 1 NZLR 74
Yang v Manoa, Unreported Court of Appeal, AC 22 of 2015, 8 April 2015

Counsel for the plaintiffs	:	Mrs P Tupou
First defendant appeared in person	:	Mr L Niu SC
Second, third and fourth defendants	:	Mr S Tu'utafaiva

Ruling

A family dispute

[1] Benjamin Tapealava (Benjamin) is the eldest son of Moi Tapealava (Moi) and his wife Siutoni (Siutoni) who have passed away. Emma Tapealava (Emma) is the natural child of Moi's younger brother, Malakai Tapealava. She was customarily adopted and raised by Moi and Siutoni.

[2] Makineti Jones (Makineti) is the eldest sister of Moi and the aunt of Benjamin and Emma. Sauni Tai is a niece of Makineti and a cousin of Benjamin and Emma. Laki Niu SC is a prominent Tongan litigation lawyer who until recently has represented Makineti. 'Alipate Pasina is said to be the Manager of a security business called Homeland Security.

[3] There is a dispute as to who is entitled to the land and buildings on a town allotment at Haveluloto. Emma has lived on the property with her family since around the time of the death of Siutoni in 2011. There is also a dental practice operating there which is owned by her brother, William Tapealava. On 24 July 2012 Makineti, Laki Niu, Sauni Tai and security guards came onto the property and entered the house. It is alleged this was an attempt by Makineti to take the property by force. As a result of the events of that day this action was commenced seeking damages against all defendants for trespass, intimidation and, against Laki Niu, for battery. Makineti has filed a counterclaim seeking a declaration that the land and the house, as well as other structures on the land, belong to her and for an order for possession of the property.

Paring the claims

[4] Mrs. Tupou advised that the claims in trespass, intimidation and battery were being pursued on behalf of Emma alone and that Benjamin remains a party only for the purpose of answering Makineti's counterclaim. The claims by Benjamin against all defendants are accordingly dismissed.

[5] As far as Makineti's counterclaim is concerned, she no longer seeks an order for possession of the land but continues to pursue a declaration as to her ownership of the house and other structures on the land and possession of the house.

[6] As regards the claims for trespass and intimidation made against 'Alipate Pasina, there was no evidence connecting Mr. Pasina to the events of 24 July 2012 or to the security guards who entered the property that day. No witness identified Mr. Pasina as having been present, nor was there evidence that he was the employer, manager or supervisor of the security guards who were present from which some liability might arise. Accordingly the claims against him are dismissed.

[7] What is left for the Court to resolve are the following:

[7.1] Emma's claim in trespass against Makineti, Sauni Tai and Laki Niu.
[7.2] Emma's claim in battery against Laki Niu.
[7.3] Emma's claim in intimidation against Makineti, Sauni Tai and Laki Niu.
[7.4] Makineti's counterclaim.

The facts

[8] This case concerns a town allotment consisting of 38.2 perches at Haveluloto. It is in the heredity estate of Noble Fielakepa. To understand the events of 24 July 2012 it is necessary for me to set out some Tapealava family history.

[9] Makineti was born on 1 June 1931 and is now 85 years old. Her father was Siosaia Tapealava and her mother was Naule'o Tapealava. Siosaia and Naule'o had seven children. Tafokitau, a boy, was the eldest child. Makineti was the second child. The fourth child was Moi.

[10] Siosaia had his town allotment at Mo'unga'one and tax allotment at Ofolanga (both at Ha'apai) but in the 1940s Siosaia and Naule'o moved to Tongatapu with their children and lived at Fua'amotu. In 1945 Siosaia died and Naule'o married Kasina Tava and moved from Fua'amotu to Kasina Tava's town allotment at Kolomotu'a.

[11] In 1949 Makineti finished her secondary education at Queen Salote College and then held positions working for the Free Wesleyan Church and in the civil service. In around 1953 Makineti learned that Siosaia's town and tax allotments would be lost unless a claim was made for them. Tafokitau had taken the land of his grandfather, Nehasi Moi. Moi was 19 years old and Makineti says that she arranged for him to travel to Ha'apai to apply for their father's tax and town allotments which he did. She said that upon his return from Ha'apai he confirmed that he had been registered as the owner of both the tax and town allotments.

[12] In 1955 Moi took up a job at the hospital in Tongatapu and in 1956 he went to Fiji to study dentistry. In the same year Makineti left Tonga to go to Canberra to study nursing. The evidence established that Makineti has lived constantly overseas (mainly in Australia) since 1956 apart from periods when she has visited Tonga.

[13] Naule'o's second husband died in 1961 and in 1963 she was forced from the land at Kolomotu'a by his heir and told to remove her Tongan house from the land. Makineti was living in Australia at the time but was friendly with Kaifonua, the daughter of the Noble Fielakepa, and she said that she asked Kaifonua if there was any land her mother could live on. Kaifonua told her that there was land at Haveluloto that had been given to her by her father where Makineti's mother could live. Naule'o moved onto that land with her Tongan house. Makineti did not speak to the Noble Fielakepa about this arrangement and the moving of the house was arranged and undertaken by Tafokitau.

[14] Benjamin was born in July 1971 in Australia which was where Moi was studying dentistry at that time. I was not told when Emma was born or exactly when, as a young child, she went to live with Moi and Siutoni.

[15] Makineti visited Tonga in 1972 and stayed with Tafokitau. She said that when she visited she found that Moi had removed the ends from Naule'o's Tongan house and had moved her elsewhere. She says that she then had a brick house built on the land and her mother moved into it before she returned to Papua New Guinea, which is where she was staying at the time because of her husband's work. I understand that the house Makineti built was a modest structure and is still on the land but is dilapidated. It also does not appear to have been constructed of brick although nothing turns on that. At some stage the Tongan house was removed from the land but it was not clear when.

[16] Makineti returned to visit Tonga in 1976. Moi had qualified as a dentist. He had built a house on the land which had dental rooms and a bedroom where Naule'o was then living. Makineti said that on this visit she stayed for some of the time at the property and she planted three Heilala trees there. Makineti also says that she told Moi off for building on the land without telling her and that he apologized for this. She also said that she told Moi that they would make the house he had built bigger so that it would accommodate the family when they were visiting Tonga.

[17] In around 1978 a younger sister named Sauni added a living room to the house. Makineti says that she then added two bedrooms on the northern side of the living room, with a hallway between, and a dining room/kitchen. In fact what was added was a second smaller living room and a dining room/kitchen. The second living room was subsequently converted into two bedrooms and a hallway but not by Makineti. At the same time a front porch was added to the house by Moi. Makineti also said that at the time she had the land fenced with wooden posts and square wire mesh and she planted Tanetane trees, to keep out pigs and dogs, as well as flowers and other trees. It is not disputed that Makineti planted three Heilala trees on the property, of which just one remains. She removed two of them later. Of the other work she said she did there was no evidence that any of it still remains due to the extensive development of the property in later years. There was no evidence either that Sauni has ever claimed any interest in the land or the house as a result of her contribution. For her part Makineti accepted that the house and land as it is today is largely the result of the investment of Moi and his family, that she had never stopped them from investing in the property and that her personal contribution to the house was small.

[18] It appears Moi and his family lived in Government Quarters for most of the period between 1977 and 1997 although there was some time around 1979 that Moi was in Australia.

[19] Significantly, in 1978 Moi applied for the Haveluloto property to be registered as his town allotment. The application was successful and the land was registered in Moi's name in 1982. A deed of grant was issued to him on 22 December 1982 (Tohi 108 Folio 57). Makineti was unaware of this at the time.

[20] In 1986 Makineti, who was still living overseas, was considering starting a coffee shop business and says that she wrote to Moi to tell him that she was coming to Tonga to set up a business on the property. She received a letter back from Siutoni telling her to go and set up her business at the Talamahu market. Makineti said that this upset her and that she telephoned Siutoni and told her that she would set up her business on the property if she wanted to and Moi should move his dental business. She says Siutoni apologized and she forgave her. However, Makineti did no more about setting up any business on the property. It appears that when she next came to Tonga she stayed with Tafokitau and ran a business on his land selling take away food. Benjamin said that he

would go to help her with the business and that this was the longest period that Makineti spent in Tonga. It is not clear how long she was here on this visit but she said that it was for less than twelve months.

[21] It is not clear when Naule'o died. Makineti gave various dates and appeared confused about when this occurred. Based on the evidence it appears to me that Naule'o died in August 1998. Makineti came to Tonga to care for Naule'o and was here when her mother died. She said that she remained in Tonga for a month and stayed at Haveluloto.

[22] It is a convenient point to describe the development of the property and extensions to the house that took place after 1978. I am very grateful for the plans that are documents 28, 29 and 30 in the plaintiffs' bundle of documents. They show in a striking fashion the development undertaken by Moi and his family. It is not clear exactly when this work was done but I note from Moi's deed of grant that advances were made on mortgage after December 1982 and the mortgage was discharged in April 1999 shortly after Moi's death. That would suggest to me that the work was principally done during Moi's lifetime and that is consistent with Benjamin's evidence that his parents did the extensions to the house and the landscaping of the land. It may be that some work was done after Moi died also as Emma said in her evidence. Benjamin also confirmed, and I do not understand it to be disputed, that Makineti made no contribution to any work on the property after 1978.

[23] Page 28 of the bundle shows the house as it is today following the extensions by Moi and Siutoni. The dental rooms, the larger of the two living rooms and the kitchen/dining room remain as they were in 1978 but in other respects the house is much changed. Naule'o's bedroom has had both a bathroom and shower room built in it. The smaller living room, contributed by Makineti, has been converted into two small bedrooms and a hallway that leads from the front door through to the kitchen. On the back of the house has been added a laundry, a store room, a bathroom, a shower room, a very large veranda and a large water tank. On the front of the house, facing the road, has been built a car port and the veranda has been enlarged considerably and extends along the full width of the house. An outdoor bathroom has also been built separate from the house. In addition to all that, the property has been substantially landscaped with ornamental fencing, a cement paving driveway and three garden areas.

[24] Around 1998 Moi took ill and he moved with his family from the Government Quarters to the property. In January 1999 Moi died. He did not leave a will and no application was made for the grant of letters of administration. Makineti attended his funeral when, she said, she learned that Moi had registered the land in his name. She said that she immediately went to the Land Office to confirm that this was true. Her evidence was that Moi had registered the land in his own name when he knew that Fielakepa had given her the land and when he already had a town allotment in Ha'apai. She also said that Fielakepa had been succeeded by his son and was not aware of either the gift of the land to her or of the "presence on the allotment of my houses, trees, hedges and fences".

[25] Makineti said that at this time she removed two of the three Heilala trees and had them planted elsewhere but that the one remaining tree was left there because Siutoni had said she should leave it to show that "the home is still your home". She says that at that time she told Siutoni that the family could continue to live on the land until they had built their homes on their other lands. The purpose of this evidence was, I

understand, to demonstrate that Siutoni acknowledged Makineti's ownership of the property. If this was what occurred it seems strange that Makineti would remove her Heilala trees. For reasons I shall expand on later in this ruling I do not accept that Moi or Siutoni ever acknowledged Makineti's ownership of the property. I am also satisfied that Benjamin and Emma were never told that Makineti had any claim over the land or any inkling that she might do so until 2011 by which time Siutoni had died and Benjamin had made a claim for the land as Moi's heir.

[26] After Moi's death Siutoni claimed the land as part of her widow's estate and on 28 April 2000 it was registered in her name. She continued to live on the property until her death in July 2011.

[27] In 1999 Emma married Paelata Vea. After they were married Emma and her husband moved from the property and for most of the period thereafter until 2010 or 2011 they lived at Longolongo and had a family. I understand Benjamin lived at the property until he left for Australia in 2004. Benjamin has two younger brothers, William and Michael, but the evidence did not establish for what periods they lived at the property after Moi's death. William now lives in Australia and Michael lives in New Zealand but when they moved to those countries is not clear. However William, who is a dentist, took over Moi's dentist practice and I understand it still operates to the present day even though William resides in Australia. Emma gave evidence that she has assisted with the running of the business in an administrative capacity.

[28] In 2002 Makineti returned to Tonga and stayed at the property for two months where she was welcomed by Siutoni. Makineti said that she may have returned to Tonga in 2010 but it is not clear to me whether that was so or not.

[29] In July 2011 Siutoni died. She did not leave a will and no application was made for letters of administration. Makineti did not attend Siutoni's funeral. Emma had returned to live on the property prior to her mother's death and she has continued to occupy the property with her husband and children since at least the middle of 2011.

[30] In November 2011 Makineti came to Tonga again. She initially stayed with a friend for about four weeks and did not tell Emma that she was coming to Tonga or, at least initially, ask to stay with her. However after four weeks she did go to see Emma and asked Emma to stay on the property and was welcomed by Emma. It was on this visit that the relationship between the parties began to breakdown. Makineti told Emma that the property had been given to her by the Fielakepa and was still hers and that the dental practice should be removed from the land. This came as a complete surprise. Benjamin considered the property was his as Moi's heir and Emma believed she was living on the property with Benjamin's permission. In addition, the dental practice was run from the property and appears to have been a family enterprise. Emma rang both Benjamin and William and they travelled to Tonga to speak with Makineti. According to Makineti, William said he would remove the dental business at some future time when he had built premises on his own town allotment but he has never done so. For his part, Benjamin did not accept Makineti's claim at all.

[31] During this visit there was an incident where as a result of a heated argument between Makineti and Emma the Police were called to the property by Paelata Vea. Makineti said that she was elbowed by Emma and that when the Police were called she had out of fear locked herself in her room where due to the heat she could hardly breathe and that she only came out when her lawyer told her that the Police were no longer

there. Emma was not cross-examined about the allegation that she had elbowed Makineti and I do not accept that this occurred. It appears to me that Makineti exaggerated the events of this visit. An example was in relation to Paelata Vea's gun. Makineti said that she had seen him cleaning his gun in the house. In her evidence in chief she said she was afraid and because of this she went to stay at a friend's house. In cross-examination she said that she was not afraid and simply went to her friend to visit.

[32] On her 2011 visit Makineti was given a bedroom to stay in and was also given keys to the room and the house. When she left to return to her home in Australia Makineti locked her bedroom and left some belongings in the room and also took the keys with her. Emma said (and I accept) that she made it clear to Makineti that she would be opening the room so that it could be used by others but that she would look after Makineti's belongings until she returned for them. Makineti and Emma parted on bad terms. I am satisfied that Makineti understood when she left the property that Benjamin and Emma did not accept her claim to the land or the house and that Emma's intention was to remain living there.

[33] As I noted above Benjamin applied for the land as his own town allotment. He already had a town allotment at Popua (and his brothers also have town allotments) but he intended to elect to take his father's land and surrender his town allotment in Popua. However, on 18 November 2011 the Minister of Lands cancelled Moi's registration on the grounds that the grant to Moi in 1982 was void because he had already been registered in 1953 as the holder of a town allotment at Ha'apai. Benjamin issued proceedings challenging the Minister's decision in the Land Court under LA 24 of 2011.

[34] In July 2012 the family was planning to commemorate the anniversary of Siutoni's death. Benjamin was travelling to Tonga for that gathering. On 24 July 2012, before Benjamin had arrived in Tonga, Makineti arrived in Tonga and went straight to the property unannounced. With her were Mr. Niu, Sauni Tai and a number of security guards. It was not clear how many security guards were present but it was at least three and as many as five. They all entered the property without permission. The only person home at the time was Paelata Vea who heard voices in the house and he immediately phoned Emma. When Emma arrived she says that she found (and I accept) that there were people in the bedroom used by her daughter. She said that Makineti made it clear that she had come to claim the property for herself. An argument followed. I do not propose to set out all of Emma's evidence of what was said except for the following. Makineti said to Emma "this is my home. This is not your home and this is not your parents' home" and consistent with this Sauni Tai said "this is our home. We stayed here. Where have you come from and your parents did not help at all with this home". During the course of the argument Emma says that she was approached threateningly by Makineti and Sauni and at one stage Mr. Niu had touched her arm telling her to "stop swearing at the old lady".

[35] Emma also said that Mr. Niu was demanding that Emma make two bedrooms in the house available for Makineti and Sauni and she took legal advice about that. The counsel she received was to allow Makineti and Sauni to stay in one bedroom for the time being which is what she agreed to do. Benjamin arrived shortly after these events. Surprisingly, the security guards remained at the property and patrolled around and inside the house (even during the night hours). Makineti said in her evidence that one security guard was asked to stay behind overnight in case Emma's husband did something to her and Sauni. I do not accept that Makineti ever had cause to fear Paelata

Vea or that she did so. I also accept the evidence of Benjamin that there was more than one security guard at the property because he saw two and sometimes three flashlights when they were on patrol at night through the hallway and living room (where he was sleeping).

[36] The following day Benjamin and Emma filed these proceedings and sought and obtained an injunction on 27 July 2012 to remove the defendants from the property. I understand that Mr. Niu appeared before Scott LCJ at the hearing. On 23 August 2012 the defendants filed an application to dismiss the action alleging that the Supreme Court lacked jurisdiction to hear it. That was dismissed in a written decision of Scott LCJ of 6 September 2012. An appeal from that decision to the Court of Appeal was also dismissed in a judgment of 17 April 2013 in which the Court made important observations about the law of trespass to which I shall shortly refer.

[37] Benjamin's action against the Minister's decision cancelling Moi's registration was heard before me in the Land Court and in a decision dated 4 August 2015 I upheld the Minister's decision on the ground that Moi's registration was void under 48 of the Land Act. Since then Benjamin has applied for a lease of the land to preserve his family's investment in it but such application is still pending.

Credibility

[38] I need to say something of my assessment of the credibility of the witnesses. In support of the plaintiffs' case I heard evidence from Benjamin, Emma and Paelata Vea. I found them to be honest and credible witnesses. That is not to say that I accept unreservedly all that they had to say but their evidence was generally clear, logical and convincing. Benjamin particularly impressed me as gentle, thoughtful and entirely candid. He was clearly deeply troubled by this dispute and hurt at the allegations that Makineti has made against Moi in relation to the circumstances under which he applied for and was granted the land. Notwithstanding that, he repeatedly acknowledged Makineti's contribution to the property and what he regarded as her entitlement, along with all other members of the family, to come and stay. This was in accordance with what he understood were his parents' wishes. Emma's evidence in its important respects, particularly as to what occurred on 24 July 2012, was not subject to serious challenge in cross-examination and apart from Makineti no defendant gave any evidence to challenge what she said had occurred on that day. Paelata Vea gave only brief evidence but importantly he presented as a timorous man intent on avoiding conflict which clearly troubled and upset him. I saw nothing to support Makineti's portrayal of him as a man whom she had cause to fear.

[39] Makineti was the only defendant who gave evidence and no other witnesses were called to give evidence on their behalf. I did not find Makineti to be a reliable witness. She was confused as to when events happened. Her recall of dates, such as when her mother died, was poor. In some respects Makineti's evidence was clearly embellished. I have already given the example in her evidence in chief about seeing Paelata Vea cleaning his gun in 2011. Furthermore, in giving her evidence Makineti was often dogmatic and imperious. She asserted as facts what are in truth no more than statements of position for which, in many instances, there was little or no supporting evidence. As an example I refer to Makineti's insistence that the land was gifted to her by Kaifonua and also by Fielakepa despite the fact that her own evidence was that Kaifonua provided the land for her mother to live on and Makineti never spoke at all to Fielakepa

about the matter. In any matters of significance where there was a conflict in the evidence of Emma and Benjamin and Makineti I preferred the evidence of Emma and Benjamin.

Trespass

[40] Mrs. Tupou submitted that Emma was on 24 July 2012 (and remains) in lawful occupation of the house and that the actions of Makineti in bringing with her a lawyer and "an army of security guards" to take possession of the house presented a terrorist like entrance on the property and amounted to trespass for which all the defendants were liable in damages.

[41] Mr. Niu submitted that there was no trespass as Makineti had proved that she is the owner of the house and was entitled to enter the house to retake possession of it and in furtherance of that object she could invite the other defendants onto the land also.

[42] For the second and third defendants, Mr. Tu'utafaiva submitted that it is a good defence to an action in trespass if a defendant can prove that she entered upon the land in the exercise of a legal right (*Piliu v Satini* [2004] Tonga LR 115, 120 per Ford J). He argued that Makineti had a legal right to enter the house because she had understood the land and the house were hers, she had contributed to the development of the house so that the house would accommodate the family when they visited, when she left the house in 2011 she had told Emma that the house and land were hers and had retained keys and left her belongings there and the house had always been open to family members when they visited.

[43] The allegation is that the defendants without authorization intentionally invaded Emma's home by entering the house and remaining there without due cause. It is now beyond doubt that in Tongan law buildings which are erected on land do not form part of the land and are chattels (*Yang v Manoa*, Unreported Court of Appeal, AC 22 of 2015, 8 April 2015). Trespass to chattels is a wrongful interference of a direct and physical kind with a plaintiff's possession of goods. The use of goods without authority will amount to a trespass (*Penfolds Wines Pty Ltd v Elliott* (1946) 74 CLR 204, 214). Trespass is a wrong to actual possession and not ownership. The point was made by the Court of Appeal in this case when it stated in its judgment of 17 April 2013 ([2013] Tonga LR 55 at [20] and [21]):

> [20] The actions of trespass to land and trespass to goods protect lawful possession, not title as such. Even if the Land Court ultimately decides that the second defendant had a better title than the plaintiffs, that decision, after the event, would not justify or excuse the second defendant's forcible entry onto the property and into the house with her lawyer and 6 male security guards. The defendants would still be liable for those trespasses.
>
> [21] One of the rights enjoyed by a person in lawful possession of land or personal property is the right to be protected from unlawful disturbance of that possession, a right which can be protected by injunction and vindicated in an action for trespass to land or goods. This right and these remedies against self-help, taking the law into one's own hands, are essential for the preservation of the King's peace, and the rule of law in Tonga.

[44] As a general rule, a plaintiff must be the person in possession of goods at the time of interference which is the foundation of the action. The fact that a defendant may act without moral fault is not a defence to a claim in trespass (*Wilson v New Brighton Panelbeaters Limited* [1989] 1 NZLR 74). It follows that even an honest mistake as to the law or the facts will not provide a defence to an action in trespass.

[45] It follows that to bring this action in trespass Emma does not need to establish ownership of the house. It is sufficient that she had a possessory title. There can be no doubt either that *prima facie* the acts of Makineti in entering into the house uninvited in the presence of her lawyer and security guards, asserting ownership and telling Emma to leave the property and then remaining (with security guards) until removed by order of the court amounted to trespass. That was a substantial interference with Emma's possession and use of the house. I reject Makineti's explanation that her lawyer and the security guards were required to assist her collect her possessions and to move things from her room. Emma's evidence that Makineti, Sauni and Mr. Niu all asserted that the house belonged to Makineti was effectively unchallenged. As the Court of Appeal noted at paragraph 15 of its ruling:

> Prior to the events of 24 July the plaintiffs had been in long undisturbed possession of the house and the property. The plaintiffs claimed title to the house as their personal property under the Law of Tonga, and their possession would be protected against anyone who did not sue within 10 years ….or who did not have a better title. The plaintiffs' possession was accordingly lawful and entitled them to remain in possession until someone established a better right which certainly cannot be done by a forcible, and therefore unlawful, entry.

[46] Mr. Niu argues that Makineti had the right to retake possession of the house; that is, she had a right to exercise the self-help remedy of recaption. The statements of the Court of Appeal to the contrary, which I have noted in the paragraph above, were, he said, *obiter dicta* and not binding. I do not accept Mr. Niu's submission. The common law allows a person who is deprived of their goods to retake possession peaceably from a person into whose *defacto* possession they have come. That is not what occurred in this case. Makineti attempted to take the house by a show of force which was resisted by Emma. The issue of if and when the law will permit the exercise of reasonable force against a person who wrongfully takes or withholds possession of chattels is subject to conflicting decisions. The approach taken in different jurisdictions is essentially a matter of policy (*Blades v Higgs* (1861) 10 CBNS 713, 721; *Lambert v Ongley* [1924] NZLR 430; *Slater v Attorney-General* [2006] NZAR 664; *Toyota Finance Australia Ltd v Dennis* (2003) 58 NSWLR 101; *Devoe v Long* [1951] 1 DLR 203). The weight of authority appears to be that force cannot be used against a person unjustifiably holding chattels of another unless the possession of that other was wrongful from its inception. That is not the case here where Emma's possession was lawful (*Niu anors v Tapealava* at [15]). I consider that as a matter of both principle and policy the approach of the Court of Appeal is correct and even if it is not binding, as Mr. Niu suggests, I will follow it. Even if Makineti could establish a superior title to the house, that did not justify her forcible entry or provide a defence to an action in trespass.

[47] But that is not an end of the matter as Makineti did not have a superior title to the house. Mr. Nui asserts that Makineti had a superior title to the house because she was the owner of the "whole house" (paragraph 9 of Mr. Niu's closing submissions). This is simply fanciful in my view. The argument advanced by Mr. Niu can be summarised as follows. The land upon which the house was built, he says, was gifted by the Fielakepa to Makineti as her own and that all Makineti's siblings, including Moi, knew and recognised that the land belonged to Makineti. He continues that the house that Moi built on the land was of permanent construction so that Moi must have intended that it was to remain on the land which belongs to Makineti. Mr. Niu further submitted that there was no doubt whatsoever in anyone's mind, especially Moi and Siutoni, that the land and the whole house belonged to Makineti.

[48] When I asked Mr. Niu to identify the mechanism by which ownership of the house passed from Moi, who built the house, to Makineti he said it was a gift by Moi to Makineti and asserted that there was evidence that both Moi and Siutoni by their words and conduct recognised Makineti's ownership of the house. I do not accept Mr. Niu's analysis of either the facts or the law.

[49] There is no evidence that the Fielakepa gifted the land to Makineti. Makineti had no discussions with the Fielakepa and what is plain is that the land was made available only to provide a place for Naule'o to live. It was not a gift to Makineti. Makineti's evidence was that she asked Kaifonua "if her father might have any land available at Havelu for my mother to shift to.." (paragraph 19 of Makineti's written brief of evidence). It is trite that under Tongan law Makineti could not have owned the land. Makineti could at some stage have applied for a lease but she has never done so. Mr. Niu suggested that Makineti had an interest in the land as the Fielakepa would have been estopped from denying that he had agreed that Makineti could build and occupy this land. That is not the case because as I have said there is no evidence that the Fielakepa ever agreed that Makineti could build on and occupy the land and in any event, a right to occupy land does not create a legal interest in the land (*Schaumkel v 'Aholelei* [2013] TOCA 1 at [33]).

[50] There is also no evidence that Moi or Siutoni ever acknowledged Makineti's claim to the land apart from Makineti's assertion that they did so. The evidence that Moi and Siutoni did not recognise Makineti's claim to the land or the house is simply overwhelming and includes:

[50.1] Moi built the house on the land without Makineti's permission.

[50.2] Moi applied for the land and had it registered in his name.

[50.3] The property was substantially landscaped and extensions made to the house by Moi and Siutoni at their own expense.

[50.4] After 1978 Makineti never objected to the development of the land by Moi and Siutoni.

[50.5] Siutoni told Makineti to run her proposed business from the Talamahu market and not the land.

[50.6] When Makineti ran a business in Tonga it was from other land.

[50.7] When she came to visit Tonga Makineti would not always stay on the property and when she did it was with permission.

[50.8] Makineti removed her Heilala trees from the land when she learned that Moi had claimed it as his own.

[50.9] Siutoni applied for and had the land registered in her name following Moi's death.

[50.10] Moi and Siutoni never discussed with their children that the land or house belonged to Makineti and wanted the house to be available to the whole family when they visited Tonga.

[51] Mr. Niu argues that because the house was of permanent construction and materials it must have been intended to be a gift. In my view the fact that the house was of permanent material is entirely consistent with the fact that Moi regarded the land as his own.

[52] Mr. Tu'utafaiva presented a more subtle argument on behalf of Makineti and Sauni Tai which was that Makineti had a legal right to enter the land by virtue of the combination of all the factors I have referred to in paragraph 42. He relied upon comments by Ford J in *Piliu v Satini* (supra) where the learned Judge said that it was a good defence if a defendant can prove he has entered upon land in exercise of some kind of legal right. Mr. Tu'utafaiva submitted that Makineti had a reasonable expectation that she was entitled to enter the house to which she had keys and, as Emma and Benjamin freely accepted, was to be open to family whenever they visited Tonga. I note that in *Piliu v Satini* (supra) Ford J held that it was a good defence to an action in trespass that the second defendant in that case believed, erroneously as it turned out, on reasonable grounds that he had lawful authority from the plaintiff to have possession of her land and grow crops upon it. In my view *Piliu v Satini* is wrongly decided. As I have already noted, an absence of moral fault is no defence to an action in trespass. In any event, the answer to Mr. Tu'utafaiva's submission must be that whilst Makineti might well have reasonably believed that Emma would have no objection to her entering the house to stay on one of her visits to Tonga she could not have reasonably believed that this extended to entering the house to take possession of it from Emma by a show of force.

[53] Although no defendant argued it before me I have considered whether Makineti might be able to claim to have an interest in the house by reason of her contribution to the addition in 1978 of the smaller living room and kitchen/dining room. I have formed the view that she did not.

[54] As a general rule property in a chattel that is annexed to a dominant chattel of another will not pass by reason merely of its annexation. It will continue to belong to its original owner unless it is shown that the degree of annexation is such that it must be taken to have become part of the dominant chattel and the property of the owner of the dominant chattel. This is the doctrine of accession.

[55] There have been various tests suggested as to what degree of annexation is necessary to cause an accession (Guest A G *'Accession and Confusion in the Law of Hire Purchase'* (1964) 27 Mod LR 505). In *Rendell v Associated Finance Pty Ltd* [1957] VR 604, the Supreme Court of Victoria applied an injurious removal test where one chattel is added to another so that it cannot be separated without serious injury or destruction of the whole (see also *Lewis v Andrews and Rowley Pty Ltd* (1956) 56 SR (NSW) 439 and *McKeown v Cavalier Yachts Pty Ltd* (1988) 13 NSWLR 303, 311). An alternative test is as to 'separate existence' and asks whether the chattel has been

incorporated into another so as to have ceased to exist as a separate chattel. Examples would include the incorporation of bricks into a house or planks of wood in a ship (*Thomas v Robinson* [1977] 1 NZLR 385, 389). A third test is concerned with the destruction of utility and whether the incorporated chattel can be removed without damage to the principal chattel. In the New Zealand Supreme Court in *Thomas v Robinson* at page 391, in a case concerning additions to a vehicle, Speight J referred with apparent approval to *Rendell* as authority that:

> The accessories continue to belong to their original owner unless it shows that as a matter or practicability they cannot be identified, or, if identified, they have been incorporated to such an extent that they cannot be detached from the vehicle.

[56] In my view it does not matter in the circumstances of this case which approach is adopted. The chattels that Makineti contributed to the house were building materials (timber, concrete and the like) and were incorporated into the house in such a manner that they lost their separate identity and could and cannot be removed without causing substantial damage to the whole. Makineti cannot in those circumstances claim the return of the chattels or any interest in the house. The chattels, of necessity, became a part of the house and ownership of them passed to Moi.

[57] For the reasons I have given, Emma succeeds on her claim in trespass against Mr. Niu, Makineti and Sauni Tai.

[58] I must therefore consider the issue of damages. The sum claimed in the amended statement of claim for each cause of action is not defined and there is simply a pleading for damages of $100,000 from each defendant. That is an unhelpful and inappropriate approach and quite clearly the sums claimed exceed by a very large margin what could ever be awarded on the facts of this case. I received few submissions from Counsel as to what damages might be recoverable and I was not referred to any decided cases as to the range of awards in Tonga. I have looked at a number of decisions of the Supreme Court and Court of Appeal but none are on facts similar to this case and I gained little assistance from them.

[59] A plaintiff who proves trespass is entitled to nominal damages even if no actual loss has been suffered. Compensatory damages can include awards for pain, suffering and distress and may include aggravated damages, the purpose of which is to compensate a plaintiff for injury suffered because of the way, or the circumstances, in which the tort was committed (*Attorney-General v Niania* [1994] 3 NZLR 106 and Halsbury Vol 45 para 1403). I must, however, temper my approach to reflect the levels of income and value of money in Tonga and general conditions in the Kingdom (*Manu & Kingdom of Tonga v Muller* [1997] Tonga LR 192, 194).

[60] There is no evidence that the house suffered any damage as a result of the trespass or that Emma suffered consequential losses of a financial kind. However Mrs. Tupou submitted that this is not a case where it would be right to award only nominal damages. She referred me to the evidence of Emma which states that as a result of the defendants' actions she felt variously threatened, shocked, shamed, horrified, intimidated and mentally anguished, all of which I accept. She argued also that the trespass was of a particularly serious and offensive sort, not least because the defendants entered the bedroom of Emma's daughter, which in Tongan culture is a private space into which

no male should enter. Makineti accepted in cross-examination that in Tongan culture a girl's bedroom is taboo to any male members of the family and to male outsiders also.

[61] In my view the actions of the defendants in this case were a pre-planned and egregious breach of the rights of Emma and her family to the possession and security of their home. I consider there is also force in Emma's case that the manner in which the defendants entered the house and her daughter's bedroom was culturally offensive. The first, second and third defendants all participated equally in the events of 24 July 2012 such that they are jointly liable for the damages to be awarded. Their behaviour cannot be condoned. I believe that an award of damages must reflect the very real hurt that Emma did suffer by both the fact of the trespass and the manner in which the defendants sought to enter the home with a show of force intending, in my view, to intimidate Emma into an acceptance of Makineti's position.

[62] In all the circumstances of this case I consider that an award of damages in trespass of $4,000 is appropriate and I so award in favour of Emma against Mr. Niu, Makineti and Sauni Tai.

Battery

[63] The action in battery is against Mr. Niu only. Battery is the intentional application of force to the body of another person, without that person's consent or other lawful justification. Battery can occur with even the most trivial contact which causes no injury but affronts personal dignity and there is no requirement that the touching be hostile. I consider the view expressed by Webster CJ in *Taulanga v Kama* [2006] Tonga LR 53 to the contrary to be wrong. A moment's reflection will show that in some cases the essence of a plaintiff's complaint will be not that a touching was hostile but that it was inappropriately friendly or intimate (S. Todd, J. Hughes, J. Burrows, J. Smillie, C. Hawes and A. Beck (eds.), *The Law of Torts in New Zealand*, 3rd ed at page 102).

[64] Emma's evidence on this aspect of the claim was extremely brief. She described how following her arrival at the house a heated argument broke out which involved Mr. Niu. She said she was threatened by Makineti and Sauni Tai and that during the course of this argument the following occurred:

> Laki then touch my arm and said, "tuku ho'o kapekape'i 'a e fine'eiki" (translation – "stop swearing at the old lady"). I was shaken at the confrontation with them all and shouted at him, "Don't ever touch me! Don't ever touch me in my house!

[65] Mr. Niu did not give evidence but he did cross-examine Emma and he did not challenge her evidence on this aspect. He did ask Emma whether she spoke loudly to him and Sauni Tai and she said that she did. She also said that she was upset but not frightened during the exchange. In his submissions, Mr. Niu submitted that no injury was suffered by Emma and that having been told not to touch Emma he did not do so again.

[66] I accept that it was proven that Mr. Niu intentionally touched Emma and that in the circumstances the touching was both unwelcome and an affront to her dignity and amounted to battery. I find the claim in battery proved.

[67] As far as damages are concerned it is the case that there was a single brief touching and no injury was caused. I must take care that my assessment of damages relates only

to the battery and not to the effects of the trespass for which an award has been made separately; that would constitute a double recovery.

[68] I consider that the conduct of Mr. Niu, by involving himself in his client's affairs in such a personal and confronting manner and then touching Emma in her own home during a heated exchange was both extremely unwise and, due to his status, was perceived to be threatening and was upsetting to Emma. I believe in all the circumstances an award of modest but more than nominal damages is required, which I assess at $500.

Intimidation

[69] I accept that the tort of intimidation is part of the law of Tonga (*Bank of Tonga v Tulikihakau* [1999] Tonga LR 183) but I do not accept it has any application in this case. The tort of intimidation is concerned with the imposition of economic loss on another by unlawful means (*Rookes v Barnard* [1964] AC 1129 (HL)). I consider the requirements of the tort are the following:

[69.1] The defendant makes a coercive and unlawful threat backed up with a demand. The threat must be of the 'or else' kind; that is unless the plaintiff does or does not do something that the defendant demands the defendant will in response do something unlawful contrary to the interests or wishes of the plaintiff.

[69.2] The plaintiff complies with the demand because of the threat.

[69.3] The defendant knows or should have known that complying with the threat will cause loss or damage to the plaintiff.

[69.4] The defendant intends that its demand shall cause loss or damage to the plaintiff.

[70] Mrs. Tupou argued that Emma felt intimidated into agreeing to give up a room in the house to Makineti and Sauni Tai. Even if that was so there was no evidence of any coercive or unlawful threat which is an essential ingredient of the tort. Makineti asserted a right to take the land and the house. She did not threaten to do anything should Emma not comply with that demand. It is true that Emma agreed to allow Makineti to stay but this was on the basis of advice and only until the rights of the parties were resolved by the Court. It follows that the claim in intimidation fails.

Makineti's counterclaim

[71] Makineti counterclaims for an order declaring the house and other structures on the land to be her lawful property and that the plaintiffs vacate the property.

[72] As far as the house is concerned, for the reasons I have already given Makineti does not own the house nor does she have any interest in it. As far as other structures on the land are concerned, as best as I can tell the only structure, other than the house itself, that remains on the land that Makineti could make any claim to is the small house that she says was built in 1972 for Naule'o. I do not understand that any party makes any particular claim on that house and it was clearly intended, in my view, as a gift by Makineti to Naule'o. I do not consider Makineti owns any structures on the land.

[73] As far as possession of the house is concerned Emma is in lawful possession and Makineti is not entitled to remove her. The counterclaim is dismissed.

Result

[74] The result is as follows:

[74.1] The plaintiffs' claims against the fourth defendant are dismissed and Benjamin's claims against the first, second and third defendants are dismissed.

[74.3] Emma's claim against the first, second and third defendants in trespass is proven and she is awarded damages against them jointly in the sum of $4,000.

[74.4] Emma's claim against the first defendant in battery is proven and she is awarded damages in the sum of $500.

[74.5] Emma's claim against the first, second and third defendant in intimidation is dismissed.

[74.6] Makineti's counterclaim is dismissed.

[75] As far as costs are concerned the parties should attempt to reach agreement and if they cannot do so they may file memoranda within 21 days.

R v Malupo

Supreme Court, Nuku'alofa
Cato J
Cr 71/2015

4 May 2016

Criminal procedure – application for discharge on basis that law was unconstitutional – Attorney-General to determine class of offence – application declined

The defendant submitted that one of the charges against him, causing serious bodily harm contrary to section 107(1) Criminal Offences Act, was deficient or illegal in that the section did not prescribe any statutory basis for the exercise of a prosecutorial discretion as to whether the charge was serious, in which case it was required to be tried on indictment, or a simple offence, in which case it was required to be tried summarily. For the offence of causing serious bodily harm, the maximum penalty was 5 years imprisonment and for simple offending, the maximum sentence was 3 years imprisonment. The case was adjourned until the application to discharge the accused on that count was decided.

Held:

1. The object of the reform of the Criminal Offences Act was to devolve lesser offending to the jurisdiction of the Magistrate's Court so that the Supreme Court was concerned with the more serious class of case. This was to lessen the pressure on the Supreme Court (there being only two permanent Supreme Court Judges available in Tonga) so as to reduce the number of cases reaching the Supreme Court of a less serious kind. Magistrates were able to hear cases where the maximum sentence was three years. Parliament gave the Attorney General the discretion to determine in which category the offending fell depending on his reasonable assessment of the seriousness of the offending, the more serious instances being dealt with in the Supreme Court.
2. The court did not consider the Legislature, in providing a discretion for the Attorney-General to determine into which class the offending fell without a defined basis, acted unconstitutionally, nor was the exercise of the discretion unreasonable or unconstitutional. Accordingly, the application to discharge the accused on this ground and count one was rejected.

Statute considered:
Criminal Offences Act (Cap 18)

Counsel for the prosecution : Mr Lutui
Counsel for the defendant : Mr Niu SC

Ruling as to the legality of count one of the indictment

[1] Mr Niu SC, for the accused, prior to the trial commencing, but after the defendant had been arraigned submitted that count one in the indictment causing serious bodily harm contrary to section 107(1) Criminal Offences Act was deficient or illegal in that the section did not prescribe any statutory basis for the exercise of a prosecutorial discretion as to whether the charge was serious, in which case it required to be tried on indictment, or a simple offence, in which case it required to be tried summarily. For the offence of causing serious bodily harm, the maximum penalty is 5 years imprisonment and for simple offending, the maximum sentence is 3 years imprisonment (section 107).

[2] The point was not only novel but, if Mr Niu were correct, this would mean that there was a major difficulty with the legislation passed as amending legislation in 2012 to the Criminal Offences Act, in the case of a number of offences introducing degrees or classes of serious and minor offending. After discussions with Mr Niu and Mr Lutui for the Crown, it was decided that I should adjourn the case to enable the Crown to file submissions and for me to consider the matter further on the 4th May, 2016. I heard counsel further on that date, and have considered their submissions.

[3] I have regard to the legislation which is that contained within the 2012 Amendment to the Criminal Offences Act, the preamble of which reads;

> "An Act to amend the Criminal Offences Act to make numerous changes to reform the Act and create different degrees of offences that reflect their relative seriousness and for related matters."

The sections which make provision for serious and simple degrees or classes of offences are; section 53, fraudulent conversion by government servant (section 7 of the Amendment); section 107, bodily harm (section 10 of the Amendment); section 108, attempt to intimidate (section 11 of the Amendment); section 111 threatening documents (section 12 of the Amendment); section 116 enticing or taking away children (section 13 of the Amendment); section 124 indecent assault (section 14 of the Amendment); section 155, assault with intent to rob (section 17 of the Amendment); section 157, demanding property with menaces (section 18 of the Amendment) section 162, fraudulent conversion of property (section 19 of the Amendment); section 173 housebreaking (section 20 of the Amendment); section 174, unlawful entry into buildings at night (section 20 of the Amendment);section 176, possession of housebreaking instruments (section 21 of the Amendment); section 177, arson (section 21 Amendment) section 178, wilful damage to buildings (section 22 of the Amendment. Section 187, wilful damage to things not otherwise provided for (section 24 of the Amendment).

[4] There are, accordingly, a significant number of offences which Parliament decided could be classified as serious or simple. In almost every instance, the boundary between an indictable and a summary prosecution is the maximum sentence of imprisonment of three years which is the maximum sentence also for a Magistrate to sentence to imprisonment under section 11(2) Magistrates Court (Amendment) Act, 1912.

[5] Mr Niu contended that there should be a defined statutory basis to govern the discretion of the prosecutor when laying a charge as either indictable or summary. He put his argument in this way. Parliament had, he submitted, provided two alternative offences under section 107 and there was no criteria or criterion prescribed or definition provided as to what constitutes each of the alternative offences. He submitted further that clause 103 provided that "The Legislature shall determine the time and place for holding the Courts and shall limit the powers of the Magistrates in criminal and civil matters and shall determine what cases shall be committed for trial to the Supreme Court." He complained that the Constitutional provisions expressly required the Legislature to determine what cases shall be committed to the Supreme Court for trial. He submitted that it was for the Legislature to make the determination, and the Legislature cannot delegate that duty to the Attorney-General. He acknowledged that section 196 of the Act again as enacted in 2012 provided that "…the choice of which [of the two alternative offences] shall be charged and prosecuted shall be decided by the Attorney-General, but submitted that this delegation did not provide any criteria, criterion, or definition or even guidelines as to how an upon what basis the Attorney-General was to make his decision to charge the one or the other of the two alternatives.

[6] Mr Lutui argued that there was no such requirement. Parliament had plainly intended, he submitted, to develop classes of offending so as to give the jurisdiction to Magistrates to deal with lesser instances of the offending which could be accommodated within their jurisdiction. It was not a case of separate offences with different venues and sentencing maxima leading to a classification of serious or simple. The essential elements the Crown had to prove were the same irrespective of which class was chosen. He submitted that clause 11 of the Constitution had been complied with because the indictment clearly stated the offence charges and the grounds for the charge as required under clause 11 of the Constitution, and the particulars provided further information. He submitted Parliament had given an absolute discretion under section 196 of the Criminal Offences Act to the Attorney General to choose which of the two offences was appropriate in which to commence proceedings. There was no need for any further statutory requirements as Mr Niu contended. It was for the Attorney General to consider which class of case the facts fitted into, taking into account the distinct features and circumstances peculiar to each causing bodily harm case. Features that would make the case fall within the serious category may include amongst other things, the use of a weapon or the nature and extend of the injuries caused.

[7] It is plain, when considering the object of the reform that there was an intention to devolve lesser offending to the jurisdiction of the Magistrate's Court so that the Supreme Court was concerned with the more serious class of case. This was plainly to lessen the pressure on the Supreme Court (there being only two permanent Supreme Court Judges available in Tonga) so as to reduce the number of cases reaching the Supreme Court of a less serious kind. Magistrates were able to hear cases where the maximum sentence was three years which as I have said the maximum sentence was three years which as I have said coincided with the boundary between serious and

simply offending. In my view, Mr Lutui is correct; the legislation is not deficient in not providing a statutory basis delineating the boundaries between serious and minor offending; rather, it is clear that Parliament intended and gave the Attorney-General the power to assess which class the offending in the individual circumstances fell into, the essential elements being the same. The Attorney General would have to assess the overall seriousness of the case and the public interest in ensuring that prosecutions were commenced in the appropriate way the boundary being the relative seriousness of the offending which will vary from case to case. Such a discretion, which Mr Lutui described as absolute, has to be exercised, as with any prosecutorial discretion, bona fide and reasonably. In my view, the accused cannot complain about being prosecuted in this Court on indictment; the charge of serious injuring arising out of the discharge of a firearm and was one of several indictable charges that were laid involving a firearm.

[8] I do not consider that the defendant is prejudiced; the Crown has to establish beyond a reasonable doubt the essential elements and the Crown has provided particulars to him of his alleged offending. I do not consider that the fact that there is no defined statutory formula of framework as Mr Niu contends is fatal to the operation of his legislation, although novel in form. The purpose of the legislation as I have said was to allow less serious cases of bodily harm to be dealt with by Magistrates and Parliament plainly gave the Attorney General the discretion to determine in which category the offending fell depending on his reasonable assessment of the seriousness of the offending, the more serious instances being dealt with in this Court. That is the kind of assessment, that is determining the seriousness and incidences of offending that an Attorney General or other senior prosecuting counsel commonly has to undertake in the discharge of his prosecutorial duties. I do not consider the Legislature, in providing a discretion for the Attorney-General to determine into which class the offending fell without a defined basis, acted unconstitutionally, nor was the exercise of the discretion in this case unreasonable or unconstitutional. Accordingly, the application to discharge the accused on this ground and count one is rejected.

Makaui v Havelu anors

Land Court, Nuku'alofa
Scott J and Assessor Toumo'ua
LA 1/2014

6 May 2016

Land law – validity of grant – Minister acted on incorrect information – grant was set aside

There was a family dispute over the grant of an allotment of estate land at Pea, part of the Lavaka estate. It was granted to the first defendant on 13 January 2014. The plaintiff claimed that the land was in fact unavailable since it was already lawfully occupied on his behalf by his mother who, together with his deceased aunt had, with the consent of the then town officer, fenced off the allotment and built a substantial house upon it. The plaintiff further claimed that the actions of the second defendant, the Estate Holder's Land Representative, had the result that the Minister approved a grant to the first defendant under the impression that this was the only application, when in fact, that was not the case: the plaintiff himself was the first person to apply for the land.

Held:

1. Where applications were received for grants from hereditary estates the Ministry's practice had been to take an endorsement of support by the Estate Holder as sufficient (in the absence of anything known to the contrary) to establish that the land applied for was in fact "available" and that there was no other impediment to the grant. Unfortunately the practice was found wanting. The court recommended that in future, whether the application was for a grant of land from a hereditary estate or from Crown Land, the Minister should satisfy himself by all reasonable means that the endorsement on the application form accurately reflects the situation on the ground.
2. The court found that there was a material and unacceptable departure from the statutory procedure for applying for an allotment, where the Estate Holder's agent intervened in the procedure by preventing the application from reaching the Minister at all. This caused the Minister to consider the first defendant's application as an uncontested first received application for a hitherto vacant piece of land, which was not the case. The Minister acted on the basis of materially incorrect information given to him, and as a result he acted on wrong principles. Accordingly the grant was set aside.
3. The conclusion that the grant must be set aside did not address the question whether the land was actually available. That was for the Minister to decide.

Cases considered:

Fililangi Naulu v 'Amanaki Tupou & Ors AC 21 of 2015 (8 April 2016)
Fosita v Tu'ineau & Ors (1981 – 1988) To. L.R 105
Havea v Tu'i'afitu & Ors [1974-1980] To. L.R 55
Ma'ake v Lataimu'a [2007] To. L.R 15
Mateni v Pulileka & Anr [2009] To. L.R. 410
Palu v Bloomfield [1974 – 1980] To. L.R 105
Tafa v Viau & Ors [2006] To. L.R 236 (CA)

Statute considered:

Land Act (Cap 132)

Counsel for the plaintiff : Mrs Vaihu
Counsel for the first and second defendants : Mrs Pale-Palelei
Counsel for the third defendant (Minister of Lands) : Mr Sisifa (Solicitor General)

Judgment

Introduction

[1] This is another family dispute over the grant of an allotment of estate land. The land at Pea, part of the Lavaka estate, is Lot 2 Survey Plan 851 Volume 413 Folio 98 having an area of 1603m². It was granted to the First Defendant on 13 January 2014.

[2] The Plaintiff claims that the land was in fact unavailable since it was already lawfully occupied on his behalf by his mother who, together with his deceased aunt had, with the consent of the then town officer, fenced off the allotment and built a substantial house upon it. The Plaintiff also says that the actions of the Second Defendant, the Estate Holder's Land Representative, had the result that the Minister approved a grant to the First Defendant under the impression that this was the only application, when in fact, that was not the case: the Plaintiff himself was the first person to apply for the land.

The applicable law

[3] It is settled law that when the grant of an allotment is challenged the Court will only intervene if:

> "The person challenging its validity establishes that the Minister has acted on wrong principles which means that the Minister has acted contrary to statute, or in breach of the rules of natural justice or in breach of a clear promise by the Minister and the tofi'a holder".
> (*Havea v Tu'i'afitu & Ors* [1974-1980] To. L.R 55)

It is not in doubt that when the Minister is significantly misled or mistaken as to the true position he will also be taken to have acted on wrong principles (see e.g. *Fosita v Tu'ineau & Ors* (1981 – 1988) To. L.R 105 and *Mateni v Pulileka & Anr* [2009] To. L.R. 410).

[4] The principal provisions governing the grant of allotments out of hereditary estates which are relevant to this case are sections 43(1) and 50(a) of the Land Act.

Section 43(1) provides that:

> "Every male Tongan by birth of 16 years of age not being in possession of a tax or town allotment shall be entitled to the grant of a tax or town allotment or if in possession of neither to the grant of a tax and town allotment".

Section 50(1) provides that:

> "Land for allotments shall be taken from the hereditary estates in accordance with the following rules:
>
> (a) An applicant for an allotment lawfully resident in an hereditary estate shall have his allotment out of land *available* for allotments in that estate" (emphasis added).

[5] The leading authority on the essential requirement for the land to be "available" before it can be granted is *Tafa v Viau & Ors* [2006] To. L.R 236 (CA). The importance of availability being ascertained by the Ministry of Lands both in the case of a grant from Crown Land and a grant from an hereditary estate was recently emphasised by the Court of Appeal in *Fililangi Naulu v 'Amanaki Tupou & Ors* AC 21 of 2015 (8 April 2016).

[6] An application for the grant of an allotment is made by completing and submitting Form No 9. A copy of the Form is at Cap 132 Subsidiary Legislation S-3. It will be seen that the application is addressed to the Minister of Lands (in the case of an estate located on Tongatapu) and that there is provision for the Estate Holder to endorse his support for the application in the following terms:

> "I hereby agree to the grant of the allotment as described above and declare that there is no impediment to prejudice this grant".

[7] The importance of the Estate Holder's endorsement was emphasised in *Ma'ake v Lataimu'a* [2007] To. L.R 15, 29 where the Court stated:

> "It is an important declaration because if the land is not "available" then that clearly would be an impediment to the grant. There was therefore an obligation upon the estate holder to take reasonable steps to ensure that the Plaintiff had in fact given his consent to the grant before he (the estate holder) signed the declaration in the defendant's application form. The estate holder should not simply have relied upon the applicant in this regard but he should have taken appropriate steps himself to contact the plaintiff and check out the position and ensure that his consent was forthcoming".

[8] When Crown Land is involved it is the Minister himself who is the Estate Holder (section 2) and the requirement that the Minister cause reasonably adequate enquiries to be made by the Ministry before his endorsement is affixed to the application has been repeatedly stressed notably in *Tafa v Viau* [2006] To. L.R 114 (LC) and 236 (CA).

[9] It is not in dispute that hitherto where applications have been received for grants from hereditary estates the Ministry's practice has been to take an endorsement of support by the Estate Holder as sufficient (in the absence of anything known to the contrary) to establish that the land applied for was in fact "available" and that there was no other impediment to the grant. Unfortunately this practice has, as pointed out by the Court of Appeal in *Fililangi Naulu's* case (supra), been found wanting. The Court recommended that in future, whether the application was for a grant of land from a hereditary estate or from Crown Land, the Minister should satisfy himself by all reasonable means that the endorsement on the application form accurately reflects the situation on the ground. It also pointed out that:

> "Any application must be directed to the Minister, even if it is not accompanied by a statement of support from the Estate Holder".

I take this observation to imply that an Estate Holder is free to endorse his *opposition* to any particular application before the same is forwarded to the Ministry.

Documents

[10] A bundle of Documents numbered and referred to as P1 to P18 A was produced by the Plaintiff by consent.

The First and Second Defendants did not produce any documents but relied on those produced by the other parties.

The Third Defendant produced a bundle of documents numbered and referred to as D1 to D13, by consent.

Two documents, copies of Form 9 applications by the Plaintiff and his brother dated 28 June 2013 were produced as exhibits A and B.

Briefs of evidence of nine of the ten witnesses were filed by consent as follows:

1. Robert Mervyn George Makaui, the Plaintiff;
2. Alakivailahi Fifita, the Plaintiff's mother;
3. Tivise Tauvaka, defacto widow of Plaintiff's uncle Likutau;
4. Lipeti Tupou, a resident of Pea;
5. Viliami Fonise Havelu, the First Defendant;
6. Melaia Finau Havelu, widow of the Plaintiffs uncle Sione;
7. Siope Lola Tu'i'onetoa, a friend of the First Defendant;
8. Finau Hufanga, the Second Defendant; and
9. Warrick Vea, Lands Registration Officer, Ministry of Lands.

The plaintiff's case

[11] The Plaintiff was born in Auckland New Zealand in 1981. He is a vehicle refurbisher. He remembered coming to Tonga when he was about 8 years old. He lived on the land in question with his aunt Lupe, his mother's sister, who had a house there. He attended the local school at Pea and returned to New Zealand when he was about 11. He moved to Australia in 2007 and has lived there ever since. He is still a New Zealand Citizen and also has a Tongan passport which he obtained after his birth was registered in Tonga in 2012 (see Document P-13).

[12] The Plaintiff told the Court that his mother told him that he had some land in Tonga and that his aunt Lupe who had died in 2011 had left her house in Tonga to him (Document P-1). She also told him that she had applied for the land to be granted to him. Since he began working he had sometimes sent money to Tonga, it was for maintaining the house.

[13] Salesi Fotu is a land consultant to H. M. the King who holds the Lavaka title and is accordingly the Estate Holder. Fotu had looked at the files at the Palace Office and found two applications (Exhibits A and B) on the file. There was nothing to show the date on which they were received, either on the applications or on the file. There was nothing to show that they had ever reached the Estate Holder.

[14] Salesi Fotu also found a copy of a letter on the file dated 20 January 2014 (Document 14A). The letter was signed by Lord Luani a representative of the King and was addressed to the town officer at Pea. It will be noted that the First Defendant's deed of grant is dated 13 January 2014 (Document P 17A)

[15] The next witness was Lipeti Tupou, a long-time resident of Pea. She told the Court that her uncle Fakavale Tapua was the town officer "in the 1970's". His daughter 'Elisi who was a friend of hers told her that her father had authorised the Plaintiff's aunt Lupe to move onto the land and develop it. This she did, fencing it and building a house upon it. In this endeavour Lupe was helped by her sister, the Plaintiff's mother. In her opinion it was common knowledge in Pea that the land "belonged to Lupe and [her sister] Alakivailahi".

[16] The Plaintiff's most important witness was his mother, Alakivailahi Fifita. Mrs Vaihu took her through her brief of evidence in detail and she confirmed the truth of its contents. According to this witness she and her sister emigrated to New Zealand in the 1970's. Their plan however was eventually to have a home in Tonga. In about 1983 Lupe returned to Tonga and went to live with her father.

[17] At this time the First Defendant, her brother, was still living in Tonga. There was already family interest in the land which was earmarked for the First Defendant. According to this witness their father sometimes worked on the land, making it ready for his son, the First Defendant. The witness however did not see her brother himself ever work on the land. She told the Court that he was unemployed and suggested that he was not making a success of his life and needed "a fresh start".

[18] In 1985 the sisters and the First Defendant had a meeting: the First Defendant agreed to emigrate to New Zealand where his sisters would help him start a new life. He would relinquish his interest in the land and leave it clear for the sisters to develop: "[the First Defendant] surrendered the land to Lupe so that it could be transferred to my son after the house was built".

[19] It is not disputed that Lupe and her sister built the house, a "brick" house during 1986 and 1987. It has two rooms and a kitchen. Some of the building materials were sent over from New Zealand in a container and the other brothers Sione and Tuita helped with the construction. It was put to Alakivailahi that Lupe had been required to obtain the First Defendant's consent before the TDB would lend her money to develop the land. She agreed but stated that this was not because he had any legal claim to the land but because Lupe was not at that time resident in Tonga and the Bank needed a resident guarantor.

[20] A year after Lupe's death there was a family reunion in Tonga, as is the custom. The First Defendant visited Tonga from New Zealand for the occasion. According to the First Defendant he went to the land but was refused admission. According to Alakivailahi she was unable to admit him as she did not have the key to the gate. Furthermore, the First Defendant was drunk. She told him to go away and come back another time.

[21] On 24 July, a few days after the anniversary of Lupe's death Alakivailahi and her husband, Captain Fifita went to see the Second Defendant at his residence. They took with them a completed Form 9 application for the land by the Plaintiff. Alakivailahi told the Court that the Second Defendant told them that this was the first application for this land which had never before been registered and that he would see that the Estate Holder, Lavaka, received the application as soon as possible.

[22] According to Alakivailahi the next thing she heard, several weeks later, was from Tivise, the mother of her deceased elder brother Likutau's children who at the time was living in the house. Tivise told her that the Second Defendant had returned the application form to her for forwarding to Alakivailahi. The application was being returned because the First Defendant "had already applied" for the land. When she received the form Alakivailahi consulted a Solicitor in New Zealand.

[23] According to the Statement of Claim trouble began in 2013. Two of her defacto husband's brothers Tuita and Sione tried to evict Tivise from the house. The matter was reported to the Police who were unable to act as the ownership of the property was unclear.

[24] On about 20 January 2014 Alakivailahi and her husband went to the Royal Palace. They wanted to see the Estate Holder, the King, to find out why the application on behalf of the Plaintiff had been returned. They were unable to see the King however his representative, Lord Luani, agreed to write the letter Document P14 – 14A. The witness stated, that neither she, nor Lord Luani, was aware that in fact the land had already been granted to the First Defendant on 13 January that is, about a week before the letter was sent.

[25] Tivise Tauvaka's evidence was consistent with that of Alakivailahi. In 2011 she moved into the house at her request. She was aware that the house had been built by Lupe and Alakivailahi. She was present when the application was presented to the Second Defendant and at the visit to the Palace. The trouble began when Sione and Tuita came to the house and violently demanded that she leave.

The first defendant's case

[26] In his Statement of Defence the First Defendant admits that the house was built by Lupe and in paragraph 2(ii) "that all the expenses was done by Lupe alone". In paragraph 10 he admits that he has never lived on the land although it was "earmarked for him to develop one day". He relied on the fact that when Lupe had sought a loan to develop the land his own signature was required on the application. This, he suggested, was evidence that he was regarded as having a legal claim to the land.

[27] The First Defendant told the Court that he is now aged 71 unmarried and without children. Apart from the visit to Tonga on the anniversary of his sister's death he has always lived in New Zealand. According to the First Defendant the land was allocated to him by the then town officer Moeaki in about 1965 after he went with his father to

see Lord Lavaka. After that "I went and took care of the allotment". He built a seven feet by seven feet dwelling with a flat tin roof and "took occupation". He denied entering into any arrangement with Lupe to the effect that he would surrender the land to her upon emigrating to New Zealand. He did, however agree that Lupe would build a house on the land. He stated that when he went to the house in 2012 his sister Alakivailahi told him to go away and not to return as he had lost the land.

[28] In cross examination the First Defendant denied that Lupe had paid for the house or that she had sent any container from New Zealand. He denied that Alakivailahi had made any financial contribution. He denied that Lupe had made any will. As to his application for the grant of the allotment to him this was made at the suggestion of the Second Defendant. He was not sure whether he knew that the Plaintiff had also applied for the land.

[29] In answer to questions from the Court the First Defendant, for the first time, claimed to have lent two sums of money $6000 and $7000 to assist with the construction of the house. These sums, he claimed, had not been repaid.

[30] The First Defendant called two witnesses. The first was Melaia Finau Havelu. She confirmed the truth of her brief of evidence and in particular that the First Defendant had built "a make-shift shelter (faka-palepale) with a tin roof and thatched walls made out of coconut palm leaves". She stated that "we all knew the land belonged" to the First Defendant. Contrary to the last sentence of her brief she conceded that Lupe had paid for the construction of the brick house.

[31] The second witness for the First Defendant was Siope Lolo Tu'i'onetoa, now the town officer. They had known each other for many years. When they were young men in the 1970's they went to the land and ate tava (lychee) that was growing there. "When I said to Viliami we might be arrested for coming here he answered: who will come and arrest us, the allotment belongs to me".

The second defendant's case

[32] The Second Defendant's oral evidence to the Court closely followed his Statement of Defence and his brief of evidence. He accepted that he had received an application for the land presented on behalf of the Plaintiff by his mother and that he had undertaken to process it.

[33] In accordance with the Estate Holder's instructions to give preference to those born in, brought up in and living in Pea he had considered the application and had consulted the family, in particular the Plaintiff's uncle Sione. Sione was not pleased to hear of the application and suggested that the land had been allocated to the First Defendant many years ago. Having made his enquiries he decided that he could not support the Plaintiff's application, not least because his father did not come from Pea but from Houma. He also took into account that the First Plaintiff was "a local of Pea, well known for his talent in the cricket field and local affairs of the community". After receiving the application he went to the Ministry of Lands. Upon examining the relevant map he found the First Defendant's name written on the plan of the land; this confirmed what he had been told, namely that the First Defendant was generally considered in Pea to be the holder of the allotment. It was his policy not to present competing applications to the Estate Holder but to decide which one merited the Estate Holder's approval. This he did on this occasion and the result was that the First Defendant's application was

approved by the Estate Holder and then forwarded to the Minister for the grant to be made.

[34] In cross examination the Second Defendant conceded that he knew Lupe had fenced off and built on the land, however "my only concern is with the land, not constructions". "As to the requirement for the land to be available I took it into account but I thought that if I did it the other way I would be sued by the First Defendant".

[35] Although the Second Defendant had conceded in cross examination that the Plaintiff's application did not reach the Estate Holder, in answering questions to the Court he claimed that he had told the King that there was a competing application. He also claimed that the King was aware that Lupe had built on the land. Finally, he claimed that when Lord Luani wrote the letter on the 20th he had already been told by the Second Defendant that the grant of the land to the First Defendant had already been made.

The third defendant's case

[36] The only witness for the Minister was Warrick Vea. His oral evidence closely followed the brief filed. In short, the Ministry received the First Defendant's application endorsed with the Estate Holder's certificate of support. No other application was received by the Ministry and the Ministry was unaware that there was another application or that the First Defendant's application was contested. As was the practice, the Ministry, apart from verifying that the land had not previously been allocated made no actual inspection of the allotment or any other enquiries. It relied on the Estate Holders declaration that there was no impediment to a grant to the applicant. It was on this basis that the grant to the First Defendant had been approved and processed.

[37] At the conclusion of his evidence Vea was asked to compare documents D6 and P12 with document P16. It will be noted that while all these maps show the allotment in question, only P16 has the First Defendant's name endorsed upon it. In Mr Vea's opinion that name could only have been inserted on the plan *after* the First Defendant's application had been received and the area had been surveyed. In his opinion the First Defendant's name would not have been found endorsed on the allotment prior to his application for it being received.

Submissions

[38] Mrs Vaihu filed excellent written submissions. Principally, she argued that the allotment was unavailable for grant by reason of its lawful occupation by the Plaintiffs mother and/or the Plaintiff who had inherited the house from his aunt Lupe.

[39] Mrs Pale-Palelei suggested that the occupants of the property were licencees at best and that their licence could not prevail against a claim by the First Defendant (see *Palu v Bloomfield* [1974 – 1980] To. L.R 105). She also suggested that there was no basis for any claim for financial compensation by the Plaintiff who had not shown that he had made any or any significant contribution to the cost of building the house.

[40] As to the Second Defendant Mrs Pale-Palelei submitted that the fraud and misrepresentation claimed by the Plaintiff had not been shown to have occurred. On the contrary the Second Defendant had performed his duties with diligence and competence.

[41] Mr Sisifa contrasted the present case with that of *Fililangi Naulu* (above). As pointed out that in *Naulu* there had been material available to the Minister which suggested that the Estate Holder's declaration did not reflect the true position. In the present case however the uncontested evidence of Warrick Vea was that nothing had come to the attention of the Minister which cast any doubt on the accuracy of the declaration. Accordingly, the Minister was correct to take it as established that there was no impediment to the grant.

Consideration of the issues

[42] In my opinion the question to be answered is whether the procedures mandated by the Act prior to a grant being made were followed.

[43] As has already been noted, an application for the grant of an allotment must be made by submitting a completed Form 9 to the Minister. It is the Minister, not the Estate Holder, who is authorised to grant an allotment (section 19(2)). The Form provides for the application, before it is submitted to the Minister, to be endorsed with the Estate Holders certificate.

[44] While, as has also been noted, the Estate Holder is responsible for enquiring to the circumstances pertaining to the application (paragraph 7 above) he of course does not have to make these enquiries personally; ordinarily, as in this case, he will have an official representative to consider applications and make enquiries on his behalf. In order to ensure a consistent and ordered approach to applications received, it seems entirely proper for the Estate Holder to give his agent representative guidelines to follow as was done in this case. I find nothing wrong with these guidelines. Having applied those guidelines and made his enquiries the applications or competing applications can then be submitted to the Estate Holder for him either to support or for his support to be withheld. What, however, I am satisfied is a material and unacceptable departure from the statutory procedure for applying for an allotment is for an Estate Holder's agent to intervene in the procedure by preventing applications (whether or not endorsed with the Estate Holder's support) reaching the Minister at all. This however is what I find, as a fact, happened in this case.

[45] The effect of the decision of the Second Defendant to withhold the Plaintiff's application was to cause the Minister to consider the First Defendant's application as an uncontested first received application for a hitherto vacant piece of land, which of course was not at all the case.

[46] The consequences of the Ministry's reliance on the Estate Holder's certificate alone, without any further enquiries being made, taken together with the suppression by the Second Defendant of the Plaintiffs own application were, that the Minister acted on the basis of materially incorrect information given to him, and as a result he acted on wrong principles. Accordingly the grant must be set aside.

[47] Mrs Pale–Palelei's suggestion that the Plaintiff, at best a mere licencee, could not impugn the rights of a grantee overlooks the fact that the grant itself is invalid for the reasons already given.

[48] It should be understood that the conclusion that the grant must be set aside does not address the question whether the land in question is actually available. That, as the Court of Appeal has repeatedly emphasised (see *Fililangi Naulu v Amanaki Tupou & Ors* (above) paragraphs 23 & 24) is for the Minister to decide.

[49] Before leaving the matter it may be worth pointing out that the Form 9 currently in use is not identical with the Form to be found at S-3 of Cap 132. In its published form the applicant's declaration reads as follows:

> "I hereby declare that I am a male Tongan subject by birth, over 16 years of age"

The form currently in use reads:

> "I hereby declare that I am a Tongan subject and have attained 16 years of age".

390 I am advised by the Court Interpreter that the Tongan version makes it clear that the applicant is male. The important point however is that the current declaration, unlike the Form at S-3 makes no reference to the applicant being a Tongan subject by birth which is a condition of eligibility contained in Section 43(1) of the Act:

> "Every male Tongan subject by birth of 16 years ..." (and see *Ministry of Lands v Kulitapa* [1974 – 1980] To. L.R 101)

[50] Were it to be decided to amend the Form 9 currently in use provision for an Estate Holder to state his *non endorsement* of an application might also be considered.

Result:

1. The grant to the First Defendant must be set aside.

400 2. I will hear Counsel as to costs.

Tu'akoi anor v Tu'akoi anors

Land Court, Nuku'alofa
Scott J and Assessor Fukofuka
LA 24/2008

6 May 2016

Land law – surrender of interest in allotment – whether obligation on Minister to consult before deciding – whether widow could surrender life interest

The registered holder of the land in question died in 2007. The First Defendant was his widow and registered her life interest in the allotment after his death. She then built a house on the allotment which was where she and the Second Defendant (the only child of the marriage) live with their family. In 2008 the First Defendant applied to the Third Defendant (the Minister) for permission to surrender her interest in the allotment. The intention of the First and Second Defendants was that following its surrender and reversion to the Crown the Second Defendant would then seek to lease the land in her own name. On 30 September 2008 Cabinet approved the First Defendant's request and the notice was published on 6 November 2008. On 30 October 2008 the Plaintiffs (a sister and a brother of the deceased) claimed that the surrender by the First Defendant was unlawful since she was not a "holder" of the allotment within the meaning of section 54(1) of the Land Act, and that Cabinet's decision to approve the First Defendant's application was in breach of the rules of natural justice by reason of the Minister's failure to consult the Plaintiffs "their brothers and sisters or nephews and nieces" before the decision was taken. They sought an order declaring that the purported surrender by the First Defendant of her widow's estate on 15 October 2008 was null and void.

Held:

1. A widow's right to surrender her life interest in an allotment was beyond reasonable doubt. The first question that then arose was whether, before agreeing to an application to surrender, there was a duty to consult all those persons who may hope to acquire an interest in the estate *after* the reversion had taken place.
2. Sections 82, 83 and 84 were clear that a right to inherit was determined at the date that the death said to give rise to the right occurred. Were this not the case then section 84 could simply be circumvented by someone other than a son or grandson of the deceased holder surrendering the allotment that he already held and then claiming not to hold one.

3. The Second Plaintiff had no basis upon which to "claim to be the legal successor" to the land. The First Plaintiff was a sister of the deceased. Section 82 did not permit her to inherit her brother's allotment. Neither Plaintiff was or was able to advance any claim to be the legal successors to the land, which was perhaps why no response was received to the section 54(2) notice before it expired. There was no reason or right for any person to be heard by the Minister or Cabinet *prior* to the consideration of the surrender application.
4. Blood relatives had a right to apply for the reverted land to be granted to them. Anyone of full age had that right, including the Second Defendant, a legitimate adopted daughter of the last male holder of the land and his widow. The court was satisfied however that that right was not the same right as the claimed right to be heard before the application to surrender was considered. No such claimed right existed.
5. The Plaintiffs had no *locus standi* to bring the action. The claim was dismissed with Defendants' costs to be taxed if not agreed.

Case considered:
Schaumkel & Anr v 'Aholelei & Anr [2013] TOCA 1; AC 14 of 2012

Statute considered:
Land Act (Cap 132)

Counsel for the plaintiffs	:	L M Niu SC
Counsel for the first and second defendants	:	S Tu'utafaiva
Counsel for the third defendant (Minister of Lands)		: 'A Kefu SC (Acting Attorney General)

Judgment

Introduction

[1] An agreed statement of facts and written submissions by all three Counsel have been filed. There are no factual issues and no evidence was heard. The Court proceeds to judgment following consideration of the papers before it.

Background

[2] The land in question is a town allotment whose registered holder, until his death in 2007, was 'Elone Fetaiakimoeata Tu'akoi (Fetaiaki). The First Defendant is his widow. The Second Defendant who was legally adopted, was the only child of the marriage.

[3] Following the death of her husband the First Defendant registered her life interest in the allotment as provided by sections 80 and 87 of the Act. She built a house on the allotment which is where she and the Second Defendant are living with their family.

[4] In 2008 the First Defendant applied to the Third Defendant (the Minister) for permission to surrender her interest in the allotment. As is apparent from the application (Documents 7 & 8) the intention of the First and Second Defendants was that following its surrender and reversion to the Crown the Second Defendant would then seek to lease the land in her own name.

[5] On 30 September 2008 Cabinet approved the First Defendant's request and on 22 October a section 54(2) notice was issued (Documents 27 & 28). Apparently it was published on 6 November 2008.

[6] At the time of the publication several brothers and sisters of Fetaiaki were still alive. These include his sister Satua, the First Plaintiff, and his younger brothers Siosiua, the Second Plaintiff, and Siale. According to a report by the Lands Registration Division (Documents 13 & 14) both Siosiua and Siale were already registered as holders of their own town allotments.

[7] On 17 October 2008 Siale and Satua wrote to the Minister (Documents 21 & 22). They described the First Defendant's request to surrender the land as "unlawful, unconstitutional and ungodly". They asserted that the Second Defendant was not their brother's daughter and demanded that the land "revert back to the family that the property belongs to" following the First Defendant's departure.

[8] On 16 March 2009 Siosiua applied to the Minister to surrender his own town allotment at Ngele'ia. In his letter (Documents 29 & 30) he stated that upon Cabinet approval to his request "I will be available, with no town allotment or tax allotment, and I will be able to become heir for my older brother Fetaiaki Tu'akoi's town and tax allotment at the time his widow [the First Defendant] remarries or dies because they have no legitimate male children (or legitimate female children)".

[9] Between about 19 and 28 November 2009 the Minister received no fewer than eight applications from close relatives of Fetaiaki (including a sister, an illegitimate daughter and four nephews) for the land either to be granted or to be leased to them. On 9 September 2010 the Second Defendant herself applied for a 50 year lease of the land (Document 63).

Proceedings Commenced: The Claim

[10] The writ was issued on 30 October 2008. It was amended on 16 July 2009. The Plaintiff stated in paragraphs 2 and 12 that the Second Defendant "was the illegitimate daughter [of the First Defendant] to another man" and that by agreeing to the First Defendant's request to surrender the land with the intention that it then be leased by the Second Defendant:

> ".. the Defendants have thereby practically alienated the allotment from the blood family of the deceased (Fetaiaki) to the First Defendant's own family contrary to normal practice of the Ministry of Lands which ensures that such allotments are granted only to blood relatives of deceased holders".

[11] In paragraph 12 it was pleaded that the surrender by the First Defendant was unlawful since she was not a "holder" of the allotment within the meaning of section 54(1) of the Land Act.

[12] In paragraph 9 the Plaintiffs claimed that the Cabinet's decision to approve the First Defendant's application was in breach of the rules of natural justice by reason of the Minister's failure to consult the Plaintiffs "their brothers and sisters or nephews and nieces" before the decision was taken.

[13] The only relief sought (apart from costs) was an order declaring:

> "That the purported surrender by the First Defendant of her widows estate on 15 October 2008 [was] null and void".

Defences: First and Second Defedants

[14] The Plaintiff's claims were denied. It was asserted that the First Defendant was the "holder" of an estate to which the Land Act applies. Consultation, as demanded by the Plaintiffs would have been "impractical", the more so as most of the claimants reside overseas. The land was not being "alienated", it was Fetaiaki's wish that it be given to the Second Defendant.

Defences: Third Defendant

[15] The Statement of Defence is dated 20 January 2011. This date is important since it is over two years after the 12 month period in the section 54 (2) notice expired. The Third Defendant pleaded:

(i) That section 54(1) permitted a widow to surrender her estate;
(ii) That there is no identifiable heir to the land apart from the widow since Fetaiaki's surviving brothers already have registered town allotments;
(iii) That in any event no claimant heir had submitted a claim before the expiry of the section 54(2) notice;
(iv) Therefore the land has reverted to the Crown. In paragraph 11(3) it was also stated that no decision had yet been taken on the Second Defendant's application for a lease made in September 2010.

[16] In paragraph 9(1) the Third Defendant pleaded that the First Plaintiff had no legal standing. The standing of the Plaintiffs to commence these proceedings was the first of the two fundamental questions addressed in the legal submissions. The second was the lawfulness of the surrender.

Consideration of the Issues

[17] At the hearing Mr Kefu amended paragraph 3(2) of his submissions to read:

> "The First Defendant is a holder of the land under the Land Act and is therefore entitled to waive her rights to the land".

In *Schaumkel & Anr v 'Aholelei & Anr* [2013] TOCA 1; AC 14 of 2012, the Court of Appeal, at paragraph 17 of their judgment accepted that although section 54 does not apply to a widow with a life estate "a widow must be able to surrender her right to an allotment and, in the absence of a statutory procedure directed at such surrender we are satisfied that the procedure approved by the Minister was appropriate".

[18] The term "holder" as defined in section 2 of the Act includes:

> "any Tongan subject claiming to be interested in land which he is legally capable to hold".

This definition clearly includes a widow with a "right to an allotment".

[19] The procedure followed by the Minister in *Schaumkel* was precisely that of section 54. In my opinion a widow's right to surrender her life interest in the allotment is beyond doubt. Whether it derives directly from the Act or from the curial correction of a statutory lacuna is in my opinion, at best, only of academic interest.

[20] On the assumption that a widow has a right to surrender and that a procedure analogous to section 54 should be followed to manage the application and its consequences, the first question that then arises is whether, before agreeing to an application to surrender, there is a duty to consult all those persons who may hope to acquire an interest in the estate *after* the reversion had taken place.

[21] As will be seen from section 54(3) the purpose of the notice is to:

> "... require any person claiming to be the legal successor to the surrendered land to lodge his claim in writing to the allotment".

If no valid claim is received within 12 months the land reverts to the Crown or Hereditary Estate (section 87).

[22] In my opinion, examination of sections 82, 83 and 84 make it quite clear that a right to inherit is determined at the date that the death said to give rise to the right occurs. Were this not the case then section 84 could simply be circumvented (as has been attempted in this case by Siosiua – see paragraph 8 above) by someone other than a son or grandson of the deceased holder surrendering the allotment that he already held and then claiming not to hold one.

[23] If this analysis is correct then it must follow that paragraph 23 of Mr Niu's submissions cannot be correct and that the Second Plaintiff has no basis upon which to "claim to be the legal successor" to the land.

[24] The First Plaintiff is a sister of Fetaiaki. She is not his unmarried daughter. Section 82 does not permit her to inherit her brother's allotment.

[25] In my opinion neither Plaintiff is or was able to advance any claim to be the legal successors to the land, which is perhaps why no response was received to the section 54(2) notice before it expired.

[26] The Act provides a procedure for advertising the pending reversion of a surrendered allotment and gives an opportunity to claimants to the legal succession to the land to notify the Ministry of their claim which, if upheld, prevents reversion occurring. There is no statutory procedure for advertising an intention to apply for

permission to surrender and there is no provision for persons other than those who can advance a section 82 right to inherit to be notified that the application is pending or even to register their interest, whatever it might be, prior to the expiry of the 12 month notice period.

[27] In my view the only rights which the surrender procedure is designed to protect are those which might be lost if the land actually reverted at the end of the notice period. Rights to apply for the land whether by way of grant or lease, do not arise until the reversion has actually taken place. They are not imperilled by the reversion itself.

[28] In my judgment there is no reason or right for any person to be heard by the Minister or Cabinet *prior* to the consideration of the surrender application.

[29] In paragraphs 14 and 20 Mr Niu propounded the right of blood relatives to apply for the lease of reverted land. No doubt such persons have a right to apply for the reverted land to be granted to them. Anyone of full age has, including the Second Defendant, a legitimate adopted daughter of the last male holder of the land and his widow. I am satisfied however that this right is not the same right as the claimed right to be heard before the application to surrender, is considered. In my opinion no such claimed right exists.

[30] It follows from the above that the Plaintiffs have no *locus standi* to bring this action.

RESULT: The claim is dismissed with Defendants' costs to be taxed if not agreed.

R v 'Inia

Supreme Court, Nuku'alofa
Cato J
Cr 29/2015

9 May 2016

Sentencing – causing death and bodily injury while under the influence of alcohol – three years imprisonment with final year suspended

On 1 January 2015 at about 2pm the prisoner was driving and hit two pedestrians and then crashed into the deceased's building and hit the deceased who was sitting near her building. He was later found to be driving with an excessive level of alcohol of 480 micrograms of alcohol per litre of breath. He was charged with causing death whilst under the influence of alcohol and two counts of causing bodily injury whilst driving under the influence of alcohol. He defended the charges and, after a trial, was found guilty on all charges. He appeared for sentencing.

Held:

1. It was clear that in providing for higher maxima sentences under the 2010 Amendment to the Traffic Act, Parliament directed the Courts that cases of serious culpable driving involving death particularly were to be given higher sentences than formerly had been the case in manslaughter by negligence cases where the maximum was 10 years imprisonment. An appropriate starting point for driving whilst under the influence of alcohol and causing death was 5 years imprisonment. The starting point reflected the seriousness of the offending and the public interest in securing the safety of other members of the public and should be fixed at a level which fairly reflected this so that drivers were deterred from operating motor vehicles when intoxicated.
2. An aggravating feature was that the level of intoxication was very high – nearly double the permissible level. The starting point was increased by six months. The prisoner's actions were precipitated by somebody crossing the road. The court allowed him 12 months deduction from the overall starting point of five and half years, making an effective starting point of four and half years imprisonment.
3. By way of mitigation he was a first offender and was of good character. He was aged 31, had three young children and formerly ran a successful business. He apologised to the deceased's family and paid about $8000 for travel arrangements and the children's education. He was allowed 18 months for mitigation which therefore led to a sentence of three years. The final year of his sentence was suspended.

4. On the charges of causing bodily injury whilst driving under the influence of alcohol, he was sentenced to 12 months imprisonment on each count of causing actual bodily harm whilst under the influence of alcohol to be served concurrently with his sentence on count one.

Case considered:
R v Fanua [2016] Tonga LR 208

Statute considered:
Traffic Act (Cap 156)

Counsel for the prosecution : Mr 'Aho
Counsel for the defendant : Mr WC Edwards SC

Sentence

[1] The prisoner, Mr Maololo 'Inia, appears for sentence on one count of causing death whilst under the influence of alcohol contrary to section 26A of the Traffic Act and 2 counts of causing bodily injury whilst driving under the influence of alcohol contrary to section 26A of the Traffic Act. He defended these charges in a trial which commenced on the 7th March and ended in a verdict of guilty on all charges delivered on the 11th March, and convicted accordingly.

[2] The evidence established that on the 1st January 2015 at approximately 2pm the accused was driving along the Bypass Road at Ma'ufanga in a southerly direction. He was later found to be driving with an excessive level of alcohol of 480 micrograms of alcohol per litre of breath.

[3] It was a fine day and at about 2pm the vehicle went off the road and hit first two pedestrians who were on the roadside and then proceeded to crash into the deceased's building and hit the deceased who was standing near her building. The vehicle came to a stop in the vicinity of the deceased's building. The bystanders were not seriously injured but received medical treatment. The deceased died in hospital from a fractured skull, with haemorrhage and cerebral oedema.

[4] It was not very clear at all to me as to why the prisoner on what was a clear sunny day on a straight piece of road with no apparent other road traffic had lost control of his vehicle. However, it was plain beyond any reasonable doubt that the elements of the offence of cause death and bodily injury had been made out and so I convicted. At sentence, Mr Edwards produced a police statement from a witness to say that a young person had crossed the road shortly before the incident and this had in effect caused the prisoner to brake heavily, causing the car to spin and the driver to lose control as the car left the road. This evidence had not been produced at trial and so I inquired of Mr Aho whether the Crown accepted that this might well have been a material reason for the prisoner to commence the action he did leading him to lose control with such tragic consequences. Mr Aho rightly in my view accepted this was the case. That did not alter or impugn the conviction but it is a factor for me to take into account on sentence.

[5] In my view, an appropriate starting point for offending of this kind where death is involved is about five years based on the comparable figure of five years for rape which also carried a maximum sentence of 15 years in Tonga. Recently, in CR 108 of 2015 *R v Vaka Fanua* 21st April 2016 I said in a case of reckless dangerous driving speed and manner resulting in death under section 25(5) of the Traffic Act, that the starting point would be about four to five years based also on the comparable starting point for rape. It is clear that in providing for higher maxima sentences under the 2010 Amendment to the Traffic Act, Parliament directed the Courts that cases of serious culpable driving involving death particularly were to be given higher sentences than formerly had been the case in manslaughter by negligence cases where the maximum is 10 years imprisonment. In my view, an appropriate starting point for driving whilst under the influence of alcohol and causing death is 5 years imprisonment. This starting point must reflect the seriousness of the offending and the public interest in securing the safety of other members of the public and be fixed at a level which fairly reflects this so that drivers are deterred from operating motor vehicles when intoxicated.

[6] Mr Aho submitted that the level of intoxication here was high and I agree with him. He submitted this was an aggravating feature and I agree with that submission also. The amount was a breath level that was nearly double the statutory permissible level of 250 micrograms of alcohol per litre of breath. Mr Edwards explained that his client had been drinking the night before but on the day in question whilst cooking the New Year's meal he had had more beer and had effectively unwittingly topped up from the previous day's drinking. He had left the house to pick up a friend who lived not far away when the accident happened. He in an attempt to mitigate suggested the prisoner did not appreciate that he was so intoxicated, but whilst that might be so, the prisoner assumed the risk of being so and he must, I consider, have known he had consumed alcohol to the point where he should not be driving, and he should not have driven. I consider the starting point should be increased by 6 months. In cases of higher concentrations, the period of aggravation can be higher.

[7] I now consider an appropriate overall starting point in this case taking in to account the fact that the prisoner's actions were precipitated by somebody crossing the road. It is difficult to assess because I know very little about what actually occurred and whether a sober driver notwithstanding the unexpected intervention of the young person could have safely taken steps to avoid causing an accident. A person's ability to react to and avoid unforeseen contingencies when driving drunk is obviously lessened by alcohol consumption. I allow him, however, 12 months deduction from the overall starting point of five and half years, making an effective starting point here of four and half years imprisonment.

[8] By way of mitigation, he does not have the advantage of a guilty plea. However, he is a first offender and I am satisfied otherwise is of good character. He is aged about 31, married with three young children and formerly ran a successful export business. His wife now carries the burden of looking after the children and providing for them out of her earnings. He asks for leniency because of her circumstances but unfortunately often secondary victims of offenders are their own family who have to suffer the consequences of their imprisonment so there is only limited mitigation I can allow for this. More importantly, albeit that he chose to defend, I am satisfied that he has remorse for what he has done and he has taken steps I am told, and the Crown did not disagree, to apologise to the deceased's family. He has paid for travel arrangements for the funeral and the children's education. In all I am told he has spent about $8000.

I was told he had suffered; losing his business and also having now the ongoing strain of living with the knowledge his driving had killed someone. These last matters however, are natural incidents of his offending, and are not properly matters of mitigation. In these circumstances, I allow him mitigation of 18 months imprisonment. The sentence on the charge of causing death whilst driving under the influence is three years imprisonment backdated to his remand in custody for which he has been convicted.

[9] On the question of suspension, Mr Edwards approached this by acknowledging he had to spend some period in prison but only a year, he submitted, and I should suspend the rest. He is plainly entitled to part of his sentence suspended, but I do not accede to Mr Edwards submission that one year is sufficient. He had a high breath reading and his driving killed an innocent bystander. To accede to Mr Edwards robust submission would be in my view to send the wrong message to the Tongan public, and to, indeed, diminish the plain directive of Parliament which is that the Courts adopt a more severe approach in driving cases particularly where death is involved. As I have said in *Fanua*, "The sentences must serve as an example to others to ensure the security or safety of the public and to properly reflect the fact that a person has died or suffered serious injury. "I do not think that an actual term of one years imprisonment, as Mr Edwards' submitted for causing death whilst under the influence of alcohol meets this concern. In this case I am however, prepared to suspend the final year of his imprisonment on the following condition;

a. That he is to commit no further offences punishable by imprisonment during the period of his suspension.

Mr Edwards assure me that he did not have a drink problem and so I make not order for counseling associated with his suspension.

[10] On the other charges of causing bodily injury whilst driving under the influence of alcohol, he is convicted and I sentence him to 12 months imprisonment on each count of causing actual bodily harm whilst under the influence of alcohol to be served concurrently with his sentence on count one. Had the injuries been more severe, the prisoner risked either the sentence on count one being increased to reflect this or at least part of the sentences on these counts being accumulated. In all the circumstances, I do not think it is appropriate to do this and the Crown has not sought any additional penalty.

[11] On the question of disqualification, I disqualify the prisoner from driving for three years from today's date.

Taumoepeau anors v Sika anors

Supreme Court, Nuku'alofa
Paulsen CJ
CV 43/2014

22, 23, 24, and 26 February 2016; 11 May 2016

Incorporated societies – standing of non-members to bring proceedings – plaintiffs, as directors, had standing

The Tonga National Rugby League Incorporated (TNRL) was a society incorporated under the Incorporated Societies Act (the Act) with objects that included fostering, developing, extending and governing the playing of Rugby League Football inside the Kingdom of Tonga and also outside the Kingdom, insofar as it related to the Tonga national team and players eligible to represent Tonga. The plaintiffs were all officers on the board of directors of the TNRL. The first defendant and second defendant held the positions of president and chairman, respectively, on the board of directors. Evidence suggested that the TNRL had a history of dysfunction dating back a number of years and involving prior court proceedings. There was a dispute over whether changes made to the Rules of the TNRL (the Rules) in 2012 affecting the election of officers were valid. The causes of the plaintiffs' dissatisfaction however run deeper than that. In short, the plaintiffs believed that the second defendant, and others who supported him, usurped the role of the board and mismanaged the affairs and the finances of the TNRL and used its money for improper purposes without board approval. There were two causes of action in the original statement of claim. The first cause of action concerned the validity of the changes to the Rules, the effect of which was that the president, chairman and secretary of the TNRL would hold their positions for a period of 4 years and not be subject to annual election, as was the case with all other officers. That matter came before Cato J for hearing in December 2014 at which time consent orders were made, declaring the changes to the Rules invalid and cancelling them. The second cause of action alleged that the first and second defendants breached the Rules and the Act and acted in a manner which was contrary to the interests of the TNRL and its members. The complaints were serious, wide ranging and particularised. Most of the plaintiffs' evidence was effectively unchallenged. The first and second defendants chose to rely upon legal defences. They contended that the plaintiffs had no standing to bring the action and that, even if the plaintiffs had standing, the court had no power to make the orders sought.

Held:

1. As to the issue of the plaintiffs' standing, it was well-established that members of societies could bring matters to court, either by seeking judicial review or on the basis of an alleged breach of contract. Standing to intervene in the affairs of a voluntary association did not rest only with the members.

The plaintiffs' interests as directors were closely aligned with those of the members of the TNRL. Furthermore, the plaintiffs had an additional interest in ensuring that the affairs of the TNRL were run honestly and for proper purposes. It was not inconceivable that they might be personally liable to the TNRL and the members for the improper use of the TNRL funds. It was only right that they should therefore be able to take action to protect themselves and prevent or remedy unlawful conduct. The court was satisfied that the plaintiffs had standing to bring the action.

2. The court was satisfied that the funds of the TNRL were not been managed in accordance with the Rules in a number of significant respects. Specifically, not all money received for and on behalf of the TNRL was paid into its bank account with the ANZ bank, money of the TNRL was used for purposes that were not authorised by the board and that the second defendant incurred obligations on behalf of the TNRL without board approval.

3. The evidence established that since 2012 no auditor had been appointed in breach of the Rules and whilst the obligation to appoint an auditor rested with the board, any attempts by the plaintiffs to have an auditor appointed were deflected or resisted. The court was satisfied that without the intervention of the court no auditor would be appointed. Accordingly, the court directed the appointment of an auditor of the accounts of the TNRL for the 2012, 2013, 2014 and 2015 financial years.

4. The court exercised its discretion to award relief that it considered just, notwithstanding that it had not been specifically sought, in two respects. First, the court made orders that there would be an election of officers to the board. Secondly, funds of the TNRL were used without board approval in breach of the Rules. On 29 April 2016 the court made orders to prevent this from continuing. The court ordered that those orders remain in place pending the election of officers.

Cases considered:

Belmont Finance Corp Ltd v Williams Furniture Ltd [1979] 1 Ch 250 (CA)

Finnigan v New Zealand Rugby Football Union (No 3) [1985] 2 NZLR 181 (HC and CA)

Gibson v New Zealand Land Search and Rescue Dogs Inc [2012] NZHC 1320, [2012] NZAR 699

Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses Ltd [1982] AC 617 (HL)

Oggi Advertising Limited v Auckland City Council [2005] NZAR 451 (HC)

O'Neill v Otago Area Health Board (High Court, Dunedin CP 50/91, 10 April 1992)

The Great Christchurch Buildings Trust v Church Property Trustees [2012] NZHC 3045

Turner v Pickering [1976] 1 NZLR 129

Statute considered:

Incorporated Societies Act (Cap 28)

Counsel for the plaintiffs : Mr W Edwards
Counsel for the defendants : Mr S Tu'utafaiva

Interim ruling

[1] Tonga National Rugby League Incorporated (TNRL) is a society incorporated under the Incorporated Societies Act (the Act) with objects that include fostering, developing, extending and governing the playing of Rugby League Football inside the Kingdom of Tonga and also outside the Kingdom, insofar as it relates to the Tonga national team and players eligible to represent Tonga.

[2] The plaintiffs are all officers on the board of directors of the TNRL.

[3] The first defendant and second defendant hold the positions of president and chairman, respectively, on the board of directors.

[4] The evidence suggests that the TNRL has a history of dysfunction dating back a number of years and involving prior court proceedings. There is little to suggest that the situation is improving.

[5] The immediate catalyst for this action was a dispute over whether changes made to the Rules of the TNRL (the Rules) in 2012 affecting the election of officers were valid. The causes of the plaintiffs' dissatisfaction run deeper than that. In short, the plaintiffs believe that the second defendant, and others supporting him, has usurped the role of the board and mismanaged the affairs and the finances of the TNRL and used its money for improper purposes without board approval.

[6] This case has proceeded in two parts reflecting two causes of action in the original statement of claim. The first cause of action concerned the validity of the changes to the Rules to which I have referred, the effect of which was that the president, chairman and secretary of the TNRL would hold their positions for a period of 4 years and not be subject to annual election, as is the case with all other officers. That matter came before Cato J for hearing in December 2014 at which time consent orders were made, declaring the changes to the Rules invalid and cancelling them. The court's ruling included:

> The TNRL Constitution registered in September 2008 is declared to be the valid Constitution of the Society effective from 10 August 2012.
>
> All Officers for the Tonga National Rugby League will vacate their positions at each Annual General Meeting and elections for all Officers of the Tonga National Rugby League will take place at each Annual General Meeting in accordance with clause 7 of the Constitution of 2008...
>
> It is ordered that the registration of the amended Constitution on 1 March 2013 be cancelled in whole, and that the cancellation of the Constitution is in accordance with section 21 (4) of the Incorporated Societies Act, Cap 28 Vol 1 Laws of Tonga.

[7] Despite the ruling, which required the election of officers to take place "at each Annual General Meeting", the evidence is that the elections were last held on 1 March 2013. I will return to what can be done about that.

[8] It is the second cause of action, in what is now an amended statement of claim, with which this ruling is primarily concerned. The second cause of action alleges that the first and second defendants have breached the Rules and the Act and have acted in a

manner which is contrary to the interests of the TNRL and its members. The complaints are serious, wide ranging and particularised. For the purposes of providing context for what follows, what is alleged in general terms is that:

[8.1] The second defendant and others supporting him (notably the former secretary, Mr. Lopeti 'Uhatafe, and present treasurer, Mr. Matani Mataele) have failed to call meetings of the board as required by the Rules, have excluded the board members from meetings concerning the affairs of the TNRL, have caused the TNRL to incur financial obligations without board knowledge and have failed to provide any information to the board about the financial affairs of the TNRL despite repeated requests.

[8.2] The second defendant and others have failed to account for money received for or on behalf of the TNRL, have never obtained any approval of the board for payments of expenses or accounts using TNRL funds and have used the money of the TNRL for improper purposes for the benefit of, *inter alia*, the second defendant and the first defendant. The plaintiffs allege that the money of the TNRL has been taken in circumstances amounting to theft.

[8.3] The second defendant and others have failed to provide an audit of the finances of the TNRL for any of the years 2012, 2013, 2014, and 2015 which is required under the Rules and in the 2012 year the members in annual general meeting were presented with a false financial report. The report was false in that it was presented as having been audited when it was not and it materially misstated the financial position of the TNRL.

[8.4] The second defendant and others have not arranged for the filing of annual financial statements of the TNRL with the Registrar of Incorporated Societies as required by section 23 of the Act for the years 2012, 2013, 2014, 2015.

[8.5] That in breach of a memorandum of understanding between the Government of Tonga and the TNRL, pursuant to which the Government provided TOP$250,000 to the TNRL to be used for player allowances at the 2013 Rugby League World Cup, the first and second defendants and others caused the TNRL to fail to comply with the grant conditions and disbursed the money for purposes other than for players' allowances.

[9] I heard evidence from all of the plaintiffs along with another director, Taniela Inukiha'angana. An affidavit of a former director, Lupeni 'Otuhouma, was admitted into evidence also. Surprisingly, given the serious allegations that have been made against them, the first defendant and second defendant did not give evidence and they did not call any witnesses to give evidence on their behalf either. Whilst Mr. Tu'utafaiva did cross-examine the plaintiffs and Mr. Inukiha'angana, most of the plaintiffs' evidence is effectively unchallenged. The first and second defendants have chosen to rely upon legal defences. They contend that the plaintiffs have no standing to bring this action

and that even if the plaintiffs have standing the court has no power to make the orders that are sought.

[10] There has been some delay in the issue of this ruling. This is because counsel advised me that there was a real prospect of settlement and that I should withhold my ruling to allow the parties the opportunity to explore that further. There have been a number of appearances of counsel before the court where I was advised that the discussions were ongoing and settlement was likely. However, on 28 April 2016 the plaintiffs filed an application for injunction which complained that without board approval the treasurer of the TNRL, Mr. Matani Mataele, had withdrawn TOP$8,000 from the ANZ bank account of the TNRL to reimburse expenses he claimed had been incurred on behalf of the TNRL by the second defendant, Mr. Stan Moheloa. The plaintiffs sought orders restraining the defendants or anyone on their behalf from withdrawing money from the account of the TNRL without board approval, removing the defendants and Mr. Mataele as signatories on the bank account and for repayment of money drawn from the account without the board's approval. The matter came before me on 29 April 2016 when I was advised that settlement was no longer likely and after hearing from counsel I made orders that included the following:

> The defendants, their servants, agents or employees (including any Officer of the Tonga National Rugby League Inc) are restrained from:
>
> - Withdrawing any money from any bank account of the Tonga National Rugby League Inc (including but not limited to its account with ANZ Bank Account No.1100142); or
> - Applying any money belonging to or received by or on behalf of the Tonga National Rugby League Inc for any purpose including (but not limited to) the payment of any debt or obligation of the Tonga National Rugby League Inc:
>
> without first obtaining authorisation to do so by a valid resolution of the Board of Directors of the Tonga National Rugby League Inc.

[11] Against that background I now turn to consider the facts. I have set out the facts in some detail. I have done this for two reasons. First, the totality of the evidence had to be considered to address the defendants' principal defence that the plaintiffs have no standing. Secondly, I consider it important that the members of the TNRL are fully aware of the matters that have been put before the court in relation to the affairs of their society so as to inform their future decisions.

The facts

[12] As I have noted, all the plaintiffs are directors of the TNRL. The first named plaintiff, Mr. Siliveinusi Taumoepeau, has been a director since 2007. He was appointed vice president at an annual general meeting on 10 August 2012. He was subsequently re-elected at the next annual general meeting on 1 March 2013. Following 10 August 2012 Mr. Taumoepeau had requested a meeting of the board. The Rules provide that the board should meet at least once monthly but this does not occur. Mr. Taumoepeau produced email correspondence between himself, Mr. Moheloa and the then secretary, Mr. Lopeti 'Uhatafe, during September and October 2012, when he drew Mr. Moheloa's attention to the requirements of the Rules. Mr. Moheloa advised in an

email of 26 September 2012 that he was busy and that various people, including Mr. 'Uhatafe, were away but that he would advise a date for a meeting when he learned when the secretary was expected to return. Mr. Taumoepeau received a challenging response from Mr. 'Uhatafe on 2 October 2012 asserting that for 15 years he had convened the board meetings. Mr. 'Uhatafe said that he and others were busy with the preparations for 2013 Rugby League World Cup. One of the plaintiffs' complaints is that the board was excluded from the World Cup preparations. Mr. 'Uhatafe also asserted that Mr. Taumoepeau would not be entitled to vote at the next annual general meeting and that the president and vice president were not members of the board. This final comment was unexplained.

[13] A board meeting was convened on 16 November 2012. Mr. Moheloa invited a former director, Mr. 'Afofa Ta'ai, to participate in the meeting and allowed for the appointment of two new directors which the plaintiffs say was contrary to the Rules. It was at this meeting also that Mr. Moheloa proposed the changes to the Rules which became so contentious. The proposed changes were put to the meeting and passed. In his evidence Mr. Fukofuka said that the changes were passed because the chairman nominated the two additional people to vote and support it at the meeting.

[14] At this meeting Mr. Taumoepeau asked questions about the finances of TNRL but no information was provided. He said (and there was no evidence to the contrary) that between 10 August 2012 and 1 March 2013 there were never any minutes distributed following board meetings, no accounts approved by the board for payment nor any disclosure to the board of the TNRL bank statements or any other financial information. He said he was not even aware of who was authorized to be a signatory on the TNRL's bank account. Furthermore, there was no appointment of an auditor of the accounts of the TNRL as was required by the Rules or any discussion with the board about that.

[15] As a result of enquires Mr. Taumoepeau made following the 16 November 2012 meeting, Mr. Taumoepeau learned that from the date of his appointment on 10 August 2012 to the date of the next board meeting on 16 November 2012, Mr. Moheloa and Mr. 'Uhatafe had withdrawn more than TOP$40,000 from the ANZ bank account of the TNRL without board approval. A statement of the TNRL's ANZ bank account shows regular and, in some cases, large withdrawals from the account in this period and is consistent with Mr. Taumoepeau's evidence.

[16] On 23 November 2012 Mr. Taumoepeau wrote by email to both Mr. Moheloa and to the president and first defendant, Mr. Semisi Sika, challenging the changes to the Rules on the grounds that they were unconstitutional (as was later proved to be the case). He received no response.

[17] On 6 February 2013 Mr. Taumoepeau emailed the directors noting that the Rules required the holding of the annual general meeting in the month of February and that the financial statements of the TNRL should be forwarded to the members at least 14 days before the annual general meeting. He received a reply from Mr. Moheloa saying that he had been away and had left it to the office to prepare for the annual general meeting. He gave no date for the holding of the meeting. On 23 February 2013 Mr. 'Uhatafe sent an email to board members attaching what purported to be a "financial report 2012" and the minutes of the 2012 annual general meeting. He advised that the annual general meeting for 2013 would be held on 1 March 2013. The financial report consisted of a statement of income and expenditure, a statement of the financial position and a statement of cash flow for the 12 months to 31 December 2012.

[18] The annual general meeting was held on 1 March 2013. The minutes of the meeting were produced. The minutes record that officers were elected other than for the positions of president, chairman and secretary. Amongst those elected was Mr. Mataele as treasurer. He has adopted positions hostile to the plaintiffs since his election and has been associated with what the plaintiffs say was the improper use of the TNRL's money. Mr. Taumoepeau said in his evidence that at this meeting there was a strong majority to challenge Mr. Moheloa and Mr. 'Uhatafe in relation to their management of the TNRL. The minutes reflect a growing desire for financial accountability but resistance to this also. There was a motion to nominate an auditor but this was rejected on the basis that the Rules provide for the board to appoint the auditor. The financial report 2012 was presented as an "audited report" but a request for TNRL bank statements to verify information in the report was rejected on the basis that the auditor's comments should suffice. A request was made also for further information about substantial grants received by the TNRL and how they were used, which appear from the minutes to have been deflected on the basis that at least some of the amounts involved were only small.

[19] Mr. Taumoepeau and other directors were not happy with how things had progressed. Mr. Taumoepeau said that he was being stonewalled and that information was being deliberately withheld. He obtained copies of the TNRL's ANZ bank account statements and compared them with the financial report presented to the members. There were discrepancies. Under the Rules all moneys belonging to or received by the TNRL must be paid into its bank account and all accounts must be passed for payment by the board. The evidence is that these rules have been consistently breached. The evidence is that the bank statements showed total expenditure from the TNRL account of TOP$93,233.82 in the 2012 financial year compared with the TOP$159,566.15 shown in the financial report. That is a difference of TOP$66,332.33. Similarly TOP$106,333.55 was deposited into the TNRL bank account in the same period yet total income of the TNRL in the financial report was recorded as TOP$160,203.60. That is a difference of TOP$53,870.05. The differences were unidentified and unexplained in the financial report. In addition there were expenses recorded as having been incurred by the TNRL in the financial report such as rent, telephone and communication costs which Mr. Taumoepeau says his enquires revealed were not incurred.

[20] From the TNRL bank statements Mr. Taumoepeau had learned that in the months of November 2012 to February 2013, a period during which there were no rugby league competitions and the office of TNRL was virtually closed, a total of 27 cheque withdrawals totaling more than TOP$30,000 were made from the TNRL's ANZ bank account. The drawings were not approved by the board and no invoices or receipts were ever produced to the board in respect of them. Whilst he accepted that some expenses would have been incurred, that did not explain either the level or frequency of the withdrawals from the account. Mr. Taumoepeau was able to obtain copies of cheques drawn on the bank account. He learned that a number of withdrawals were made by cash cheques and for large sums. There were cash cheques drawn for TOP$3,900 on 28 March 2012, TOP$8,000 on 22 April 2012, TOP$2,400 on 8 November 2102, TOP$3,000 on 9 November 2012, TOP$2,300 on 23 November 2012 and TOP$7,400 on 31 January 2013. Four of those cheques were drawn on the account in the off-season months. The cheques were signed by Mr. Moheloa and Mr. 'Uhatafe and in most cases presented for payment by Mr. 'Uhatafe. There was also a cheque for TOP$2,221.83

dated 31 January 2012 drawn in favour of Asco Motors, a company with which Mr. Moheloa is associated.

[21] Mr. Taumoepeau emailed Mr. Moheloa and Mr. Sika on 26 March 2013 calling for a board meeting as a follow-up to the annual general meeting as well as for discussion on the 2013 World Cup preparations and the finances of the TNRL. A board meeting was arranged for 2 April 2013. At the meeting Mr. Taumoepeau tabled copies of the cash cheques and the bank statements and drew the board's attention to the differences between what was contained in them and the finance report 2012. He said, and I accept, that the treasurer, Mr. Mataele, tried to interfere and block his questions. He questioned Mr. 'Uhatafe as to the identity and qualifications of the auditor from which it became clear that the finance report had not been prepared by an auditor at all. Mr. 'Utahafe, who had presented the report as having been audited, now said that the report writer, who appears to have been a Ms. Kalolaine Tupou, only worked for an audit company but would not give details of the company or the position that she held. He refused to allow the board members to speak with Ms. Tupou either. The plaintiffs' case is that the financial report was presented to conceal how Mr. 'Utahafe and Mr. Moheloa had been using the money of the TNRL. It is not necessary for me to make any such finding. It is sufficient for present purposes that the plaintiffs' concerns as to the content of the financial report and the qualifications of Ms. Tupou were substantial and, in the circumstances, justified. The board meeting of 2 April 2013 was adjourned so that Mr. 'Utahafe and Mr. Moheloa could report back on the issues raised by Mr. Taumoepeau.

[22] On 19 April 2013 Mr. Taumoepeau emailed Mr. Sika to inform him of his concerns about the management of the TNRL finances. Relevantly, in that email he said:

> In your capacity as president of TNRL, may I raise with you issues I wish to be addressed in regards to league.
>
> … we feel that there is a lack transparency and accountability in how rugby league is administered which I strongly feel this is solely because of Lopeti 'Uhatafe.
>
> In the last 5 years, the board has tried to give the office of the Treasurer, management, and control of the finances of TNRL, in which Knowlton 'Ita'aehau and Raymond Sika were elected as such. It has been unsuccessful because Lopeti acts in his capacity as Secretary and also Finance Controller. The board has asked numerous times for financial reports to every board meetings but it has not been done. The annual financial report submitted to this year's AGM and the auditor mentioned are both unreliable and untrustworthy.
>
> There are also issues with overseas trips under the guise of TNRL. I have evidence of people traveling to Australia under TNRL sponsorship for league sponsored events, yet they do not have any association with TNRL.
>
> This is a concern as it is a total disregard for the TNRL's Constitution and may be breaches of the Company and Society Acts under which the TNRL operates.

[23] Mr. Taumoepeau was not the only director who was concerned. The other plaintiffs gave evidence confirming what Mr. Taumoepeau had to say and on 23 May 2013 the Hihifo representative on the board, Mr. Molisoni 'Otukolo, wrote to Mr. Moheloa (copying Mr. Sika and others) requesting that a board meeting be convened as a matter of urgency and stating:

> According to the Constitution it is a requirement that we meet at least once monthly [clause 9.1]. But I find that there has been requests for meetings from my fellow Board members and no response to those requests. The Constitution clearly states, especially as it is a World Cup year, discussion must be tabled for finances, approval of finances in respect of the World Cup requirements, the sponsorship requirements, the selection procedure, and other matters. Further, as it is the 25th Anniversary for the TNRL, we have seriously been poor in promoting the opening of the National Championship to recognise our 25 year history.
>
> .. Therefore I kindly ask that a Board meeting be convened. I give notice, knowing that the Vice President has also given notice for a Board meeting to be convened and I am copying him in this email.

[24] Mr. Moheloa's response to that email was defensive. In an email of 23 May 2013, he said that it was uncharacteristic for Mr. 'Otukolo "to question the credibility of rugby league and how it had been running". He said that he did not need to be reminded of the content of the Rules and that Mr. 'Otukolo's reference to them was "petty and trivial". He told Mr. 'Otukolo to raise his grievances at a meeting. Mr. 'Otukolo responded asking that at the next meeting the matters to be tabled include the financial information that had been requested at the last board meeting (a reference to the issues raised by Mr. Taumoepeau) as well as a report on World Cup preparations.

[25] The next board meeting was held on 28 May 2013 and the information that was provided by the chairman and the secretary did not satisfy the plaintiffs. The chairman said that a withdrawal from the TNRL account for TOP$7,400 on 31 January 2013 was a back payment of salary to Mr. 'Utahafe as a result of an increase in his remuneration from TOP$300 to TOP$500 per week. That explanation was unsatisfactory because, as Mr. Taumoepeau notes, a salary increase was never approved by the board nor had it approved the payment of that amount from the account. Other explanations included that the cash cheque of TOP$2,400 drawn on 8 November 2012 was for payment of legal costs incurred in defending action taken against the TNRL. It is difficult to see why such a payment would be made in cash and without board approval. Mr. Fangupo described the explanations as bizarre. The meeting concluded on the basis that Mr. Moheloa would have the finances of the TNRL for 2012 audited by an independent and qualified auditor. This has never happened. There was clearly now a serious level of distrust. This is reflected in the evidence of Mr. Fangupo who said as follows:

> …I say that Mr. Taumoepeau and a number of Directors, including myself, were not satisfied with the answers given by Mr. Moheloa. In my view it was an attempt to conceal the money that Mr. Moheloa and Mr. Uhatafe were drawing from the account, without permission from the Board and without our knowledge as Board members and for reasons not approved by the Board. I say that those drawings in many instances were not for the

TNRL, but were personal drawings made by the Secretary with the assistance of the First Defendant.

[26] Mr. Taumoepeau then made a complaint to the Police which alleged that Mr. Moheloa and Mr. 'Uhatafe had drawn money from the bank account of the TNRL without permission in circumstances that amounted to theft. The complaint was made around the end of May 2013. I am told that it has not been pursued pending the hearing of this action.

[27] The evidence of the plaintiffs was that following the 28 May 2013 meeting there was a failure to produce agendas or minutes for board meetings, there was no disclosure to the board of bank statements or financial information of the TNRL nor were approvals given by the board to the use of money from the TNRL bank account. The evidence of the plaintiffs was that they were not only excluded from any decisions concerning the finances of the TNRL but also excluded from any involvement in decisions relating to the 2013 Rugby League World Cup. Mr. Taumoepeau said that the board was not informed about what was being done to raise funds for the event, had no knowledge of the finances that had been gathered or how the money of the TNRL was being spent, they were not informed of negotiations that were being undertaken with the Government for financial assistance nor were they invited to functions that were staged for the national team.

[28] There were negotiations with the Government to provide financial assistance for the 2013 Rugby League World Cup. A Sports Grant Agreement was signed between the Government and the TNRL on 1 November 2013 by which stage the World Cup had already commenced. The representatives of TNRL who attended the event included Mr. Moheloa, Mr. Sika and Mr. 'Uhatafe but not the plaintiffs. As a result, Mr. Fangupo was asked to sign the agreement. This was an offer of conditional financial assistance in that the only purpose for which the money could be spent was for players' allowances and the TNRL had imposed upon it strict reporting obligations. The agreement noted that the TNRL's level of compliance with the terms and conditions of the agreement "will impact on any future consideration for conditional financial assistance".

[29] On 1 December 2013 Mr. Fangupo sent an email to Mr. Mataele (copied to Mr. 'Uhatafe, Mr. Moheloa, Mr. Sika and Mr. Taumoepeau) requesting that Mr. Mataele provide the TNRL bank statements for the past 6 months and that he bring them to the board meeting which was scheduled for 4 December 2013. He noted that if Mr. Mataele needed assistance in getting the information he should let Mr. Fangupo know so he could discuss the matter with the CEO of the ANZ bank, Mr. Owen Thompson. This request for information was repelled. Mr. Sika responded that Mr. Fangupo's request for bank statements showed disrespect to the committee and individuals on it. Mr. 'Uhatafe responded that the president was correct and, cryptically, that a report could be provided but that there was a process for providing such information. He also challenged the right of three of the board members, including Mr. Taumoepeau, to sit on the board.

[30] There followed yet more correspondence on 3 and 4 December 2013 in which Mr. Taumoepeau and Mr. Fangupo sought from Mr. Mataele a report on the 2013 World Cup. When, on 12 December 2013, Mr. Fangupo again wrote to Mr. Mataele asking him how he was progressing with the report and for a draft of it before it was sent to an auditor, Mr. Mataele responded that it was "not an easy job to do the financial report" and that only he, Mr. Moheloa and Mr. 'Uhatafe would be meeting to look at the

financial report before it was given to an auditor. He said that there was still a lot of work to do and that Mr. Fangupo's request to see a copy of the draft report "was not a good idea". Mr. Fangupo justifiably regarded this as yet another attempt to hide information from the directors and to exclude them from meetings. On 13 December 2013 he sent an email to Mr. Mataele, Mr. Moheloa, Mr. Sika and Mr. 'Uhatafe (and others) in which he said:

> Can you please email me the name of the person who is doing the audit and also minutes from the last Board Meeting as requested.
>
> Can you please explain to me why only Stan, Lopeti, and yourself are the only ones meeting on Monday to discuss Rugby League World Cup Financial Report and no other Board members have been invited to this meeting?
>
> Why is Misi, Nusi and myself not invited to this meeting?
>
> Please remember that we are ALL Board members for TNRL and we must all make decisions together as a collective group on behalf of TNRL Board not as individual groups. I know that Nusi and I did not travel to Rugby League World Cup with you but we are still part of the TNRL Board.
>
> I feel that since my involvement with TNRL as a Board member since elected at AGM in Jan/Feb 2013, I feel that only certain individuals on the TNRL Board are told certain things and the rest are kept in the dark, this needs to stop. ...
>
> Look at what I have just found out in the past 24 hours regarding TRL and BLK verbal agreement for AUD$100,000 of merchandise. First time I have ever heard about it! Where is that merchandise? and Who is benefiting from using TNRL merchandise?, definitely not the clubs who can't afford a ball and cones for there [sic] team trainings or the referees who turn up every week and never her [sic] rewarded for their efforts etc...
>
> I want to be part of this meeting with you, Stan and Lopeti on Monday and I would like Nusi to be also present. I know that you have had problems with Nusi in the past but let's get over it and move on and work together as a Board moving forward.
>
> Please advise what time meeting is on Monday and venue."

[31] There was no response to that email.

[32] Cash cheques continued to be drawn upon the ANZ bank account without board approval. On 1 December 2013 a cash cheque for T$3,000.00 was drawn which was presented for payment by Mr. Sika. On the same day another cash cheque for TOP$3,000.00 was drawn, which was presented for payment by Mr. 'Uhatafe. There were further cheques in favour of ASCO Motors during January and February 2014, again without board approval.

[33] On 10 February 2014 an email was sent by 'Onetoto 'Anisi of the Ministry of Internal Affairs to Mr. Moheloa complaining that the TNRL had not provided reports which were a condition of the Government financial assistance for the 2013 Rugby League World Cup. The email stated:

> This is NOT the first time to follow up this overdue acquittal report with your end. I hope this time around the acquittal reports will be provided to the Ministry of Finance as stated in the signed agreement.
>
> A legal action will be commenced to recover this, if there's no further progress receive from TNRL on the matter."

[34] The annual general meeting for 2014 was scheduled for 7 March 2014. On 27 February 2014 Mr. Taumoepeau emailed Mr. 'Uhatafe confirming the date for the meeting. Mr. 'Uhatafe responded that the report on the World Cup was not available and suggested that the AGM be postponed until 28 March 2014. Mr. Taumoepeau emailed Mr. Sika (copying other members of the board) requesting that the meeting proceed as planned. He wrote:

> It should be a board decision to delay such meeting and we feel that it is not a good enough reason stated by Lopeti to delay such meeting. The financial report to Gov't for the World Cup was due on the last week of January. Why do we have to delay the AGM because the said auditor for the report is busy, according to Lopeti. If he/she couldn't have made that deadline, why are the rest of the TNRL members have to wait for a report that essentially has no effect on the AGM. If I remember correctly, the TNRL financial report submitted by Lopeti have not been adopted by the last 2 AGMs. Why shall we wait for a TNRL financial report which I presume might be incomplete and probably inaccurate. Mr. President, you've emphasized in our board meetings how we need to be transparent and accountable as directors of TNRL board. You have led by example but unfortunately I feel that it is not so for our finances, which you are not a part of. I'm sorry Robbie but financial accountability for TNRL is practically zero because we do not know who handles the financial transactions and who actually manages TNRL finances. I, and a lot of other members and directors are looking forward to the AGM next Friday and we do hope that you, Mr. President, will call said meeting as scheduled. Please view this as in the best interest of TNRL and not a critique of any members of TNRL.

[35] The meeting proceeded on 7 March 2014 but no financial reports were presented either in relation to the World Cup or the TNRL finances generally. At that meeting a dispute arose as to the lawfulness of the 2012 changes to the Rules and there was no election of officers and the meeting was adjourned. Following the meeting, Mr. Taumoepeau wrote to Mr. Moheloa on 21 March 2014 asking if Mr. Moheloa would update the directors on the reports on both TNRL and World Cup finances. As he received no response to his email, on 26 March 2014 he sent an email to Mr. Sika in the following terms:

> Dear Mr. President,
>
> I and some of the TNRL directors are concerned with the current situation rugby league is in although you have done a tremendous job for league as President which we acknowledge and thank you.
>
> On behalf of these directors may I ask that you specify a time in which the AGM may be re-called. The AGM (held 7th March 2014) was dismissed because there was no TNRL annual audited financial report as well as the financial report for the 2013 Mate Ma'a Tonga world cup campaign, mainly the grant from Government. Government was due a report 2 months ago. It has been 4 months and yet no words on the status of an audited report supposed to be submitted to the board before submitting such to Government and the AGM.
>
> I enquired with the Chairman of the Board but he has not replied. When the Treasurer was asked when the report will be ready, he answered 'next week'.
>
> Mr. President, because of information and newsbits from the media about the World Cup finances, I'm concerned of this late submission of this report. I hope that a report be a truthful, audited account, according to the MOU signed between TNRL and Government. I am also concerned as it was yourself who tirelessly worked and obtained this grant, and in the hope it won't affect your good standing if this is an unreliable financial report. I wish that the Treasurer would give us a definite schedule of when we might have this report so we can re-call and complete the AGM. Thank you for your time.

[36] Mr. Taumoepeau said he received no response to this email either.

[37] On 3 April 2014 a letter was sent by members of the TNRL to Mr. Sika requesting elections, an audited financial report for 2013 and an audited financial report for the 2013 World Cup. The letter read:

> We the undersigned clubs are the Member clubs that participated in the only board approved Competition for 2013. We say that we are entitled to vote at the AGM for 2014.
>
> The AGM was adjourned for you to take legal advice on the Constitution and await the audited report for 2013 and the World Cup.

The following Member clubs have signed this letter requesting that we convene the AGM to complete the remaining items on the Agenda presented by Lopeti 'Uhatafe, where we want the following matters attended to and finalized as soon as possible:-

1. We want the AGM called and we want nominations for President, Vice President, Chairman, Vice Chairman, Directors, Secretary and Treasurer voted on at the 2014 AGM;
2. We the Members want to address the audited financial report for the World Cup 2014; and
3. We the Members want to address the audited report for the 2013 financial year and the Chairman's report for 2013.

We ask that you urgently table these matters for the TNRL because we want the AGM to be called and re-convened to finish all outstanding matters within 7 days from the receipt of this notice from the Member clubs.

We note that we the undersigned clubs had nominated Siliveinusi Taumoepeau as our candidate for Chairman and Tavake Fangupo as Secretary of the Tonga National Rugby League and we, being the majority clubs entitled to vote on this issue, we want this vote carried out within the time stated herein.

We ask that these things be carried out within the notice period, failing which we will instruct William Edwards to file proceedings with the Supreme Court of Tonga seeking the Orders. Further, we would also seek Orders to call for the election of ALL the OFFICES of the TNRL.

Respectfully signed,

Signed: Taufa Fukofuka
[Kolomu'a Rep]
Kolomu'a Chairman

Signed: Similoni 'Ilaiu
[Mu'a Rep]

Signed: Neo Fe'ao
[Ma'ufanga Rep]

Signed: Siuola Ma'ake
[Houmakelikao Rep]
Captain

Signed: Fitiola Tu'ifua
[Halaloto Rep]

Signed: Sione Kafatolu Ha'angana
[Ha'akame Rep]

Signed: Lupeni 'Otuhouma
[Navutoka Rep]
Rugby League

Signed: Fehoko Tu'ivai
[Fasi Rep] & Womens

Signed: Tevita Pole'o
[Vaini Rep]

[38] On 8 April 2014 a further cash cheque was drawn on the ANZ account of the TNRL, this time for the large sum of T$19,500. The cheque was signed by Mr. Moheloa and Mr. 'Uhatafe and it appears to have been presented for payment by Mr. Sika. The payment was not approved by the board, nor were any invoices/accounts or other documents presented to the board or to the court to defend it as a valid payment for the purposes of the TNRL.

[39] On 10 April 2014 Mr. Taumoepeau emailed Mr. Sika on the subject of the lack of transparency and accountability in the management of the TNRL. His email reads as follows:

> Mr. President,
>
> Ref: transparency and accountability
>
> Referring to the above words, those are words that you spoke of to the TNRL board when you became Pres. of TNRL. I believe that some of the current directors do not think that the administration of league is transparent and accountable. I and some of the directors feel left out of the decision making thus we felt we are not considered equal in this board, as we are constitutionally bound to. The decision making in TNRL is done by 2 or 3 people whereas it should be the whole board and its members. There has been a lot of differences because only a few directors know what is really going on in the TNRL and not all members.
>
> Since 2009, there have been questions and enquiries about the financial situations and reports for TNRL, reports that should be submitted to the board which they rightfully should know about. Financial reports submitted to AGMs have been unreliable and incomplete and if questioned, answers given are unreliable too.
>
> The few who make decisions for TNRL think they are the 'only' members of the board, disregarding the rest of us who were elected at the AGM. We find out about TNRL decisions after it has been decided without some of us directors.
>
> This has been going on for too long and it should stop. You've mentioned that we work together, but we are not privy to certain financial information that we should know about as board members and as a whole board. We, as a constitutionally elected board do not know the full administration of this board as we are required to. We've heard and knew of the alleged misappropriations of the Gov't grant for MMT, we are still waiting for this report and why has it taken so long to complete an audited report due 2 months ago? Why hasn't there been no mention of any report for the $60,000 mismanagement….those 2 persons whom you rely on to represent us at the RLIF AGM and to operate league here in the Kingdom….chairman of the board, Stan Moheloa and Lopeti 'Uhatafe, Secretary. It's because of these 2 that we are having arguments and differences about league for years.

> To remedy this, it's for you to recall the AGM so the clubs and the members may exercise their TNRL constitutional rights to elect who they think should administer and operate league, short and simple.
>
> This is a grave concern as league has suffered because we do not know who makes the call for league, the TNRL board or the chairman and the secretary and whom they favor."

[40] Mr. Taumoepeau's email did not receive a reply.

[41] On 29 April 2014 Mr. Taumoepeau wrote to Mr. Moheloa as a result of a decision that had been made without consultation with the board to exclude the Kolomu'a Warriors from competition. The email read:

> It has come to my attention that there has been unilateral decisions for TNRL made by yourself, Lopeti and Matani without the knowledge of the rest of the TNRL board. This is unacceptable and an affront to those of us board members who were constitutionally elected to represent the league clubs in the board. I had requested earlier in the month for a board meeting to discuss league issues and the incomplete AGM. We would have liked to discuss also the RLIF AGM. It is the board who decides who represents TNRL at this meeting, not a few directors. Most of the voting members of our AGM do not agree with you representing TNRL at the RLIF AGM. You do not represent the majority of the members who should have a say on who represents them in an RLIF meeting. Why aren't other directors advised of these decisions let alone a board meeting which is what you should have done. There is no transparency or accountability in how things are done in league locally. That is why the game has suffered in the past few years because you and a few other directors make decisions without the rest of us who are also entitled to be heard as TNRL board members.
>
> I've also received word that Kolomu'a Warriors has been disqualified from playing. Why? This should have been a board decision not by 2 or 3 people. Please, for the sake of the game, this is not right. You are punishing the players who are keen to play for unacceptable reasons. Kolomu'a Warriors would like to be heard on why they are disqualified. This is so unfair and I request that Kolomu'a be allowed to explain themselves to the board for any allegations that stipulated this decision by a few.
>
> I hope that we can resolve this through dialogue and if we can have the hearing this week."

[42] Mr. Moheloa responded on the same day and accused Mr. Taumoepeau of discrediting the TNRL and stated:

> "Without any doubt you have breached Resolution I and therefore you are suspended from the board and await further decision of the board."

[43] There was no attempt by the defendants to justify Mr. Moheloa's unilateral action in purporting to suspend an elected member of the board.

[44] On 5 May 2014 Mr. Moheloa was sent a letter by the Solicitor General which was a final demand by the Government that the TNRL comply with the conditional financial assistance agreement and provide reports to the Government on the use of its funds for 2013 Rugby League World Cup. The letter pointed out that under clause 3(g) of the agreement the TNRL was to submit, two months after the final day of the tournament, a report on how the financial assistance was utilized "including a financial report with invoices and receipts, and providing any further information on those reports as requested by the Ministry". The Solicitor General noted that the TNRL had failed on its commitments under clause 3(g) despite repeated requests by the Government. He wrote:

> As legal advisors to Government we hereby demand that within 21 days of receipt of this demand letter, TNRL must submit the final report in accordance with clause 3(g) of the Agreement. If the final report is not submitted within the 21 days than Government will immediately take legal action against TNRL."

[45] On 28 May 2014 Mr. Taumoepeau wrote to the treasurer asking what was the status of the TNRL and Rugby League World Cup financial reports, which were long overdue. The treasurer responded that "We still wait for the Auditor to complete her work to our report". Later that day Mr. Fangupo emailed Mr. Mataele and asked for the name and contact details of the auditor to impress upon the auditor that it was urgent and serious that the reports to Government and the members be provided. He said that if the auditor was too busy to do the work that he knew of two qualified auditors who were on standby who would do the work at no charge to the TNRL. This email was followed up by another email from Mr. Taumoepeau to Mr. Mataele asking:

> Who's the auditor please? If we can advise him/her of the urgency to complete the financial reports for Gov't and League as we await the AGM on these reports too.

[46] In what was now a clear pattern, Mr. Mataele dismissed the request and responded as follows:

> Sorry Nusi, you have no business to do that … it up to the chairman and Misi also the treasurer to do that … be patient and wait for the time that we complete the report ... why you guys trying for ... the auditor is the qualify auditor … thank for your help ... but we don't need that ...

[47] On 24 June 2014 this action was filed but that is not the end of the relevant narrative. On 14 August 2014 Mr. Fangupo emailed Mr. Sika (but copied Mr. Moheloa and others) about the failure by the TNRL to continue with the 2014 annual general meeting. He asked that the meeting proceed and the agenda be provided prior to the meeting. He said:

> We will notify you of the written nominations for persons to be elected into the officers of the TNRL – we will provide you nominations for President, Vice President, Chairman, Vice Chairman, Directors and Secretary. We hope that you would furnish us with your nominations as well ahead of the Meeting.

[48] The 2014 annual general meeting resumed on 14 August 2014. The validity of the 2012 changes to the Rules had not been determined. There was a discussion about the Rules under which the election of officers should be conducted. The matter was put to a vote with the majority voting to hold the election under the Rules as they were prior to the 2012 changes. Mr. Moheloa decided that the elections would have to wait for a court decision and they were therefore not held. As far as the financial report for the TNRL was concerned, Mr. Moheloa apologised to the meeting that it was not ready. The minutes record that:

> The Chairman of the board apologizes for not presenting the report. This is due to Auditor being away abroad on study and she has unable to complete the report. There was a letter from the Auditor confirming the above and apologize for her shortfall and will try to get a copy as soon as she could. The meeting obviously concerns with the long delay in providing the report. It was suggested that we should request the auditor to send an interim report as the Government has been waiting for the submission. Mr. Lutui also raised his concerns with this report as Government is chasing and could go to Court if nothing is done about it?

[49] The final matter recorded in the minutes was the election of a new secretary to replace Mr. 'Uhatafe who had died. A ballot was held which resulted in tied votes for two candidates. The minutes record that Mr. Moheloa purported to exercise a casting vote. This was challenged as having no constitutional basis in the Rules. The minutes record that Mr. Moheloa asserted a right to have a casting vote and his preferred candidate was declared the victor.

[50] On 12 December 2014 this action came before Cato J. who after a hearing made consent orders, to which I have already referred, striking down the changes to the Rules.

[51] Following the issue of the court ruling the annual general meeting was called on 13 April 2015 but again there was no election of officers. This meeting was adjourned because the secretary had failed to give proper notice of the meeting and there was still no audited financial report. A report was handed out at the meeting but this was simply a cash flow report relating to the first three months of 2015.

[52] In July 2015 Mr. Moheloa accepted from the ANZ bank a letter of offer to extend the TNRL's overdraft facility. The letter of offer is dated 31 July 2015 but it was signed by Mr. Moheloa on 6 August 2015. No board approval was obtained to accept this offer.

[53] Shortly before this case went to hearing, an auditor's report on the use of the Government grant to the TNRL for the 2013 Rugby League World Cup was disclosed by the defendants. The key findings in the report are that there was a failure by the TNRL to comply with the conditions of the grant as follows:

> *Non-compliance with Grant Agreement Section 3(a).*
>
> The grant's purpose was for "Tonga Rugby League World Cup player's allowance. It was identified that only 45% (TOP$111,536) of the total grant was disbursed as allowances. Of the total allowance payment, TOP$30,376 was paid as allowance to eight staff members. This is not in line with the condition of the fund. Therefore, only TOP$81,160 complied with the condition of the grant.
>
> *Non-compliance with Grant Agreement Section 3 (c).*
>
> Under this condition, the fund is not to be used on certain items including alcohol. In vouching expenditures, £497 (TOP$1,440) was spent on alcohol.
>
> *Non-compliance with Grant Agreement Section 3(d).*
>
> This condition requires TNRL to "keep and maintain in a proper orderly manner, in accordance with the internationally accepted accounting standards and practice, all administrative and accounting records regarding to the expenditure of the conditional financial assistance awarded under this Agreement." In voucher the expenditure, there were instances where no or partial supporting documents were available.

[54] The audit report provided recommendations as follows:

> That the Chairman of the Board and the Board should always ensure that disbursement of funds from any grants with condition, that the condition is adhered to at all times.
>
> That the Board consider reimbursing part of the ground that was not disbursed in accordance with the condition of the grant.

The issue of the plaintiffs' standing

[55] It is convenient to deal with this point now. Mr. Tu'utafaiva's argument was a narrow one. He referred me to an extract from the text by Mark von Dadelszen (2000 Ed) *Law of Societies in New Zealand* at page 152 which was referred to by Mr. Edwards in his opening statement as follows:

> Where a wrong is alleged to have been done to an entity the proper plaintiff is the entity itself. If a simple majority of members accepts a transaction which is alleged to be illegal in some way no individual may sue unless what has been done amounts to a fraud on the minority.

[56] Mr. Tu'utafaiva argued that the plaintiffs bring this action as directors of the TNRL and not as members and have not pleaded that the defendants' conduct amounted to a fraud on the minority without which the plaintiffs can have no standing. I do not accept this argument. The extract from von Dadelzsen's text has no relevance to this case. It is concerned with the circumstance where the members have by a majority ratified what would otherwise be an illegal act on the part of a society. There is no suggestion that has occurred in this case.

[57] It is well established that members of societies can bring matters to court, either by seeking judicial review or on the basis of an alleged breach of contract (*Gibson v New Zealand Land Search and Rescue Dogs Inc* [2012] NZHC 1320, [2012] NZAR 699 [*Gibson v NZ SAR Dogs Inc*]; *Finnigan v New Zealand Rugby Football Union (No 3)* [1985] 2 NZLR 181 (HC and CA)). The rights of a member were described in *Turner v Pickering* [1976] 1 NZLR 129 at page 141 as follows:

> It seems to be now established that the plaintiff can have enforceable rights of a contractual nature brought about by his membership of a voluntary association, including the right that its affairs will be conducted honestly and bona fide in accordance with its rules. It is no longer necessary for him to be protecting a private right of a proprietary character before he can ask the court to intervene; but public policy still suggests some limitation to exclude interference with associations of a wholly social nature or where it is clear that no legal relationships of any sort were intended between members.

[58] It is not the case that standing to intervene in the affairs of a voluntary association rests only with the members. In deciding whether a person other than a member has standing the court must look at the totality of the circumstances of the particular case. In *Finnigan v New Zealand Rugby Football Union Inc* [1985] 2 NZLR 159, Cooke P of the New Zealand Court of Appeal said, at page 178:

> In cases where an incorporated association is alleged to have acted against its objects but the plaintiff cannot show a contract, we think that all the circumstances have to be considered – case by case or category of case by category of case – in order to determine as a question of mixed law and fact whether or not he or she has sufficient standing. The law or practise relating to limited liability companies is not necessarily a helpful analogy in approaching these cases. The doctrine of ultra vires in company law was evolved mainly to protect investors and creditors. The same considerations are not easily transportable to cases where the raison d'etre of an organisation is not to make profits but to promote a certain activity.

[59] The Court's overarching objective is to do justice and remedy conduct of a body which is unlawful and this objective should not be frustrated by technical arguments regarding standing (*Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617 (HL) at 641 per Lord Diplock). One important circumstance where the Court will favour granting standing to a party is where there is no obvious or more suitable or likely party to bring the action (*The Great Christchurch Buildings Trust v Church Property Trustees* [2012] NZHC 3045 at [79]; *Oggi Advertising Limited v Auckland City Council* [2005] NZAR 451 (HC) at [13]). Other relevant factors include the importance of the issues raised and the effect

of the issues, not just on the parties, but on the community as a whole. *Finnigan* (supra) and *Church Property Trustees* (supra) are both vivid examples of the application of these principles. This does not mean of course that an applicant will be granted standing in every case. Standing will be refused if he cannot be said to have any real interest in the case or there is a lack of good faith or the issues are unimportant or shown to be clearly frivolous or untenable (*O'Neill v Otago Area Health Board* (High Court, Dunedin CP 50/91, 10 April 1992); *Church Property Trustees* (supra) at [69] and [80]).

[60] In this case, the plaintiffs and the defendants are closely associated with each other and with the members of the TNRL by virtue of their positions as officers under the Rules. The Rules provide for the appointment and membership of the board at clauses 7 and 8. Rule 7.1 states the officers of the TNRL are elected at annual general meetings. Rule 7.2 provides that the nominations for officers are to be made by any member except in the case of vacancies under Rule 7.5 which may be filled by the board subject to the appointment being confirmed at the next annual general meeting. Rule 9 sets out the primary duties of the directors and the board including managing the funds and affairs of the TNRL and to do such acts as are deemed necessary or expedient for carrying into effect the objects of the TNRL. The plaintiffs' interests as directors are therefore closely aligned with those of the members of the TNRL. Furthermore, the plaintiffs have an additional interest in ensuring that the affairs of the TNRL are run honestly and for proper purposes. It is not inconceivable that they might be personally liable to the TNRL and the members for the improper use of the TNRL funds. It is only right that they should therefore be able to take action to protect themselves and prevent or remedy unlawful conduct. Furthermore, as Mr. Edwards pointed out, they may also be personally liable for non-compliance with the requirements of the Act (section 23). As the Court of Appeal said in *Finnigan* (supra) at page 179:

> The plaintiffs cannot be dismissed as mere busybodies, cranks or other mischief makers

[61] What the plaintiffs allege in this case is that the defendants have used their positions to act against the objects of the TNRL, and in particular the obligations contained in Rule 4(a) to foster, develop, extend and govern the game in the Kingdom and Rule 4(d) to apply all income and property of the TNRL "solely towards the promotion of the objects of the [TNRL]". This action cannot be dismissed as a bearing on only administrative or internal management matters.

[62] Also, whilst the TNRL is a private and voluntary society there is a significant public aspect to this litigation. The TNRL administers the game of Rugby League on a national and international level and the actions that are subject to challenge have had and will continue to have a significant effect on the future of this game in the Kingdom. The fortunes of the TNRL are of significant interest to a wide segment of the Tongan community. Furthermore, as I have noted, some of the allegations concern the use of public money donated to the TNRL by the Government on terms which have not been honoured and which may affect the ability of the TNRL to obtain further financial support from the Government. Importantly also in my view, if the plaintiffs do not have standing to bring this action the reality is that there may be no effective way to hold directors of the board accountable. The plaintiffs say (and I accept) that despite being officers of the TNRL, there is good reason to believe that the funds of the society have been misused and any information concerning the financial affairs of the TNRL has

been withheld from them. At least some of the information provided to the board and the members, such as the 2012 financial report, was misleading and this would not have been discovered but for the actions of Mr. Taumoepeau. The members of the TNRL are heavily reliant upon the board to act honestly and supply them with accurate information concerning its affairs and cannot reasonably be expected to have the inclination or the means to make independent enquires to challenge the information that is provided to them.

[63] For these reasons I am satisfied that the plaintiffs have standing to bring this action.

The relief sought by the plaintiff

[64] In the amended statement of claim the plaintiffs have sought the following:

> [64.1] Interlocutory relief that the first, second and third defendants deliver up financial documents of the TNRL from 1 January 2012 and that the first and second defendants be removed as officers of the TNRL pending further order of the Court.
>
> [64.2] A declaration that the plaintiffs have the power to appoint a qualified auditor to undertake an audit of the financial accounts of the TNRL from 1 January 2012 to the date of the declaration.
>
> [64.3] A declaration that the first, second and third defendants account to the members of the TNRL for all finances of the TNRL.
>
> [64.4] A declaration that the first and second defendants be expelled as officers of the TNRL.
>
> [64.5] Any further Order that this court deems just and equitable.

Interlocutory relief

[65] A good deal of Mr. Tu'utafaiva's cross-examination of the witnesses and his legal submissions were directed against the granting of orders that the defendants deliver up financial records of the TNRL and be removed from office pending the hearing. This was unnecessary as the prayer was seeking discovery of documents (which was dealt with during the interlocutory stages of the action) and interlocutory relief for the removal of the first and second defendants pending the hearing only, which was not pursued. I need not say any more about this relief.

The appointment of a qualified auditor

[66] The plaintiffs seek a declaration that they are able to appoint a qualified auditor to undertake audits of the accounts of the TNRL for each year since 2012. Mr. Tu'utafaiva submits that the power to appoint an auditor rests with the board and not the aggrieved directors and accordingly the court should not make the order in the terms sought.

[67] Rule 9.1 provides that it is the board that shall manage the funds and affairs of the TNRL. The financial year of the TNRL is from 1 January to 31 December each year (Rule 10.1) and Rules 10.2 and 10.3 require that all moneys belonging to or received by the TNRL must be paid into its bank account and all accounts must be passed for payment by the board or a duly appointed sub-committee thereof. There is no suggestion that any such sub-committee was appointed in this case. The obligation of the board to have the accounts of the TNRL audited each year arises from Rule 10.6 which provides:

> The book of accounts of the Tonga National Rugby League shall be audited by the Auditor who shall have the power to call for the production of all books, papers, accounts, and documents relating to the affairs of the Tonga National Rugby Leave at any time.

[68] In Rule 1 "Auditor" is defined as meaning "the Society's Auditor" but there was no evidence that a qualified auditor has ever been appointed to report on the financial accounts of the TNRL since at least since 2012. Rule 15.1 provides:

> The Annual General Meeting of the Tonga National Rugby League which is the highest decision making body of the Tonga National Rugby League, shall be held in the month of February, or such time approved by the Board of Directors and endorsed at the Annual General Meeting, in each calendar year to receive the report and audited balance sheet of the Board of Directors for the preceding year and to elect officers. The report of the Board of Directors and the report of the financial statement of the Board shall be forwarded to each Member, Affiliate, Honorary Member or Life Member at least 14 days before the Annual Meeting.

[69] I accept Mr. Tu'utafaiva's submission that the auditor is to be appointed by the board and not an aggrieved director. However the objection he makes is a technical and arid one particularly as he also advises me that the defendants have no objection to the appointment of an auditor. The evidence established that since 2012 no auditor has been appointed in breach of the Rules and whilst the obligation to appoint an auditor rests with the board, any attempts by the plaintiffs to have an auditor appointed have been deflected or resisted. I am satisfied that without the intervention of the court no auditor will be appointed. Accordingly, I intend to direct that an auditor be appointed to report on the financial accounts of the TNRL for the 2012, 2013, 2014 and 2015 financial years.

That the first, second and third defendants account to the members.

[70] Mr. Tu'utafaiva submits that it has not been proved that the defendants fraudulently used the TNRL's money and that there was insufficient evidence for the relief sought to be granted. It is clear to me that the funds of the TNRL have not been managed in accordance with the Rules in a number of significant respects. Specifically, I am satisfied that not all money received for and on behalf of the TNRL has been paid into its bank account with the ANZ bank, that money of the TNRL has been used for purposes that were not authorised by the board and that Mr. Moheloa has incurred obligations on behalf of the TNRL without board approval also. It is not necessary for me to make any finding as to whether the defendants must account to the TNRL as I

understand from Mr. Edwards' memorandum to the Court of 1 April 2016 that this relief is no longer sought in this proceeding.

That Mr. Moheloa and Mr. Sika be expelled as officers of the TNRL

[71] Mr. Tu'utafaiva submits, and I agree, that under the Rules (Rules 8.3 and 21) it is for the board to decide if any member or official has been guilty of misconduct such that they should be expelled. There was no evidence that the matter has in fact been considered and voted on by the board or that the defendants had prevented such a vote from being taken. There was evidence from Mr. Fukofuka that a meeting was called to consider expelling the first and second defendants but that the meeting was adjourned when a fight broke out between Mr. Mataele and another director over another matter. In those circumstances I would not have made the order sought but again understand from Mr. Edwards' memorandum that it is not pursued in this action.

Other relief

[72] The Court may in its discretion award relief that it considers just, notwithstanding that it has not been specifically sought, provided that it is of a kind which arises from the statement of claim and there is no material prejudice to a defendant. The matter falls to be determined according to the interests of justice (*Belmont Finance Corp Ltd v Williams Furniture Ltd* [1979] 1 Ch 250 (CA)). In this case there is a need for the Court to exercise it discretion in two respects.

[73] First, the Rules require the election of officers each year at the annual general meeting. The orders made by Cato J were clearly predicated on the understanding that this would occur and required all officers to vacate their positions at each annual general meeting. In breach of the Rules and those orders, elections have not been held and the officers have not vacated their positions. It is necessary in my view for court intervention, as without it I am satisfied that the issues which divide the board will not be resolved and elections will not be held. Accordingly, the court will make orders for the election of officers to be held on terms to be finalised once I have heard further from counsel.

[74] Secondly, and as I have already noted, the evidence satisfies me that funds of the TNRL have been used without board approval in breach of the Rules. On 29 April 2016 I made orders to prevent this from continuing. In my view there is a need for those orders to remain in place pending the election of officers to which I have referred and I will so order.

[75] I have considered whether the granting of this relief will prejudice the defendants in anyway. I am satisfied that it will not. The granting of such relief imposes no obligations on the parties other than to comply with the terms of the Rules.

The result

[76] The plaintiffs are successful to the extent that this Court will make orders:

[76.1] For the appointment of an auditor of the accounts of the TNRL for the 2012, 2013, 2014 and 2015 financial years.

[76.2] Requiring the holding of elections for the officers of the TNRL.

[76.3] Preventing the use of funds of the TNRL pending the hearing of elections for any purpose not authorised by the board.

1030 [77] The specific terms of those orders will be finalised once I have heard further from counsel. Counsel are to confer to see if they can reach agreement and if so should submit a memorandum in writing to the court before the next hearing.

[78] This action will be called before me on Friday, 20 May 2016 at 9am at which time I will hear from counsel as to the terms of the orders that should be made.

[79] At the same time I will hear from counsel as to costs which in the interim I reserve.

Vea anor v Vea anors

Land Court, Nuku'alofa
Paulsen P
LA 22/2009

12 May 2016

Land law – consent orders – application by one party to vary – court did not have jurisdiction

On 5 February 2015 parties to a family dispute concerning a town allotment had the court make consent orders. On 17 March 2016 the defendants applied to vary or set aside those consent orders. They claimed that the plaintiffs breached the terms of the consent orders. The plaintiffs opposed the application. The principal issue was whether the court has jurisdiction to do so.

Held:

1. The court could not vary consent orders on the application of just one of the parties except in an ordinary action brought for that purpose. Where a consent order embodied an agreement which amounted to a contract between the parties the court would only interfere with it on the same grounds as it would any other contract.
2. If the defendants considered grounds existed they had the options to apply to enforce the court orders using the execution process available under the Rules; or commence an ordinary action to set aside the agreement upon which the consent orders of the court were based.

Rules considered:
Supreme Court Rules 2007

Counsel for the plaintiffs/respondents : Mr L Niu SC
Counsel for the defendants/applicants : Mr H Tatila

Ruling

[1] The defendants apply to vary or set aside orders of this court made by consent. The principal issue is whether the court has jurisdiction to do so.

[2] This is a family dispute concerning a town allotment known as Tavatu'utolu at Kolomotu'a. It was the subject of a substantive ruling of this court in 2010 but then following the making of an application by the plaintiffs for the issue of a writ of possession the parties had the court make consent orders on 5 February 2015. The orders were on the following terms:

1. A Writ of Possession is to issue from the Court on the terms attached.
2. The first defendant is the lawful owner of the dwellinghouse which is presently on the town allotment, Tavatu'utolu, Kolomotu'a.
3. The first defendant shall vacate the said town allotment, Tavatu'utolu, and his said dwellinghouse, together with his wife and family as ordered in the Writ of Possession issued today, i.e. within 30 days from today.
4. The first plaintiff may occupy and use the said dwellinghouse and may let or rent out the same to any person for an income for herself but only with the written consent of the first defendant as to such person and terms of such tenancy.
5. The first plaintiff shall carefully use and preserve the said dwellinghouse for the first defendant when she would pass away, and she shall properly insure the same against fire, earthquake and hurricane at all times.
6. The second and third defendants shall not remove any part of the house of the second plaintiff and anything affixed thereto but they may remove any other house or structure which they have built on it by no later than 30 days from the date of these orders.

[3] On 17 March 2016 the defendants filed this application. They say that the plaintiffs have breached the terms of the consent orders in that they have allowed a Fijian women and two other Tongan women to occupy the dwellinghouse without the first defendant's permission and have failed to insure the dwellinghouse against fire, earthquake and hurricane. In his affidavit the first defendant 'Aipolo Vea states:

> "That I am asking the Judge of the Land Court for an order setting aside Court Order of 5th February 2015 or varied and to vacate the dwelling house by the Fijian woman Nanise Likutabua and two (2) other Tongan women or any other people brought to the dwelling house by the first or second respondents and I and my family shall return to the dwelling house forthwith and if the first respondent shall return to Tonga then she is acceptable to come and reside with the applicants at the dwelling house."

[4] The application is opposed by the plaintiffs. An affidavit has been filed by the second named plaintiff, Semisi Vea, who says that the dwelling house is unfinished in important respects and it cannot be rented and is uninsurable. He says that insurance cannot be obtained due to the incomplete condition of the house and because there are no drawings or plans particularly with regard to the foundations and structural integrity of the dwellinghouse. Semisi Vea also deposes that a Fijian lady has been allowed to stay in the dwellinghouse to look after it but that it is not let or rented to her or anyone else due to lack of water and electricity and because the property is not fenced.

Jurisdiction

[5] The application must fail on the matter of jurisdiction. Mr. Tatila argues that the court can make the orders sought under O.13 rule 7 Supreme Court Rules. This is

plainly not the case. That rule applies where an applicant was not served with a copy of the relevant application notice and was adversely affected by the making of the order. It does not apply where orders have been made by consent.

[6] In my view the court cannot vary consent orders on the application of just one of the parties except in an ordinary action brought for that purpose. Where a consent order embodies an agreement which amounts to a contract between the parties (as is the case here) the court will only interfere with it on the same grounds as it would any other contract. (White Book 1998 Ed, Vol 2 at page 1268-1270).

[7] As I explained to Mr. Tatila, it appears to me that the defendants' options in this
90 case are:

[7.1] Apply to enforce the court orders using the execution process available under the Rules; or
[7.2] Commence an ordinary action to set aside the agreement upon which the consent orders of the court are based;

if they consider such grounds exist.

Result

[8] The application is dismissed.

[9] The plaintiffs seek costs. For the defendants, Mr. Tatila asks that costs lie where they fall.

100 [10] I had made the defendants' counsel aware of the problems facing this application at the last hearing. I am also told that before the hearing this morning an offer was extended by the plaintiffs that they would not seek costs should the application be withdrawn. Despite this the defendants chose to proceed with the application. It is only proper in those circumstances that the usual rule applies and that costs follow the event.

[11] The plaintiffs are to have their costs which shall be fixed by the Registrar if not agreed.

R v Naufahu

Supreme Court, Nuku'alofa
Cato J
Cr 14/2016

23 May 2016

Sentencing – grievous bodily harm and domestic violence – 5 ½ years' imprisonment with the final 18 months suspended

The prisoner and the complainant had been married for almost 30 years and had nine children. On 24 August 2015 the prisoner splashed a pot of hot water on the complainant's upper body. The complainant went to hospital where she was admitted into intensive care for 5 days. The burns had caused an airway obstruction which required her breathing to be supported by mechanical ventilation. She received 35 to 40 percent burns of her total body surface area. Permanent scars and damage has been caused to the complainant's hand and eye. The prisoner was charged with causing grievous bodily harm and domestic violence. He pleaded guilty and appeared for sentencing.

Held:

1. The appropriate starting point for the offence of grievous bodily harm was at the upper range of the 10 year maximum period. The principal sentencing rationale was the protection of victims of violence, deterrence of the prisoner and others in the community from this kind of offending towards women, denunciation of callous and cruel actions like this, and appropriate retribution. Afterwards he took no action to relieve her distress or assist her in any way. An appropriate starting point was 8 years imprisonment.
2. The mitigating factors were the early guilty plea, the fact that he was a first offender, he had been a member of the armed services, was involved with his Church, and provided for his family. Two and a half years were reduced from his sentence by way of mitigation. Because of his early plea, his age, and the fact he was a first offender and probably could be rehabilitated he was deserving of some measure of his sentence being suspended. He was sentenced to five and a half years imprisonment. The final 18 months of his sentence were suspended with conditions.
3. On the offence of domestic violence he was convicted and sentenced to 10 months imprisonment to be served concurrently.

Statutes considered:

Criminal Offences Act (Cap 18)
Family Protection Act 2013

Counsel for the Crown : Ms Tu'inukuafe
Counsel for the defendant : Mr Tu'utafaiva

Sentence

[1] The prisoner, Saia Naufahu, appears before me for sentence on one count of causing grievous bodily harm contrary to section 106(1) (2) (a) (c) or (d) of the Criminal Offences Act. He also appears for sentence on one count of domestic violence contrary to sections 28(1) (a) of the Family Protection Act 2013. The maximum sentence for causing grievous bodily harm is 10 years imprisonment and for domestic violence is 12 months imprisonment or a fine not exceeding $2000 or both.

[2] The facts of the offending were that the prisoner, who was married to the complainant for almost 30 years, had nine children with her, and they lived in Sopu. On the 24th August, 2015 at around 5:30am the complaint was in the kitchen preparing breakfast and lunch for the children. She stated that she was using her laptop whilst she waited for the food to cook. She heard the prisoner walk into the kitchen and placing a large pot on the stove and running water. After about 20 minutes, he returned and turned the stove off. The prisoner then carried the pot from the stove. The complainant walked out of the room and bumped into the prisoner as she made her way to the toilet. After she had finished in the toilet, she reached out to open the door when the prisoner splashed the pot of hot water on her upper body. He then walked away whilst she cried out to a relative in the house for help. The complainant went to the shower. The relative told the prisoner not to do anything else to the complainant as he went and put the pot back on the stove. The prisoner did not render any assistance to the complainant who went to the shower. A taxi was called for and the complainant went to hospital where she was admitted into intensive care for 5 days. The burns had caused an airway obstruction which required her breathing to be supported by mechanical ventilation. Medical advice is that she received 35 to 40 percent burns of her total body surface area. Permanent scars and damage has been caused to the complainant's hand and eye.

[3] In his probation report, and indeed initially to the probation office the prisoner suggested that the splashing of water was accidental although he had subsequently admitted it was not to police and on the 11th April 2016 had entered an early plea to both counts. I sentence him on the basis that his actions were deliberate and premeditatedly consistently with his pleas. The probation report throws some light on the offender and the nature of the relationship between him and his wife. It would seem, although initially a happy relationship, it had deteriorated over the years. The prisoner's drinking and controlling nature is mentioned in the report and also the fact that from time to time there appears to have been some domestic violence. The complainant also had extramarital affairs according to the probation report which appear to have been corroborated by a close relative. The complainant had attended a course of study in Vanuatu in about 2009 and it is suggested also that matters deteriorated after that. It seems plain that this marriage was unhappy and at times violent. Alcohol seems to have played a part and no doubt any marital affairs that the complainant became involved with contributed also to this discord. Mr Tu'utafaiva stated that the prisoner had arisen to find an email to a male friend of the complainant which he asserted was the trigger for the events of that morning.

[4] I consider an appropriate starting point for deliberately splashing boiling water on his wife must be in the upper range of the ten year maximum period. Mr Tu'utafaiva

accepted that his was so. His actions placed the complainant on life support for five days and a victim impact report states that she was in hospital for a month after that. She was obviously in great pain and the report indicates that not only she has residual physical effects from the incident but she has suffered understandingly marked psychological effects as well. It must have been a terrifying experience for her. Sadly, it would seem some of the children in the large family of nine seem to take the side of the father despite the cruel nature of their father's offending. This is probably because he has been the principal breadwinner in the family. The complainant feels unable to return to the matrimonial home although the prisoner is in custody, and plainly the actions of Mr Naufahu have had a very destructive effect upon her. I am told she has 4 of the children still requiring support with her and plans to file for divorce. I consider the sanctions of the prisoner, although perhaps motivated or triggered I suspect, by a long period of domestic discord, were both callous and very cruel. They were plainly premeditated.

[5] There is evidence in the probation report and in other documents from his family who have obviously been under great stress, his church and others of a person who has made a contribution to the community. He was in the armed forces for many years and ran what seems to have been a reasonably successful electrical business which is being carried on by members of his family. It seems the prisoner may display a personality that in public is at variance with that encountered by his wife in their private life, more commonly known as a Jekyll and Hyde personality, particularly, I suspect where alcohol has been involved. The principal sentencing rationale in cases like this is the protection of victims of violence, deterrence of the prisoner and others in the community from this kind of offending towards women, denunciation of callous and cruel actions like this, and appropriate retribution. Afterwards, I observe, he took no action to relieve her distress or assist her in any way. An appropriate starting point, in my view, is 8 years imprisonment. Had the injuries been any more serious, I would have been inclined to an even higher starting point. I do not think, and Mr Tu'utafaiva did not press this, that any marital infidelity or suggestion of this on the part of the complainant, reduces the objective seriousness of the offending, and I do not take this into account this in reducing the starting point.

[6] By way of mitigation I take into account the early guilty plea which has saved his wife the ordeal of giving evidence. I also take into consideration the fact he is a first offender, aged 54 and some in the community have spoken well of him. He has served Tonga in his capacity as a member of the armed services for a long time including overseas service on two occasions. He is involved with his Church. He has, it seems, provided as well as he could for his family (as their letter to the Court evidences) although their lives must have been adversely affected by his behaviour and drinking and no doubt occasions of domestic violence over the years. He has, it is said, in the probation report made an apology which has been accepted, although I rather doubt, having read the victim impact report, that this is really so. His wife seems to be very scared of him and has sought protection. I allow him two years and a half by way of mitigation. The sentence I pass on him is 5 and a half years imprisonment for grievous bodily harm backdated to the time of his remand in custody.

[7] I consider, however, because of his early plea, his age, and the fact he is a first offender and probably can be rehabilitated he is deserving of some measure of his sentence being suspended. In his case, I suspend the final 18 months of his sentence on the following conditions;

a. He is not to commit any offences punishable by imprisonment for two years;
b. He is during the time of his suspension to reside where directed by his probation officer;
c. He is not to communicate with or physically approach the complainant unless she has made it first known to his probation officer that she is willing to see him;
d. He is not to consume alcohol during the period of his suspension;
e. He is to attend a course under the direction of the Salvation Army and Probation on alcohol and drug abuse;
f. He is to attend a course on domestic violence and abuse under the direction of probation and the Women's Crisis Centre.

[8] He is warned that a failure to comply with any of these conditions may well see him returned to prison to serve the balance of his sentence.

[9] On the offence of domestic violence he is convicted and sentenced to 10 months imprisonment concurrent with count one.

R v Soafa

Supreme Court, Nuku'alofa
Cato J
Cr 5/2016

23 May 2016

Sentencing – attempted rape – attack in the complainant's home – 4 years' imprisonment with 12 months suspended with conditions

On 16 October 2015 at about 7:30pm, the complainant, a Japanese national working as volunteer, in Tonga aged 23 was at her rental home in Tofoa. The prisoner knocked on her door. He was intoxicated. He asked to use her phone to call his mother and was told to leave because the complainant was afraid. He then attacked the complainant. He forced her to the ground, pulled down her pants and underwear and tried to insert his penis into her vagina but she struggled and pushed him away. People who were passing heard her cries for help and knocked on the door. They saw the prisoner naked on top of the complainant and she struggling. The prisoner got up and escaped through the bedroom window, leaving some of his clothing and a mobile phone behind. He admitted to the offending when arrested by the police. He was aged 18 and pleaded guilty to attempted rape, serious indecent assault, and serious housebreaking.

Held:

1. The prisoner was remorseful and apologised to the complainant. She did not accept the apology. The court was satisfied that the prisoner understood and accepted responsibility for the seriousness of his offending. The maximum sentence was 10 years imprisonment. The court considered the appropriate starting point was 4 years.
2. Aggravating factors considered were that he attacked her and punched her in her own home. Protection of women from predatory behaviour, and in their own homes, deterrence to the accused and others, and denunciation of such offending were considerations which were considered in fixing an appropriate overall starting point for sentence. The starting point was increased to 6 years imprisonment.
3. The fact that the prisoner had been drinking may explain in part his criminal actions but they did not justify them and they did not assist him by way of mitigation. He pleaded guilty at an early opportunity and saved the complainant having to give evidence. He was a first offender and aged only 18. He had apologized, albeit that his apology has not been accepted, and he had shown some efforts to rehabilitate himself. For all these factors but most importantly his early guilty pleas, acceptance of responsibility and expression of remorse, he was allowed two years by way of mitigation.

4. The sentence imposed for attempted rape was 4 years imprisonment with the final 12 months suspended with conditions. The sentence imposed for serious indecent assault, touching her vagina without her consent, was 18 months imprisonment to be served concurrently with count one, and for serious housebreaking, he was sentenced to two years imprisonment concurrently with count one.

Case considered:
Langi v R [2014] Tonga LR 100 (CA)

Statute considered:
Criminal Offences Act (Cap 18)

Counsel for the Crown : Ms Tu'inukuafe
Counsel for the defendant : Mr Tu'utafaiva

Sentence

[1] The prisoner, Lopeti Soafa, aged 18 pleaded guilty to attempted rape contrary to section 4, 118(1) (a) and 120 of the Criminal Offences Act; serious indecent assault contrary to sections 124(1) and (2) of the Criminal Offences Act, and serious housebreaking contrary to section 173(1) (b) and 5 of the Criminal Offences Act.

[2] The agreed facts were that on the 16th October 2015 at approximately 7:30pm, the complainant, a Japanese national working as volunteer, in Tonga aged 23 was at her rental home in Tofoa. The prisoner knocked on her door. He was intoxicated. He asked to use her phone to call his mother and was told to leave because the complainant was afraid. He then attacked the complainant. He forced her to the floor and punched her face. He pulled her hair and pushed her on to a sofa. She screamed, and called out for help. He squeezed her neck and held her mouth to stop her from screaming. He forced her to the ground, pulled down her pants and underwear and tried to insert his penis into her vagina but she struggled and pushed him away. People who were passing heard her cries for help and knocked on the door. They saw the prisoner naked on top of the complainant and she struggling. The prisoner got up and escaped through the bedroom window, leaving some of his clothing and a mobile phone behind. He admitted to the offending when arrested by the police.

[3] The prisoner is a first offender. He seems to have suffered from the separation of his parents in 2006 and left school at about 15. He left in about the 4th Form. He seems to have got into the wrong company, and was working in the bush. He was drunk he said to his probation officer on the night in question. He claims to be remorseful, and has made apology to the complainant through the internet and to Japanese officials in Tonga who saw him. The complainant has not accepted this apology and was concerned to have email contact in Japan. He seems to have been involved with Church work subsequently and attended a four week course on Biogas with Youth with a Mission in March of this year whilst on bail. The report from University of Nations/ youth with a Missions and his Church leader's reference suggest that despite the seriousness of this offending, there is room for some optimism that he can reform. I am satisfied that he understands and accepts responsibility for the seriousness of his offending.

[4] I note that in *Langi v R* in [2014] Tonga LR, the Court of Appeal considered a general starting point for the offence of attempted rape was four years imprisonment, the maximum for this offence being 10 years. There, it seems the prisoner planned his attack after seeing the victim was out of contact with her companion and alone, there was repeated violence, the added humiliation of oral sex to avoid the rape and the protracted nature of events. These latter factors were seen as aggravating the eventual sentence for attempted rape to one of 7 and a half years after a guilty plea had reduced the starting point to three years.

[5] In this case, I consider also an appropriate starting point is four years imprisonment. I have no doubt that the object of the prisoner's gratification would have been achieved had he been less intoxicated and the complainant less robust in resisting his advance. He did not leave when requested but punched her and used forced to overcome her. He seems to have watched her enter into her house and used a deception to attempt to gain entry. Whilst he had been drinking, his actions were premeditated and purposeful. For attacking her and punching her in her own home, which I consider aggravating factors I increase the starting point to one of 6 years imprisonment. Protection of women from this kind of predatory behaviour, and in their own homes, deterrence to the accused and others, and denunciation of such offending are considerations which must be considered in fixing an appropriate overall starting point for sentence. This must have been a truly terrifying and humiliating experience for a young woman who had come to Tonga on voluntary service and who was returned to Japan by Japanese authorities after the incident. I have read the victim impact report and it confirms she was the victim not only of attempted rape but physical violence, that it has caused her to suffer adversely psychologically from the experience and plainly ruined her Tongan experience and her desire to serve here in Tonga. She does not accept the prisoner's apology for what she described, in my view appropriately, as these "horrible crimes".

[6] The fact that the prisoner had been drinking may explain in part his criminal actions that evening, but they cannot justify them and they do not assist him by way of mitigation. He has, however, pleaded guilty at an early opportunity and saved the complainant having to give evidence. He is a first offender and aged only 18. He had apologized, albeit that his apology has not been accepted, and he had shown some efforts already to rehabilitate himself. For all these factors but most importantly his early guilty pleas, acceptance of responsibility and expression of remorse, I allow him two years by way of mitigation. The sentence I impose upon him for attempted rape is accordingly one of four years' imprisonment, backdated to his remand in custody.

[7] He is I consider a good prospect for rehabilitation and I suspend the final 12 months of his sentence on the following conditions;

a. He is not to commit any offences punishable by way of imprisonment for two years;
b. He is on probation for 12 months;
c. He is to live where directed by this probation officer during this period;
d. He is not to drink alcohol on probation;
e. He is not to make any efforts to contact the complainant in Japan by any means whatsoever including emailing her;
f. He is to attend a course on alcohol and drug abuse as directed by probation and under the Salvation Army;

g. He is to attend a course on sexual abuse under the direction of probation and the Woman's Crisis Centre.

[8] I consider the facts objectively so serious that his sentence should not be reduced beyond the 12 month suspension that I have ordered. I have advised him that a breach of any of these conditions could see him returned to prison to serve the balance of his sentence.

[9] On the count of serious indecent assault touching her vagina without her consent, I sentence him to 18 months imprisonment to be served concurrently with count one.

[10] On the count of serious housebreaking, I sentence him to two years imprisonment concurrently with count one.

[11] I have asked that a copy of this sentencing judgment be forwarded to the complainant by appropriate means in Japan. The Court acknowledges the importance of young people and volunteers from many nations including Japan for the development of many facts of Tongan life and expresses the view that it is to be hoped that the complainant will in time be able to put to one side these events, and recall with fondness other aspects of her life and experience in Tonga.

R v Fang

Supreme Court, Nuku'alofa
Cato J
Cr 134/2015

23 June 2016

Sentencing – importing counterfeit goods – exercise books – fine of $13,000, reduced to $9,000 for guilty plea and first time offender

The defendant pleaded guilty to one count of importing counterfeit goods on behalf of a company of which he was one of the shareholders and a director. The substance of the charge consisted of a large number of exercise books of various sizes. The amount that would be required to produce such a large number of books which the defendant had imported on the 28 January 2014 was a substantial sum namely about NZ$4,000. This figure was supplied by Croxley Stationary Limited whose produce the books were falsely represented to be. The defendant had imported the books so as to be able to compete more profitably when they were sold in Tonga.

Held:

1. The maximum penalty was a fine of $100,000 or a term of 10 years imprisonment, or both. The defendant was a married man with no previous convictions, and he pleaded guilty. There were a number of shareholders of the corporate business but the defendant was the director and importer.
2. The fine imposed must reflect the retributive component and also be sufficient as a penalty to deter other importers who may be tempted to engage in importing counterfeit goods which could undermine the integrity of merchandising in Tonga as well as affect business.
3. A starting point for this size of importation of a product which was in considerable demand in Tonga and probably a first to come before the Courts in Tonga, was $13,000. That was a substantial figure. It would have been higher if the object of the importation had been realized by on sale. The figure was reduced for the guilty plea and also because the defendant was a first offender to one of $9000. That fine was to be paid within 48 hours of this judgment into Court; in lieu of payment, the defendant was sentenced to imprisonment for 6 months.

Statutes considered:

Criminal Offences Act (Cap 18)
Customs and Excise Management Act 2007

Counsel for the Crown : Mr Lutui
Counsel for the defendant : Mr Edwards

Sentence

[1] The defendant had pleaded guilty to one count of importing counterfeit goods contrary to section 94 (1) of the Customs and Excise Management Act 2007 on behalf of a company of which he was one of the shareholders and a director. The substance of the charge consisted of a large number of exercise books of various sizes. The amount that would be required to produce such a large number of books which the defendant had imported on the 28th January 2014 was a substantial sum namely about NZ$4,000. This figure was supplied by Croxley Stationary Limited whose produce the books were falsely represented to be.

[2] The defendant had plainly imported the books so as to be able to compete more profitably when they were sold in Tonga. The price that it cost to manufacture the goods in China was very significantly cheaper allowing the Company to have sold to retailers at a much lower price than it would have been able to do had they been from a legitimate source. Potentially Croxley and other suppliers could have been very seriously affected had the defendant succeeded in his object but Customs seized the product on delivery in Tongatapu and hence the defendant was not able to sell them.

[3] The prosecution suggested during the course of argument as to the appropriate sentence that the importation was an evasion of the Laws of Tonga applicable to manufacturing, were misleading of customers, had the potential to deprive the government, the manufacturer and private retailers of revenue, and in this case the import was substantial. The suggestion was advanced that counterfeiting of goods was becoming prevalent in Tonga, although it seems this is one of the first, if not the first to come before this Court.

[4] I accept however, the Crown's submissions that this is serious offending. The maximum penalty for this offending as reflected in section 94 (1) of the Customs and Excise Management Act 2007, renders a person liable upon conviction to a fine not exceeding $100,000 or to a term to imprisonment not exceeding ten years, or both. For this reason, having heard counsel Mr William Edwards and Mr Lutui for the Crown as to penalty I adjourned the sentence to consider what that penalty should be and deliver a written judgment.

[5] The defendant is a married man with no previous convictions, and he pleaded guilty. There were a number of shareholders of the corporate business but the defendant was the director and importer in this case. I was informed by Mr Edwards that the defendant was able to pay a reasonably substantial fine and could do so on sentence. It is plain that the offending has the potential to seriously harm the integrity of merchandising in Tonga, if as was suggested, this practice becomes prevalent. Such a practice would adversely affect retailers who source through legitimate channels and indeed it was as a consequence of such complaints that the matter has come before the Court, the goods being seized by Customs. I accept that there was no question of duty being evaded in this case since the books are non-dutiable.

[6] This Court has to impose a fine that fairly reflects the seriousness of the offending. First the fine must reflect the retributive component and in my view also be sufficient as a penalty to deter and put on notice other importers who may be tempted to engage in this kind of activity. I inquired of both counsel what was considered by them to be an appropriate fine, and Mr Edwards suggested $6000.00 Mr Lutui submitted an amount greater than 10,000.

[7] Had the importation been successful and the product reached its market and been subject to a complaint of this kind, then my starting point would have been higher. Further had a complainant been able to demonstrate a loss of sales as a consequence of having to compete with counterfeit goods which had been on sold then I would have entertained a claim that this should be reflected in an increase in penalty with, in addition to an appropriate fine, a payment by way of compensation to an adversely affected claimant under section 25 of the Criminal Offences Act if that claimant could demonstrate financial loss directly attributable to the importation and on sale into the market of counterfeit goods. As a consequence of the timely intervention of Customs, this was not required in this case.

[8] The fine I impose is intended to be one that reflects the seriousness of the offending and deter others from participating in such an activity which does undermine the integrity of merchandising in Tonga as well as affecting business. In my view, a starting point for this size of importation of a product which is in considerable demand in Tonga and probably a first to come before the Courts in Tonga, is $13,000. That is a substantial figure. As I have said it would have been higher if the object of the importation had been realized by on sale. I reduce this for the guilty plea and also because the defendant is a first offender to one of $9000.00. That fine is to be paid within 48 hours of this judgment into Court following discussions with Mr Edwards, who agreed that his client could make payment into Court forthwith. In lieu of payment, the defendant is sentenced to imprisonment for 6 months. Leave is granted for Mr Edwards to apply for a further short extension of time for payment in the unlikely event that his client is unable to pay the fine within 48 hours.

Tauelangi v Hemaloto

Supreme Court, Nuku'alofa
Paulsen CJ
CV 24/2015

30 and 31 May 2016; 1 July 2016

Civil law – question as to "gift" – unconscionability and undue influence considered – tractor was held to be a gift

A dispute arose over ownership of a Massey Ferguson 265 tractor ('the tractor'). The tractor was purchased in New Zealand in August 2013. It was paid for by the defendant, Vilisoni Paul Hemaloto (Vilisoni) and sent to Tonga for the plaintiff, Ma'asi Tauelangi ('Ma'asi'), to cultivate his land. In February 2015 Vilisoni asked to use the tractor. Ma'asi gave him permission to do so but since then Vilisoni has refused to return the tractor and has registered it in his own name. Ma'asi claimed that the tractor was a gift. He sought the return of the tractor and a direction that it be registered in his name and costs. Vilisoni denied that the tractor was a gift. He accepted that the tractor was purchased for Ma'asi but said they had an agreement that Ma'asi was to send him containers of food to reimburse him for the purchase price. As the containers of food were never sent he retained ownership of the tractor. Vilisoni has filed a counterclaim in which he sought a declaration that he was the owner of the tractor. The broad issues were: was the tractor a gift from Vilisoni to Ma'asi?, if the tractor was not a gift, was there an agreement that Vilisoni was to receive containers of food as reimbursement of the purchase price?, if so, did Vilisoni retain ownership of the tractor until the containers of food were received?, and if the tractor was a gift should the gift be set aside in equity.

Held:

1. The defendant's intention in offering to buy the tractor was entirely unconditional. He provided evidence that if he had not received the containers of food but had seen that the tractor was being used as he had imagined, he would not have taken the action he did. The receipt of containers of food grown using the tractor was not a condition of that. The court found that on the balance of the evidence the tractor was gifted by the defendant to the plaintiff.
2. A court could rely on its equitable jurisdiction to set aside a transaction that it considered to be unfair on the grounds of undue influence or an unconscionable bargain. Undue influence could take two forms. The first form arose in transactions when one party actually used their position to take advantage of another party and influence them to enter into the transaction. In the second form, there was a presumption that undue influence existed because of the type of relationship between the parties and

the nature of the particular transaction as one not ordinarily expected between parties in that relationship. The decision to make a gift of the tractor was due in large part to the fact that the plaintiff's brother, Father Tauelangi, was the defendant's priest.

3. Both Vilisoni's defence and counterclaim were incongruous with any reliance on equitable principles. His case was that he was to be reimbursed in full for the money he contributed to the purchase price of the tractor. That tended to negate any suggestion of unconscionability or undue influence.

4. There would be real prejudice to plaintiff in allowing equitable principles to be raised during the trial. The prejudice arose for two reasons: first, the plaintiff emphasised the closeness of the relationship between the defendant and Father Tauelangi to provide justification for the gift. If unconscionability or undue influence had been raised, counsel may have decided to run the plaintiff's case on a different basis altogether; secondly, if a presumption of undue influence arose then the plaintiff would need to rebut that. His case was not prepared on that basis. It could not be fair that he be expected to satisfy an onus that was not known to him at the outset of the trial.

5. The court found that the tractor was a gift to the plaintiff and he was the owner of it. The defendant was to return the tractor to the plaintiff within 14 days. The defendant was ordered to cooperate to provide for a transfer of registration of ownership of the tractor in the plaintiff's name. The defendant's counterclaim was dismissed.

Cases considered:

Allcard v Skinner (1887) 36 ChD 145 (CA)
Berry v Warnett (Inspector of Taxes) [1980] 3 All ER 798
Buttress v Johnson (1936) 56 CLR 113
Cheese v Thomas (1994) 1 WLR 129
Cochrane v Moore [1980] 25 QBD 57 (CA)
Commonwealth Bank of Australia v Amadio (1983) 151 CLR 447
Curtis v Curtis [2011] EWCA Civ 1602
Evans v Lloyd [2013] EWHC 1725 (Ch)
Fry v Lane (1888) 40 ChD 312
Haskew v Equity Trustees, Executors and Agency Co Ltd (1919) 27 CLR 231
Hatch v Hatch (1804) 9 Ves 292
Johnson v Buttress (1936) 56 CLR 113
Lancashire Loans v Black [1934] 1 KB 380
Langton v Langton [1995] 2 FLR 890
Linderstam v Barnett (1915) 19 CLR 528
Louth v Diprose (1992) 175 CLR 621
Meisels v Lichtman [2008] EWHC 661 (QB)
O'Rorke v Bolingbroke (1877) 2 AC 814
Royal Bank of Scotland Plc v Etridge (No 2) (2002) 2 AC 773

Counsel for the plaintiff : Mr S Tu'utafaiva
Counsel for the defendant : Mrs F Vaihu

Ruling

The issues

[1] This is a dispute over ownership of a Massey Ferguson 265 tractor ('the tractor'). The tractor was purchased in New Zealand in August 2013. It was paid for by the defendant, Vilisoni Paul Hemaloto (Vilisoni) and sent to Tonga for the plaintiff, Ma'asi Tauelangi ('Ma'asi'), to cultivate his land. In February 2015 Vilisoni asked to use the tractor. Ma'asi gave him permission to do so but since then Vilisoni has refused to return the tractor and has registered it in his own name.

[2] Ma'asi claims that the tractor was a gift. He seeks the return of the tractor and a direction that it be registered in his name and costs. Vilisoni denies that the tractor was a gift. He accepts that the tractor was purchased for Ma'asi but says they had an agreement that Ma'asi was to send him containers of food to reimburse him for the purchase price. As the containers of food were never sent he has retained ownership of the tractor. Vilisoni has filed a counterclaim in which he seeks a declaration that he is the owner of the tractor.

[3] During closing submissions I raised with Counsel whether, should it be found that Vilisoni gifted the tractor to Ma'asi, the gift could be set aside in equity as being an unconscionable bargain or the result of undue influence. This was not pleaded by Vilisoni. Neither Counsel had considered the matter and I called for submissions. I have now received the submissions and will address this matter later in this ruling.

[4] The issues can be broadly stated as follows:

[4.1] Was the tractor a gift from Vilisoni to Ma'asi?
[4.2] If the tractor was not a gift, was there an agreement that Vilisoni was to receive containers of food as reimbursement of the purchase price?
[4.3] If so, did Vilisoni retain ownership of the tractor until the containers of food were received?
[4.4] If the tractor was a gift should the gift be set aside in equity

The facts

[5] 'Ofa Tauelangi is Ma'asi's brother and a Catholic Priest. I will refer to him as Father Tauelangi although I understand he is presently taking time out from his religious duties.

[6] In 2013, Father Tauelangi was serving as an assistant priest in a Catholic Church in Auckland, a position which he held for five years until September 2014. Vilisoni and his wife, Malia Hemaloto ('Malia'), had lived in New Zealand for approximately 30 years until returning to Tonga in 2015 and were members of Father Tauelangi's church. On all accounts, they were devoted parishioners and shared a close relationship with Father Tauelangi. Both said that Father Tauelangi was welcome at their home and he frequently visited and received assistance from Vilisoni and Malia. They cooked meals for him, did washing and let him rest at their home and watch television. The evidence suggests that Vilisoni and Ma'asi were acutely aware of Father Tauelangi's position in the church and held a strong belief that it was their responsibility to care for him in any way they were able to. At some stage, Vilisoni and Malia became aware that Father

Tauelangi's family in Tonga required financial assistance from him and expressed their general willingness to help Father Tauelangi and his family.

[7] On or about 24 July 2013, Ma'asi travelled from Tonga to New Zealand with the intention of obtaining a tractor and returning with it to Tonga. He said that he had previously discussed this with his brother as a way to generate food and an income for his family in Tonga. He had no money for a tractor and was entirely dependent on Father Tauelangi to purchase the tractor.

[8] It appears that, aware of Ma'asi having arrived in New Zealand, Vilisoni asked Father Tauelangi whether Ma'asi needed anything. Father Tauelangi told Vilisoni that his brother was a hard-worker and was able to grow crops to feed his family and sell in Tonga, but needed a tractor in order to do so. During a visit to Vilisoni's house, Father Tauelangi looked on TradeMe and found a Leyland tractor for sale with a reserve price of NZ$4,000. It was thought this could be purchased for NZ$7,000 but where that figure came from was never properly explained to me. It is unclear whether Ma'asi was present. However both Ma'asi and Father Tauelangi gave evidence that although they intended to buy the Leyland tractor, and Father Tauelangi said he had the money to do so, Vilisoni talked them out of it and said the Leyland tractor was not good enough. Their evidence was that Vilisoni said that Ma'asi should help him with some painting work at his home and he would purchase him a better tractor.

[9] Malia gave evidence that she agreed with Vilisoni that they would purchase the Leyland tractor for Ma'asi. However she said she was concerned about doing so due to the added pressure that would be placed on her to increase her work hours so that she could provide for her own family as she and Vilisoni have six children of their own. Vilisoni was retired, although I understand on receipt of compensation due to an injury sustained at work.

[10] Vilisoni and Malia gave evidence that they invited Father Tauelangi and Ma'asi to their house for dinner. This was before the tractor was purchased. Vilisoni said that during the evening he, Ma'asi and Father Tauelangi discussed the arrangement in greater detail. Malia heard only parts of the conversation from the kitchen. Vilisoni said that he, Father Tauelangi and Ma'asi agreed that he would purchase a tractor for Ma'asi in return for the shipment of containers of crops back to Vilisoni in New Zealand in late 2014. It is not clear how many containers were to be sent to Vilisoni, who seemed to believe that there would be one or two containers which he would sell, keeping enough of the proceeds to reimburse himself for the purchase price of the tractor and send the remaining funds back to Father Tauelangi's family. He also said that Father Tauelangi was aware that he was in the process of painting part of the interior of his house at the time, and arranged for Ma'asi to go to his house the next day to assist him. Both Ma'asi and Tauelangi resolutely deny that there was any discussion or agreement regarding containers of crops. They say that Father Tauelangi said he would purchase the Leyland tractor and it was only because of Vilisoni's persistence that Ma'asi and Father Tauelangi agreed to let him help to purchase a tractor. As noted they say it was Vilisoni who asked that Ma'asi help with the painting and Ma'asi did go to Vilisoni's house and assist with some painting but it was probably for no more than a day or two.

[11] There is no dispute that at some later stage it was Vilisoni who suggested that Ma'asi and Father Tauelangi go with him to the Tractor Centre at Pukekohe to look at suitable tractors. They went on 30 August 2013. It was there that the three men saw the Massey Ferguson tractor. After the tractor was taken for a test-drive, Ma'asi and Father Tauelangi stated that they liked the tractor and the decision was made that they would purchase it. The price was NZ$15,000.00. New tyres were also purchased at a price of NZ$1,350.00. Father Tauelangi said he told Vilisoni that he wished to pay part of the purchase price and cost of the tyres but allowed Vilisoni to pay it in whole because of his insistence that he would do so. Ma'asi's evidence is to the same effect.

[12] Vilisoni stated that he purchased the tractor as he felt he could not tell Father Tauelangi that they needed to look for a different, less expensive tractor. He also said that he thought he would be able to get reimbursed from the crops he was to receive. The invoice and receipt for the tractor was made out in the name of 'Ofa Tauelangi (Father Tauelangi). Vilisoni claims that Father Tauelangi signed the purchase papers while he was looking at the tyres, but did not object to this when he realised. The tractor stayed at the Tractor Centre for another three to four weeks to be repainted, which Father Tauelangi paid for at a cost of NZD$2,000.00. Father Tauelangi claims that during this time he spent a further NZD$3,600.00 for further maintenance works to be carried out on the tractor.

[13] The tractor was then transported to Tonga in a container provided by Maika Haupeakui, an uncle of Ma'asi and Father Tauelangi and arrived in Nuku'alofa on 4 November 2013. In his bundle of documents Ma'asi provided invoices dated 5 November 2013, which he paid, from the Tongan Ministry of Revenue and Customs and Dateline. Ma'asi took possession of the tractor sometime after this date but never registered the tractor.

[14] Vilisoni said that he returned to Tonga on a number of occasions between November 2013 and his relocation to Tonga in 2015. This included a visit in December 2013 and three visits during 2014. He stated that on each occasion he visited Ma'asi and he observed that the tractor had been used only to transport material to Ma'asi's property but had not been used to cultivate any land or grow crops. When he asked Ma'asi about this, Ma'asi responded that he did not have the necessary ploughing equipment to use the tractor to cultivate land. Vilisoni claimed that on one of these occasions he asked Ma'asi about the containers of crops and when he would receive them, to which Ma'asi responded by requesting a further sum of money to put towards clearing trees on his property. Vilisoni refused to give him the money.

[15] In early 2015, Vilisoni and Malia relocated to Ma'ufanga. On or about 16 February 2015, Vilisoni again went to Ma'asi's house, this time to ask if he could borrow the tractor to mow lawns on the property of the Noble Fakafanua. Ma'asi and his parents agreed to this. However Vilisoni did not return the tractor and continues to hold it. He has also registered it in his name. Ma'asi said Vilisoni ignored his repeated requests for the return of the tractor.

[16] During the trial, Vilisoni stated that when he took possession of the tractor he purchased ploughing equipment and has since been able to cultivate 40 acres of land and grow enough cassava to send a container to Australia and to sell food at a market in Tonga each day. He said that he has employed three workers whose wages he has paid with the income generated by the use of the tractor.

Credibility of the witnesses

[17] There are disputes between the parties as to the circumstances surrounding the purchase of the tractor and, importantly, whether there was any agreement that Ma'asi would send containers of crops to Vilisoni. I should say something of my assessment of the credibility of the witnesses.

[18] Ma'asi did not provide plausible responses to some questions asked during his cross-examination. For instance, he was unable or unwilling to say whether TOP$20,000.00 was a substantial amount of money in reference to the amount of his annual salary (which is a much smaller amount). He provided inconsistent evidence regarding the time he spent painting Vilisoni's house, stating first that he worked for a period of one or two weeks and then on further cross-examination that it was for approximately three or four days. On several occasions he stated that his intention had been to start using the tractor but that Vilisoni had then taken the tractor from his land. However, he provided no evidence of any steps he had taken to acquire the equipment he claimed was necessary to operate the tractor. On the whole I found Ma'asi to a guarded but not a dishonest witness.

[19] Father Tauelangi was an uncooperative witness but I do not consider he was dishonest either. He was however evasive on occasions and if he did not like questions put to him he would avoid answering them or answer them with a question. I do not accept what Father Tauelangi said that he felt pressured by Vilisoni to let him purchase the tractor. My experience of him is such that he could easily have refused Vilisoni's offer had he wished to do so. Sadly for a man in his position, Father Tauelangi seemed quite willing to benefit his family in Tonga at the expense of Vilisoni and Malia.

[20] Vilisoni and Malia both gave evidence. I have no doubt Malia was an honest witness but she could say little that was relevant to this proceeding except as to the depth of her relationship with Father Tauelangi. Vilisoni however was not a good witness. His evidence was unclear and confused on the important matters such as in relation to his explanation of the amount that he had told Father Tauelangi and Ma'asi he was prepared to pay for the tractor and also as to what exactly was agreed about the sending of crops. Vilisoni stated in his brief of evidence that Ma'asi was a stranger to him, which clearly was not the case as it is not disputed that he had painted Vilisoni's house. He also stated that the purchasing of the tractor was not a big deal for him when clearly it was. Vilisoni became emotional and defensive at times also. I believe that this was because of his understandable extreme disappointment that his generosity to Ma'asi and his family has been so badly abused rather than out of any attempt to mislead the court. However his emotion has I believe distorted his view of what actually occurred. On the whole where there is a conflict in the evidence I prefer the evidence of Ma'asi and Father Tauelangi over the evidence of Vilisoni because it simply seems more plausible in the circumstances of the case.

Was the tractor a gift

[21] Mr. Tu'utafaiva submitted that the tractor was purchased and given to Ma'asi as a gift with no arrangement for repayment by crops or otherwise. He argued that the parties never agreed that containers of crops would be sent to Vilisoni and that the painting work Ma'asi did was not an exchange of services for the tractor, but simply a sign of Ma'asi's appreciation for the gift.

[22] Mrs. Vaihu submitted that the tractor was not a gift and was given in return for crops. She accepted that if the Court felt the tractor was a gift then that was an end of the matter and Ma'asi must succeed on his claim. Unfortunately the statement of counterclaim pleads that the tractor was a gift. Mrs Vaihu sought to amend the word "gift" (at [18]) which she said describe only the feeling with which the tractor was given to Ma'asi and not the circumstances of the arrangement for the purchase of the tractor.

[23] Property is gifted by one person (donor) to another (donee) when the donor voluntarily and gratuitously transfers the property to the donee without receiving consideration and with no intention that the property will be returned to them (*Berry v Warnett (Inspector of Taxes)* [1980] 3 All ER 798 at 811). A gift of property is effective when the donor intends it to be gifted and the donee receives the property; there can be no gift without the giving and taking of property (*Cochrane v Moore* [1980] 25 QBD 57 (CA) at 76).

[24] It is necessary to examine Vilisoni's intentions as a gift will only be effective where it is intended to be gifted by the donor (*Meisels v Lichtman* [2008] EWHC 661 (QB) at [71]). Vilisoni claimed that he purchased the tractor for Ma'asi on the understanding that he would receive crops that had been grown using the tractor. He stated that he did not intend for Ma'asi to retain the tractor if this did not occur. Vilisoni's evidence about what was discussed was cursory and unsatisfactory. He said that the matter was discussed at the dinner table but even if that was so, and Ma'asi and Father Tauelangi deny it is so, I do not believe that in the circumstances anyone, including Vilisoni, would have taken those discussions as imposing a legal obligation on Ma'asi to send crops. Vilisoni's relationship with Father Tauelangi was close and his intention in offering to buy the tractor was entirely unconditional in my view.

[25] Malia's evidence does not assist because she admittedly did not hear what was discussed except she said that there were references to tax allotments. I have no doubt that she is correct as there clearly must have been discussions between Vilisoni and the other two men about how Ma'asi would use the tractor and how it would benefit his family.

[26] Of particular importance is Vilisoni's evidence that if he had not received the containers of food but had seen that the tractor was being used as he had imagined, he would not have taken the action he did. This statement accords with my overall impression of Vilisoni and assessment of his motivation for purchasing the tractor. Vilisoni sought to assist Father Tauelangi and understood that purchasing a tractor for his brother would relieve many of the pressures placed on him by his family in Tonga. The receipt of containers of food grown using the tractor was not a condition of that.

[27] I find that on the balance of the evidence presented to me the tractor was gifted by Vilisoni to Ma'asi.

Are there grounds to support the setting aside of the arrangement in equity?

[28] My finding above makes it unnecessary for me to decide the issues in paragraph [4.2] and [4.2] but it does leave outstanding the issue of whether the Court may set aside the gift in equity. Although I have decided that I should not do so I will say something about the law which will help explain the conclusion I have reached.

[29] It is well established that a Court may rely on its equitable jurisdiction to set aside a transaction that it considers to be unfair on the grounds of undue influence or an unconscionable bargain (*Buttress v Johnson* (1936) 56 CLR 113, 134; *Commonwealth Bank of Australia v Amadio* (1983) 151 CLR 447, 461, 474; *O'Rorke v Bolingbroke* (1877) 2 AC 814, 822-3). In *Louth v Diprose* (1992) 175 CLR 621 at page 627, Brennan J described the common basis of the two doctrines as follows:

> They both depend upon the effect of influence (presumed or actual) improperly brought to bear by one party to a relationship on the mind of the other whereby the other disposes of his property. Gifts obtained by unconscionable conduct and gifts obtained by undue influence are set aside by equity on substantially the same basis.

[30] Both doctrines are applied to ensure that transactions do not unjustly enrich one party at the expense of the other. Nevertheless, Mason J expressed the difference between the two doctrines in the Australian case of *Amadio* at page 461 in the following terms:

> Although unconscionable conduct in this narrow sense bears some resemblance to the doctrine of undue influence, there is a difference between the two. In the latter the will of the innocent party is not independent and voluntary because it is overborne. In the former the will of the innocent party, even if independent and voluntary, is the result of the disadvantageous position in which he is placed and of the other party unconscientiously taking advantage of that position.

[31] In the case of unconscionable dealings, the Court's enquiry is focused on the stronger party's conduct in attempting to take advantage of the disadvantageous position of the other party to the transaction. In the *Amadio* case at page 474, Deane J found that the following matters must be established for a transaction to be considered unconscionable:

> (i) a party to a transaction was under a special disability in dealing with the other party with the consequence that there was an absence of any reasonable degree of equality between them and (ii) that disability was sufficiently evident to the stronger party to make it prima facie unfair or "unconscientious" that he procure, or accept, the weaker party's assent to the impugned transaction in the circumstances in which he procured or accepted it.

If this can be shown, the stronger party will have the burden of proving that nevertheless, the particular transaction was fair, just and reasonable (*Fry v Lane* (1888) 40 ChD 312, 322). If they are unable to do so and it is possible for the parties to be placed in their original positions, the Court may set aside the transaction.

[32] The basis of the Court's jurisdiction to intervene in cases where undue influence arises was described by Dixon J in *Johnson v Buttress* (1936) 56 CLR 113 at page 134 in the following way:

> The basis of the equitable jurisdiction to set aside an alienation of property on the ground of undue influence is the prevention of an unconscientious use of any special capacity or opportunity that may exist or arise of affecting the alienor's will or freedom of judgment in reference to such a matter.

The doctrine is used by Courts to ensure that people are protected "from being forced, tricked or misled in any way by others into parting with their property" (*Allcard v Skinner* (1887) 36 ChD 145 (CA) at pages 182-3).

[33] Undue influence can take two forms (*Johnson v Buttress* at page 134). The first form arises in transactions when one party actually uses their position to take advantage of another party and influence them to enter into the transaction. In the second form, there is a presumption that undue influence exists because of the type of relationship between the parties and the nature of the particular transaction as one not ordinarily expected between parties in that relationship (*Allcard*, 185; *Royal Bank of Scotland Plc v Etridge (No 2)* (2002) 2 AC 773, 798-800).

[34] Established categories of presumed undue influence include but are not limited to that of parent and child (*Lancashire Loans v Black* [1934] 1 KB 380) and solicitor and client (*Hatch v Hatch* (1804) 9 Ves 292). Of relevance to the present case is the presumed undue influence category of religious superior and member (*Allcard v Skinner*).

[35] Until 2013 there was English case authority to the effect that the doctrine of unconscionable bargains did not apply in cases involving gifts (*Langton v Langton* [1995] 2 FLR 890). However, that approach was not followed by Keyser J in *Evans v Lloyd* [2013] EWHC 1725 (Ch).

[36] In *Allcard v Skinner*, it was held that the presumption of undue influence attaches to relationships of religious influence. This is of course important in this case because there is no doubt that Vilisoni's decision to make a gift of the tractor was due in large part because of Father Tauelangi's position as his priest. In *Allcard*, Lindley LJ described the nature of the relationship, going so far as to state at page 183 that:

> …the influence of one mind over another is very subtle, and of all influences religious influence is the most dangerous and the most powerful, and to counteract it Courts of Equity have gone very far. They have not shrunk from setting aside gifts made to persons in a position to exercise undue influence over the donors, although there has been no proof of the actual exercise of such influence.

[37] The presumption can be rebutted if it can be shown that the allegedly stronger party "took no advantage of the donor, but that the gift was the independent and well-understood act of a man in a position to exercise a free judgment based on information as full as that of the donee" (*Johnson v Buttress* at page 135). The Court must be satisfied that the gift was the result of the donor's independent will; it is not enough to show that the donor understood the transaction (*Allcard v Skinner* at page 171). The burden of proving this to the Court rests with the donee (*Curtis v Curtis* [2011] EWCA Civ 1602).

[38] While such an assessment must necessarily take account of the particular circumstances arising in each case, the English and Australian courts have identified a number of factors that are of particular relevance. Evidence that the donor received independent advice prior to making the gift is not essential to rebut the presumption and will be given different weighting depending on the circumstances of the case (*Haskew v Equity Trustees, Executors and Agency Co Ltd* (1919) 27 CLR 231, 235). For instance, there is Australian authority that undue influence may still be found to have existed even if independent advice was received if it does not appear to have affected the transaction (*Linderstam v Barnett* (1915) 19 CLR 528). Both the conduct of the donee and the fact that they did not receive any personal benefit from the transaction have also been noted as potentially relevant considerations (*Allcard v Skinner* per Cotton LJ; *Cheese v Thomas* (1994) 1 WLR 129, 138).

[39] Turning to this case, I have decided that it would not be just to allow Vilisoni to rely on equitable principles to challenge the gift. He did not rely on them in his statement of defence and counterclaim or in the case that he presented to the court. Whilst this court will, so as to do justice between parties, often take a less rigid approach to matters of pleading than might be expected in other jurisdictions a line has to be drawn somewhere. The court's leniency cannot extend in this case to allowing Vilisoni raise a previously unrecognised counterclaim after the conclusion of the evidence.

[40] Both Vilisoni's defence and counterclaim were incongruous with any reliance on the equitable principles to which I have referred. His case was that he was to be reimbursed in full for the money he contributed to the purchase price of the tractor. That tends to negate any suggestion of unconscionability or undue influence.

[41] It is now clear to me that there would be real prejudice to Ma'asi in allowing these matters to be raised. This prejudice arises for two reasons. First, Mr Tu'utafaiva's approach to this case was to emphasis the closeness of the relationship between Vilisoni and Father Tauelangi to provide justification for the gift. If unconscionability or undue influence had been raised he might well have decided to run the plaintiff's case on a different basis altogether. Secondly, in the circumstance of this case, particularly the relationship between Father Tauelangi and Vilisoni, a presumption of undue influence will arise which Ma'asi would need to rebut. His case was not prepared on that basis. It

cannot be fair that he be expected to satisfy an onus that was not known to him at the outset of the trial.

Result

430 [42] Ma'asi is successful. I find that the tractor was a gift to him and he is the owner of it. Vilisoni is to return the tractor to Ma'asi within 14 days of the date of this ruling. I also direct that Vilisoni is to cooperate to provide for a transfer of registration of ownership of the tractor in Ma'asi's name.

[43] Vilisoni's counterclaim is dismissed.

[44] In relation to costs, Ma'asi has obtained much from the generosity of Vilisoni. It may well be that upon reflection the parties feel that it is not necessary for me to make any determination on costs. However, if any party wishes to apply for costs they may file a memorandum within 14 days with 7 days for any reply.

R v Iketau

Supreme Court, Nuku'alofa
Cato J
Cr 99/2015

8 July 2016

Sentencing – sodomy and indecent assault on child under 12 – apology not accepted by family of complainant – three years with final year suspended

On or about 22 June 2015 at Lapaha, the complainant was home alone and doing some laundry. She walked to a kava club house near her property to get some pegs for her laundry. The accused then entered the kava house clasping his hand over her mouth and strangling her to prevent her screaming. He then pulled down her plants placed his penis in her anus and copulated. He forced her to kiss and suck his neck. She ran straight home crying and a complaint to the police followed that day. The complainant was under 12 and the accused was 17. The accused was charged with sodomy and indecent assault of a child. The maximum sentence for sodomy was ten years imprisonment, and for indecent assault on a child under the age of 12, seven years imprisonment.

Held:

1. The accused was a first-time offender from a large family. He did not proceed very far at secondary school and was unemployed relying on his parents. His mother described him as otherwise well-behaved and disciplined and a person who preferred to remain at home. His parents were missionaries. He was remorseful. Apologies were not accepted by the family of the complainant. Acceptance of an apology either with or without financial reparation was an important sentencing factor.
2. The appropriate starting point for sodomy was four years imprisonment. This was based on the five years starting point which the Court of Appeal said was appropriate for rape which carried a maximum sentence of 15 years. The starting point of should be increased to four and half years for the associated violence. It would have been higher had the accused been older.
3. As mitigating factors the court considered his guilty plea, the fact he was a first-time offender, his youth and his statement of remorse. For the sodomy, he was convicted and sentenced to three years' imprisonment. For indecent assault, he was convicted and sentenced to 12 months imprisonment to be served concurrently with sodomy. The final 12 months of his sentence for sodomy was suspended with conditions.

Statute considered:
Criminal Offences Act (Cap 18)

Counsel for the appellant : Name
Counsel for the respondent : Name

Sentence

[1] Sione Iketau is charged with sodomy contrary to section 136 of the Criminal Offences Act and indecent assault of a child contrary to section 125 of the Criminal Offences Act. The maximum sentence for sodomy is ten years imprisonment, and for indecent assault on a child, under the age of 12, 7 years imprisonment. Because this is the first case of sodomy known to the prosecution in a case of this kind, I have recorded my oral sentence given on the 7th July, 2016, in this written judgment.

[2] The complainant was aged under 12 when the offences were committed. The accused was aged 17. She was living with her parents, who despite expressions of remorse being tendered to them by the accused and his family, and money which their daughter would not accept, they are understandably still very angry about the accused's offending, and do not accept the apology. At the time of the offending, the accused had been staying with a relative who is a neighbour of the complainant. He was about to return to his family in Ha'apai when the offending took place.

[3] The agreed summary of facts are that, on or about the 22nd June, 2015 at Lapaha, the complainant was home alone and doing some laundry. She walked to a kava club house near her property to get some pegs for her laundry. The accused then entered the kava house clasping his hand over her mouth and strangling her to prevent her screaming. He then pulled down her plants placed his penis in her anus and copulated. He forced her to kiss and suck his neck. She ran straight home crying and a complaint to the police followed that day. The accused, in his probation report, suggested he had formed a relationship with the complainant but I do not accept this. I consider he opportunistically forced himself upon a much younger complainant.

[4] The accused is a first-time offender from a large family. I have read the probation report. The accused did not proceed very far at secondary school and is unemployed relying on his parents. His mother described him as otherwise well behaved and disciplined and a person who preferred to remain at home. His parents are missionaries. The probation report indicated he is remorseful. I have already observed that apologies have not been accepted by the family of the complainant. Acceptance of an apology either with or without financial reparation is an important sentencing factor in Tonga.

[5] I consider an appropriate starting point for sodomy is 4 years imprisonment. I base this on the five years starting point which the Court of Appeal has said is appropriate for rape which carries a maximum sentence of 15 years. In my view, the starting point of 4 years should be increased to four and half years for the associated violence. It would have been higher had the accused been older.

[6] I allow him mitigation for his guilty plea, the fact he is a first offender, his youth and his statement of remorse. For the sodomy, he is convicted and sentenced to three years' imprisonment. For indecent assault, he is convicted and sentenced to 12 months imprisonment to be served concurrently with sodomy. The sentences are backdated to the date of his remand in custody. I recommend that consideration is given to his sentence being served in Ha'apai where his parents are working as missionaries.

[7] The final 12 months of his sentence for sodomy is be suspended on the following condition;

a. He is not to commit any offences punishable by imprisonment for a period of 2 years.
b. He is placed on probation for 12 months and is directed to live where his probation officer directs.
c. He is not to associate directly or indirectly with the complainant during that period.

R v Timani

Supreme Court, Nuku'alofa
Cato J
Cr 32/2015

8 July 2016

Criminal law – grievous bodily harm – self-defence pleaded – defence failed – accused guilty

On 7 February 2015 the accused joined the complainant's group and all were drinking. Angry words were exchanged and the accused walked home. He returned to the area with a large knife. The complainant and the accused fought and then the accused pulled the knife from his pocket and stabbed the complainant. The accused was charged with causing grievous bodily harm. He pleaded self-defence.

Held:

1. The Crown had to prove that the accused wilfully did an act which caused grievous harm. The court found beyond reasonable doubt that the accused's act of stabbing was wilful, drunk though the accused may have been.
2. The court did not accept beyond any reasonable doubt that the accused told the truth when he said in evidence he used the knife in self-defence; that is in the honest belief that it was necessary to stop and force the complainant back. The stabbing was beyond a reasonable doubt an act that was not carried out in self-defence.
3. The accused was convicted of causing grievous bodily harm and was remanded in custody for sentencing.

Cases considered:

Azuelo v R [2009] Tonga LR 149 (CA)
Palmer v The Queen [1971] AC 814

Statute considered:

Criminal Offences Act (Cap 18)

Counsel for the Crown : Ms S Kausea
Counsel for the accused : Mr O Pouono

Verdict and reasons

[1] The accused was charged with one count of causing grievous bodily harm contrary to section 106 (1) and (2) (a) of the Criminal Offences Act.

[2] The particulars were;

> On or about the 7th February 2015 at Navutoka he did cause grievous harm to Tesimoni Funaki when he wilfully and without lawful excuse stabbed him with a knife causing injuries to the back and right lung.

[3] In order to succeed in this conviction, the Crown has to prove the following essential ingredients namely;

> a. That the accused beyond any reasonable doubt wilfully and without lawful justification stabbed the complainant in this case it is alleged with a knife.
> b. Second that this caused the complainant grievous bodily harm meaning, in this case, harm that endangered life.

[4] The evidence is in a very narrow compass. The complainant Tesimoni Funaki gave evidence that on or about the 7th February 2015, he was drinking with friends on the foreshore near a bench in Navutoka. He had, he admitted, a lot to drink and was drunk but he still had his wits about him. They had been drinking from bottles of spirits which had been watered down.

[5] Later that evening, the accused joined them. He took what seemed to be the remaining bottle away with him without permission. That had been retrieved but there were at least angry words exchanged between he and one of the members of the complainant's group who had taken the bottle from him before the accused walked to his home nearby. Later, he came back to the area from his home armed with a large knife. He was seen by another witness unrelated to this group Sepiuta Mu'a who was also in the beach area. She tried to get the knife from him under a pretence because she was concerned about him. He did not give it to her and moved back to the area where Tesimoni Funaki was.

[6] According to Funaki, he challenged him to a fight. The accused disputed this and said it was Funaki who challenged him. Funaki said he was angry with him and that he agreed to fight. The men fought adjacent on the road. It seems a few punches were thrown by each when the accused on his own admission pulled the knife from where he had placed it in his back pocket and, as the complainant bent forward, he stabbed him in the upper and mid area of the back a few inches below the neck with his right hand. The complainant thought he had been punched. According to the complainant the fighting lasted about 20-30 seconds. He said he did not throw any punches after what he thought had been a punch to his back. He started to have difficulty with breathing. His friends had intervened and stopped the men fighting. One of the men had the sense to arrange for the complainant to be taken quickly to hospital. There, he was able to be operated on and drips placed into his body. Blood and air that had entered through a perforated lung was able to be extracted and the operation was successful.

[7] Dr Vea from the hospital gave evidence of the steps that had been taken by surgeon who had performed the operation. He said that without the operation the complainant could have died within one to two hours. The force used in his opinion to penetrate into the lungs deep through skin and muscle would be significant. Looking at the knife that

had been produced in evidence, he considered that the length of the penetration to puncture the lung would have meant the blade would have penetrated to the area where in the photographs exhibited the blade area appears to be taped. He said the complainant had been in hospital about 12 days and made a full recovery.

[8] Sepiuta Mu'a gave evidence also of being in the area and seeing the accused with a bottle of alcohol which one of the complainant's group a man, by the name of Semi, took back from him. The accused and Semi swore at each other. Later she said the accused returned to his house nearby and came back with a knife and walked towards the area where the men were drinking. He said, according to her when asked about the knife, that it was to get some raw fish. He stood on the road and she said he was challenged by the complainant to a fight. The complainant advanced forward. She said she saw the accused throw some punches. The complainant ducked towards the complainant and their bodies connected. She intervened with others. She did not know the complainant had been stabbed until later but she saw the accused only with the handle and she found the blade nearby. She later gave these to the police having taken them first it seems with the accused to his home.

[9] The accused gave evidence. He said he had been drinking a lot earlier in the day, spirits with friends. He admitted joining the complainant's group and taking a bottle of liquor which one of the complainants' group, Semi, came and took it back. He said he went and got a knife from his home because he was going to get some food from his uncle. He admitted joining in a fight with the complainant. Although he initially maintained he had not intended to hit the complainant with the knife that was in his back pocket, he eventually admitted this in questioning by the Crown prosecutor. He said he did this because he wanted to stop him and force him back. At that stage, the accused had his head bowed and he held him by his left arm and brought the knife out of his pocket and stabbed him with his right arm. He admitted he was left with the handle. The knife had broken during the stabbing and he had thrown the blade to the ground. He said the blade produced in evidence was not the same. It was shorter and not as wide. He denied he had the knife with him to deliberately challenge the men.

Submissions

[10] Mr Pouono, in written submissions, appeared to submit that the Crown had to prove not only an intention by the accused to do an act but also an intention to do an act that was intended also to cause grievous bodily harm. That is not, however, the case. All that the Crown has to prove is that the accused wilfully did an act which caused grievous harm.

[11] Further, he submitted that self-defence applied. He submitted that I should accept that the accused honestly and instinctively used force that he thought was necessary to harm the complainant because he felt he would be overwhelmed by the complainant.

[12] The Crown, Ms Kausea, submitted this could not be a case of self-defence. Ms Kausea submitted that the complainant was a much smaller man than the accused and had been engaged in what he thought was a one on one punch up. Both men at the time of the stabbing were upright. Neither had got the better of each other.

[13] She submitted that the accused could not have honestly believed that the force was necessary given the circumstances leading up to the fight. During the fight she said the accused was able to hold the complaint's head restraining and grabbing his hair before he used the knife stabbing him on the back. He had no need to stab the accused and self-defence should not succeed.

Findings

[14] I find that the complainant and the accused and probably others associated with them had all been drinking and were probably drunk on the evening in question. However, all I find were able to act quite purposefully and I do not find that alcohol, whilst it may have played a part in fuelling the anger of the complainant and the accused, that evening, it did not affect the intent or actions of the accused that night. I have considered this in relation to the issue of whether the accused's act of stabbing was wilful and beyond any reasonable doubt I find that it was, drunk though the accused may have been. The accused admitted in evidence that he intended the stabbing and from his actions I infer beyond doubt he must have carried out the stabbing wilfully. In short, when the accused admitted that he withdrew his knife from his rear pocket and used it to stab the complainant in the back whilst his head was forwards, that his was an intentional or wilful act. Both men up to that point had freely engaged in what was a short fight, with both men throwing punches with seemingly little harm to either prior to the stabbing. The complainant, who is a well-built man, is considerably smaller in stature than the accused who is both a well built and taller man. At the material time, when the knife was introduced both men were upright and there was no suggestion that either were getting the better of the other, as the Crown Prosecutor pointed out.

[15] I have had cited to me passages from Halsbury 4th ed, Reissue vol (1) at par 456, *Palmer v The Queen* [1971] AC 814, at 832 and considered in *Azuelo v R* [2009] Tonga LR 149 (CA), which I have read.

[16] I have considered the evidence on this aspect of self-defence. First, I reject the accused's explanation that he took the knife from his property to take to his uncle's that evening for food. By that time, the accused had taken away from him a bottle of alcohol which he had apparently stolen from the complainant and his group, and there had been an angry exchange of words. I do not see why he should bother to take a knife to his uncle's home and not use one from there if food was his object. I consider he picked up a knife because, fuelled with alcohol and angry at being deprived of the bottle he had taken, he was anticipating there might be more violence that evening and wanted to ensure he was armed. The knife, which the accused said was not the blade of the knife he used was plainly well able to inflict the very serious and life threatening wound that was inflicted by the accused. I do not find credible either his assertion that the blade produced was a different blade, smaller in size and of less width. The blade plainly, in my view, that was used in the stabbing was picked up from the scene by the witness Sepiuta Mu'a who was nearby the fighting. She said that she picked it up at the scene of the fighting and had given to the police. The knife broke during the stabbing as the accused admitted and the accused had retained the handle. I consider the accused deliberately told a lie in his evidence because he well knew that he knife he used was capable of causing serious injury and he wished to minimize his responsibility. I consider that the accused that evening was spoiling for a fight. Had he not been, I see no reason why he would have gone back to the area where he knew the men were, aware that there was already demonstrated bad blood between them.

[17] I do not accept beyond any reasonable doubt that the accused told the truth when he said in evidence he used the knife in self-defence; that is in the honest belief that it was necessary to stop and force the complainant back. At that point, there was nothing to suggest that the complainant had got the better of the accused who was a bigger man, or indeed that the accused could not have disengaged easily from the fight before resorting to what was a strike with significant and potentially lethal force. I do not consider beyond a reasonable doubt either, that this was a situation where the accused, being attacked, in a moment of unexpected anguish, had done what he honestly and instinctively thought was necessary. He could have easily resisted the complainant's forward and head down movement by, if not simply disengaging from him, by pushing him or punching him away. Accordingly, I find that the stabbing was beyond a reasonable doubt an act that was not carried out in self-defence. It was an unreasonable response and one that I consider beyond reasonable doubt could not have honestly been considered by the accused to have been necessary and or reasonable in the circumstances for his defence.

[18] The wilful act of stabbing beyond any reasonable doubt was life threatening and unlawful and, accordingly, the accused is guilty of the crime of causing grievous bodily harm under section 106 of the Criminal Offences Act.

Verdict – Guilty

[19] The accused is convicted and remanded in custody for sentence. A probation is ordered.

[20] Postscript

I have been asked by Mr Pouono to incorporate in my judgment, my concerns that during the hearing it became apparent that a significant part of the record of interview had been lost. The office in charge explained that when he gave the documents to prosecutions, shortly after the offending, the record of interview was present, in its entirely. The first he knew it was not was shortly before this trial. The first the prosecution knew about this was shortly before this trial when it became apparent to the present prosecutor, Ms Kausea, that pages were missing. Inquiries of Prosecutions by the Officer in charge of this case, have failed to locate the missing pages. The trial file or file of record that I hold also has missing documents. I have asked the Attorney General to approach the Commissioner of Police to ascertain what can be done to promote the better security of important documents such as records of interview. At the very least, copies should be made of them and held in a separate file. That was not the case here and I understand is not current police practice. I record also that, at Mr Pouono's request, I excluded the record of interview, the voluntary statement and the charge sheet on the grounds of fairness. Although in this prosecution, the failure to be able to produce a complete document did not in my view cause any irreparable injury to either party, in other cases, the damage may be far more telling.

R v Sa

Supreme Court, Nuku'alofa
Cato J
Cr 12/2016

19 July 2016

Sentencing – rape and serious housebreaking – starting point 7 years and 9 months – discount of 2 years and 9 months for mitigating factors – final 12 months suspended

On 25 September 2015 between 2 and 3 am, the prisoner broke into the complainant's house and raped her at knifepoint. He was 17 at the time and pleaded guilty to rape and serious housebreaking. He appeared for sentencing.

Held:

1. The starting point for sentencing was fixed at seven years and nine months imprisonment. The complainant was pregnant and her two children were nearby. He used a knife to intimidate her after unlawfully entering her house. The sentence imposed must reflect the seriousness of the offending and be one that denounced and deterred the prisoner, and was protective of women.
2. In mitigation the court considered his early guilty plea, his youth, the fact he was a first-time offender, his expression of remorse, his apology which was accepted and the family gifts. The complainant made a plea for leniency. The court allowed two years and nine month discount.
3. For rape he was sentenced to 5 years with the final 12 months suspended with conditions. On the offence of serious housebreaking he was sentenced to three years' imprisonment to be served concurrently with the rape sentence.

Case considered:

R v Holani [2016] Tonga LR 63

Statute considered:

Criminal Offences Act (Cap 18)

Counsel for the appellant : Name
Counsel for the respondent : Name

Sentence

[1] The prisoner, Paneti Sa, is a 17 year old who appears before me on sentence for one count of rape contrary to section 118(1) Criminal Offences Act, and one count of serious housebreaking contrary to sections 173(1) (b) and (4) of the Criminal Offences Act. He had earlier pleaded guilty to both counts.

[2] The complainant was a 27 year old housewife residing on Tongatapu. The prisoner also resides in the same area. On the 25th September 2015, between the hours of 2 and 3 am, the complainant was still awake in her home. Her children were asleep. She heard someone walking around her house and went to her children's bedroom and slept with them. Whilst she was asleep, she felt someone pulling her. She woke up and was told to turn around. When she was finally awake, she saw the prisoner holding a knife. The accused told her to take down her clothes. She screamed and woke her children up. The accused threw her on to a bed in another room and told her to face down. The complainant told her to be careful because she was pregnant. He took off his clothes and she felt his penis on her buttocks but it was not erect. The prisoner aroused himself and told her to place his penis inside her vagina but she could not. Her children were crying out calling her name. The prisoner then pointed a knife at her and told her to face up. She was very scared and did what she was told. He then pointed the knife at her chest and told her to widen her legs and he then inserted his penis into her vagina. Whilst raping her, he tried to kiss her. She pushed him away. He ejaculated. He walked away and put the knife on the table. She then realised that it was one from her kitchen. She took her children to a neighbour's after she left. On the next day, she reported the matter to the police. I have read a victim impact report which evidences that the trauma has seriously affected both the complainant and her husband. No harm however, came to the baby. I have also listened to the complainant in Court, as she bravely recounted her experience and said she forgave the complainant, and indeed asked for leniency for him. Some gifts have been made by the family in the Tongan way.

[3] The prisoner is now 18. He has no previous convictions. He had been drinking. He is the youngest of a large family. His parents work at a plantation and his mother as a domestic. He left school in the fifth form having failed to pass National examinations. He is unemployed. He has expressed regret.

[4] The starting point, assessed objectively, must reflect the aggravating circumstances that are present here and be well above the usual starting point of five years. The Crown cited to me *R v Holani* [2016] Tonga LR 63, where I had sentenced a young man who had broken into the complainant's residence to four years and nine months imprisonment suspending the final year on conditions. In that case, the starting point I assessed as being 7 years, because of the aggravating feature that he had broken into the complainant's home in the early hours of the morning and there committed the crime of rape. I expressed the view that a woman was entitled to feel safe in her home. Home invasions accompanied by sexual offending I have found not uncommon in Tonga possibly as a consequence of the limited security many homes have. Holani had no previous convictions. He was drunk at the time of the offending. He also co-operated with police and pleaded guilty. He was given two years and three months mitigation for his early guilty plea, his previous good character and the fact that gifts had been given to the victim.

[5] In this case, the offending was objectively worse. Known to the prisoner, the complainant was pregnant and her two children were nearby. He used a knife to

intimidate her which he had obtained from the kitchen after unlawfully entering into the house. The starting point I fix at seven years and nine months imprisonment. The sentence that I impose must reflect the seriousness of this offending and be one that denounces and deters the prisoner and others from this kind of offending, and is protective of women.

[6] From this, I give a substantial discount, however for his early guilty plea, his youth (he was several years younger than Holani at the time of the offending), the fact he is a first offender, his expression of remorse, his apology which was accepted and for the family gifts. I also take into account the complainant's plea for leniency. I allow him two years and nine months discount in mitigation. The sentence I impose upon him is 5 years for rape, backdated to the time he was placed in custody.

[7] I suspend the final 12 months of this sentence also. He has expressed remorse, has pleaded guilty, and is young. He has accordingly some prospect of rehabilitation. As against this, however, is the predatory and callous nature of his crime which militates in my view against any greater suspension. The conditions of his suspension are;

a. He is not to commit any offences punishable by imprisonment for a period of two years;
b. He is placed on probation for the period of his suspension;
c. He is to live where directed by his probation officer;
d. He is not to drink alcohol;
e. He is to attend courses under the direction of probation on drug and alcohol rehabilitation and in relation to the sexual abuse of women.

[8] Should he fail to abide by these conditions, he shall render himself liable to return to prison to serve the suspended portion of his sentence.

[9] On the offence of serious housebreaking, in this case, a home invasion prior to his committing a serious crime, he is sentenced to three years' imprisonment to be served concurrently with the rape sentence and backdated.

R v Finau

Supreme Court, Nuku'alofa
Cato J
AM 6/2016

21 July 2016

Appeal against dismissal of charges – concern with Magistrate's approach – appeal allowed and case to be retried
Criminal defamation – defence to prove truth as well as that publication was for the public benefit

Criminal defamation proceedings were brought against the respondent for a publication on the internet using Facebook. The Magistrate dismissed the case and the Crown appealed that dismissal.

Held:

1. Under criminal defamation the legislation provided that the truth of the alleged defamatory words were not a defence, unless it was further proved by the accused that the publication was for the public benefit. The Magistrate considered that the words were true but did not turn his mind to the issue of whether publication was for the public benefit.
2. The appeal was allowed and the case was remitted back to the Magistrate's Court for retrial.

Statute considered:
Defamation Act 1988

Counsel for the appellant : Mr Kefu, Acting Attorney General

The respondent in person

Crown appeal against dismissal of proceedings

[1] The appellant appeals against the dismissal of criminal defamation proceedings brought against the respondent for a publication on the internet (facebook) to the following effect;

> "That was the ugly thing between the father and daughter and mothers you are sisters go and tell your father to talk about this curse that I am telling you, living curse."

[2] The complainant laid under section 2 of the Defamation Act 1988 was that these words referred to Sione Makihele and caused hatred and ridicule against him.

[3] The publication was made by the defendant in a facebook publication which was cited by a number of persons who gave evidence that they had seen the publication.

[4] The Crown appeal is not directed here at the merits of the dismissal but at what it asserts are material irregularities in the Magistrates' approach to the case. Mr Kefu, in his written memorandum of argument, explained that the police have been advised that it is only the most serious instances that criminal proceedings for defamation should be commenced; otherwise the parties should be left to their civil remedies for defamation.

[5] Mr Kefu raised three concerns here with the Magistrates' approach;

i. That he failed to give any reasons for his apparent decision that the summons was defective;

ii. That he failed to assess first if the words were capable of being defamatory of the complainant. Mr Kefu submitted he had failed to assess whether there was evidence of actual defamation of the complainant in the view of the persons who read the published words.

iii. The Magistrate had assessed whether the allegation made against the Complainant were true and after accepting that the allegations were true, and what he had done to his cousin masturbating in her presence on 4 different occasions) was not "good" because they were related and he said should have respect for one another, he then acquitted the respondent without giving reasons for doing so.

In this regard, Mr Kefu submitted the approach was wrong because under criminal defamation, section 7 provides that the truth of the alleged defamatory words are not a defence, unless it is further proved by the accused that the publication was for the public benefit. Mr Kefu submitted that the Magistrate failed to make inquiry as to whether the publication was for the public benefit.

[6] I have attempted to make sense of the evidence, the submissions of the prosecutor, the defence submissions and the Magistrate's judgment but have had great difficulty in doing so, even allowing for the fact that these have been transcribed from Tongan to English for this Appeal.

[7] Mr Kefu is correct when he submits that the summons was not defective or at least so defective that this should have meant that the proceedings were dismissed on this ground, if indeed that was intended by the Magistrate. Mr Kefu acknowledged that the correct section was section 5 of the Defamation Act and not section 2(1) of the Act as the summons mentioned which is the definition section. I agree with Mr Kefu, however, that the summons was sufficiently clear as to what the particulars of the defamation were so that the defendant was not prejudiced in her defence.

[8] The second submission was that the Magistrate had not determined that the statement was defamatory. In my view, the Magistrate also failed to direct himself at all as to whether in terms of section 2(1) the writing, printing or otherwise item put into visible form of any matter damaged the reputation of another or exposed another to hatred, contempt or caused him to be shunned. Gatley on Libel and Slander, (1981), states at paragraph 51 "any imputation of conduct considered by right thinking persons

to be immoral is necessarily defamatory. In this case, aside from the publication itself, evidence was also led from certain persons known or related to the complainant, to whom the publication was directed or had seen it, that the conduct referred to involved the defendant masturbating in the presence of a third party. This was denied by the complainant. This later basis would constitute what is known as a true innuendo, namely an additional or extrinsic factual basis for what on its face is a statement capable of being regarded as defamatory. Gatley, at para 105. It is this later basis that Mr Kefu would appear to be relying on when he submits that the Magistrate failed to assess whether there was evidence of actual defamation of the complainant in the view of persons who read the words. I agree that the Magistrate does not seem to have turned his mind to this issue.

[9] Instead, he seems to have proceeded to consider whether the allegations of masturbation were true. Although proof on the part of a defendant in a civil action for defamation would be a defence, that is not so in criminal defamation. Section 7 of the Act provides that the truth of the publication is only relevant to a defendant's acquittal if it is also proved that the publication of the matters charged was for the public benefit. Mr Kefu rightly pointed out that, although the Magistrate seems to have preferred the view that masturbation had taken place and that this was the basis for the publication, I consider Mr Kefu is correct that he did not turn his mind to the issue of whether in the circumstances of this case, publication was for the public benefit. I add that the matter is further confused because the witness in front of whom the masturbation was alleged to have taken place was apparently the complainant's cousin and not a sister as the summons alleges. It is unclear to me whether this was in fact the basis upon which the Magistrate ruled the summons was defective and could not be amended or indeed what he made of this.

[10] In the light of the fact that the defendant was acquitted, I considered whether I should attempt to resolve the matter on the evidence as it appeared in the record rather than remit the matter to be retried, but I decline to do this. The transcript is not very satisfactory, and I accept Mr Kefu's submission that the matter should be remitted back to the Magistrate's Court for trial before another Magistrate. I so direct; however, I express the view that because criminal defamation is rather uncommon and difficult area of law, it would be preferable, if this time, the matter was prosecuted by a Crown prosecutor rather than a police prosecutor.

[11] Accordingly, I allow the appeal. The case is remitted back to the Magistrate's Court. The Crown shall deliver a copy of this judgment to the respondent who is unrepresented and arrange for her to be notified of a date for her next appearance in the Magistrate's Court when a date for the retrial can be fixed.

R v Latu

Supreme Court, Nuku'alofa
Cato J
AM 4/2015

21 July 2016

Evidence – question as to voluntariness of admissions – ruling by Magistrate required as to admissibility of record
Appeal against dismissal of charges – question as to admissibility of record – appeal allowed and case to be retried

The respondent was charged with possession of drugs and one charge of cultivation. The Magistrate dismissed the charges. The Crown appealed.

Held:

1. Where there was questioning on an issue of voluntariness of admissions at any stage in a trial, a judge or magistrate should be satisfied that the record of interview was voluntary and that the Prosecution had negatived any complaint of duress, threat or unlawful inducement beyond a reasonable doubt. This was because a document containing a confession was such an important aspect of a criminal trial that its integrity must be assured to a very high standard.
2. The record of interview became only conditionally admissible because of the questioning by the defence counsel, therefore a ruling by the Magistrate was required as to its admissibility.
3. There was no ruling made by the Magistrate as to the admissibility of the record of interview. Therefore the appeal was upheld and the case was to be retried.

Cases considered:

MacPherson v The Queen (1981) 147 CLR 512
Police v Coward [1976] 2 NZLR 86
R v Cruse [1989] 2 NZLR 279 (NZ CA)
R v McGuin [1982] 1 NZLR 13
R v Wallbank [1996] 1 Qd R 78

Statute considered:

Illicit Drugs Control Act 2003

Counsel for the Crown : Mr Aho
Counsel for the respondent : Mr Niu

Judgment on appeal

[1] This was a Crown appeal brought against the determination of Senior Magistrate Mafi in his enhanced jurisdiction dismissing charges against the respondent for possession of drugs namely cannabis and one charge of cultivation contrary to the Illicit Drugs Control Act. The Appeal raised some interesting issues.

[2] At the conclusion of the case, counsel for the respondent, Mr Niu SC, submitted there was no case to answer because the prosecutor, Mr Aho, had not tendered in evidence an analyst's certificate confirming that the material located and forming the basis of the charges was cannabis. In a helpful memorandum filed on appeal, Mr Aho conceded that he had inadvertently omitted to file the certificate but relied on well-known authority to the effect that a prima facie case can be established from admission made by the accused in a record of interview so long as there is a foundation for a court to find that the defendant had personal knowledge that the material or substance was an illicit or prohibited drug. Mr Aho, in a comprehensive and well-crafted memorandum, cited inter alia Archbold (2004 edition) at para 26-23 to 26-24 as well as a large number of supporting cases from other jurisdictions, including one I was familiar with *Police v Coward* [1976] 2 NZLR 86 per Roper J.; also *R v Cruse* [1989] 2 NZLR 279 (NZ CA).

[3] Mr Niu SC also filed a memorandum in which he contended that the record of interview had been the subject of a challenge as to its voluntariness. I asked Counsel to comment upon this before turning to the issue of the validity of Mr Aho's point, namely that the record of interview contained telling admissions that the material located by police was cannabis with which the defendant was concerned. Mr Aho acknowledged that Mr Niu had cross-examined a witness on the issue of voluntariness, but the record of interview he said had been tendered first without objection. Where there is questioning on an issue of voluntariness, at any stage in a trial, a judge or magistrate should be satisfied that the record of interview is voluntary and that the Prosecution has negatived any complaint of duress, threat or unlawful inducement beyond a reasonable doubt. This is because a document containing a confession is such an important aspect of a criminal trial that its integrity must be assured to a very high standard. See *R v McGuin* [1982] 1 NZLR 13, and the illuminating discussion of McMullin J at 19-22 preferring the English approach of the criminal standard rather than the civil standard of proof that is applied in Australia. Although Mr Niu SC may not have formally objected to the admissibility of the record of interview, this being a Judge alone case, the nature of his questioning had the effect of putting this in issue. As such the record of interview became only conditionally admissible, and in the light of the questioning by defence counsel, a ruling by Senior Magistrate Mafi was required on the admissibility of the document. *MacPherson v The Queen* (1981) 147 CLR 512 at 523, per Gibbs CJ and Wilson J (High Court of Australia); also *R v Wallbank* [1996] 1 Qd R 78. *McPherson* concerned an unrepresented defendant, but I see no difference in principle where a defendant is represented. The Court must be satisfied beyond a reasonable doubt that the confession is voluntary, no matter when that arises at trial. I inquired and was told that there had been no ruling on this issue. As a consequence of this irregularity, I am unable to rule on the issue upon which Mr Aho invites me to rule, namely whether admissions in the record of information are sufficient to establish a prima facie case.

[4] After discussion, both counsel sensibly agreed that the best course in the circumstances was to allow the appeal and direct a new trial. That will have to be before Senior Magistrate Mafi since the case is in the enhanced jurisdiction.

[5] Accordingly, I uphold the appeal and direct that the case is to be placed before Senior Magistrate Mafi for a retrial. The next appearance in on the 2nd August at 10 am in Courtroom 3 for a date to be fixed for trial. Bail is extended. There is no order for costs.

R v Motu'apuaka

Supreme Court, Nuku'alofa
Cato J
AM 7/2016

5 August 2016

Sentencing – Crown appeal against sentence – appeal allowed – punitive condition imposed as part of suspension

The respondent was charged with causing serious bodily harm. The maximum sentence was 5 years imprisonment. He was sentenced at the Magistrate's Court to 9 months imprisonment which was fully suspended for two years. The Crown appealed against the sentence.

Held:

1. The court was concerned that there was no agreed facts on the file, and also that no probation report was called for and no report requested either from the psychiatric ward before sentencing despite his attendance there. The reasoning given in the record of proceedings was and of little assistance. The court file as delivered contained little information. Also of concern was that there was no reference by the Magistrate to the list of previous convictions which indicated that between 2000 and 2008 the respondent had been before the court seven times on offences involving, theft, housebreaking, unlawful assembly and riot. He had been sentenced to terms of imprisonment, probation and some sentences had been suspended. However, there were no convictions for several years before the present offending in 2014, and he had not violently offended. The court took that into account.
2. The sentence of nine months was an adequate sentence although on the lower level for the use of a weapon, and took into account the late guilty plea, and the fact that there was apparently no serious injury to the victim. The sentence was manifestly deficient in one respect. The suspension should have been accompanied by a punitive condition to emphasise to the respondent the seriousness of using a knife as a weapon. The court varied the sentence to require the respondent as a condition of his suspension to perform 40 hours community work under the direction of probation with the recommendation that this be cleaning the Vuna Road. The minimum hours were imposed because this was a Crown appeal.

Statute considered:

Criminal Offences Act (Cap 18)

Judgment upholding crown appeal against sentence

[1] The Appellant appeals against the manifest inadequacy of the sentence imposed on the Respondent by Senior Magistrate Mafi at the Magistrate's Court in Fasi on the 5th or 6th of November, 2015, on a charge of causing serious bodily harm contrary to sections 107(1) (2) and (4) of the Criminal Offences Act as amended in 2012. The maximum sentence is 5 years imprisonment.

[2] He had been arraigned before me and pleaded not guilty to this charge on the 26th June 2014 and had elected trial by Judge alone. By consent, the case had been remitted to Senior Magistrate Mafi in his enhanced jurisdiction for trial. Mr Aho said that there had been a considerable delay in the trial of the matter.

[3] On the 22nd October 2015, the Respondent was re-arraigned and pleaded guilty before Senior Magistrate Mafi. He was then for some reason remanded to the Psychiatric ward of Vaiola Hospital and sentencing was adjourned to the 29th October, 2015.

[4] Mr Aho informed me that his sentencing submissions contained a summary of the facts contained within an earlier memorandum, he had submitted to the Court and a list of the criminal convictions of the Respondent. A bench warrant had been issued for the arrest of the Respondent because he had escaped from the Psychiatric ward.

[5] He appeared after arrest on the 3rd November, 2015 and was remanded in police custody until sentence on the 6th November, 2015.

[6] He was sentenced to 9 months imprisonment which was fully suspended for two years.

[7] The record of the proceedings which I received from the Magistrate's Court is brief. It reads:

> Criminal case number 36 /2014 Police v Sontane Motu'apuaka assault
>
> Ct read the indictment. Accused pleads guilty
>
> I am guilty your worship. I harmed the other person because he attacked me with a knife and he punched and attacked me with a rock. Therefore your Honour I am guilty and I have three children. I apologise for what had happened. I feel the utmost remorse. I ask for your leniency and mercy.
>
> Ct: You were previously convicted for assault and that has become a habit of yours. However, because it was the victim who attacked you and because of your children, I hereby sentence you to 9 months imprisonment with two years suspension.

[8] On the 11th November, 2015, the Appellant filed a Notice of Appeal with the Magistrate's Court. It was not, however, until the 16th June 2016 that the Appeal case reached this Court. That is an unacceptable delay and no reason has been given for this delay. Delays of this kind can prejudice justice.

[9] There does not appear to be any agreed summary of facts either with the file. It seems it was a late plea of guilty and Mr Aho said that the Crown facts which the

Magistrate had before him were contained within a memorandum of an intended Crown opening that had been filed with the Magistrates Court in or about the 9th June 2015. He said that he had presented these facts again for the Magistrate for sentence on the 29th October, 2015, when he appeared. He did not appear on the actual sentence he said on the 6th November, 2015 because he was overseas. I was concerned that there was a very significant disparity between the statement of facts presented by Mr Aho and the Magistrates' version as reported on sentence. This moved me to inquire of Mr Aho whether the Court had received the correct file and he assured me it had, so I proceeded to hear the appeal.

[10] The Crown's case was that the victim had been drinking kava at the Crown Hall on or about the 20th February 2014 at Ha'alo. The Respondent had joined the party at around 3am on 21st February 2014. Whilst drinking kava, the victim began to joke about the accused. This angered the Respondent and so he stood up, walked outside the town hall and challenged the victim to come outside and fight him. The victim walked outside to chase after the accused and then the accused threw a knife at the victim. The knife penetrated into the victim's left shoulder, leaving a superficial laceration on the left shoulder. The Respondent had admitted to the offending.

[11] It is of concern to me that there is no agreed facts on the file, and also it is concerning, in a case of this seriousness, involving the use of a knife to cause injury, that no probation report was called for and no report requested either from the Psychiatric ward before sentencing despite his attendance there. The reasoning given in the report as recorded is brief in the extreme and of little assistance to this Court. I also add that the Court file as delivered up to this Court contains little information.

[12] Of concern also is that there is no reference by the Magistrate to the list of convictions that had I am told been furnished to the Court by Mr Aho. These indicate that between 2000-2008 the Respondent has been before the Court 7 times on offences involving, theft, housebreaking, unlawful assembly and riot. He had been sentenced to terms of imprisonment, probation and some sentences have been suspended. It is deserving of note, however, that he does not seem to have offended for several years before the present offending in 2014, and has not violently offended. I take this into account on this Appeal.

[13] Despite the very unsatisfactory nature of the sentencing process, I feel able to dispose of this Appeal. Because it is a Crown appeal, I approach the matter allowing the Respondent a measure of leniency. I consider that the Magistrate was correct to impose a sentence of imprisonment for this offending. The use of a weapon to inflict injury will almost always attract the potential for a sentence of imprisonment, the length of it being dependant on the seriousness of the injury inflicted, and what if any mitigating factors are present.

[14] The summary of facts as presented by Mr Aho, however, as I have said bears no resemblance to the provocation mentioned by the Respondent in his short account to the Magistrate before sentence. On Mr Aho's version of events, there is little, if any, provocation prior to the use of the knife by the Respondent. That is why it is necessary for a Sentencing Officer to proceed in cases where there is a guilty plea on an agreed set of facts. If there is no agreement, then there has to be a trial on the facts to determine a proper basis for sentence. The Agreed facts should then be sent together with other documents to this Court when an appeal against sentence or, as here, a Crown Appeal against sentence is filed. In this case, it seems the Magistrate proceeded on the basis of

an attack by the victim which as I have said is not born out in the facts Mr Aho says were presented to the Court. The Magistrate also referred to a previous conviction for assault but there is no record of that in the summary of convictions either.

[15] I consider that the sentence of nine months is an adequate sentence although on the lower level for the use of a weapon, and takes into account the late guilty plea, and the fact that there was apparently no serious injury to the victim. Before sentencing in cases like this the sentencing judge should discuss with the Police prosecutor or the Crown prosecutor the nature of the injuries and in what state the victim is at the date of sentencing, if that is possible.

[16] I also do not, in this case, interfere with the fact that Senior Magistrate Mafi suspended the sentence, because the record of convictions evidenced a lapse of offending between 2008 and the present offending of about 6 years and, contrary to the observation of the Magistrate, it seems he had not been involved in any offence involving violence. Normally, I would require some brief reason to be recorded why a sentence should be suspended in whole or in part. There were no reasons given here aside from the fact the accused had a family on his own assertion which was not born out by confirmation from any probation report, and some provocation. There was no reference to any of the *Mounga* principles which govern suspension of sentences in Tonga.

[17] However, I consider the sentence is manifestly deficient in one respect. The suspension should have been accompanied by a punitive condition to emphasise to the Respondent the seriousness of using a knife as a weapon. Mr Aho is correct when he submits his use of knife was here at best highly reckless as it was highly dangerous. The Respondent was very fortunate that the injuries were apparently not serious. In my view, the sentence imposed should be varied to reflect a punitive and deterrent element. I vary the sentence to require the Respondent as a condition of his suspension to perform 40 hours community work under the direction of probation with the recommendation that this be cleaning the Vuna Road. I have imposed the minimum hours because this is a Crown appeal.

[18] Finally, I stress that appeals should be processed and sent to the Court much more expeditiously than occurred here, so that appeals can be disposed of quickly and regularly.

[19] I allow the Appeal to the extent that the sentence should read;

i. The Respondent is convicted and sentenced to 9 months imprisonment for causing serious harm contrary to section 107(1) (2) and (4) of the Criminal Offences Act.
ii. That sentence is fully suspended on the following conditions;
   a. The Respondent is not to commit any offences punishable by imprisonment for two years;
   b. He is to carry out 40 hours community work under the direction of probation with a recommendation that this be cleaning the Vuna Road.

The period of suspension operates from the date of his sentence namely the 6th November 2015.

170 [20] He is warned that a failure to carry out either of these conditions may result in his being recalled to serve the term of imprisonment.

[21] The Respondent is to report to Probation with a copy of this Judgment or Court order no later than 4pm on Monday 8th August, 2016 so that arrangements can be made with Probation for him to perform his community work forthwith. Mr Aho should also communicate with Probation by that date.

Tu'uhetoka v Tu'uhetoka

Land Court, Nuku'alofa
Paulsen, Lord Chief Justice
Number

19 July and 2 August 2016; 8 August 2016

Land law – interim injunction sought for eviction – refused

The plaintiff applied for an interim injunction that the defendant be evicted from the dwellinghouse upon his town allotment at Lapaha. The application was opposed by the defendant who claimed that she was the owner of the dwellinghouse and entitled to occupy it. The defendant claimed that her brothers gifted her the dwellinghouse and that Ioane (the plaintiff's adopted brother) and his family had no right to live there. As far as the plaintiff was concerned, the defendant claimed that he had no use for the dwellinghouse and that he would own the dwellinghouse upon her death.

Held:

1. The papers filed in support of (and opposition to) an application for interim injunction must be fulsome and focus upon all the relevant considerations of arguable case, adequacy of damages, balance of convenience and overall justice of the case.
2. There was no dispute that the plaintiff was the owner of the land. The plaintiff regarded the defendant as a trespasser and sought her eviction from the land and also from the dwellinghouse on the land. In an action for trespass a plaintiff did not need to prove ownership of a chattel. A plaintiff must only establish a right to immediate possession of the chattel. The court was satisfied that it was clearly arguable that following the death of 'Epifanio the plaintiff took lawful *defacto* possession of the dwellinghouse, authorizing first his sister and then Ioane and his family to live in it and that this conferred upon him a right to be protected from unlawful disturbance. It was open to a defendant to prove a superior title, which was what the defendant contended. The plaintiff's case was arguable.
3. The court refused the application for injunction for the following reasons: first, the court did not discount the possibility that if the defendant was evicted from the dwellinghouse immediately that may compromise the effectiveness of her treatment; secondly and importantly, the plaintiff's Counsel conceded that the refusal of the injunction would not result in serious harm to Ioane and his family and that they had alternative accommodation; and thirdly, the substantive action was able to be heard by the Court in a timely manner.

Cases considered:

Klissers Farmhouse Bakeries v Harvest Bakeries Limited [1985] 2 NZLR 129 (CA)

Mike Pero (New Zealand) Limited v Heath and Ors [2015] NZHC 2040

Niu anors v Tapealava anor [2013] Tonga LR 55

Wellington International Airport Ltd v Air New Zealand Ltd (HC Wellington CIV 2007-485-1756, 30 July 2008)

Counsel for the plaintiff : Mr H Tatila
Counsel for the defendant : Mr L Niu SC

Ruling

[1] This is an application by the plaintiff for an interim injunction that the defendant be evicted from the dwellinghouse upon his town allotment at Lapaha. The application is opposed by the defendant who says that she is the owner of the dwellinghouse and entitled to occupy it.

The principles

[2] As I have said on a number of occasions, in Tonga the principles to be applied in considering applications for interim injunctions are those set out by the New Zealand Court of Appeal in *Klissers Farmhouse Bakeries v Harvest Bakeries Limited* [1985] 2 NZLR 129 (CA). These can be summarised as:

[2.1] Whether there is a serious issue to be tried.
[2.2] Whether the balance of convenience favours the granting of an injunction.
[2.3] Whether the overall justice of the case favours the granting of an injunction.

[3] Recently in *Mike Pero (New Zealand) Limited v Heath and Ors* [2015] NZHC 2040 Moore J conveniently summarised the matter in this way:

> [25] Thus the Court must first consider whether there is a serious question to be tried and, if it determines there is, whether damages would provide an adequate remedy and against that, where the balance of convenience properly lies. In assessing the balance of convenience, regard may be had to the adequacy of damages should relief not be granted, the relative strength of each party's case and the impact of a decision on the rights of third parties.
>
> [26] Finally the Court is required to step back and consider what overall justice requires having regard to these considerations.
>
> [27] I note that after identifying those issues, Cooke J (as he then was) in *Klissers Farmhouse Bakeries* emphasised that:
>
> > "…an interlocutory decision of this kind is essentially discretionary and its solution cannot be governed and is not much simplified by generality."

[28] The Court is not concerned with attempting to resolve conflicts of evidence in respect of facts which may determine the case, nor is it concerned with deciding difficult questions of law which "call for detailed argument and mature considerations".

[4] The affidavit filed in support of this application was terse. The plaintiff relied largely upon the content of the statement of claim as stating the relevant facts. Counsel need to be aware that in deciding whether to grant or refuse an injunction the Court acts in a principled manner having regard to considerations which go beyond the respective merits of the parties' cases. The papers filed in support of (and opposition to) an application for interim injunction must be fulsome and focus upon all the relevant considerations of arguable case, adequacy of damages, balance of convenience and overall justice of the case.

The position of the parties.

[5] The plaintiff's father was 'Epifanio Moahengi Tu'uhetoka. 'Epifanio owned a tax and a town allotment at Lapaha which he inherited from his father in around 1980. 'Epifanio raised his family on the town allotment, occupying the dwellinghouse on the land. He also obtained and repaid loans to build or renovate the dwellinghouse.

[6] 'Epifanio died on 5 December 2013. The plaintiff succeeded to his lands and registration was effected on 6 January 2014. The plaintiff lives in Australia. Following 'Epifanio's death, the plaintiff allowed his sister and her husband to occupy the land and reside in the dwellinghouse and more latterly he allowed his adopted brother 'Ioane Falekaono, his wife and six children to live there. They moved into the dwellinghouse on around 8 March 2016.

[7] The defendant is the sister of 'Epifanio and is the plaintiff's aunt. She lives in New Zealand. In May 2016 she came to Tonga and initially stayed with relatives. On 26 May 2016 the defendant and her brother went to the plaintiff's town allotment and asked Ioane to move out because she wanted to live there. Ioane contacted the plaintiff who said he was not to leave the property. The defendant and her brother returned on 28 May 2016 and again required Ioane to leave the property. Again he did not do so. As a result of these events, on 2 June 2016 the plaintiff travelled to Tonga from Australia. He decided to allow the defendant to live in the dwellinghouse with Ioane and his family, an arrangement Ioane was prepared to accept. The plaintiff returned to Australia on 16 June 2016. On 17 June 2016 the defendant broke into the property and attempted to prevent Ioane (or his family) returning. The Police became involved. The defendant then lived with Ioane's family for a short time but on 1 July 2016 she removed their belongings and has prevented them returning to the property. On 2 July 2016 the plaintiff arranged for a lawyer to serve a letter on the defendant requiring her to move out of the property and threatening Court action but she refuses to leave.

[8] The defendant has filed an affidavit. In it she says that she was a sickly child and that upon the death of her parents (who died just weeks apart in around October 1980) it was agreed with her siblings that she would have the dwellinghouse as long as she lived and was unmarried because of her 'frail and sickly condition'. However, it appears that the defendant choose in 1982 to move to Australia. Although she returned to Tonga in 1985 she then left again in 1986 and has lived in New Zealand ever since. She says that she did provide financial assistance to 'Epifanio to maintain the dwellinghouse, to

service the loans 'Epifanio obtained for renovations and also for family purposes generally, including the payment of school fees.

[9] Much of the defendant's affidavit details her past and present medical ailments. She has clearly suffered from ill health in recent years. In 2015 she was advised to have her breasts removed due to breast cancer. She has had other ailments also. Although she has conventional medical treatment available to her in New Zealand she has decided to rely on traditional Tongan medicine. She says that this medicine involves the light rubbing of her body with Tongan leaves. In May 2016 she learned that there was a woman in Lapaha who could treat her and she came to Tonga on 23 May 2016. She required Ioane and his family to leave the dwellinghouse as she needs peace and quiet and rest whilst she is being treated. She says she gave Ioane a week to move out of the dwellinghouse and that he (and his family) can live with his parents. She says that she resigned from her job in New Zealand in November 2015 but does not get a sickness benefit now (apparently as she chooses to live in Tonga) and as a consequence she does not have any income to pay rent. She relies on her brothers to provide for her but they have their own families to provide for also.

[10] The defendant's case then is that her brothers gifted her the dwellinghouse and that Ioane and his family have no right to live there. As far as the plaintiff is concerned, the defendant says that he has no use for the dwellinghouse and that he will own the dwellinghouse upon her death.

An arguable case

[11] There is no dispute that the plaintiff is the owner of the land. The plaintiff regards the defendant as a trespasser and seeks her eviction from the land and also from the dwellinghouse on the land. I did not understand Mr. Niu to contend that the plaintiff does not have an arguable case for the removal of the defendant from his land. He was right not to do so.

[12] As far as the dwellinghouse is concerned, in Tonga a dwellinghouse is a chattel. In this case the issue of ownership of the dwellinghouse is muddied by the fact that it appears that following the death of both 'Epifanio and his father before him no letters of administration were applied for to allow for the distribution of the estate according to law. However, in an action for trespass a plaintiff does not need to prove ownership of a chattel. A plaintiff must only establish a right to immediate possession of the chattel. I am satisfied that it is clearly arguable that following the death of 'Epifanio the plaintiff took lawful *defacto* possession of the dwellinghouse, authorizing first his sister and then Ioane and his family to live in it and that this confers upon him a right to be protected from unlawful disturbance (*Niu anors v Tapealava anor* [2013] Tonga LR 55, 58 at [21]). Of course it is open to a defendant to prove a superior title, which is what the defendant contends for in this case. I will deal with this below but for present purposes it is sufficient that I find that the plaintiff's case is arguable.

Balance of convenience

[13] There are a number of factors which I have considered when weighing the balance of convenience.

[14] The first matter is whether either party will suffer unquantifiable loss in the event that they are successful at trial but not on the interim application (*Wellington*

International Airport Ltd v Air New Zealand Ltd (HC Wellington CIV 2007-485-1756, 30 July 2008 at [4]-[14])). In this regard, the defendant contends that she will indeed suffer unquantifiable loss. I accept that the evidence establishes that the defendant is suffering from serious ill-health. Her perception is that the treatment she is receiving will only be effective if she can rest in peace and quiet and that this is not possible if the dwellinghouse is occupied by a family with six children. To her mind the matter is one of life and death (see paragraph 18 of her affidavit). Whether her view has any basis in fact is not at all clear but the plaintiff's counsel did not challenge the defendant's position on this aspect of the case.

[15] The defendant says that she has nowhere else to live and cannot afford to pay rent. If that is so, it is the result of the defendant's own choices to the extent that she has made herself ineligible for payment of a benefit in New Zealand and has forgone modern conventional medical treatment. That is entirely her right, but there is obvious unfairness in the defendant visiting the consequences of her choices upon the plaintiff, Ioane and his family. It also appears to me that the defendant is almost certainly overstating her case as she has brothers in Tonga who have, and are, providing for her, but again there was no effort made on behalf of the plaintiff to counter this evidence in a meaningful way.

[16] The plaintiff does not require the dwellinghouse for his own occupation. I am entitled to take into account the interests of third parties. Whilst Ioane would clearly prefer to be living in the dwellinghouse at the present time it was not disputed that he has somewhere else to live. Most importantly, in answer to a question from me the plaintiff's Counsel said that he did not foresee any serious harm would be suffered by Ioane and his family if the injunction was refused. He also noted that Ioane was living with his father and that his belongings that were still at the plaintiff's property (consisting of peanuts and pigs) were not at risk.

[17] Another factor which I can take into account is the respective strengths of the parties' cases. At this stage I can make only a broad assessment of the opposing sides. I have noted above that I consider the plaintiff has an arguable case that he is entitled to immediate possession of the dwellinghouse. The defendant claims she has a superior title. The defendant's case is founded upon an alleged agreement that she said she made with her siblings following their parents' deaths to gift her the dwellinghouse. Her case faces very formidable difficulties in my view. I do not propose to dwell on these difficulties but simply note them. First, it is not clear to me what right the defendant's siblings had to gift her the house. Secondly, the alleged agreement is incongruous with, *inter alia*, the facts that the defendant has lived away from Tonga since 1982, that 'Epifonia lived in the dwellinghouse and raised his family there and that 'Epifonia raised and repaid loans to maintain and renovate the dwellinghouse (albeit the defendant says she and others made some contributions). Furthermore, if there was such an agreement it appears to me that the defendant's ability to assert title as against the plaintiff may well be subject to a strong limitation defence. My preliminary assessment is that the defendant's case is weak.

[18] A further factor that features in my assessment of the balance of convenience is the availability of Court time to hear the substantive action. In many cases it is preferable for the Court to set a case down for an urgent hearing rather than make interim orders of the type sought here. In this case the Court is able to accommodate an early hearing of this action on 28-29 November 2016.

The overall justice of the case

[19] This is an issue upon which I have had to give considerable and anxious consideration before arriving at a conclusion. Notwithstanding her understandable concern for her health the defendant has acted in a high handed manner towards the plaintiff and Ioane. A refusal to grant the injunction sought will cause serious inconvenience to Ioane and his family who have been forcibly removed from their home. Added to that, my assessment is that the defendant's case is weak and that there is a high probability that the plaintiff will prevail in this action.

[20] Despite all of that, I am going to refuse the application for injunction for these reasons. First, I do not discount the possibility that if the defendant is evicted from the dwellinghouse immediately that may compromise the effectiveness of her treatment. Secondly and importantly, the plaintiff's Counsel conceded that the refusal of the injunction will not result in serious harm to Ioane and his family and that they do presently have alternative accommodation. Thirdly, the substantive action is able to be heard by the Court in a timely manner. Had it not been for a combination of all of these factors I would have been minded to grant the application.

Result

[21] By a very close margin and not without considerable reservation the application for injunction is refused. Costs are reserved.

[22] This action will be heard on 28-29 November 2016.

[23] There will be a conference at 9am on Friday, 12 August 2016 at which time I will make timetabling directions.

R v Lolohea anor

Supreme Court, Nuku'alofa
Cato J
Cr 144 and 145/2015

10 August 2016

Sentencing – manslaughter – guilty pleas of co-accused – different sentences

The prisoners were both charged with the murder of Mr Eneasi Latu and in the alternative manslaughter. On 25 November 2014, they had both pleaded not guilty to all the charges. On 13 June 2016, Mr Manumu'a was re-arraigned and pleaded guilty to the count of manslaughter. Manumu'a and another accused, also charged with murder, a Mr Lolosio Valu, had elected trial by jury. At trial, Mr Valu was discharged from an indictment for murder, manslaughter and grievous harm and pleaded guilty to a lesser charge, after the Crown indicated that it desired to offer no further evidence in relation to him towards the conclusion of the Crown evidence. By that stage, the evidence had established that he had withdrawn or left the scene, and had no part in the homicide. The deceased had been dispossessed of a machete and an iron rod with which he had earlier confronted the prisoners and Mr Valu before Manumu'a and Lolohea had each, in a concerted way hit him with a number of blows to his upper body, with heavy sticks (tree branches) as he lay on the ground near the gate. Mr Lolohea had elected to be tried by Judge alone which was set down for 5 and 6 July 2016. On 1 July 2016, after a trial lasting several days, Mr Manumu'a was found not guilty of murder. As a consequence, of this verdict, the Crown on 5 July 2016, withdrew the charge of murder against Mr Lolohea. He was then re-arraigned and pleaded guilty to manslaughter. Both men were remanded in custody for sentence on 5 August 2016 and, after submissions were considered, the sentencing was reserved until 10 August 2016.

Held:

1. The court considered the manslaughter pleas were inevitable. The accused should be given some meaningful mitigation for their pleas to manslaughter which was an acknowledgement of their responsibility in Mr Latu's death. In all for their pleas, expression of remorse, the fact they are first offenders, and the fact that they have made compensation and their apologies have been accepted, the court allowed them a discount of two years' imprisonment by way of mitigation. Accordingly, the sentence imposed on them both for manslaughter after conviction was ten years imprisonment.
2. The court considered that both qualified for some measure of suspension of part of their sentence. Both were first offenders and both acknowledged their role and expressed regret. Mr Manumu'a from the outset was more co-operative with Police, however, and eventually offered a plea to manslaughter prior to his trial for murder. This was not an early plea having

been entered in June 2016. Mr Lolohea was not so co-operative with the police, and maintained a denial to all charges until the point of trial.

3. It was appropriate to distinguish between the prisoners on the length of suspension because, of the two, Mr Manumu'a was more consistent and a better candidate for rehabilitation that Mr Lolohea. Further, Mr Manumu'a was not involved in any earlier altercation with the deceased as was Mr Lolohea with whom the deceased had a brief encounter on his way home. Of the two Mr Lolohea was the more aggressive that evening. The final two years of the sentence of Mr Manumu'a was suspended on conditions.
4. The final 18 months of Mr Lolohea's sentence was suspended on conditions.

Cases considered:

Kofutu'a v R [2010] Tonga LR 120
Mounga [1998] Tonga LR 154
Vaomotou v R [2014] Tonga LR 62 (CA)
Tu'itavake v R [2005] Tonga LR 348

Statute considered:

Criminal Offences Act (Cap 18)

Counsel for the Crown	:	Mr Lutui
Counsel for the first defendant	:	Ms Fa'anunu
Counsel for second defendant	:	Mr Tu'utafaiva

Sentence

[1] The prisoners had been both charged with murder of Mr Eneasi Latu under section 85, 86(1) (a) and (2), 87(1) (b) and 91 of the Criminal Offences Act, and in the alternative manslaughter contrary to sections 85, 86(1) (a) and (2), 92 and 93 of the Criminal Offences Act. On the 25th November 2014, they had both pleaded not guilty to all the charges.

[2] On the 13th June, 2016, Mr Manumu'a was re-arraigned and pleaded guilty to the count of manslaughter.

[3] Manumu'a and another accused, also charged with murder, a Mr Lolosio Valu, had elected trial by jury which was set for two weeks to commence on 20th June, to 1st July 2016. At trial, Mr Valu was discharged from an indictment for murder, manslaughter and grievous harm and pleaded guilty to a lesser charge, after the Crown indicated that it desired to offer no further evidence in relation to him towards the conclusion of the Crown evidence. By that stage, the evidence had established that he had withdrawn or left the scene, and had no part in the homicide.

[4] Mr Lolohea had elected to be tried by Judge alone which was set down for the 5th to the 6th July, 2016.

[5] On the 1st July, 2016, after a trial lasting several days, Mr Manumu'a was found not guilty of murder.

[6] As a consequence, of this verdict, the Crown on the 5th July 2016, withdrew the charge of murder against Mr Lolohea. He was then re-arraigned and pleaded guilty to manslaughter.

[7] Both men were remanded in custody for sentence on the 5th August, 2016 and, after submissions were considered, the sentencing was reserved until the 10th August, 2016.

[8] At the hearing of the sentencing submissions, Mr Lutui and Ms Fa'anunu presented me with an agreed statement of fact. Because the agreed statement of fact largely replicated the evidence I had heard in the case of Manumu'a, I will set it out in full. It will form the basis of my sentences for both men.

Agreed summary of Facts

1. The Accused person is Semisi Lolohea, 27 years of age, Niutoua.
2. The Deceased is 'Eneasi Tu'ineau Latu, 48 years of age, of Afa. He was married and had 6 children.
3. On or about Monday 21 July 2013 at Afa, Semisi Lolohea and Monalisa Manumu'a went to the residence of 'Ana Lupe Kama for a meal. They then walked together with 'Ati Vakavelo to his tax allotment where they consumed alcohol. They consumed a 1 litre bottle and one 500ml bottle of alcohol. In the evening of that day when they finished their drinks, they returned to where 'Ana Lupe Kama resided and continued to drink alcohol.
4. While they were drinking, Lolohea and Manumu'a, kept complaining about Lotu Latu and how he had previously taken 'Ana Lupe Kama to a drinking party a week prior where she got beaten up.
5. They obtained more alcohol and continued to drink. On or about 12 am at night, Lolohea noticed Lotu Latu walking down the road in front of the residence where they were drinking, Lolohea then attacked Lotu Latu and beat him up. Monalisa also joined in and started punching Lotu Latu. Lolesio Valu intervened and stopped Lolohea and Manumu'a while Lotu Latu ran off seeking help at Heleni and Tala'a Naitoko's residence nearby.
6. At this time, 'Eneasi Tu'ineau Latu (the deceased and father of Lotu Latu) was walking back together with 'Ati Vakavelo from a kava party at one of the residence in Afa. Lolohea then collared the deceased on the road telling him to go and check on his son as to whether or not he was still alive.
7. The deceased got angry and left, returning a few minutes later with a machete in one hand and an iron rod in the other. He stood on the road in front of the residence where Lolohea, Manumu'a and Valu and 'Ana Lupe Kama were and shouted out to them asking why they had beaten up his son.
8. They became very angry and began to quarrel. Lolohea, Manumu'a and Valu started to throw sticks at the deceased before walking out and attacking him. In the process, the deceased swung his knife and injured Lolohea's leg. Lolohea became more angry and continued to pursue the deceased with Monalisa and Valu. They took turns beating

him with sticks while the deceased shielded himself and moved backwards.

9. Lolohea and Manumu'a beat the deceased until he fell to the ground and they continued to beat him while he lay on the ground. This occurred in front of 'Ati and Lepeka Vakavelo's residence. Lepeka Vakavelo then called her husband for help and he came and tried to hold back both Lolohea and Manumu'a. At this time, the deceased was already seriously injured and lying on the road.
10. The deceased was rushed to the hospital. The deceased was pronounced dead on arrival and the cause of death was determined to be intracerebral (brain) haemorrhage as a result of impacts to the face and head of the deceased. He also suffered multiple blunt impacts and fractures to other parts of his body.
11. The accused is a first time offender.

[9] At the hearing, I inquired of both counsel, Mr Lutui and Ms Fa'anunu, whether one matter which I considered important from the aspect of both prisoner's sentencing had been agreed upon. It had appeared from photographs produced at the trial of Mr Manumu'a that the deceased had been dispossessed of a machete and an iron rod with which he had earlier confronted the prisoners and Mr Valu before Manumu'a and Lolohea had each, in a concerted way hit him with a number of blows to his upper body, with heavy sticks (tree branches) as he lay on the ground near the gate in front of Mr and Mrs Vakavelo's residence. It was accepted that this was so.

[10] The count of murder had been advanced against Mr Manumu'a on the basis that he, together with Semisi Lolohea, had caused the death of Mr Latu when they unlawfully beat him repeatedly with sticks causing injuries to his body, which Manumu'a knew to be likely to cause death, and he was reckless as to whether those injuries would result in his death or not. At the trial, the defence contended, first that Mr Manumu'a had not known that the beating was likely to cause his death and hence he was not guilty of murder. Further, the defence had argued if he were guilty of murder then that was mitigated to manslaughter by the defence of extreme provocation under section 89 and 90 of the Criminal Offences Act.

[11] During his submissions on sentence, Mr Tu'utafaiva submitted that the Jury had acquitted his client because of provocation suggesting perhaps that this was consistent with a more benign view of the facts, namely that he had acted under passion derived from extreme provocation in hitting the deceased as he lay on the ground. I indicated that it was unclear that this was so. I had allowed but had some reservation about doing so extreme provocation being put to the jury because I felt that whatever provocation had been given had dissipated once the deceased had been forced backwards and lost his weapons before being attacked on the ground. As I heard the evidence of the trial of Mr Manumu'a, the provocation had arisen at the commencement of the fight when the deceased lashed out with a machete and a rod which he had also brought from his home but at the time he had been fatally assaulted by both men acting in concert he was defenceless and on the ground. I consider that, at that point, their actions were much more likely motivated by revenge and anger fuelled no doubt by the considerable amount of alcohol that had been consumed by both men that day. I considered that it was more likely that the Jury considered that beyond reasonable doubt the Crown had

not proven that Mr Manumu'a knew that his actions were likely, meaning would probably cause Mr Latu's death, and carried on regardless. A judge has a wide discretion in determining the facts relevant to the commission of an offence. A particular constraint is that he or she must not take a view of the facts which conflicts with the Jury's verdict. ***R v Pryor*** 2 Qd R 768; ***R v Nicholls*** [1960]1 WLR 658.

[12] That said, it is possible as Mr Tu'utafaiva submitted that certain members felt murder should be mitigated by extreme provocation in the case of Mr Manumu'a. I consider in relation to both prisoners' sentences that provocation, in any event, cannot be simply put to one side. Certainly, the major initial contributing factor for this homicide was the foolish decision of Mr 'Eneasi Latu to return armed with a machete and iron bar to the area where he knew Semisi Lolohea had earlier confronted him concerning the activities of his son. He then, I accept, acted, in a very menacing way using threatening and highly charged language. I accept he struck Lolohea with the machete causing a wound to the shin I am told by his counsel which required some medical attention and also it seems Mr Valu was also struck during the initial stages.

[13] Having heard from all parties on the starting point, I consider that the nature of the beating involving heavy blows with two heavy tree branches to the upper body of a man who was defenceless and prone on the road plainly constituted extreme violence. Although the initial provocation may still have been operating on their minds and fuelled their anger, I consider their main motivation, at the end, was to exact revenge. I, have considered a number of authorities including *Tu'itavake v R* [2005] Tonga LR 348, *Kofutu'a v R* [2010] Tonga LR 120 and *Vaomotou* v R [2014] Tonga LR 62 (CA) cited to me by the Crown and with which I was familiar because of having to sentence in other manslaughter cases. I consider that, but for the initial provocation, my starting point would have been 14 years, for the extreme violence and brutality that these concerted assaults on a defenceless man represented. An assessment of the degree of provocation in this case must be one that, however, is meaningful. I discount the nominal starting point of 14 years imprisonment by three years to take into account the provocative actions of the deceased which relevantly set the scene for the violence that was to so tragically follow. The actual starting point in relation to both prisoners I accordingly set at 11 years imprisonment. That bears some similarity also with the upper level of the ***Tu'itavake*** guidelines 10-12 years for provocation followed by a weapon being used with great brutality based on English cases.

[14] Both counsel, in their able submissions, emphasised their client's pleas of guilty, with Mr Tu'utafaiva asserting his clients prior acknowledgment by a plea to manslaughter. Mr Lolohea had, however, maintained a denial to the point of trial, as he had done from the date of arrest. Both prisoners were first offenders and both had provided apologies and Tongan compensation; food, pigs and mats to the family of the deceased. The apologies were accepted by the deceased's family to whom I was informed that Mr Lolohea was distantly related.

[15] Mr Lolohea is aged 27. He is said to have had a happy childhood. He is married to an Australian who has returned to Australia pending the outcome of this sentencing. He has no children. He had met his wife when he went picking fruit in Australia. He did not seem to achieve highly at school apart from athletics in which he won medals in inter-college sport. There is a suggestion in the probation report that in Australia he used drugs and he also consumed alcohol with friends. To a considerable extent, he like Manumu'a, was I consider affected by alcohol on the night of the incident. He was it seems the one who was looking for a fight with first Mr Lotu Latu and then later

aggressive towards his father, the deceased, as he passed the group to go home before returning back to confront the men with weapons. He had some history of adjustment disorder with depressive mood, but Dr Puloka had found him fit to plead and in full remission from any previous history of adjustment disorder.

[16] Mr Manumu'a is aged 25 and single. His father abandoned the family when he was a child and went to live in the United States. His mother is using a wheelchair and looked after by a daughter. She brought up the prisoner with his siblings after the father left. The prisoner had been brought up by a grandparent also which she regrets. The prisoner was the member of the family that was relied on for work in the plantation and income from fishing. Alcohol again had become an unsavoury part of his life and the consumption of this with his peers. However, he was involved in church activities and community activities. He seems to acknowledge, in his probation report, that he was intoxicated on the night of the incident. I have no doubt that the anger of both he and Mr Lolohea was fuelled also by the amount of alcohol they had consumed earlier, but the consumption of alcohol is not a mitigation factor I can consider on sentence. He, like Mr Lolohea, in his probation report and through counsel expressed regret at the death of Mr Eneasi Latu who left a window and several children, and their role in it.

[17] I consider the manslaughter pleas were inevitable in this case. That said, the accused must be given some meaningful mitigation for their pleas to manslaughter which was an acknowledgement of their responsibility in Mr Latu's death. In all for their pleas, expression of remorse, the fact they are first offenders, and the fact that they have made compensation and their apologies have been accepted, I allow them a discount of 2 years imprisonment by way of mitigation. Accordingly, the sentence I pass upon them both for manslaughter after conviction is ten years imprisonment.

[18] I consider however, that both qualify for some measure of suspension of part of their sentence consistently with *Mounga* [1998] Tonga LR 154 and the observations of the Court of Appeal in *Kofutu'a v R* [2010] Tonga LR 120 that;

> "suspension had the twin aims of rehabilitation and deterrence. It did not involve a reduction in the term of imprisonment but merely suspension of part which could be activated should the prisoner reoffend'.

Both are first offenders and both now acknowledge their role and have expressed regret. Mr Manumu'a from the outset was more co-operative with Police, however, and eventually, after Mr Tu'utafaiva, became his counsel, offered a plea to manslaughter prior to his trial for murder. However, even so, this could not be described as an early plea having been entered in June 2016. Mr Lolohea was not so co-operative with the police, and maintained a denial to all charges until the point of trial. I consider it is appropriate to draw some distinction between the prisoners on the length of suspension because, of the two, Mr Manumu'a was more consistent and, to my mind, genuine and a better candidate for rehabilitation that Mr Lolohea. I also note that, on the evidence, I heard at his trial Mr Manumu'a was not involved in any earlier altercation with the deceased as was Mr Lolohea with whom the deceased had a brief encounter on his way home. I formed the impression that of the two Mr Lolohea was the more aggressive that evening, at least in regard to the events that arose before the

homicide. I reflect this by allowing Mr Manumu'a suspension of the final 2 years of his sentence on the following conditions;

i. He is to commit no further offences punishable by imprisonment for a period of two years ;
ii. He is on probation for the period of his suspension and is to live where directed;
iii. He is not to drink alcohol during his suspension;
iv. He is to attend course on anger management and on alcohol abuse under the direction of probation.

He is warned that a failure to abide by these conditions may mean he is returned to prison to serve the balance of his sentence.

[19] In relation to Mr Lolohea, I suspend the final 18 months of his imprisonment on the following conditions;

i. He is to commit no further offences punishable by imprisonment for a period of two years ;
ii. He is on probation for the period of his suspension and is to live where directed;
iii. He is not to drink alcohol during his suspension;
iv. He is to attend courses on anger management and on alcohol abuse under the direction of probation.

[20] He is warned that a failure to abide by these conditions may mean he is returned to prison to serve the balance of his sentence.

[21] The sentences of imprisonment are both backdated to the dates the prisoners were remanded in custody.

R v Makafilia

Supreme Court, Nuku'alofa
Cato J
CR 8/2016

10 August 2016

Criminal law – serious bodily harm – self-defence – acquittal

On 21 August 2015 the complainant was outside the residence of the accused when the accused appeared with a machete. The complainant had been fighting with the brother of the accused, Lautaimi, and followed him home. When the complainant saw the accused appear with a machete, he and a friend threw some large rocks at him. He also punched the accused about three times. Other young men were present - about 6-7 of them. The accused struck the complainant twice with a machete to the upper breast area and in the area of his wrist. The incident occurred about 2am. Medical evidence was given by the tendering of a report that the complainant had sustained a wound to the left distal forearm, deep through muscle exposing the radius bone which was not broken. There was also a 15 cm transverse laceration on the right anterior chest at the level of the clavicle. The accused was indicted on one count of causing serious bodily harm. The issue was whether the accused should be acquitted of the offence of causing serious bodily harm by virtue of self-defence and/or defence of another.

Held:

1. Self-defence was rooted in common sense. In the circumstances, faced with the group, two of whom had been involved in an attack on the accused moments earlier and with knowledge that they had been involved with chasing his brother, and confronted alone by a number of angry young rock-throwing men, the court was unable to say beyond reasonable doubt that the accused's use of the machete to inflict the injuries he did for the purpose of dispersing the group was unreasonable or an excessive, or disproportionate use of force.
2. Accordingly the accused was acquitted.

Cases considered:

Beckford v The Queen [1998] 1 AC 130
Palmer v R [1971] AC 814
R v Makafilia [2005] Tonga LR 448
R McInes 55 CR App R 551

Statute considered:

Criminal Offences Act (Cap 18)

Counsel for the Crown : Mr 'Aho
Counsel for the defendant : Mr Tu'utafaiva

Verdict and reasons

[1] The accused, Salesi Makafilia, was indicted on one count of causing serious bodily harm contrary to section 107(1), (2) (c) conclusion of the evidence and after submissions which lasted for only about half a day, I adjourned for my verdict to be given on the 10th August, 2016.

[2] The evidence was in a very narrow, confined ambit. The case involved one issue and that was whether the accused should be acquitted of the offence of causing serious bodily harm by virtue of self-defence and/or defence of another.

[3] The complainant gave evidence that on the 21st August, 2015, he was at Sopu outside the residence of the accused when the accused appeared with a machete. The complainant admitted he had been fighting with the brother of the accused, Lautaimi, and followed him to the Makafilia home. He admitted that he saw the accused appear with a machete and that he threw a large rock at him. He said also that a friend of his also threw a rock and that both missed. He said he also proceeded to punch the accused about three times. He said other young men were present about 6-7 of them. He said that the accused had struck him twice with a machete to the upper breast area and in the area of his wrist. He admitted to Mr Tu'utafaiva that he had been drinking since about 8pm in the evening. The incident occurred about 2am. Medical evidence was given by the tendering of a report that the complainant had sustained a wound to the left distal forearm, deep through muscle exposing the radius bone which was not broken. There was also a 15 cm transverse laceration on the right anterior chest at the level of the clavicle.

[4] The only other evidence, aside from the machete which was produced in evidence, was a record of interview of the accused taken on the 28th August, 2015. The accused was unrepresented. He said that he was married, a vegetable grower, and that he had been at home drinking on the night in question. He had finished drinking with others at about 1am. He said his younger brother had alerted him to the fact that Lautaimi was being chased by a group of boys. He said he got up and took the machete and ran towards the boys chasing Lautaimi.

[5] He said he ran over. There were a lot of them. They came with rocks. He tried to disperse them using the machete. The boy that he hit with the machete was the second boy. He ran over not knowing that he had a machete. He then beckoned him with the machete and the complainant beckoned to throw rocks at him. The accused said that he struck the complainant with the machete in order for them to disperse because they were throwing rocks and that is what he thought he'd do, to injure someone and they will disperse.

[6] He admitted hitting him twice. He was not acquainted with him. He said his first blow landed below the right side of his neck and as for the second strike he could not confirm where it landed. He believed he had injured him. They then retreated and went home. He said this occurred on the main road opposite his residence at about 2am. He repeated that he hit the complainant because he tried to disperse them when they chased Lautaimi and he did not wish for Mosese Piutau to be injured when he tried to disperse

them. He felt remorseful not happy. He did not wish for anything like this to happen and he said he wished to apologise to Mosese Piutau.

[7] The accused did not give evidence.

[8] Mr Tu'utafaiva advanced self-defence and defence of another. He submitted that a person was able to use reasonable force in self-defence or in the defence of another as he honestly believed was necessary in the circumstances. *Beckford v The Queen* [1998] 1 AC 130 at 144 per Lord Griffiths. In this case, the events he submitted had taken place in the early morning, and there were a number of people in the road. He had learned Lautaimi was being chased. He submitted that the accused had acted in the agony of the moment prima facie raising self-defence and that he was entitled to an acquittal based on self-defence and defence of another unless I was sure that the force used was unreasonable.

[9] Mr Aho submitted there was no need for the accused to do what he did. Lautaimi, he said on the complainant's evidence had returned to the house. He could have simply avoided doing anything. He submitted there was no real threat and that his actions were disproportionate to the force used by the complainant to use the words of Ford J in *R v Makafilia* [2005] Tonga LR 448, at 454. He submitted that self-defence should fail and the accused should be convicted.

Findings and Verdict

[10] The accused did not give evidence. In these circumstances, the veracity of the assertions he made in his record of interview could not be tested. However, there does not seem to be very much at all at variance with what the complainant said in his evidence occurred. He had admitted fighting with Lautaimi and chasing him to the area of the Makafilia residence. He suggests Lautaimi went inside but the accused makes no mention of this, in his record of interview. Rather he says he ran towards the area where the boys were chasing Lautaimi. The complainant does confirm that a number of young men were present and the complainant admitted that he and a person by the name of Etuate threw large rocks at the accused when he appeared with a knife. He admitted wanting to proceed fighting with the accused. I have no reason not to believe the accused when he said he used the machete to disperse the group. In other words, I accept that what he did was with an honest belief that it was necessary to disperse this group of aggressive youths in self-defence and in defence of his brother when he confronted them. Where Lautaimi was on the point or stage of confrontation between the accused and the group of youths is unclear.

[11] The real issue is whether what he did namely striking twice with a machete was reasonable in the circumstances as he believed them to be. On this issue, there is some force in Mr Aho's argument that the use of a weapon such as a machete was an unreasonable or disproportionate reaction. A machete is a weapon capable of being used with lethal consequences. Further, there was not merely one blow inflicted by the accused but two. I am, however, guided in my verdict by the direction in the Privy Council in *Palmer v R* [1971] AC 814 approved by the English Court of Appeal in *R McInes* 55 CR App R 551, cited in Archbold (2016 edition) at para 19-46, as follows

> "If there has been an attack so that defence is reasonably necessary, it will be recognized that a person defending himself cannot weight to a nicety the exact measure of his defensive action. If the jury thought in a moment of

> unexpected anguish a person had done only what he honestly and instinctively thought necessary that would be most potent evidence that only reasonable defensive action had been taken".

[12] As the judgment also emphasises self-defence is rooted in common sense. Whilst initially, the accused took the machete with a view to going outside and protecting his brother from others who were chasing him, the focus of his attention quickly moved to the complainant and his group, who assaulted him. Two of that group, the complainant and a friend reacted by throwing what were describe as large rocks. In these circumstances, I cannot assert beyond reasonable doubt that the decision of the accused which I accept was honestly and instinctively formed to use the machete to disperse the group by hitting the complainant was an unreasonable or excessive use of force. It achieved, as Mr Tu'utafaiva, said the result he sought in that the group dispersed. Further, although two blows and lacerations were inflicted, they were not lethal injuries or life threatening. A more determined use of a machete (which I closely examined) in the hands of a person bent on revenge would have had the potential and would have been likely in my view to have inflicted far more serious harm.

[13] In these circumstances, faced with the group, two of whom had been involved in an attack on him, moments earlier and with knowledge that they had been involved with chasing his brother, as Mr Tu'utafaiva submitted in the "agony of the moment" and in the circumstances he found himself, that is confronted alone by a number of what must have seemed to be angry young rock throwing men, I am unable to say beyond reasonable doubt that his use of the machete to inflict the injuries he did for the purpose of dispersing the group was unreasonable or an excessive, or disproportionate use of force.

[14] Accordingly, I acquit the accused. He is discharged.

Lord Sevele of Vailahi v Prime Minister of Tonga anor

Supreme Court, Nuku'alofa
Paulsen LCJ
CV 26/2016

24 August 2016; 25 August 2016

Civil procedure – interim injunction sought to maintain position – judicial review proceedings - granted

The plaintiff applied for an interim injunction to restrain the defendants from acting on the second defendant's decision of 26 May 2016 to remove and replace the plaintiff as the Chief Executive Officer and Chairman of the Tonga Pacific Games Organizing Committee and to cease payment of his remuneration and benefits. The application was filed on 1 June 2016 but it was not heard earlier as it was understood that the defendants agreed to maintain the status quo (that is, not to remove the plaintiff from his position and continue payment of his salary and benefits) pending the hearing of the substantive action. The plaintiff continued to perform his duties and receive his remuneration until the end of June 2016. As a result of a change of position of the defendants the application was brought on to be heard on an urgent basis.

Held:

1. When deciding whether to allow an application for an interim injunction, the Court should consider whether there was a serious question to be tried, whether the balance of convenience favoured the granting of the injunction, and whether the overall justice of the case favoured the granting of the injunction? When an interim injunction was sought in the context of a judicial review proceeding this approach needed to take account of the public law factors involved including the overarching consideration that in order to ensure societal and legal stability, it was generally in the public's interest that decisions of public authorities are respected until dealt with before the Court.
2. The court was satisfied that the plaintiff established an arguable case that the purported removal of him from his office as Chief Executive and withhold his remuneration was unlawful. The balance of convenience favoured the plaintiff and the maintenance of the status quo pending the hearing of the substantive action.
3. It was proper to grant an interlocutory injunction which restrained the defendants from taking any steps to remove the plaintiff from office as Chief Executive and requiring it to make payment of his salary and other benefits pending the hearing of the action.

Cases considered:

American Cyanamid Company v Ethicon Limited [1975] AC 396

Belize Alliance of Conservation Non-Governmental Organisations v Department of the Environment of Belize and Anor (Practice Note) [2003] UKPC 63 [35]

Klissers Farmhouse Bakeries v Harvest Bakeries Ltd [1985] 2 NZLR 129 (CA)

Mike Pero (New Zealand) Limited v Heath and Ors [2015] NZHC 2040

Project Blue Sky Inc and Ors v Australian Broadcasting Authority 153 ALR 490

R v Ministry of Agriculture, Fisheries and Food and Anor, Ex Parte Monsanto Plc [1999] QB 1161

Supervisor of Elections and Ors v Sione Tupouniua (Unreported, Court of Appeal, AC32/2014, 24 November 2014, Scott Salmon and Hansen JJ

Statutes considered:

Interpretation Act (Cap 1)

Pacific Games Organisation Act 2013

Remuneration Authority Act 2010

Counsel for the plaintiff : Mr WC Edwards

Counsel for the first and second defendants : Mr L Niu

Ruling on application for injunction

[1] This ruling concerns an opposed application by the plaintiff for an interim injunction to restrain the defendants from acting on the second defendant's decision of 26 May 2016 to remove and replace the plaintiff as the Chief Executive Officer and Chairman of the Tonga Pacific Games Organizing Committee and to cease payment of his remuneration and benefits.

[2] Whilst this application was filed on 1 June 2016 it was not heard earlier as it was understood that the defendants agreed to maintain the status quo (that is, not to remove the plaintiff from his position and continue payment of his salary and benefits) pending the hearing of the substantive action. The plaintiff has continued to perform his duties and receive his remuneration until the end of June 2016. As a result of a change of position of the defendants the application was brought on to be heard on an urgent basis.

The facts

[3] I set out the facts only in so far as they affect this application.

[4] In late 2012, Tonga was named the host of the 2019 Pacific Games. The Pacific Games Organisation Act 2013 ('the Act') was enacted to provide for the organisation of the Games.

[5] Section 3 of the Act established the Organizing Committee as the statutory body responsible for the day to day preparation and management leading up to the Games and for the conduct of the Games.

[6] The plaintiff was appointed as the Chief Executive of the Organizing Committee. He is employed by the Organizing Committee. His appointment was made under section 9(1) of the Act and was for the period April 2014 to October 2019.

[7] The plaintiff signed a written employment contract with the Organizing Committee on 9 May 2014 which was subject to an agreed addendum dated 23 June 2015. Because of its relevance to a submission advanced by the defendants' Counsel, Mr. Niu, I note here that the addendum states that it was entered into because it was recognised by the Organizing Committee that there was a need to ensure that the requirements of natural justice and fairness in any steps taken to terminate the plaintiff's employment "should be spelt out in this contract". The addendum goes on to provide for specific grounds for termination of the plaintiff's employment and that:

> If this contract of employment is terminated by the Organizing Committee without the consent of the CEO, then unless the Organizing Committee proves that the termination was reasonable and based on one of grounds set out in (2) hereunder, then the CEO is entitled to damages for wrongful termination of contract and the benefits that would have to be paid to the CEO had this contract continued to its full term.

[8] The duties of the Chief Executive are set out in section 9(2) of the Act and include that he is to be the Chairperson of the Organizing Committee, carry out or supervise the work the Organizing Committee has decided to do, control all the activities the Organizing Committee has required and report to the Organizing Committee on progress of work the Organizing Committee has required to be undertaken. In addition the Act states that he acts as the Secretary of the second defendant ('the Authority') and reports on "progress and problems" to the Prime Minister (section 9(2)).

[9] By section 4(1) of the Act the Organizing Committee consists of not less than 9 persons, although there is power to co-opt other persons from time to time to attend and participate in deliberations of the Organizing Committee but without any power to vote on any matter (section 4(4)).

[10] Section 4(2) provides that the members of the Organizing Committee shall be appointed by the Authority after consultation with the Pacific Games Council and the Tonga Sports Association and National Olympic Committee (TASANOC). That section however recognises three *ex officio* members of the Organizing Committee, namely the Chief Executive, the Solicitor General and the Secretary General of TASANOC who under section 4(2)(b) hold office "whilst they remain Chief Executive Officer, Secretary General and Solicitor General respectively". In addition under sections 4(2)(c) and (d) the Authority is required to appoint to the Organizing Committee a nominee of both the responsible Minister and the Pacific Games Council.

[11] Relevantly, in light of both the Government's decision to withhold the funds of the Organizing Committee (to which I shall shortly refer) and some of the reasons advanced to support its decision to remove the plaintiff, the Act makes clear that the Organizing Committee is to be a financially autonomous body free and independent of any Government Department (section 5(2)). The Act recognises also that the Organizing Committee shall comply with any directions of the Pacific Games Council "which is to retain overall control of the Games, in accordance with the Host Contract" (section 5(3)). The Host Contract is a lengthy document dated 19 October 2012 between the Pacific Games Council, the Tonga Pacific Games Association and the

Government of Tonga which, inter alia, states that the Games are the exclusive property of the Pacific Games Council and that it is that body which retains overall control of the Games.

[12] The first defendant is the Prime Minister of Tonga and also the Chairperson of the Authority. The Authority was established by section 15 of the Act. Its roles include appointing members of the Organizing Committee "in accordance with this Act" (section 16(1)(a)), overseeing the "good governance, accountability and transparency" of the Organizing Committee (section 16(1)), making sure that the Organizing Committee plans and works properly to prepare and conduct the Games and to report to the Minister primarily responsible for the Games.

[13] On 15 December 2015 the first defendant wrote to the plaintiff expressing the displeasure and concern of himself and Cabinet at the performance of the plaintiff and his staff of the Organizing Committee. The letter stated that it was a grave concern that the plaintiff's salary was excessive and exceedingly large and that the plaintiff's contract of employment had been signed without due consultation with the Remuneration Authority as required by section 9(1) of the Act. The letter went on to challenge the appointment, salaries and performance of other staff members, Takitoa Taumoepeau and Sakopo Lolohea, and then requested the voluntary resignations of the plaintiff, Mr. Taumoepeau and Mr. Lolohea (as well as one Ringo Fa'oliu) by 18 December 2015. The plaintiff responded in a letter of 17 December 2015 providing a detailed defence of, inter alia, the work of the Organizing Committee and its staff, including Mr. Taumoepeau and Mr. Lolohea, and the Chief Executive's salary. The letter also advised that neither the plaintiff nor any of the staff of the Organizing Committee that he had recruited wished to resign from their positions.

[14] On 26 May 2016, the plaintiff received a letter from the first defendant purporting to immediately terminate his employment as the Chief Executive of the Organizing Committee. The letter read:

> Immediate Vacating of Government-Funded PG2019 OC/Chairman Position by Termination of Employment of Current Incumbent With Effect From 4:30pm Friday 27/05/16
>
> In my capacity as Prime Minister of Tonga hence Chairman of the Audit & Governance Authority (AGA), I hereby inform you – the incumbent of the above mentioned position, that the AGA has approved by majority the following AGA Decision:
>
> 1. That the current employment of Lord Sevele-'O-Vailahi as OC CEO/Chairman including remuneration and benefits be immediately terminated and that he vacates the Office of the OC with effect from 4:30pm Friday the 27th May 2016; and
> 2. That the Solicitor General be appointed Interim CEO/Chairman of the OC under the terms and conditions of his current employment and to take effect immediately after the above stated termination of employment until further notice.

> As you may have been aware of from previous leaked AGA circular letter, the justifiable sensible basis of this decision was significant downgrade of the roles of the stated position of concern. This occurred when the Government Facilities Committee (GFC) took over the majority of the Organizing Committee (OC) roles, so as OC CEO's roles, with effect from 5 February 2016. The position is currently being re-evaluated before it will be re-advertised and to which you may still wish to re-apply in due course.
>
> The decision is in line with Tonga as a sovereign state, Tonga's Public Financial Management Act for frugal and prudent utilization of its public funds in the eyes of the public, and the Pacific Games Organization Act 2013 geared to accommodate the Pacific Games Council's sports event for the Pacific.
>
> Thank you in advance for your cooperation in vacating the said position as per the above AGA Decision.

[15] On 30 May 2016, the Prime Minister's office issued a media release that the Authority had approved that the position of the plaintiff as Chief Executive and Chairman of the Organizing Committee be vacated by the plaintiff and that he was to be replaced by the Solicitor General on an interim basis.

[16] The decision has not been accepted by the plaintiff who has continued to work in his role. He has filed an affidavit setting out the work that he has done since the defendants purported to remove him, which has not been challenged by the defendants. The decision has not been accepted either by the Pacific Games Council. It has issued a media release on 31 May 2016 stating that it did not recognise the actions taken to remove the plaintiff which it said were not within the powers of the Authority.

The pleadings and case management

[17] On 1 June 2016, the plaintiff filed the statement of claim commencing this action, together with ex parte applications for leave to apply for judicial review (which I granted on 13 June 2016) and an injunction to preserve the status quo and allow the Organizing Committee to continue its preparations for the Games until the substantive action is finally heard.

[18] The defendants filed a statement of defence and counterclaim and recently an affidavit of the Hon. Prime Minister in reply to the injunction application.

[19] The plaintiff asserts that the defendants' decision to remove him was unlawful as the Act does not provide them with the power to terminate the employment of the Chief Executive. He says that this position can only be terminated in accordance with the proviso to section 9(1) of the Act which gives the Organizing Committee the power to terminate the employment of the Chief Executive at any time and without assigning any reason, notwithstanding any other contractual condition or law. He further argues that the power in section 9 of the Act is to be read subject to the terms of his employment contract, referring to the addendum of June 2015, requiring that any termination of the Chief Executive by the Organizing Committee be made for one of the reasons stated in that document. Alternatively, the plaintiff claims that the defendants did not accord him natural justice as they did not provide sufficient

particulars of their reasons for the decision or allow the plaintiff adequate time to respond to the reasons and a reasonable opportunity to be heard before making the decision to terminate his employment.

[20] In their statement of defence the defendants plead that the appointment of the plaintiff was not in accordance with the Act in that it was not made in consultation with the Remuneration Authority as required by section 9(1). They also assert that the position was not advertised to the public and was therefore not made in accordance with the principles of good governance, accountability and transparency. The defendants also deny that they were required to afford natural justice to the plaintiff before terminating his appointment because the Authority was not his employer nor a party to the plaintiff's employment contract. In any event, the defendants say that they afforded him natural justice. It is pleaded also that the Authority had the power to terminate the plaintiff's employment under section 7 of the Act in the performance of its responsibilities to oversee the good governance, accountability and transparency of the Organizing Committee and "for invalidity of appointment or for down grading of the responsibilities of any member of the Committee".

[21] The defendants have also filed a counterclaim that alleges that the processes by which the plaintiff was appointed and his salary determined were contrary to the Act and invalid because of the lack of consultation with the Remuneration Authority and the failure to publicly advertise the position. They seek a declaration that the plaintiff's appointment was invalid or, in the alternative, that the salary and benefits agreed to be paid in respect of his employment were unlawful and an order for the plaintiff to refund a substantial portion of the salary he has received over and above what the defendants consider he was entitled to. The defendants plead that as of 15 April 2016 the amount the plaintiff should repay totalled $264,000 and in addition he should repay a further $11,000 for every month he works after 15 April 2016.

[22] As I noted earlier, when this application first came before the Court it was agreed that in light of the defendants' willingness to maintain the status quo it was not necessary to determine the injunction application. In a minute of 13 June 2015 I adjourned the plaintiff's application for injunction but granted leave to the plaintiff to bring the application back before the Court should that be necessary. At the same time I was able to give the action an early hearing date of 29-30 August 2016 which was acceptable to the parties.

[23] However, on 4 July 2016 the plaintiff wrote an email to the Ministry of Finance and National Planning because he had learned that the Prime Minister's Office had issued a directive that funds of the Organizing Committee, from which salaries are paid, were to be withheld. On 5 July 2016, Tatafu Moeaki of the Ministry replied to the plaintiff by email that he had been instructed to "defer making any payment to the OC in this new FY 2016/17 until we get clearance from the PMO including the revised role of the OC". The plaintiff wrote to the Prime Minister on 12 July 2016 asking him to reconsider his decision to withhold funds of the Organizing Committee. The plaintiff then received a letter dated 21 July 2016 from the Chief Secretary and Secretary of Cabinet that she had been directed that the Ministry would "continue to hold the funds for the Organizing Committee until the Audit Report for the Committee is submitted". In his affidavit of 11 August 2016 the plaintiff states that all audits and audited accounts have been provided to the Authority.

[24] Against the background of these developments on 20 July 2016 the Court received a request from Mr. Nui, on behalf of the defendants, to adjourn the trial scheduled for 13-14 September 2016 because of the Prime Minister's travel commitments. A conference was convened with Counsel on 28 July 2016. At that conference I was made aware, in broad terms, that an issue had arisen as to the payment of the plaintiff's salary but Counsel were confident that this would be resolved. I made it clear that I would only entertain the application for an adjournment of the trial if the status quo was maintained and this was understood. Email correspondence from Mr. Niu to the plaintiff's Counsel, Mr. Edwards, dated 28 July 2016 (immediately following the conference) confirms that Mr. Niu conveyed to the defendants "the direction of the [Lord Chief Justice] agreed in chambers that the status quo be maintained i.e. that the funds of the [Organizing Committee] not be withheld (although the audit report has not be [sic] done by the OC but that report be still required and must still be produced in the meantime)". It was on this basis that I agreed to adjourn the trial until 13-14 October 2016 but again reserved leave for the injunction application to be brought on "should any steps be taken to alter the status quo". On 12 August 2016 I received an application from the plaintiff that the application for injunction be heard as the plaintiff's salary (as well as the salaries of other staff of the Organizing Committee) continued to be withheld. I set the application down for hearing on 24 August 2016 to provide time for the defendants to file evidence in opposition to the application for injunction should they wish to do so and an affidavit of the Hon. Prime Minister was subsequently filed.

The Hon. Prime Minister's affidavit

[25] The Hon. Prime Minister's affidavit in opposition to the injunction application is a brief document. It deals principally with the process by which the plaintiff was appointed, the allegedly rushed nature of that process, the fact that the role was not advertised and that terms and conditions of the plaintiff's appointment were referred to the Remuneration Authority but for its information only. The affidavit does however acknowledge that the plaintiff's appointment and terms of employment were agreed to by the Authority.

[26] The Hon. Prime Minister states that the Authority has a responsibility to ensure that the funds of the Organizing Committee are properly applied and as the Authority is not satisfied it has directed that the funds of the Organizing Committee be stopped. Relevantly for present purposes it is said:

> We have therefore requested audited report of the OC for 2014-2015 and they have been forwarded but we have found them to be incomplete and we have advised them to complete them and they have still not done that up to now. We have yet to receive the audited report for 2015-2016…..
>
> We believe that the appointment of the plaintiff as CEO was grossly improper because the position was not properly advertised for fair opportunity for application by the public and because the salary of $180,000 per annum plus 20% retirement contribution is grossly excessive and it was agreed upon without proper consultation with the Remuneration Authority as we believe is required by the Act to be done. We believe that the Act envisaged that the remuneration of a CEO of the OC is to be

> comparable to the salaries set by the Remuneration Authority for other CEO's of Government and statutory bodies of Government.
>
> And as the plaintiff did not wish to accept our decision to dismiss him and has continued to for us to continue [sic] to pay him his salary, we therefore decided to stop payment of his salary by stopping the funds to the OC. We believe that we would fail in our responsibility under the Act to ensure the good governance, transparency and accountability of the operation of the OC if we allow the salaries of the plaintiff and the OC to continue to be paid when we know they are grossly excessive and we believe unlawful.
>
> It is also relevant of course to point out that the responsibilities of the plaintiff and of the 3 men he has engaged has been substantially reduced by the removal of the responsibility for the games facilities from the OC to the Government Games Facilities Committee.

[27] As far as the allegation that natural justice was not observed, all that the Hon. Prime Minister has to say relevant to that matter is:

> Before the plaintiff's contract was terminated, I held a meeting with the plaintiff at my office where I asked him to step down from his position as CEO of the [Organizing Committee] whilst the Government reconsiders the role of the CEO with a view to advertising it. The plaintiff refused to stand down.

[28] I should note for completeness only that there is no requirement in the Act that the position of the Chief Executive be advertised publicly nor is the audit report of the Organizing Committee for the 2015-2016 year yet due (section 18(3)). I also note that a notable feature of the affidavit is the absence of any engagement on the question of where the balance of convenience lies in relation to the granting or refusal of the injunction.

The legal principles

[29] When deciding whether to allow an application for an interim injunction, the Court should follow the approach set out in *American Cyanamid Company v Ethicon Limited* [1975] AC 396 and *Klissers Farmhouse Bakeries v Harvest Bakeries Ltd* [1985] 2 NZLR 129 (CA) as follows:

> [29.1] Is there a serious question to be tried?
> [29.2] Does the balance of convenience favour the granting of the injunction?
> [29.3] Does the overall justice of the case favour the granting of the injunction?

[30] In the usual case the interaction between the principles was described in the following way by Moore J in *Mike Pero (New Zealand) Limited v Heath and Ors* [2015] NZHC 2040:

> [25] Thus the Court must first consider whether there is a serious issue to be tried and, if it determines there is, whether damages would provide an adequate remedy and against that, where the balance of convenience

properly lies. In assessing the balance of convenience, regard may be had to the adequacy of damages should relief not be granted, the relative strength of each party's case and the impact of a decision on the rights of third parties.

[26] Finally the Court is required to step back and consider what overall justice requires having regard to these considerations.

[31] Where an interim injunction is sought in the context of a judicial review proceeding however, as in the present case, this approach needs to take account of the public law factors involved (*R v Ministry of Agriculture, Fisheries and Food and Anor, Ex Parte Monsanto Plc* [1999] QB 1161 ('*R v MAAF, Ex parte Monsanto*'); *Belize Alliance of Conservation Non-Governmental Organisations v Department of the Environment of Belize and Anor (Practice Note)* [2003] UKPC 63 [35] ('*BACONGO v Department of the Environment of Belize*')). These include the overarching consideration that to ensure societal and legal stability, it is generally in the public's interest that decisions of public authorities are respected until dealt with before the Court (*R v MAAF, Ex parte Monsanto*; *R v Secretary of State for Transport, Ex parte Factortame*). I had full regard to this principle in the assessment of the present application.

[32] Given the element of public interest involved in judicial review proceeding the most important factor for the Court's consideration will generally be whether the balance of convenience favours the injunction rather than whether damages would provide an adequate remedy (*R v Secretary of State for Transport, Ex parte Factortame).*

[33] The Court must assess the balance of convenience taking into account the strength of the claimant's case and the extent of the loss or prejudice that would be suffered by each party if the Court grants or does not grant the injunction and one of the parties is then successful in Court (*R v Secretary of State for Trade and Industry, Ex parte Trades Union Congress* [2001] 1 CMLR 8 [27]).

[34] Whether or not to grant an injunction in judicial review proceedings is of course always a matter for the Court to determine in its discretion and in consideration of all the circumstances of the case (*BACONGO v Department of the Environment of Belize*; *R v Secretary of State for Transport, Ex parte Factortame*).

Is there a serious issue to be tried?

[35] The plaintiff's first argument is that the plaintiff's appointment was invalid because it was not publicly advertised and there was not proper consultation with the Remuneration Authority. There are immediate difficulties faced by this argument. First, the plaintiff's appointment was approved by the Authority. Mr. Nui argued that this does not matter as that appointment was made under another Government but it is to be noted that it is not the Government but the Authority that made the decision under review. Secondly, upon a proper reading of the Act it is the Authority that is required to consult with the Remuneration Authority over the engagement of the Chief Executive (section 9(1)) and what the Authority now seeks to do is set up its own failure to consult with the Remuneration Authority to remove the plaintiff. Thirdly and most relevantly, the correct approach for determining whether the infringement of a statutory provision will result in invalidity is to ask whether it was the purpose of the legislation

that an act done in breach of such a provision should be treated as invalid and that in determining the question of purpose, regard must be had to the language of the relevant provision and the scope and object of the whole statute (*Supervisor of Elections and Ors v Sione Tupouniua* (Unreported, Court of Appeal, AC32/2014, 24 November 2014, Scott Salmon and Hansen JJ) and *Project Blue Sky Inc and Ors v Australian Broadcasting Authority* 153 ALR 490). In my view having regard to the words of section 9(1) which requires only consultation with the Remuneration Authority and not its consent to either the appointment or terms of appointment of the Chief Executive, the scheme of the Act as a whole as well as the statutory role, functions and powers of the Remuneration Authority as set out in Part III and section 13 of the Remuneration Authority Act 2010 (which is primarily to make recommendations on the salaries and other monetary benefits of certain Officers) it is difficult to see how a failure to consult, or any inadequacy in the level of consultation, with the Remuneration Authority will invalidate the appointment of the Chief Executive.

[36] The defendants' second argument relies upon section 7(1) of the Act which provides:

> Without prejudice to section 4(2)(a)(c) and (d) any member of the Organizing Committee, may be removed from office by the Authority for disability, inefficiency, bankruptcy, neglect of duty, misconduct or permanent departure from Tonga, or may resign his office by written notice addressed to the Chairperson.

[37] The defendants argue that under section 7(1) the Authority has a general power to remove any member of the Organizing Committee. My view at this stage of the proceeding is that the section does not confer any such power on the Authority. As I have noted earlier, section 4(1) and (2) of the Act are concerned with the appointment of the members of the Organizing Committee. Section 4(2)(b) states that the members specified in sections 4(1)(a)(b) and (c) (that is the Chief Executive, the Secretary General of TASANOC and the Solicitor General) are *ex offico* appointments "holding office whilst they remain Chief Executive Officer, Secretary General and Solicitor General." In contrast, the other members of the Organizing Committee may be removed by the Authority (in the case of the nominees of the Minister and Pacific Games Council after receiving notice that they wished to change their nominees) at any time without cause. The opening words of section 7(1) which read "Without prejudice to section 4(2)(a)(c) and (d)" are intended to make clear that the powers to remove members appointed under those particular sections (which do not include the *ex offico* members) are unaffected by the power vested in the Authority to remove those members for any of the reasons set out in section 7(1), namely for "disability, inefficiency bankruptcy, neglect of duty, misconduct or permanent departure from Tongan or he may resign his office by written notice addressed to the Chairperson". The powers of removal in sections 4(2)(a), (c) and (d) are intended therefore to work in conjunction with the powers in section 7.

[38] The power of removal in section 7(1) cannot apply to *ex offico* members of the Organizing Committee as they hold their office whilst they remain the Chief Executive, Secretary General of TASANOC and Solicitor General (section 4(2)(b)). The Chief Executive is employed by the Organizing Committee and it is only the Organizing Committee that is given the express power under the Act to terminate his employment upon which his membership on the Organizing Committee depends. Section 9(1) of the Act provides as follows:

> Provided that notwithstanding any other contractual condition or law, Organizing Committee may at any time and entirely at its discretion and without assigning any reason, terminate the employment of the Chief Executive Officer with immediate effect, subject to any rights of compensation that may be specified in the employment contract.

[39] In my view the Act does not give or confer any power on the Authority to terminate the Chief Executive's employment under section 7 or otherwise.

[40] Relevant to this it is to be noted that section 4(1) provides that the Chief Executive, Secretary General of TASANOC and the Solicitor General "shall" be members of the Organizing Committee. If the Authority had a power to remove *ex offico* members they could not be replaced whilst they held their qualifying offices as there is no power granted to the Authority to replace an *ex offico* member who is removed from Office. There is therefore no power in the Act for the Authority to replace the Chief Executive with the Solicitor General on a temporary basis or otherwise as it has purported to do in this case.

[41] A third argument was advanced by Mr. Niu that if the Act did not expressly confer upon the Authority the power to terminate the plaintiff's employment then it must have an implied power to do so to give effect to and perform its function to oversee the good governance, accountability and transparency of the Organizing Committee (section 16(1)(b)). He asked me to refer to the Interpretation Act. Section 9 of that Act states that:

> Where in any Act ... power is given to any person to do or enforce the doing of any Act or thing all such powers shall be understood to be given as are reasonably necessary to enable any person to do or enforce the doing of the act of thing.

[42] In my view this argument is barely tenable because section 16(1)(b) does not confer on the Authority any power and nor would the implication of the implied power for which the defendant's contend be necessary or proper in light of the clear statutory intent that the employment of the Chief Executive may only be terminated by the Organizing Committee.

[43] It is not strictly necessary for me to go on and consider the alterative allegation of the plaintiff that he was not afforded natural justice. It will suffice to say that if it was ultimately to be held that the Authority did have the power to remove the plaintiff there is a strong case that natural justice had to be observed. The evidence before the Court, particularly the Hon Prime Minister's affidavit, suggests that the removal of the plaintiff was perfunctory.

[44] For these reasons I am satisfied that the plaintiff has established an arguable case that the purported removal of him from his office as Chief Executive was unlawful.

Where does the balance of convenience lie?

[45] In relation to the balance of convenience, as I noted the Hon. Prime Minister's affidavit had little to say which was relevant to this issue. The plaintiff has remained in his position performing his duties since the Authority purported to remove him. It is apparent from the plaintiff's fourth affidavit that a significant amount has been achieved in that time and there was no attempt by the defendants to contend otherwise or to suggest that they will suffer any loss or detriment should the plaintiff remain in office pending the hearing of this action. I accept that if the plaintiff is granted the injunction his salary will have to be met from the funds which are presently being withheld from the Organizing Committee but there is nothing to suggest that this will result in financial prejudice.

[46] In his oral submissions Mr Niu suggested that the balance of convenience favoured the defendants because the plaintiff could be compensated in damages should it ultimately be found that his employment was terminated unlawfully. This is not a strong argument. The plaintiff's employment is with the Organizing Committee not the Authority. It would appear unlikely that he will have a right to compensation from the Organizing Committee even if he is ultimately successful. Mr. Niu argued that this did not matter as the plaintiff would have a claim against the Authority but he did not articulate the legal basis for such a claim. Even assuming a right to compensation from the Authority there is nothing before me to suggest that the Authority would accept its liability to pay the plaintiff damages and there is no offer to provide an undertaking to do so. The plaintiff has however provided an undertaking as to damages and the defendants have not taken issue with it or suggested that the plaintiff is not able to honour it.

[47] There is clearly prejudice to the plaintiff that will arise should I not grant him the injunction. There is the obvious financial prejudice in not receiving his salary until the case is heard. Furthermore, Mr. Edwards submitted with some force that the Authority has made plain its intention to remove the duties of the Chief Executive and the Organizing Committee with no statutory authority to do so. He submitted, and I accept, that any such change will prejudice the plaintiff and impact upon his ability to perform his duties should he be successful in this action.

[48] Mr Edwards also submitted that the physical removal of the plaintiff from his position will result in damage to his reputation for which he will have no ability to seek compensation in damages. Whilst I do not put great weight on this final matter I think there is some merit in the submission that even ultimate victory may not fully restore the reputational damage which may be caused should the plaintiff now be forced from office.

[49] For these reasons I am of the view that the balance of convenience favours the plaintiff and the maintenance of the status quo pending the hearing of the substantive action.

Should the injunction be granted in the overall justice of the case?

[50] In assessing the overall justice of the case the following factors weigh with me. Based on the arguments that have been presented to date I consider that the plaintiff has a strong case that the defendants acted unlawfully in purporting to remove him from office. Furthermore, for the defendants' parts there has been an inconsistency of approach as to the reasons justifying the decision. I am mindful that the trial of this action is in October and it might be thought that there is no pressing need to grant the plaintiff interlocutory relief in light of that. Against that however, the plaintiff would have pursued his application when it was first filed had there not been clear indications that the defendants would maintain the status quo. I do not think the plaintiff should therefore be prejudiced by the defendants' change of position at a late stage.

Conclusion

[51] The plaintiff has satisfied me that he has a strong case that the actions of the defendants in purporting to remove him as Chief Executive and withhold his remuneration were unlawful. The balance of convenience favours the maintenance of the status quo pending the hearing. I am also satisfied that it is proper to grant an interlocutory injunction restraining the defendants from taking any steps to remove the plaintiff from office as Chief Executive and requiring it to make payment of his salary and other benefits pending the hearing of this action. I will make orders to that effect.

Result

[52] The order I make is as follows:

> Pending further order of this Court the defendants, their employees, agent or servants, are restrained from acting upon or carrying out the removal of the plaintiff as the Chief Executive of the Tonga Pacific Games Organizing Committee (appointed under the Pacific Games Organizing Act 2013) and he is to be paid all remuneration and to receive all other benefits due to him in the performance of that role including any remuneration or benefits withheld from him since 1 July 2016.

[53] The plaintiff is entitled to the costs of this application which shall be fixed by the Registrar if not agreed.

Paea anor v Sika

Supreme Court, Nuku'alofa
Paulsen CJ
CV 43/2016

8 September 2016; 13 September 2016

Civil procedure – interim injunction application – judicial review proceedings – prompt substantive hearing – refused

The applicants applied for an urgent injunction to restrain the respondent (the Minister of Tourism) from removing them from their positions as Chairperson and a Director, respectively, of the Tonga Tourism Authority Board until further order of the Court. The applicants commenced the substantive action that sought a declaration that the decision of the respondent that their appointments had expired and that they were to vacate their offices, was invalid. The applicants also sought orders that set aside the decision and direct the applicants to resume their duties forthwith.

Held:

1. When deciding whether to allow an application for an interim injunction, the Court should consider whether there was a serious question to be tried, whether the balance of convenience favoured the granting of the injunction, and whether the overall justice of the case favoured the granting of the injunction? When an interim injunction was sought in the context of a judicial review proceeding this approach needed to take account of the public law factors involved including the overarching consideration that in order to ensure societal and legal stability, it was generally in the public's interest that decisions of public authorities are respected until dealt with before the court.
2. The court made some assessment of the relative strengths of the cases and noted that the applicants' case was not strong. The court found that the balance of convenience favoured the refusal of the injunction for the following reasons: the applicants would not suffer significant loss to their reputation or finances should an injunction be refused; secondly, the granting of an injunction would not advance the interests of the applicants or the Authority before the substantive action was heard and could possibly cause further disruption should the applicants ultimately be unsuccessful; thirdly, in applications of this kind the court should have regard to the public's interest that decisions of public authorities are respected until dealt with before the court. Finally, the hearing of the substantive action was to be heard on 21 September 2016 and therefore it was not considered appropriate to make interim orders when the case could be heard so promptly.

3. The application for injunction was refused. The overall justice of the case favoured refusing the injunction considering the relative weakness of the applicants' case, the lack of any real prejudice to the applicants if the injunction were to be refused or any significant advantage if it were granted, and the availability of a very early hearing date.

Cases considered:

American Cyanamid Company v Ethicon Limited [1975] AC 396
Klissers Farmhouse Bakeries v Harvest Bakeries Ltd [1985] 2 NZLR 129 (CA)
Lord Sevele of Vailahi v Prime Minister of Tonga anor [2016] Tonga LR 342
R v Inland Revenue Commissioners, Ex parte Preston [1985] AC 835
R v MAAF, Ex parte Monsanto Plc [1999] QB 1161
R v North East Devon Health Authority, Ex parte Coughlan [2001] QB 213
R v Secretary of State for Education and Employment, Ex parte Begbie [2000] 1 WLR 1115
R v Secretary of State for Transport, Ex parte Factortame Limited and Ors (No 2) [1991] AC 603

Statute considered:

Tonga Tourism Authority Act 2012

Rules considered:

Supreme Court Rules 2007

Counsel for the applicants : Mrs P Tupou
Counsel for the respondent : Mr S Sisifa SC

Ruling on application for injunction

[1] The applicants commenced this action seeking a declaration that the decision of the respondent, who is the Minister of Tourism, that their appointments as the Chairperson and a Director, respectively, of the Tonga Tourism Authority Board had expired, and that they were to vacate their offices, was invalid. The applicants also seek orders that set aside the decision and direct the applicants to resume their duties forthwith.

[2] This ruling concerns an opposed application by the applicants for an urgent injunction to restrain the respondent from removing them from their positions on the Board until further order of the Court.

[3] The application was filed on 12 August 2016 along with an application for leave to apply for judicial review. On 15 August 2016 I granted the applicants leave to apply for judicial review under Order 39 Rule 2 Supreme Court Rules and required the injunction application to proceed on notice. I adjourned the matter to 19 August 2016 for service and on that date made timetabling orders for the filing of evidence. I also directed that the application was to be heard on 8 September 2016. Although the timetable was not complied with the application was argued on 8 September 2016 at the conclusion of which I reserved my decision.

[4] I have concluded that I should refuse the injunction application and intend to set the substantive action down on an urgent basis before Scott J on 21 September 2016. I consider that in view of the imminent trial it is sufficient and appropriate that I record the facts (which I do not understand are materially disputed) and my reasons concisely.

The facts

[5] On 1 October 2015 the Ministry of Infrastructure and Tourism submitted a proposal to cabinet to approve the nomination of a Chairperson and three Directors to the Board of the Tonga Tourism Authority which I understand were to fill vacancies following resignations of Directors and the Chairperson in 2013 and 2015.

[6] On 2 October 2015 Cabinet approved the appointment of the applicants (and two others) to the Board. The Cabinet decision records that the first named applicant, Mr. Paea, was to be appointed as Chairperson of the Board to replace Mr. Ross Chapman. It did not otherwise state the terms and conditions of the appointments.

[7] The applicants received letters of offer dated 5 October 2015 for appointment to the Board which were signed by the then Minister of Infrastructure and Tourism, Hon 'Etuate Lavulavu. The letters stated that the appointments would be for "a term of up to three (3) years" from 2 October 2015. Other terms and conditions of the appointments included those set out in sections 8, 9 and 10 of the Tonga Tourism Authority Act 2012 ('the Act').

[8] The applicants accepted the appointments and on around 20 January 2016 they received further letters from the Minister confirming their appointments from 2 October 2016. The letters also confirmed the earlier advice that the appointments were for a term of up to three years and that sections 8, 9 and 10 of the Act applied to the appointments.

[9] On 17 June 2016 the applicants received a letter from the newly appointed Minister, the respondent Hon Semisi Sika, that the applicants' appointments had expired on 3 May 2016. His reason was that the applicants had been appointed to fill vacancies on the Board and that, pursuant to section 9(10) of the Act, every person appointed to fill a vacancy could only be appointed for the remainder of the term for which the vacating Director was appointed. Whilst acknowledging that the former Minister had written that the applicants' appointments were to be for up to three years, the Minister stated that "we must follow the Act" and that the applicants could be reappointed to the Board subject to Cabinet approval.

[10] On 21 July 2016 the applicants received letters from the Acting Chief Executive Officer for Tourism requiring them to vacate the offices of the Tonga Tourism Authority. Again reliance was placed upon section 9(10) of the Act to assert that the applicants' appointments had expired.

The positions of the parties

[11] The applicants argue that the Minister's decision was unlawful on five grounds. First, they say that they were appointed for three years under sections 9(1)(b) and (2)(a) of the Act, and not to fill a vacancy under sections 9(9) and (10). They submit that the Act does not expressly prohibit an appointment under section 9(1)(b) and (2)(a) when a vacancy arises. In the alternative the applicants argue that even if their appointments

for three years were "irregular or defective" in excess of Cabinet's powers, they were entitled to retain their appointments under the doctrine of de facto officer. The second ground is that the decision was made in breach of the principle of natural justice in that the applicants were not given an opportunity to be heard prior to the decision being made. Thirdly, the applicants contend that as a result of the former Minister's representations they had a legitimate expectation to serve on the Board for three years. Fourthly, it is said that the Minister's decision was made under a mistake of fact that the appointment of the applicants was made under section 9(10) of the Act when it was made under sections 9(1)(b) and 9(2)(a). The final ground advanced is that the Minister's decision was unreasonable as it was made without regard to the applicants' interests and rights.

[12] The respondent argues that he made no decision to remove the applicants from their positions but that their tenure had expired as a matter of law under section 9(10) of the Act. He argues that the rationale behind section 9 is to ensure that the term of tenure of Directors, whether initially appointed or replaced, is to be completed after three years unless they are reappointed.

The legal principles

[13] I did not understand there to be any difference between the parties as to the legal principles to be applied by the Court when deciding whether to allow an application for an interim injunction. The Court should follow the approach set out in *American Cyanamid Company v Ethicon Limited* [1975] AC 396 and *Klissers Farmhouse Bakeries v Harvest Bakeries Ltd* [1985] 2 NZLR 129 (CA) as follows:

> [13.1] Is there a serious question to be tried?
> [13.2] Does the balance of convenience favour the granting of the injunction?
> [13.3] Does the overall justice of the case favour the granting of the injunction?

[14] However, as I recently noted in *Lord Sevele of Vailahi v Prime Minister of Tonga* anor [2016] Tonga LR 342 when an interim injunction is sought in the context of a judicial review proceeding this approach needs to take account of the public law factors involved including the overarching consideration that in order to ensure societal and legal stability, it is generally in the public's interest that decisions of public authorities are respected until dealt with before the Court (*R v MAAF, Ex parte Monsanto Plc* [1999] QB 1161; *R v Secretary of State for Transport, Ex parte Factortame Limited and Ors (No 2)* [1991] AC 603).

[15] Given the element of public interest involved in judicial review proceedings, the more important factor for the Court's consideration will generally be whether the balance of convenience favours the injunction rather than whether damages would provide an adequate remedy. The Court must assess the balance of convenience taking into account the strength of the claimant's case and the extent of the loss or prejudice that would be suffered by each party if the Court grants or does not grant the injunction and one of the parties is then successful in Court.

[16] Whether to grant an injunction or not is, in the final analysis, a matter for the Court to determine in its discretion and in consideration of all the circumstances of the case.

Is there a serious issue to be tried?

[17] I have given careful consideration to all the grounds advanced by the applicants in support of their claim. The grounds were not fully argued by either party and my comments are preliminary and broad brush and cannot be taken as necessarily reflecting the final outcome. Nevertheless, it is necessary for me to make some assessment of the relative strengths of the cases presented to me.

[18] The applicants posit that Cabinet has the power to appoint Directors under sections 9(1)(b) and (2)(a) or under section 9(10) of the Act. However, it appears to me that those sections do not operate conjunctively but disjunctively. They apply in different circumstances. Once it is accepted that the applicants were appointed to fill a vacancy on the Board there is a strong argument that their appointments could only ever be for the remainder of the term for which the vacating Director was appointed. I do not consider the doctrine of de facto officer applies to the circumstances of this case.

[19] If this interpretation of the Act is correct, it would follow that the respondent did not make a decision to remove the applicants but, as the respondent contends, their appointments simply expired. There could in those circumstances be no obligation on the respondent to offer the applicants an opportunity to be heard and the arguments based on mistake and unreasonableness would also fall away.

[20] The best argument made for the applicants before me was that they had a legitimate expectation of appointment for three years which it would be unjust to frustrate (*R v North East Devon Health Authority, Ex parte Coughlan* [2001] QB 213; *R v Inland Revenue Commissioners, Ex parte Preston* [1985] AC 835; *R v Secretary of State for Education and Employment, Ex parte Begbie* [2000] 1 WLR 1115 at [53]), but there are clearly counter arguments that such expectation must yield to the clear terms of the Act and that in any event the applicants were never offered appointment for three years but only for "up to three years".

[21] I am not required to resolve these matters. It is sufficient for present purposes for me to note that my assessment is that the applicants' case is not strong.

Where does the balance of convenience lie?

[22] Both parties argued that the balance of convenience favoured them. Both argued that should the Court decide the application for injunction against them they would suffer damage to their reputations. I accept some reputational damage is possible but also that both parties overstate the case. They also both argued that if the Court decides the application in their favour the other party will suffer little if any loss. I consider that neither party will suffer significant hardship regardless of the result of this application for reasons I shall come to.

[23] The applicants submit that the granting of the injunction would allow them to unfreeze the bank account of the Authority so that it can operate normally and continue on with work they had planned for the benefit of tourism in Tonga. I put only limited weight on these factors as the applicants' Counsel advises me that the bank account is frozen as a result of the actions of the applicants and because I consider that the applicants and the Authority are unlikely to progress their work significantly before the hearing of the substantive action.

[24] The applicants also argue that an injunction is necessary to protect the applicants from the appointment by Cabinet of further Directors, but against that I understood Mr. Sisifa to say that such appointments are awaiting credibility checks and will not be made prior to the hearing of the substantive action on the dates I have proposed to Counsel.

[25] It was also argued that without an injunction the applicants will lose work and remuneration until the claim is finally determined, but the remuneration is not significant and Mrs. Tupou did not try to press that argument.

[26] In my view the balance of convenience favours the refusal of the injunction for these reasons. First, I do not consider that the applicants, who must make the case for an injunction, will suffer significant loss to their reputation or finances should an injunction be refused. Secondly, the granting of an injunction will not advance the interests of the applicants or the Authority before the substantive action is heard and could possibly cause further disruption should the applicants ultimately be unsuccessful. Thirdly, and as I noted earlier, in applications of this kind the Court should have regard to the public's interest that decisions of public authorities are respected until dealt with before the Court. Finally, I am able to offer the parties a hearing for the substantive action on 21 September 2016 before Scott J to resolve the matter. I do not consider it appropriate to make interim orders when the case can be heard so promptly.

[27] Counsel have advised me that the proposed date for the trial is suitable and that neither intends to file further evidence. If either party wishes to cross-examine on the affidavits then they can give notice of that and I consider that such cross-examination as is necessary can be accommodated within the time available.

Should the injunction be granted in the overall justice of the case?

[28] Standing back and looking at the matter as a whole, the relative weakness of the applicants' case, the lack of any real prejudice to the applicants if the injunction were to be refused or any significant advantage if it were granted, and the availability of a very early hearing date strongly indicate to me that the overall justice of the case favours refusing the injunction.

Result

[29] The application for injunction is refused.

[30] Costs are reserved.

[31] This action is set down for trial before Scott J on 21 September 2016. Any party wishing to cross examine on any affidavit must note the requirement to serve notice in accordance with Order 27 Rule 7 Supreme Court Rules.

Public Service Association v Government of Tonga anors

Supreme Court, Nuku'alofa
Paulsen CJ
CV 41/2016

9 September 2016; 13 September 2016

Civil procedure – leave to apply for judicial review – refused

The Public Service Association (the PSA) applied for leave to apply for judicial review of Cabinet's decisions 661 and 662 of 8 July 2015 to implement the recommendations of the Remuneration Authority as to the remuneration and other benefits of public service employees contained in the Remuneration Authority's reports of July 2014 and September 2015.

Held:

1. The purpose of the requirement that leave be obtained to apply for judicial review was to ensure that an applicant could only proceed to a substantive hearing if the Court was satisfied that there was a case fit for further investigation on a full *inter partes* hearing.
2. The applicant did not satisfy the court that it had an arguable case for review. The reasons were that the pleadings were defective; the issues raised were not justiciable; and there was no arguable ground advanced for review.
3. The most significant defect in the statement of claim was that it did not clearly state what decisions were being challenged, the content of those decisions or the grounds upon which the challenge to those decisions was being advanced.
4. The application for leave to apply for judicial review was refused. Therefore the applicant's application for injunction was dismissed.

Cases considered:

Aye v Minister for Immigration and Citizenship (2010) 187 FCR 449
Couch v Attorney General [2010] 3 NZLR 149
Council of Civil Service Unions v Minister for Civil Service [1985] AC 374
Davey v Aylesbury Vale District Council [2008] 2 All ER 178
Inland Revenue Commissioner v National Federation of Self-Employed and Small Businesses Limited [1981] 2 All ER 93
Minister for Arts v Peko-Wallsend Ltd (1987) 75 ALR 218
Moala v Public Service Commission [2012] TOCA 14; AC 22 of 2011 (27 April 2012)
Price Waterhouse v Fortex Group Ltd (Unreported, Court of Appeal, CA 179/98, 30 November 1998)

Ririnui v Landcorp Farming Limited and others [2016] NZSC 62
Stewart v Ronalds [2009] NSWCA 277

Statute considered:
Public Service Act 2002

Regulations considered:
Public Service (Grievances & Dispute Procedures) (Amendment) Regulations 2010

Rules considered:
Supreme Court Rules 2007

Counsel for the applicant	:	Mr O Pouono
Counsel for the respondents	:	Mr 'A Kefu SC

Ruling

The application and the procedural history

[1] This is an application for leave to apply for judicial review.

[2] This case has had an unhappy history. The applicant filed an application for injunction on 5 August 2016. It sought an injunction to restrain the respondents from implementing salary structures for the public service which were recommended in Remuneration Authority reports of June 2014 and September 2015 and which it was said had been approved by Cabinet on 8 July 2016. On 8 August 2016, I issued a minute pointing out that what was being sought was in the nature of judicial review but leave had not been granted to commence judicial review proceedings.

[3] As far as the injunction application was concerned there was no undertaking as to damages, which is a mandatory requirement of the Supreme Court Rules. There had also been delay in applying for the injunction and no obvious justification provided for proceeding on an ex parte basis, nor was it clear to me why the second and third respondents were required parties. Unusually, the application also sought orders that affidavits filed in support of the injunction be treated as confidential (that is, not be disclosed to the respondents) until after the application was determined because the deponents' employment might be at risk if the affidavits were disclosed to the respondents.

[4] Reserving the position as to whether leave to apply for judicial review should be granted, I directed that the application for injunction would proceed on notice. Out of an abundance of caution, I did not require the applicant to serve the affidavits of Losaline Ma'asi, Telesia Ma'asi, Kilifi Polutele, Vilai Ilolahia and annexure 4 to the affidavit of the applicant's General Secretary, Mele Teusivi 'Amanaki. I also directed that the case would be called before me on 12 August 2016 for review.

[5] On 11 August 2016 the applicant filed an ex parte application for leave to apply for judicial review. When the case came before me on 12 August 2016 I was advised that the respondents had not been served with the injunction application. The case was adjourned to 19 August 2016 in the expectation that I would deal with the application for leave to apply for judicial review early the following week.

[6] Having considered the application for leave, on 15 August 2016 I issued a further minute in which I stated that on the information that was put before me I was not satisfied that the applicant had established grounds for obtaining leave to apply for judicial review. In accordance with O.39 Rule 3(1) Supreme Court Rules I said I would hear from Counsel on that application on 19 August 2016. On 19 August 2016 and again on 2 September 2016 I granted adjournments to give the applicant more time to make submissions and put further evidence before the Court in support of its leave application. Consistent with the practice that has been followed in this Court I also directed that I would hear submissions on the application from the respondents' Counsel. On 5 September 2016, the applicant filed a further affidavit of Mrs. 'Amanaki and also some written submissions in support of the application for leave.

[7] The application for leave was heard on 9 September 2016. Both the applicant and respondents were represented by Counsel. I reserved my decision.

The rules

[8] Order 39, Rules 1, 2 and 3 Supreme Court Rules relevantly provide:

> O.39 Rule 1. When remedy available
>
> This order applies to any action against an inferior Court, tribunal or public body (including an individual charged with public duties) in which the relief claimed includes an order of mandamus, prohibition or certiorari, or a declaration or injunction (in this order referred to as "judicial review").
>
> O.39 Rule 2. Leave of Court required
>
> (1) No application shall be made for judicial review unless the leave of the Court has been obtained in accordance with this rule.
> (2) An application for leave to apply for judicial review shall be made promptly and in any event within three months from the date when grounds for the application first arose unless the Court considers that there is good reason for extending that period.
> (3) An application for leave shall be made ex parte by filing:
> (a) an application notice which is to set out concisely the relief claimed and the grounds therefore;
> (b) a copy of the proposed writ and statement of claim; and
> (c) an affidavit verifying the facts relied on.

O.39 Rule 3. Court's powers

(1) The Court may grant the application without a hearing, but shall not refuse it without hearing the applicant.
(2) The Court shall not grant leave unless satisfied that the applicant has a sufficient interest in the matter to which the application relates.

[9] Where there has not been undue delay in bringing an application for leave the Court must still be satisfied that there is an arguable case for review (*Moala v Public Service Commission* [2012] TOCA 14; AC 22 of 2011 (27 April 2012)). The burden upon the applicant in this regard is not onerous. Mr. Kefu referred me to the judgment of Lord Diplock in *Inland Revenue Commissioner v National Federation of Self-Employed and Small Businesses Limited* [1981] 2 All ER 93, 106 where he said:

> The whole purpose of requiring that leave should first be obtained to make the application for judicial review would be defeated if the court were to go into the matter in any depth at that stage. If, on a quick perusal of the material then available, the court thinks that it discloses what might on further consideration turn out to be an arguable case in favour of granting to the applicant the relief claimed, it ought, in the exercise of a judicial discretion, to give him leave to apply for that relief.

[10] However, the Court will not grant leave where the case is frivolous, vexatious or hopeless. The purpose of the requirement that leave be obtained is to ensure that an applicant may only proceed to a substantive hearing if the Court is satisfied that there is a case fit for further investigation on a full *inter partes* hearing (White Book, 1991 Edition at 53/1-14/8; *Davey v Aylesbury Vale District Council* [2008] 2 All ER 178).

The reasons this application fails

[11] The applicant has not satisfied me that it has even an arguable case for review. My reasons can be summarised as:

[11.1] The pleadings are defective;
[11.2] The issues raised are not justiciable;
[11.3] There is no arguable ground advanced for review.

Defects in the pleadings

[12] A statement of claim serves a number of purposes in civil proceedings. These include defining the claim so that the Court knows what it must rule upon and fairly informing the defendant of the case that it must meet. This is reflected in Order 8 Rules 2(b) and (c) Supreme Court Rules which states that a statement of claim must contain:

(b) the material facts upon which the plaintiff relies giving such particulars of time, place, amounts, names of persons, nature and dates of instruments, and other circumstances as may suffice to inform the Court and the party or parties against whom relief is sought of the plaintiff's cause of action;

(c) the relief or remedy sought and shall state specifically any claim for interest;

[13] The New Zealand Court of Appeal said in *Price Waterhouse v Fortex Group Ltd* (Unreported, Court of Appeal, CA 179/98, 30 November 1998):

> What we are saying is that both the Court and opposite parties are entitled to be advised of the essential basis of a claim or defence and all necessary ingredients of it, so that subsequent processes and the trial itself can be conducted against recognisable boundaries. Neither the Court nor opposite parties should be placed in the position of having to deal with a proposition of whose substance adequate notice has not been given in the pleadings.

[14] Defective pleadings can, in most instances, be remedied by amendment. That said, leave should not be granted to an applicant seeking judicial review in circumstances such as exist here, where the statement of claim is discursive, repetitive, omits essential information relevant to the claim, contains significant contradictions and generally requires substantial amendment. Mr. Kefu submitted that it would be unfair to require the respondents to reply to the statement of claim in its present form. I agree and consider that the respondents would have difficulty responding to the statement of claim in a meaningful way. Had I not had the benefit of reading the affidavits filed in support of the injunction application, the statement of claim would have been largely incomprehensible to me.

[15] The most significant defect in the statement of claim in my view is that it does not clearly state what decisions are being challenged, the content of those decisions or the grounds upon which the challenge to those decisions is being advanced. The starting point is paragraph 5 of the statement of claim. It purports to describe the nature of the claim. The claim is said to be that the implementation of new salary structures approved by Cabinet on 8 July 2016 was a breach of a memorandum of understanding of 3 September 2005 between a Cabinet subcommittee on behalf of the Government of Tonga and a negotiation team of the Interim Committee of Civil Servants (the memorandum of understanding). That at least is stated with reasonable clarity but when one reads further it appears that other decisions are under challenge and for different reasons, although there has been no attempt to differentiate between different causes of action and there is just one prayer for relief.

[16] Paragraph 7 of the statement of claim alleges that 800 public servants have submitted written grievances to the Public Service Commission against the new salary structures. Paragraph 8 then alleges that the implementation of the new salary structures without first addressing the public service employees' grievances is a breach by the Public Service Commission (not Cabinet) of its obligations under sections 6-8 Public Service (Grievances & Dispute Procedures) (Amendment) Regulations 2010 (the regulations). Later in paragraph 11 it is pleaded that in failing to comply with the regulations the Public Service Commission was acting on behalf of the Government without further explanation.

[17] Paragraph 7 also refers to a decision of Cabinet of 27 April 2016 "for the consultations to be carried out" from which I infer (although it is far from clear) that it is being asserted that Cabinet was to consult on the new salary structures. There is no further detail of the 27 April 2016 decision or on the scope of the expected consultation. Paragraph 9 enigmatically pleads that the rescinding of the decision of 27 April 2016 by Cabinet on 13 May 2016 was a breach of the regulations without previously stating that such decision had been rescinded or the circumstances under which it was rescinded.

[18] Paragraph 10 appears to contain a further claim. It refers to a Notice of Employment Dispute submitted by the applicant to the Public Service Commission on 30 March 2016 on behalf of its members. It does not state what the notice related to or what was being sought on behalf of the applicant's members. It is then alleged that the implementation of the new salary structures without addressing the notice was a breach by the Public Service Commission of the regulations.

[19] Finally, paragraph 12 of the statement of claim pleads that the implementation of the new salary structures without first "replying back to the employees" was a breach of natural justice "on the rights of the employees to know what has been done to their grievances and a chance for a fair dialogue regarding their benefits at work".

[20] Mr. Pouono advised me that his instructions are that the decisions under challenge are solely Cabinet decisions 661 and 662 of 8 July 2016 (the statement of claim does not actually refer to Cabinet decisions 661 or 662) which it is alleged approved the implementation of the recommendations of the Remuneration Authority in its reports of June 2014 and September 2015. The Cabinet decisions were not put before the Court and Mr. Pouono said that his client does not have them. There is at least some evidence of the decisions in annexure 32 to the affidavit of Mrs. Amanaki of 5 August 2016, which is a letter dated 11 July 2016 from the Prime Minister's Office to Mrs. Amanaki in which it is stated:

> I am also to inform that Cabinet have also considered the update reports on the First Remuneration Report June 2014 and the Second Remuneration Report September 2015 also including Remuneration related policies and Cabinet Decision No. 661 and No. 662 respectively, have approved the implementation of these reports with effect from 1st July 2016.

[21] From what I am able to glean from the papers, and with the assistance of what Mr. Pouono has told me, I understand that what the plaintiff is seeking is judicial review of Cabinet's decisions 661 and 662 of 8 July 2015 to implement the recommendations of the Remuneration Authority as to the remuneration and other benefits of public service employees contained in the Remuneration Authority's reports of July 2014 and September 2015. I further understand that the grounds advanced are the following:

> [21.1] The decisions breach the memorandum of understanding because employees' grievances have not been addressed.
>
> [21.2] The decisions breach regulations 6-8 of the regulations which impose a procedure for resolving employment grievances brought by employees because employee grievances have not been addressed.

[21.3] The decisions breach regulations 12-20 of the regulations which impose a procedure for resolving employment disputes brought by an employee association because the applicant's Notice of Employment Dispute has not been addressed.

[21.4] The decisions breach natural justice because the employees' grievances have not been addressed.

[22] I now turn to consider whether there is an arguable case:

[22.1] That Cabinet's decisions are justiciable or whether those decisions are non-justiciable on account of their policy and political content;

[22.2] That any public law principle justifying review is engaged on any of the grounds that are advanced by the applicant.

Are the decisions justiciable?

[23] Recently in the judgment of Elias CJ and Arnold J in *Ririnui v Landcorp Farming Limited and others* [2016] NZSC 62 at [1] the learned judges of the New Zealand Supreme Court said as follows:

> This is a judicial review case. Judicial review is a supervisory jurisdiction which enables the courts to ensure that public powers are exercised lawfully. In principle, all exercises of public power are reviewable, whether the relevant power is derived from statute, the prerogative or any other source. The courts acknowledge limits, however. These limits are reflected primarily in the notions that the case must involve the exercise of a public power, that even if the court has jurisdiction, the exercise of power must be one that is appropriate for review and that relief is, in any event discretionary.

[24] In P A Joseph's leading text '*Constitutional and Administrative Law in New Zealand*' (4th Ed at 22.5, page 873) the author notes that although no public administration is immune from review *per se*:

> The courts respect the constitutional and institutional differences between the branches [of Government] and defer over decisions involving: the national interest, polycentric issues, macro-economic policy, the allocation of public resources, the mediation of sectional interests and moral preferences.

[25] The English and Australian courts recognise the need for deference based on a consideration of the status of the decision maker and the nature of the power being exercised (*Council of Civil Service Unions v Minister for Civil Service* [1985] AC 374, *Minister for Arts v Peko-Wallsend Ltd* (1987) 75 ALR 218, 225-227, *Aye v Minister for Immigration and Citizenship* (2010) 187 FCR 449, *South Australia v O'Shea* (1987) 163 CLR 378, 389). In *Council of Civil Service Unions* (supra) Lord Diplock at pages 408-409 said:

> To qualify as a subject for judicial review the decision must have consequences which affect some person other than the decision maker, although it may affect him too. It must affect such other person either:
>
> (1) by altering rights or obligations of that person which are enforceable by or against him in private law; or
> (2) by depriving him of some benefit or advantage which either:
>
> (a) he has in the past been permitted by the decision-maker to enjoy and which he can legitimately expect to be permitted to continue to do until there has been communicated to him some rational ground for withdrawing it on which he has been given an opportunity to comment; or
>
> (b) he has received assurance from the decision-maker will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn.

[26] Decisions which directly affect the rights or circumstances of an individual, or persons readily ascertainable and few in number, are more likely to be open to review but that is not the case where the decision is dictated by broad policy considerations of public interest or does not involve questions to which the judicial processes are adapted to provide the correct answer (Lord Diplock (supra) at page 411). In such cases the policy considerations may require the "submerging of individual disadvantage" (*Peko-Wallsend* (supra) at [84]).

[27] In *Stewart v Ronalds* [2009] NSWCA 277 at [42] and [43] the Court stated:

> Central to the identification of the kinds of decisions amenable to review by the courts is the suitability of the subject for judicial assessment and, in particular here, whether the assessment of the legitimacy or otherwise of the decision depends on legal standards or by reference to political considerations…
>
> …Essential to the task is the identification of the controversy, its limits and character. Often the nature and extent of rights of individuals, whether of a proprietary or other character, as affected by the asserted wrong will bespeak a justiciable controversy. The presence of standards capable of being assessed legally may do likewise…

[28] In *Couch v Attorney General* [2010] 3 NZLR 149 at [161] the Supreme Court of New Zealand said that the courts should be very reluctant to embark on "an examination of general government policies, priorities and funding decisions." This caution is particularly apposite here.

[29] Section 6(g) of the Public Service Act (as amended in 2010) provides that it is a principal function of the Public Service Commission to:

> determine the respective designations and other terms and conditions of employment, including the remuneration, for employment for employees subject to the approval of Cabinet.

[30] The Public Service Act does not set out any specific process or procedures to be followed by the Public Service Commission in assessing public service employees' remuneration or terms of employment or by Cabinet in deciding whether to grant its approval to them. There is however the Public Service Policy 2010, made pursuant to section 23 of the Public Service Act by the Public Service Commission with the approval of Cabinet, which provides some guidance on what the Public Service Commission must consider, focusing on fairness, affordability and the circumstances of the national economy. Policy 39(1) provides that the Public Service Commission shall undertake a review of remuneration paid in the public service every three years. Policy 37 sets out principles to apply to the remuneration paid to public service employees which includes at (a), (e) and (l):

> remuneration shall be affordable to the Government, fair and appropriate within the national economy;
>
> salary scales shall be reviewed formally at least once every 3 years…;
>
> any changes in remuneration may be implemented over time and as they become affordable to the Government.

[31] For the Court to investigate Cabinet's decisions that are challenged in this case the Court would necessarily need to scrutinise the deliberations in Cabinet and the basis upon which the decisions were made, which must include matters of macro-economic policy, social policy, affordability and the proper allocation of the Kingdom's resources. These are "quintessentially political questions" that this Court is not suited to adjudicate upon. It is not the function of the Court to do so in my view (*Stewart v Ronalds* (supra) at [45]).

[32] That this is the case is reinforced by the fact that so far as Cabinet's decisions may adversely affect employees in the public service they have rights to seek redress either individually or through an employee association under the regulations. An employee may raise an employment grievance which includes circumstances where the employee claims that his employment or one or more conditions of it are affected to his disadvantage by unjustifiable action of his employer or that his employment conditions disadvantage or discriminate against him. An employee association may give notice of an employment dispute on behalf of its members and seek redress for its members in respect to any dispute relating to their terms and conditions of employment. The availability of these avenues to resolve disputes and grievances leads me to the view that judicial review is neither necessary nor desirable.

Is review justified on any of the grounds advanced

[33] Although the finding that the matters raised are non-justiciable is enough to dispose of this matter I will now deal with the grounds advanced by the applicant for review and consider whether any of them are arguable. I am of the firm view that they are not.

[34] The common feature shared by the proposed causes of action is the assumption of an obligation on Government to consult with the applicant and public service employees and to address their concerns and grievances before giving its consent to the introduction of new salary structures. This is clear from paragraph 14 of the statement of claim which states:

> Government will not lose anything by deferring the implementation of the new salary structures to allow them time to complete the consultations, address grievances finalise the new structures and clarify to the employees the new salary structure and how it works including the bonus system.

[35] I can see nothing in the Public Service Act which imposes such an obligation nor could it be expected or required when Cabinet's decision is so pre-eminently one of policy (Joseph at 25.3.3 and page 1043).

[36] As the Court noted in *Peko-Wallsend* at [81]:

> Government at all levels would become unworkable if there were an obligation, before making any decision which may be financially disadvantageous to an individual, to seek out and to hear all affected persons. It was for this reason that both Lord Diplock [in *Council of Civil Service Union*s] and Mason J [in *Kioa v West* [1985] HCA 81] carefully defined the types of decisions to which the obligation applies. They did so by reference to the direct and immediate effects of those decisions. For them it was not enough that the instant decision might lead to some future decision or action which would have the specified effect.

[37] The applicant's grounds for review are untenable for other reasons also.

[38] The first ground is that the Cabinet decisions breach clause 7 of the memorandum of understanding. The statement of claim pleads that the memorandum of understanding was entered into following a six and a half week strike of civil servants in 2005 as a result of their dissatisfaction with the 2005 public service salary review. Clause 7 states:

> The implementation of the Public Service Salary Review that was approved by Government on 30 June 2005 as effective on 01 July 2005 will be deferred for two (2) years.

[39] The statement of claim pleads that Cabinet's decision to implement that new salary structure without addressing the public service employees' grievances was a breach of clause 7. In paragraph 7 of the statement of claim it further pleads that the two year deferment in 2005 to implement the new salary structures was to allow time for Government to undertake consultation and to address grievances. This argument faces insurmountable hurdles. Clause 7 says only that the 2005 salary review will be deferred

for two years. It says nothing about future consultation on reviews of salary structures. Secondly, the memorandum is a political document which expressed a convergence of will of the parties but could not have been intended to create legally binding obligations. Even if the memorandum of understanding were to be considered binding, the present salary review of public servants remuneration was not conducted until 2014/2015 well outside the two year period provided for in the memorandum and there has been no breach of it.

[40] The next grounds advanced are that the implementation of the new salary structures without addressing the employees' grievances or the applicant's Notice of Employment Dispute breached the regulations. The statement of claim fails to identify what the grievances or the Notice of Employment Dispute specifically relate to or how the requirements of the regulations have not been complied with. In so far as the Public Service Commission has breached the regulations by failing to comply with its procedural requirements, judicial review is neither necessary nor appropriate when both the public service employees and the applicant have a remedy (other than judicial review) to appeal to the Public Service Tribunal (regulations 10 and 19).

[41] In a supplementary affidavit of 2 September 2016 Mrs. Amanaki states that the applicant has chosen to apply for judicial review due to its past experience of the Public Service Tribunal and specifically because the Tribunal has ruled that the applicant is not an employee association. She says that for this reason the applicant cannot give a notice of dispute under the regulations. I do not accept her evidence. It is apparent from the statement of claim and Mrs. Amanaki's first and supplementary affidavits that the applicant has already served a notice of dispute under the regulations. At paragraph 13 of her supplementary affidavit Mrs. Amanaki states "That in order to protect our members, we have filed notice of dispute grievance under the umbrella of Public Service Association". Secondly, in respect of the decision of the Public Service Tribunal to which Mrs. Amanaki refers (*Public Service Association v Public Service Commission* (PST Appeal 3/14, 28 July 2014) all that the Public Service Tribunal decided was that the applicant had failed to prove that it was either registered according to law or that it had public service employees within its then current membership (paragraph 12 of the ruling). These are matters that it was required to establish under the regulations (see the definition of association in regulation 2). It may establish those matters in any future proceeding, including a Public Service Tribunal proceeding in relation to the present matter. Mrs. Amanaki also referred to alleged harassment of the applicant's officers that occurred some years ago and to the fact that the Ministry of Labour had given notice in 2014 that it intended to petition the Court to wind up the applicant. I do not consider that any of these matters are relevant to any question I must decide or that they explain or justify the applicant applying for judicial review when other more appropriate avenues are open to it.

[42] The final ground advanced is that natural justice requires that the employees who have filed grievances have a right to know how they have been dealt with before the new salary structures are introduced. This ground does no more than dress up the other grounds advanced in another guise and adds nothing to them.

Result

450 [43] The application for leave to apply for judicial review is refused. It must follow that the applicant's application for injunction is dismissed and I so order.

[43] If any party seeks costs they may apply within 14 days. My preliminary view is that costs should lie where they fall.

Fonua anor v Westpac Bank of Tonga

Court of Appeal, Land Jurisdiction, Nuku'alofa
Moore, Blanchard, Hansen, and Tupou JJ
AC 5/2016

5 September 2016; 14 September 2016

Land law – mortgage agreement – Bank expressly authorised to charge interest as it did – appeal dismissed

Mr and Mrs Fonua entered into a loan agreement with the Bank on 9 March 2007. The loan was secured over their leasehold land. They fell into arrears and, on 13 June 2013, the Bank issued a notice under the Land Act (Cap 132) claiming the sum of $379,202.94. Subsequently the Bank applied for summary judgment seeking a declaration that it was entitled to possession of the leasehold land, the building and fixed improvements secured by the mortgage. Mr and Mrs Fonua counterclaimed. They claimed the amount they had been called upon to pay the Bank had been inflated by 'unlawful' charges which they had been unable to pay. The actions of the Bank were said to have been the cause of their default. On 6 May 2016 the Land Court dismissed the counterclaim against the Bank; Mr and Mrs Fonua appealed against that judgment and argued that the Land Court had erred in finding that interest, loan administration charges and late fees had been lawfully charged and in denying the Mr and Mrs Fonua's claim for damages.

Held:

1. The court was satisfied that the counterclaim could not succeed. Even if Mr and Mrs Fonua had been able to show that the Bank's actions, and not their own default, led to the forced sale of their house, they could not show it caused them any loss. They claimed damages of $200,000, the price at which the Bank would have been prepared to sell the house to them or their nominee in order to resolve a longstanding dispute. They declined the Bank's offer. But they did not lose anything as a result of the action then taken by the Bank to realise its security. The house sold for $180,000. It was the best offer received. There could be no suggestion it was sold at an undervalue. The proceeds of sale were applied to reduce Mr and Mrs Fonua's indebtedness. The Bank's enforcement action resulted in the loss of their house but not in any diminution in their net assets.
2. The Bank's practice was to compute interest on the outstanding balance of the account monthly, then debit it to the customers' account. If the interest was not paid the following month, it would be added to the outstanding balance and interest calculated on any unpaid interest as well as unpaid principal. Mr and Mrs Fonua contended throughout that this practice was impermissible. However, the court found that the memorandum of mortgage

expressly authorised the Bank to compute interest on the amount due at the end of each month and to debit such interest to the Mortgagor's account. Money so debited was payable on demand. There was clear authority for the Bank to charge interest in the way it did.

3. The appeal was dismissed.

Statute considered:
Land Act (Cap 132)

Counsel for the appellants	:	Mr LM Niu SC
Counsel for the respondent	:	Mrs D Stephenson

Judgment of the Court

Introduction

[1] The appellants (Mr and Mrs Fonua) appeal against the judgment of Scott J dated 6 May 2016 in which he dismissed their counterclaim against the respondent (the Bank).

Background

[2] Mr and Mrs Fonua entered into a loan agreement with the Bank on 9 March 2007. The loan was secured over their leasehold land. They fell into arrears and, on 13 June 2013, the Bank issued a notice under s109 of the Land Act (Cap 132) claiming the sum of $379,202.94. Subsequently the Bank applied for summary judgment seeking a declaration that it was entitled to possession of the leasehold land, the building and fixed improvements secured by the mortgage. Mr and Mrs Fonua counterclaimed. They claimed the amount they had been called upon to pay the Bank had been inflated by 'unlawful' charges which they had been unable to pay. The actions of the Bank were said to have been the cause of their default.

[3] On 6 March 2015 Scott J sitting as a Judge of the Land Court found that Mr and Mrs Fonua were in default under the mortgage. He made orders declaring that the Bank was entitled to possession of the land and requiring Mr and Mrs Fonua to give vacant possession within 28 days. An appeal against his judgment failed. This Court rejected an argument that Mr and Mrs Fonua were not in default under the mortgage. It also rejected a submission that the Land Court did not have jurisdiction to deal with other aspects of the controversy between the parties. The proceeding was remitted to the Land Court for determination of the remaining issues including Mr and Mrs Fonua's counterclaim.

[4] The hearing took place before Scott J and an assessor. The sole issue remaining for determination was the counterclaim. The basis for the counterclaim is conveniently summarized at paragraph [11] of the judgment:

> "Put briefly, the Defendants' case was that the Bank had "unlawfully" charged:
>
> (i) Loan administration charges;
> (ii) Late payment fees;
> (iii) Interest; and
> (iv) Legal fees.

As a result of making these unlawful charges the amount claimed by the bank to be owed to them had been unlawfully inflated to an amount which was "impossible" for the Defendants to repay and which "directly caused them to default on their monthly repayments by stopping those payments". In paragraph 12 of the counterclaim the Defendants state that:

> "They reasonably made the decision to stop paying the required monthly payments because that was all that they could do".

In paragraph 14:

> "The unlawful action of the Plaintiff has directly caused the loss of the lease and of the dwelling house of the Defendants … worth in excess of $300,000 at the time of repossession thereof by the Plaintiff".

[5] After considering the evidence of Mr Fonua, who said he stopped making repayments to the Bank "because the balance kept growing", and an officer of the Bank, the Court held that the charges and interest in dispute had been lawfully levied. The Court went on to observe at paragraph [37] that, in any event, the precise amount owed is a question quite separate from the Bank's right to foreclose:

> "While the trial of the Defendants' Counterclaim might possibly have reduced the Defendants' indebtedness it could not possibly reopen for consideration the Defendants' decision not to continue making mortgage repayments which the Court of Appeal has already held to be unjustified".

This appeal

[6] Before this court, Mr Niu SC no longer sought to assert that legal fees had been wrongly charged. He argued that the Land Court had erred in finding that interest, loan administration charges and late fees had been lawfully charged and in denying the Mr and Mrs Fonua's claim for damages.

[7] For reasons which we can shortly state we are satisfied that the counterclaim cannot succeed. Even if Mr and Mrs Fonua had been able to show that the Bank's actions, and not their own default, led to the forced sale of their house, they could not show it caused them any loss. They claim damages of $200,000, the price at which the Bank would have been prepared to sell the house to them or their nominee in order to resolve a longstanding dispute. They declined the Bank's offer. But they did not lose anything as a result of the action then taken by the Bank to realise its security. The house sold for $180,000. It was the best offer received. There can be no suggestion it was sold at an undervalue. The proceeds of sale have been applied to reduce Mr and Mrs Fonua's indebtedness. The Bank's enforcement action has resulted in the loss of their house but not in any diminution in their net assets.

[8] Although this is sufficient to dispose of the appeal, it may be of assistance if we indicate our view in relation to the charging of interest. It is the critical link in the chain of causation relied on to establish the counterclaim. Mr Niu acknowledged that it is the interest charged, not the other costs, which increased indebtedness to a level which, on Mr and Mrs Fonua's case, caused them to stop making repayments.

[9] The Bank's practice was to compute interest on the outstanding balance of the account monthly, then debit it to the customers' account. If the interest was not paid the following month, it would be added to the outstanding balance and interest calculated on any unpaid interest as well as unpaid principal. Mr and Mrs Fonua have contended throughout that this practice is impermissible. They say the Bank has no right to change what Mr Niu described as compound interest.

[10] We do not agree. Sub-clauses 1 (f) and (g) of the memorandum of mortgage provide:

> 1. "The Mortgagor shall on demand duly pay to the Bank: …
> (f) Also all money with which the Bank shall be at liberty to debit and charge the account of the Mortgagor under the covenants conditions or provisions herein contained.
> (g) Also interest upon all such moneys as aforesaid or on so much thereof as shall for the time being be due or remain unpaid at the rate agreed upon in writing if any and in the absence of any such agreement then without prior or other notice to the Mortgagor at and after the prevalent rate charged or chargeable by the Bank for the time being or from time to time to its other customers on a like account, **such interest to be deemed to accrue from day to day and to be computed from the time or respective times of such moneys being paid or disbursed or becoming due and at the end of every month or on such other days as the Bank may from time to time determine the interest due as aforesaid and all such interest may at the option of the Bank at any time after the end of such month as aforesaid be debited to the account of the Mortgagor** or to for or on account of any other person as aforesaid or for the payment of which the Mortgagor is otherwise liable to the Bank as hereinbefore sated to the account of the Mortgagor and such debiting of interest may and the provisions herein contained as to the moneys on which interest is payable shall be continued notwithstanding that as between the Bank and the Mortgagor or such other person as aforesaid the relationship of Banker and customer may have ceased and notwithstanding the death insolvency or incapacity of the Mortgagor or of such other person as aforesaid and notwithstanding any other matter or this whatsoever until all moneys hereby secured shall have been paid and satisfied. All of which moneys liabilities and interest as aforesaid are intended to be secured by these presents and are hereinafter referred as the Moneys Here by (sic) Secured". (emphasis added)

[11] The emphasised passage in sub-clause 1(g) expressly authorises the Bank to compute interest on the amount due at the end of each month and to debit such interest to the Mortgagor's account. By sub-clause 1(f) money so debited is payable on demand. There is, then, clear authority for the Bank to charge interest in the way it did.

170 [12] We acknowledge that the Bank's entitlement to charge for loan administration and late payment fees is not as clear cut. However, as the sums involved in aggregate were relatively modest, they could not, as Mr Niu acknowledged, have, by themselves, supported the counterclaim. It follows that even if Mr and Mrs Fonua had been able to establish loss as a result of the Bank's enforcement actions, they could not have shown that the Bank was responsible.

[13] Nothing we have said should be taken as expressing a view that, where a lender may have miscalculated the balance owing of a loan, but there is still a balance outstanding, it is permissible to suspend payment of covenanted principal and interest instalments.

180 **Result**

[14] The appeal is dismissed. The appellant is entitled to costs to be taxed if not agreed.

Minister of Revenue and Customs v Prasad anor

Court of Appeal, Nuku'alofa
Moore, Blanchard, Hansen, and Tupou JJ
AC 7/2016

5 September 2016; 14 September 2016

Revenue and taxation – Jurisdiction of Supreme Court challenged – abuse of process

The Minister of Revenue and Customs appealed from a judgment of the Lord Chief Justice of 16 May 2016 addressing the jurisdiction of the Supreme Court to resolve issues concerning the operation of the Revenue Services Administration Act (RSA Act) and the Income Tax Act (Tax Act). The respondents and cross appellants were two individuals, Rudra Prasad and Pratita Prasad (the Prasads). The Minister approached the appeal on the basis that leave to appeal was necessary because the judgment was an interlocutory judgment. The appeal raised important issues concerning the operation of the RSA Act. While counsel for the Prasads formally opposed the grant of leave, he accepted that the issues raised were important. Accordingly leave to appeal was granted.

Held:

1. The Prasads argued in their cross-appeal the reasoning of the Lord Chief Justice placed inappropriate reliance on New Zealand judgments, and did so notwithstanding that in New Zealand, unlike Tonga and Australia, there was no written constitution. However, the Supreme Court Act clearly contemplates that a law of Tonga could confer exclusive jurisdiction on another court or tribunal and thereby limit the jurisdiction of the Supreme Court. It had never been held that this section offended the Constitution. In any event Part IV created a role for the Supreme Court as the final arbiter of legal issues arising in any challenge under that part to a taxation decision because s10 of the RSA Act created an unqualified right of appeal to the Supreme Court on a question of law which may have arisen in the proceeding before the Tax Tribunal. The Prasads did not demonstrate, in their cross-appeal, any error on the part of the Lord Chief Justice and the cross-appeal was dismissed.
2. The Minister's application of 1 December 2015 sought the dismissal of the Prasads' claim on the basis that the Supreme Court did not have jurisdiction or that it was an abuse of process. It was the court's view that it was an abuse of process and for that reason should be dismissed.
3. The appeal was allowed and proceedings CV 66 of 2015 were dismissed as an abuse of process. The cross appeal was dismissed.

Cases considered:

Commissioner of Taxation v H (2010) 188 FCR 440

Layala Enterprises Pty Ltd v Federal Commissioner of Taxation (1998) 86 FCR 348

Taione v Kingdom of Tonga [2004] TOSC 47; [2005] Tonga LR 67

Tannadyce Investments Ltd v Commissioner of Inland Revenue [2012] 2 NZLR 153

Whitney v Inland Revenue Commissioners [1926] AC 37

Statutes considered:

Income Tax Act (Cap 68)

Revenue Services Administration Act 2002

Supreme Court Act (Cap 10)

Counsel for the appellant : Mr 'A Kefu

Counsel for the respondents : Mr W Edwards

Judgment of the Court

Introduction

[1] This is an appeal and a cross appeal from a judgment of the Lord Chief Justice of 16 May 2016 addressing the jurisdiction of the Supreme Court to resolve issues concerning the operation of the Revenue Services Administration Act (RSA Act) and the Income Tax Act (Tax Act). The appellant is the Minister of Revenue and Customs (the Minister). The respondents and cross appellants are two individuals, Rudra Prasad and Pratita Prasad (the Prasads). The Minister approaches the appeal on the basis that leave to appeal was necessary because the judgment of 16 May 2016 was an interlocutory judgment. The appeal raises important issues concerning the operation of the RSA Act. While counsel for the Prasads formally opposes the grant of leave, he accepts that the issues raised were important. Accordingly leave to appeal is granted.

[2] The Prasads were directors and shareholders of a company, Moapa Enterprises Limited (Moapa), that ceased trading in April 2015. On 14 April 2015, Mr Prasad entered into an agreement with a third party to sell Moapa's business, assets and stock. The Ministry of Revenue and Customs (the Ministry) was, on the same day, advised of the sale. On both that and the following day, the Ministry sent Mr Prasad four income tax assessments for Moapa for the period July 2011 to June 2014 and a consumption tax assessment for Moapa for the period September 2007 to August 2010. The total amount assessed as payable was almost TOP $2.5 million.

[3] On 15 April 2015 three notices were issued under s15(3) of the RSA Act directed to two banks, the Westpac Bank of Tonga and the ANZ Bank and, additionally, directed to the purchaser of Moapa's business. In substance, the notices required both banks to hold all deposits in bank accounts in the name of Moapa or the Prasads up to the outstanding amount of Moapa's tax liability. The purchaser was required to hold any payments to Moapa, again up to the outstanding amount of Moapa's tax liability. Mr Prasad was served with copies of the notices on the same day. Also on 15 April 2015, a lawyer representing the Prasads corresponded with the Ministry disputing any liability on their part for any tax debt of Moapa. In response the lawyer was informed

of the Ministry's position that the Prasads were personally liable for the company's tax debt because of s29 of the RSA Act. By 27 April 2015, at the latest, the lawyer acting for the Prasads was aware that the procedures under Part IV of the RSA Act provided a mechanism for challenging taxation decisions and limits existed on seeking their review by way of judicial review in the courts. He was told those matters in a letter from the Ministry.

[4] In the ensuing months further notices were issued under s15(3) and correspondence continued between the lawyer representing the Prasads and the Ministry though it is not necessary either to detail what occurred or embark on a consideration of how those further notices should be characterised as a matter of law. It is sufficient to note one further step taken by the Ministry namely the service on Mr Prasad on 30 September 2015 of a document entitled "Notice under s 29 of the [RSA Act]" explaining why, in the Ministry's opinion, that section was applicable.

[5] On 19 October 2015 the Prasads commenced proceedings in the Supreme Court by way of writ and statement of claim. The statement of claim recited the Prasads' account of the relevant facts that was a more detailed account of the facts just outlined. Thereafter, in each of four sections, the statement of claim identified, in a heading, what were described as a cause of action followed by a number of paragraphs setting out contentions of fact and law followed by a description of the relief sought. The first cause of action was, in substance, a claim that for specified reasons, the s15 notices were void and the decision to issue them was ultra vires. The relief sought was a declaration that the s15 notices were void and of no effect and consequential relief including costs. The second cause of action focused on the question of whether the two banks on which s15 notices had been served owed money to the Prasads, contending they did not and also contending that, in the result, the issuing of the s15 notices was ultra vires. The relief sought was a declaration that the issuing of or acting upon the s15 notices "was or will be" ultra vires and consequential relief including costs.

[6] The third cause of action was simply described as Certiorari. The substance of the account following this heading was that before making a decision adversely affecting the Prasads, the Minister had to observe the rules of natural justice and that there had been a denial of natural justice with the result that the Minister's decisions were void ab initio. The relief sought was an order of certiorari quashing the "s15 notices and the s29 notice", judgment for the Prasads and consequential relief including costs. The fourth cause of action was described as Judicial Review. Thereafter, the pleading recounted a number of identified considerations that either had not been taken into account or had not been given due and proper consideration. This was followed by contention that the Minister reached a decision that no reasonable decision maker would have made. The relief sought was, again, an order of certiorari quashing the "s15 notices and the s29 notice", judgment for the Prasads and consequential relief including costs.

[7] In summary, the case advanced by the Prasads in their pleadings sought to impugn, in the main, the decision to issue the s15 notices or the notices themselves though, in addition, the case also sought to impugn the "s29 notice". On 1 December 2015, the Minister made an application to have the writ set aside on the basis that the Supreme Court did not have jurisdiction to adjudicate on the claims or that the proceedings constituted an abuse of process. The judgment of 16 May 2016, which is the subject of this appeal, determined that application.

Legislation

[8] It is convenient to set out, at this point, the legislative provisions which are of central relevance to this appeal. The first is s15 of the RSA Act which provides:

> (1) For the purposes of sections 15, 16 and 17, "payer" means a person who owes or may subsequently owe money to the taxpayer, or who holds or may subsequently hold money for, or on account of, the taxpayer or who holds money on account of some other person for payment to the taxpayer, or who has authority from some other person to pay money to the taxpayer, and includes the Crown.
>
> (2) This section shall apply where a taxpayer is liable to pay an amount of tax and —
>
> (a) the tax has not been paid by the taxpayer by the due date for payment; or
>
> (b) the Minister has reasonable grounds to believe that the taxpayer will not pay the tax by the due date for payment.
>
> (3) Where this section applies, the Minister may, by notice in writing, require any person who owes money to the taxpayer to pay the amount specified in the notice to the Minister. The amount to be specified in a notice under this subsection shall not exceed the amount of tax that has not been paid or the amount that the Minister believes will not be paid by the due date.
>
> (4) Subject to subsection (5), a payer shall pay the amount specified in a notice under subsection (3) by the date specified in the notice. The date for payment specified in the notice shall not be a date before the date that the amount owed to the taxpayer becomes due to the taxpayer or held on the taxpayer's behalf.
>
> (5) A payer shall not pay an amount under this section in excess of the amount owed to the taxpayer.
>
> (6) A copy of the notice served on the payer shall be served on the taxpayer.

This section creates a mechanism whereby a third party can be obliged, by notice in writing, to pay an amount specified in the notice to the Minister and, in substance, to do so in partial or complete satisfaction of a tax debt of another person.

[9] The next provision is a definition of "taxation decision" in s2 of the RSA Act which includes, as a defined decision, "*(e) a decision by the Minister to issue a notice under section 15(3) or 16(3)*". This definition is relevant because the RSA Act establishes a mechanism in Part IV by which a taxpayer who is dissatisfied with a "taxation decision" can impugn that decision by a process commencing with an objection to the Minister within 30 days (s8) and, if dissatisfied with the decision following the objection, seek a review by the Tax Tribunal (s9). The President of that Tribunal must be a Judge of the Supreme Court (s59). From the Tax Tribunal there is a right of appeal on a question of law to the Supreme Court (s10). In addition, the process of review established by Part IV is intended to be the sole mechanism of review and appeal of tax decisions. This is sought to be achieved by s6 which provides:

Except in proceedings under part IV of this Act —

(a) no taxation decision shall be disputed in the Tax Tribunal, in any Court, or in any other proceedings on any ground whatsoever; and

(b) ...

[10] The definition of "taxation decision" does not expressly include or refer to anything done under or by reference to s29 of the RSA Act. Section 29 provides:

> (1) This section shall apply where an arrangement has been entered into with the intention or effect of rendering a company unable to satisfy a current or future tax liability under any revenue law.
>
> (2) In this section — "**arrangement**" means any contract, agreement, plan, or understanding whether express or implied and whether or not enforceable in legal proceedings; "**associate**", in relation to a person, means any other person who acts or is likely to act in accordance with the wishes of the person as a result of any connection between the persons or common ownership or control;
>
> "**controlling shareholder**", in relation to a company, means any person who beneficially holds, either alone or together with an associate or associates —
>
> (a) more than 50 per cent of the voting rights in the company;
>
> (b) more than 50 per cent of the rights to dividends; or
>
> (c) more than 50 per cent of the rights to capital; and
>
> "**director**", in relation to a company, means any person occupying the position of director of the company.
>
> (3) Subject to subsection (4), where this section applies, every person who was a director or controlling shareholder of the company at the time the arrangement was entered into shall be jointly and severally liable for the tax liability of the company.
>
> (4) A director of a company shall not be liable under this section for the tax liability of the company where the Minister is satisfied that the director derived no financial or other benefit from the arrangement and —
>
> (a) the director has on becoming aware of the arrangement, formally recorded with the company his dissent and notified the Minister in writing; or
>
> (b) the director satisfies the Minister that, at the time the arrangement was entered into —
>
> (i) the director was not involved in the executive management of the company; and
>
> (ii) the director had no knowledge of, and could not reasonably have been expected to know of the arrangement.

[11] At this point, it is appropriate to note four features of this section. The first is that its focus is on the consequences of there being an "arrangement" as defined which has the intention or effect of rendering a company unable to satisfy its tax liabilities. The

second is that in the circumstances specified in subsection (1) (that such an arrangement exists), a director or controlling shareholder, as defined, will be liable for the tax liability of the company by operation of subsection (3). The third is that liability arising under subsection (3) is not expressed to arise as a result of some decision being made or step being taken to enliven the subsection such as the giving of notice. That is to say, the section itself creates the liability if the circumstances identified in subsection (1) exist. The fourth feature, and in a sense it is a qualification to the third, is that an administrative step can be taken involving the formation of an opinion by the Minister that would render inapplicable the direct effect of the combined operation of subsections (1) and (3).

The issues

[12] The legal issues raised in the appeal and cross-appeal, though important, are narrow in compass. The first, raised in the appeal, is whether there was a decision under s29 that was amenable to judicial review. The Chief Justice concluded there was. This first issue could possibly be expressed more broadly, as it was by the Chief Justice in the penultimate paragraph of his judgment, namely whether the Prasads could challenge their liability under s29 by way of judicial review. The second issue, raised in the cross-appeal, is whether the only available mechanism for challenging the notices under s15 was that found in Part IV of the RSA Act. The Chief Justice concluded it was the only available mechanism. It is unnecessary to repeat the thorough and detailed reasoning of the Chief Justice leading to these two conclusions. We deal with each issue in turn commencing with the issue raised in the cross-appeal.

The cross appeal

[13] The Lord Chief Justice's conclusion that the only mechanism for challenging the notices issued under s15 was under Part IV was based on the effect of s6. We agree with this conclusion and his Honour's reasons. The terms of that section are clear and emphatic. The Prasads argue in their cross-appeal the reasoning of the Lord Chief Justice placed inappropriate reliance on New Zealand judgments, and in particular the judgment of the Supreme Court of New Zealand in *Tannadyce Investments Ltd v Commissioner of Inland Revenue* [2012] 2 NZLR 153 and did so notwithstanding that in New Zealand, unlike Tonga and Australia, there is no written constitution. The Prasads draw attention to clauses 82, 83A, 79 and 90 of the Tongan Constitution and argue that s6 unlawfully derogates from the constitutional role of the Supreme Court. But s 4 of the Supreme Court Act clearly contemplates that a law of Tonga can confer exclusive jurisdiction on another court or tribunal and thereby limit the jurisdiction of the Supreme Court. It has never been held that this section offends the Constitution. In any event Part IV creates a role for the Supreme Court as the final arbiter of legal issues arising in any challenge under that part to a taxation decision because s10 of the RSA Act creates an unqualified right of appeal (though to be made within 30 days) to the Supreme Court on a question of law which may have arisen in the proceeding before the Tax Tribunal. The Prasads have not demonstrated, in their cross-appeal, any error on the part of the Lord Chief Justice and the cross-appeal should be dismissed.

The appeal

[14] We turn to consider the issue raised in the appeal. As noted earlier, the definition of "taxation decision" does not expressly include or refer to anything done under or by

reference to s29 of the RSA Act. Accordingly, s6 does not, in terms, prohibit a challenge to anything done under or by reference to s29 in a Court. However we do not share the view of the Chief Justice that, in some way, the operation of s29 is enlivened by an administrative decision under that section amenable to judicial review. The provision is self-executing: see Aronson, Judicial Review of Administrative Action, 4th edition at [2.220]. As Lord Dunedin observed in *Whitney v Inland Revenue Commissioners* [1926] AC 37 at 52 at a high level of generality, the declaration of liability for tax is the work of the taxing statute. Ultimately, of course, it will be necessary to consider the terms of the particular taxing statute to ascertain the effect of any specific provision creating, directly, liability under it. However two comparatively recent examples where it has been determined tax liability arises by the direct operation of the tax legislation are *Commissioner of Taxation v H* (2010) 188 FCR 440 and *Layala Enterprises Pty Ltd v Federal Commissioner of Taxation* (1998) 86 FCR 348. Also, as noted earlier, the RSA Act does not provide for the "issuing" of a notice under s29. In the result, the case pleaded by the Prasads and summarised earlier is entirely misconceived because no challenge can be made in the Supreme Court to the s15 notice or any decision to issue it. In so far as the case relates to s29, it is based on a challenge to a decision relying on orthodox administrative law grounds. Yet there is no decision amenable to judicial review. The same can be said of the second statement of claim (filed after and pursuant to the judgment of 16 May 2016) which is in broadly the same but truncated terms as the original statement of claim summarised above but focusing more on s29.

[15] However notwithstanding these observations we do not accept what appears to be the ultimate position advanced by the Minister, namely that necessarily the only mechanism for challenging liability said to arise by operation of s29 is, in a case such as the present, by challenging under Part IV the notices under s15 (which, on the Minister's approach, cannot now be done because any such challenge is now time-barred) and collaterally challenging what is said by the Minister to be the effect of s29. Subject to a possible issue about whether the Prasads were each a "taxpayer" standing in the shoes of Moapa for the purposes of s15, we accept that (putting to one side limitation questions) such a collateral challenge could be made, in this case, in a direct challenge under Part IV to the s15 notices. It could also be raised in any proceedings brought under s14 seeking to recover from the Prasads amounts allegedly owing by operation of s 29. Section 6 cannot be taken to prevent the Prasads from challenging what is said to be the effect of section 29 in this case given that, as noted earlier, anything done under or by reference to s29 does not constitute, itself, a "taxation decision" as defined.

[16] Courts have long recognised a jurisdiction to entertain proceedings seeking only declaratory relief concerning the legal rights or liabilities of parties to a legal controversy: see, for example, the commentary in Chapter 19 of Wright, Remedies 2nd edition 2014 and, by way of illustration, the discussion in *Taione v Kingdom of Tonga* [2004] TOSC 47; [2005] Tonga LR 67 at 125-126. While this court should not express a concluded view about whether such a proceeding can be bought by the Prasads as this issue was not argued in this appeal and cross-appeal it is probable that such a proceeding could be brought in and determined by the Supreme Court subject to the operation of Order 39 of the Supreme Court Rules. That Order creates specific limits on proceedings, inter alia, seeking a declaration against a public body including an individual charged with public duties. But that is not the case the Prasads are presently advancing in their pleadings and to the extent that they do seek declaratory relief it is

directed to the s15 notices. They do not raise the narrow issue of whether they are liable under s29 for the tax liability of Moapa. The Minister's application of 1 December 2015 sought the dismissal of the Prasads' claim on the basis that the Supreme Court did not have jurisdiction or that it was an abuse of process. As presently framed, it is in our view an abuse of process and for that reason should be dismissed.

Result

[17] Accordingly, Court orders:

(i) The appeal is allowed.
(ii) Proceedings CV 66 of 2015 are dismissed as an abuse of process.
(iii) The cross appeal is dismissed.
(iv) The Prasads pay the Minister's costs of the appeal and cross-appeal to be taxed if not agreed upon.

Palu anors v Edwards anors

Court of Appeal, Nuku'alofa
Moore, Blanchard, Hansen, and Tupou JJ
AM 25/2013

5 September 2016; 14 September 2016

Appeal – dismissed for want of prosecution

On the day of the hearing counsel for the appellants sought leave to withdraw because he had not received any instructions from the appellants. The appellants appeared neither through a lawyer, nor by themselves, and failed to prosecute the appeal.

Held:

1. The appeal was therefore dismissed for want of prosecution with costs.

Counsel for the appellants	:	Mr S Tu'utafaiva
Counsel for the respondents	:	Mr W Edwards

Minute of the Court

[1] This matter was called for hearing on 5 September 2016 which was the day fixed for the hearing of the appeal at this sitting of the Court of Appeal. At the hearing, Mr. Tu'utafaiva who is counsel on the record for the appellants sought leave to withdraw as counsel for the appellants. Mr. Tu'utafaiva advised the Court that he has received no further instructions from the appellants in relation to the appeal. The Court granted Mr. Tu'utafaiva leave to withdraw.

[2] The appellants had earlier made an application for the adjournment of the hearing of this appeal to a member of the Court of Appeal. However, that application was dismissed. In these circumstances, it could have reasonably been expected that the appellants would appear either by themselves, for themselves, or represented by a lawyer and prosecute their appeal at the time the appeal was fixed for hearing. However, the appellants appeared neither through a lawyer, nor by themselves, and have failed to prosecute this appeal.

[3] For these reasons, the appeal is therefore dismissed for want of prosecution with costs.

Filimoehala v Filimoehala anor

Court of Appeal, Land Jurisdiction, Nuku'alofa
Moore, Blanchard, Hansen, and Tupou JJ
AC 9/2016

6 September 2016; 14 September 2016

Land law – laws of succession – eldest son where holder had married more than once – eldest of first marriage – appeal dismissed

On 14 June 2016 the Land Court determined that the successor to a registered town allotment known as "Kape" in Ma'ufanga previously held by Penisimani Filimoehala was the respondent, Peni Toloa Filimoehala, who was the son of the eldest son of his first marriage, and not the appellant, Peauafi Filimoehala, who was the first born son of his second marriage. The appellant challenged the conclusion of the Land Court that there could only be one eldest son who could succeed to a registered allotment on the death of the holder.

Held:

1. The appellant submitted that there was ambiguity in section 82 with regard to the eldest son where the holder had married more than once. He claimed that each marriage formed a new family unit with its own eldest son. The court found no ambiguity in section 82. The words "eldest son", "wedlock" and "inheritance" in the section were clear and unambiguous and must be given their ordinary and natural meaning.
2. The lawful successor to the allotment "Kape" was the first respondent Peni Toloa Filimoehala, the grandson of the last lawful male holder, Penismani Filimoehala, being the eldest son of the eldest son of the first marriage of the holder. The appellant's argument to the contrary was rejected.
3. The appeal was dismissed.

Counsel for the appellant	:	Mr S Fonua
Counsel for the first respondent	:	Mr S Tu'utafaiva
Counsel for the second respondent	:	Mr 'A Kefu SC

Judgment of the Court

[1] This is an appeal against a judgment of the President of the Land Court Paulsen C.J. in LA28/2015 on 14 June 2016 determining that the successor to a registered town allotment known as "Kape" in Ma'ufanga previously held by Penisimani Filimoehala is the respondent, Peni Toloa Filimoehala, who is the son of the eldest son of his first marriage, and not the appellant, Peauafi Filimoehala, who is the first born son of his second marriage.

[2] Additionally an appeal is brought against a judgment of the President on the same day between the same parties involving the same town allotment in LA9/2016 that as a result of his ruling in LA28/2015, the appellant must vacate the allotment within 1 month.

Facts

[3] Penisimani Filimoehala married Salote in 1931. They had six children the eldest being Toloa who was born in 1932. Salote died in 1942. Penisimani married Vasitai in 1943 and they had 9 children, the eldest born in 1944, Peauafi Filimoehala, who is the Appellant.

[4] Toloa, the eldest son of the first marriage of Penisimani, married Mele and their eldest legitimate son is the respondent Peni Toloa Filimoehala who was born in 1953.

[5] In 1952 Penisimani applied for a town allotment in Ma'ufanga. This was approved by the Minister of Lands but for unknown reason was not registered until 1982 it is known as "Kape."

[6] In 1988 Penisimani died and his second wife Vasitai was given the life estate interest in "Kape" as the widow.

[7] Toloa died in 2007 and was survived by his son, the respondent. Toloa predeceased the widow Vasitai, who died on 6 July 2010.

[8] On 15 April 2011 the respondent applied for and was registered as the lawful successor to "Kape".

[9] The appellant has refused to give up possession of "Kape" and after many attempts to get the appellant and the other occupier of "Kape" to vacate the allotment, the respondent filed a claim on 11 May 2015 against the appellant and Fotofili Filimoehala, another occupier of Kape, for an eviction order (LA9/2015). The respondent settled his claim with Fotofili so that claim against him was discontinued on 12 October 2015.

[10] The appellant filed his claim against the respondent on 3 November 2015 claiming "Kape" as the lawful successor (LA28/2015).

Grounds of Appeal

[11] The appeal challenges the conclusion of the Land Court that there can only be one eldest son who can succeed to a registered allotment on the death of the holder.

[12] Section 82 of the Land Act sets out the law of succession to a registered allotment on the death of the lawful male holder. The relevant parts of section 82 are as follows:

> 82. Rules of succession to allotments
>
> Subject to the life estate of the widow the succession to a tax allotment shall be as follows:
>
> (a) descent shall be traced from the last lawful male holder;
> (b) only persons born in wedlock may inherit;
> (c) the inheritance shall descent in the first place to the eldest son of the deceased holder or if such son is dead to the eldest

> male heir of the body of such son. If the eldest son of the deceased holder be dead without leaving any male heir of his body the succession shall devolve upon the next eldest son of the holder or if such son is dead to the eldest male heir of such son's body. If the second son of the deceased holder be dead without leaving any male heir of his body the succession shall go to the next eldest son of the deceased holder or the eldest male heir of his body and so on taking all the deceased holder's sons in succession in order of their ages;

[13] Mr. Fonua submits that there is ambiguity in section 82 with regard to the eldest son where the holder has married more than once. He says that each marriage forms a new family unit with its own eldest son. We cannot see any ambiguity in section 82. The words "eldest son", "wedlock" and "inheritance" in the section are clear and unambiguous and must be given their ordinary and natural meaning.

[14] Mr. Fonua refers to section 82(b) which says that *"only persons born in wedlock may inherit"*. He says that the word "*persons*" in the plural shows the legislature must have intended that where the holder married twice, there would be two eldest sons within the meaning of section 82. We do not agree. The word "persons", as submitted by Mr. Tu'utafaiva and Mr. Kefu, refer to all the persons named in paragraphs (c), (d), (e), (f) and (g) of section 82 beginning with the eldest son. When the holder dies, the order of succession begins with the eldest son if he is alive and goes on in succession in the order stated in these paragraphs. To succeed, each person must have been born in wedlock.

[15] In further support of his case, Mr. Fonua submits that when the holder married more than once, allotments acquired during each marriage would devolve to the eldest son of the marriage. Relevant to this case is that Penisimani had acquired "Kape" during his second marriage and therefore, it is submitted, the appellant is the eldest son of that marriage and entitled to succeed to "Kape".

[16] We do not agree with this line of reasoning. The key figure in the rule of succession in section 82 is the holder. He can have only one eldest son no matter how many times he marries. The time of determination for succession is when the holder dies, not when he has acquired and registered the allotment. As Mr. Kefu has pointed out in his submissions –

> "There is no legal provision to say that if a land holder re-marries the status of the male heir shifts to the eldest son of the second marriage".

[17] We agree with paragraph [24] of the President's reason for judgment stated –

> "There can be only one eldest son. Section 82 does not mention "family units" or recognise the possibility of multiple eldest sons of a deceased holder. Penisimani's eldest son was Toloa and not the Plaintiff. The Plaintiff was the eldest son of Penisimani's second marriage but that did not make him the eldest son. As Toloa had died before he succeeded to "Kape" the successor devolved "to the eldest male heir of the body of such son" which is the first defendant (section 82 (c))".

120 **Conclusion**

[18] The lawful successor to the allotment "Kape" is the first respondent Peni Toloa Filimoehala, the grandson of the last lawful male holder, Penismani Filimoehala, being the eldest son of the eldest son of the first marriage of the holder. The appellant's argument to the contrary is rejected.

Result

[19] (1) The appeal is dismissed.

(2) The appellant must vacate the allotment known as "Kape" in Ma'ufanga within 30 days of the date of this judgement.

(3) Costs are awarded to the respondents to be taxed if not agreed.

Koloamatangi v Rex

Court of Appeal, Nuku'alofa
Moore, Blanchard, Hansen, and Tupou JJ
AC 6/2016

6 September 2016; 14 September 2016

Extradition – length of time since offence – balanced against seriousness of offence – extradition appropriate

The accused was remanded in custody by Principal Magistrate Mafi who had committed him for extradition to Australia to face a charge of murder. Mr Koloamatangi appealed against the dismissal by the Supreme Court of his application under the Extradition Act for a writ of habeas corpus. The appellant argued that there were two reasons why he should not be extradited: the great length of time since he allegedly committed the crime in Australia; and the prejudice he may face as a Tongan if required to stand trial in Australia.

Held:

1. The court was not persuaded that the Supreme Court erred in exercising discretion under the Extradition Act and in the conclusion that return to Australia would not in the circumstances be unjust or oppressive. The passage of time was certainly very extended and the appellant's now long-established family life would be disrupted. That would cause hardship to him, and through his absence, to his family. But the offence he is alleged to have committed, murder, was so serious that these considerations were outweighed.
2. The prejudice argument was rejected. It must be assumed in the absence of any evidence to the contrary that the legal system of a designated country will operate fairly in relation to an extradited defendant. Such an assumption must be taken to underlie the Extradition Act and the Government of Tonga's decision to designate a particular country under it.
3. The appeal was dismissed.

Case considered:

New Zealand v Venkaraya [1995] 57 FCR 151

Statute considered:

Extradition Act (Cap 22)

Counsel for the appellant : Mr S Tu'utafaiva
Counsel for the respondent : Mr 'A Kefu

Judgment of the Court

[1] Mr Koloamatangi appeals against the dismissal by Cato J of his application to the Supreme Court under s.10 of the Extradition Act for a writ of habeas corpus. He had been remanded in custody by Principal Magistrate Mafi who had committed him for extradition to Australia to face a charge of murder.

[2] In both the Supreme Court and this Court the appellant has argued that there are two reasons why he should not be extradited:

(a) The great length of time since he allegedly committed the crime in Australia; and
(b) The prejudice he says he may face as a Tongan if required to stand trial in Australia.

[3] The murder charge arises from the stabbing to death of a woman in her own home on 9 August 1990 – just over 26 years ago, when the appellant was 23 years of age. It is alleged that the appellant was paid by the husband of the victim to kill her. The New South Wales Police investigated the crime in 1990. They considered that the appellant was a person of interest but concluded they had insufficient evidence to charge him.

[4] In August 1997 the appellant was deported from Australia to Tonga after serving a sentence of imprisonment for an unrelated offence of armed robbery.

[5] Since coming to Tonga the appellant has not offended against the law. He has married. He and his wife have six children. He is the breadwinner for his family. He has been employed by a stevedoring business for 13 years.

[6] In 2012 the New South Wales Police Unsolved Homicide Squad began re-investigating the 1990 murder. They now have further witnesses as to the appellant's alleged involvement and have brought a murder charge against him. Hence the very belated application for his extradition.

[7] Section 10(3)(b) of the Extradition Act authorises the Supreme Court to order that a person committed for extradition be discharged from custody if it appears to the Court that by reason of the passage of time since he is alleged to have committed the offence it would, having regard to all the circumstances, be unjust or oppressive to return him.

[8] Cato J referred to counsel for the appellant's submissions concerning his family circumstances, including that he is the breadwinner for the family and to the disruption to their lives if extradition occurred. He noted also a submission pointing out that the appellant had been living in Tonga without any further criminal problems since being deported from Australia. The Judge said that it was plain that a long time has passed since the murder in 1990 and the deportation in 1997 and that in that time the appellant had established a new life. The Judge continued:

> "These factors might well, in a case involving some lesser crime where the public interest in bringing an offender to justice was not so pressing as in this case, be telling factors that would justify an order being made. However, in this case the offence for which extradition is sought is murder and one that is a particularly serious example involving the allegation that the applicant was hired by another person, being the husband of the deceased, to kill the deceased. The allegation is that the applicant stabbed

the deceased in her home and was paid for carrying out the crime by the husband of the deceased".

[9] Cato J then described how it came about that the New South Wales Police have recently brought charges (including charges against the victim's husband and his brother) and applied for extradition. He said that in assessing whether it would be unfair or oppressive for the appellant to be required to return to New South Wales for trial because of the delay, the Court should consider, "in the balance", the public interest in ensuring that persons who commit serious crimes are brought to justice. This was a very serious crime and in the Judge's view it was neither unfair nor oppressive to require the appellant to face the charge in New South Wales "albeit that there has been a long passage of time" since the murder and the deportation.

[10] In this Court Mr Tu'utafaiva complained that Cato J had inappropriately concentrated on the public interest and had not considered all the circumstances, including the family situation. He accepted however that the public interest was a relevant consideration. Counsel said that it was nevertheless unfair for Australia to ask the appellant to return when he had not fled from that country but been deported.

[11] We do not accept the argument that the Judge failed to take account of the appellant's family circumstances or omitted to notice any relevant matter. Our above account of the Judge's remarks demonstrates that he did give consideration to the effect on the appellant's family life and the fact that he is the family breadwinner. As Cato J recorded, the crime was a very serious one of murder allegedly committed for money – a contract killing with the appellant said to have been acting as the "hitman".

[12] Section 10(3)(a) of the Extradition Act requires the Court to consider whether "by reason of the trivial nature of the offence" it would "having regard to all the circumstances, be unjust or oppressive to return [the committed person]". Obviously that provision can have no application where the offence is one of murder. The more serious the offence the more compelling is the argument for requiring the person to return and face trial. That is all we think Cato J meant by his reference to the public interest. Where offending is of a very serious nature it will be harder for the committed person to establish that in all the circumstances, including as here a long passage of time since the offending, return would be unjust or oppressive.

[13] By a considerable margin we have not been persuaded that Cato J erred in his exercise of discretion under s.10(3) and in his conclusion that return in this case would not in the circumstances be unjust or oppressive. The passage of time was certainly very extended and the appellant's now long established family life will be disrupted. That will cause hardship to him, and through his absence, to his family. But the offence he is alleged to have committed is so serious that these considerations are outweighed.

[14] The applicable principles in Australia concerning personal oppression and the seriousness of the offence were summarized by Sackville J in *New Zealand v Venkaraya* [1995] 57 FCR 151 at 165. In determining whether it would be oppressive to surrender a person a court can take into account the financial hardship, domestic upheaval and emotional distress the person would experience if surrendered. But the gravity of the offence charged is a relevant and very important consideration. It would rarely if ever be appropriate to decline return to a designated country on the ground of injustice or oppression where the charge to be faced is murder, at least if capital punishment is not an available penalty.

[15] The appellant's deportation from Australia does not make his return there unjust or oppressive. It was unconnected with the murder and occurred at a time when the New South Wales Police had insufficient evidence to charge him. They have changed their attitude towards him only because there is now further evidence said to incriminate him.

130 [16] The appellant's other contention is that, in terms of s.6(1)(c), he might, if returned, be prejudiced at his trial by reason of his Tongan race. If he could establish that he cannot be returned. But the only basis on which this suggestion was put forward by the appellant was his bare assertion, backed only by reference to the fact that Australia had previously deported him. Cato J was understandably dismissive of this suggestion, pointing out that the deportation was after a conviction for armed robbery and saying that there was "no onus on the New South Wales authorities to show he will not be prejudiced at trial". Mr. Tu'utafaiva was critical of the latter statement. He submitted that it was enough for the appellant to raise the issue of racial prejudice and the respondent was then obliged to prove that the trial would be unaffected by it.

140 [17] We reject this submission. It must be assumed in the absence of any evidence to the contrary that the legal system of a designated country will operate fairly in relation to an extradited defendant. Such an assumption must be taken to underlie the Extradition Act and the Government of Tonga's decision to designate a particular country under it. Otherwise the country seeking extradition would be obliged to go to great lengths in order to prove the negative proposition, that there will be no relevant prejudice to an extradited person, merely because that person has made an unsubstantiated assertion of possible prejudice.

[18] There is nothing at all to indicate that the New South Wales criminal law system will not protect the appellant against prejudice at his trial arising from his race. The fact
150 that he was previously deported from Australia does not demonstrate any such prejudice. He was deported not because of his race but because of his criminal conviction for the serious crime of armed robbery.

[19] For these reasons the appeal is dismissed.

Rex v Pedras

Court of Appeal, Nuku'alofa
Moore, Blanchard, Hansen and Tupou JJ
AC 8/2016

6 and 9 September 2016; 14 September 2016

Extradition law – was offence punishable in Tonga? – based on conduct – found extraditable

The respondent resided in Tonga. He faced charges in the United States of America of what was known as wire fraud. The United States government applied under the Extradition Act for his extradition to the United States to stand trial. The application succeeded. On 19 April 2016 the Magistrates' Court made an order for his committal for extradition. The respondent applied for habeas corpus. The Supreme Court granted the application; it found that the offence of which the respondent was accused in the United States was not a relevant offence and therefore set aside the committal order and directed the appellant's release from detention. The Crown appealed against the decision. The focus of the argument was on whether the offence of which the respondent was accused was punishable in Tonga.

Held:

1. The offending described a scheme to defraud or obtain money by 'false or fraudulent pretences, representation or promises', the first element of the offence of wire fraud under sec 1343. The indictment then detailed eleven occasions on which the respondent was alleged to have transmitted or caused to be transmitted sums of money for the purpose of executing the scheme, which satisfied the second element of the offence. The critical question was whether the offence of which the respondent was charged was punishable in Tonga by imprisonment for a term of 2 years.
2. Extradition should not occur unless the conduct in issue was a crime in both the state seeking extradition and the state which was asked to extradite. The way in which the principle was applied necessarily depended on the terms of the extradition statute in the requested state.
3. The offence of obtaining by false pretences required proof that the accused obtained for himself or another money, valuable security or other thing. It was also the case that obtaining a benefit was not an element of the offence of wire fraud under s 1343. However, the allegation was that what was transmitted by wire was, in nine of the eleven counts, money which flowed from the bank accounts of investors to bank accounts controlled by the respondent. The conduct which was relied on to prove an essential element of the offence in the United States was evidence of an essential element of an offence under s164 of the Criminal Offences Act. There was no reason

why that conduct should be excluded from consideration for the purpose of deciding whether the offence of which the respondent was accused was a relevant offence. The requirements of s5(1) were satisfied because the conduct that constituted the offence in the United States was an offence in Tonga punishable by more than 2 years' imprisonment.

4. The Supreme Court erred in finding that the offence of which the respondent was accused in the United States was not a relevant offence under the Act. The orders made setting aside the order committing the respondent to custody for return to the United States of America to stand trial and releasing him from detention were quashed. The orders made in the Magistrates' Court were restored. The respondent must accordingly forthwith surrender himself into custody.

Cases considered:

Government of Canada v Aronson [1990] 1 AC 579
In re Ismail [1999] 1 AC 320
Norris v Government of the United States of America [2008] UKHL 16
R v Secretary for the Home Department, ex p Hill [1990] QB 886
Riley v The Commonwealth of Australia (1985) 159 CLR 1
United States of America v Cullinane [2003] 2 NZLR 1 (CA)
United States of America v McVey [1992] 3 SCR 475

Statutes considered:

Criminal Offences Act (Cap 18)
Extradition Act (Cap 22)
United Kingdom Fugitive Offenders Act 1967

Counsel for the appellant : Mr 'A Kefu SC
Counsel for the respondent : Mr LM Niu SC

Judgment of the Court

Introduction

[1] The respondent resides in Tonga. He faces charges in the United States of America of what is known in short as wire fraud. The United States government applied under the Extradition Act (Cap 22) (the Act) for his extradition to the United States to stand trial. The application succeeded. On 19 April 2016 the Magistrates' Court made an order for his committal for extradition under s.9 (4) of the Act.

[2] As he is entitled to do under s.10 of the Act, the respondent applied for habeas corpus. Lord Chief Justice Paulsen granted the application. He found that the offence of which the respondent is accused in the United States is not a relevant offence for the purpose of s.3 of the Act. He set aside the committal order and directed the appellant's release from detention. The Crown appeals against the Lord Chief Justice's decision.

The Act

[3] It is convenient to first refer to the relevant provisions of the Act. Persons liable to be returned are defined in s.3 which provides as follows:

> "(1) Subject to the provisions of this Act, a person found in Tonga who is accused of a relevant offence in any other country being a country designated in terms of section 4 of this Act or who is alleged to be unlawfully at large after conviction of such an offence in any such country may be arrested and returned to the country as provided by this Act".

[4] Section 4 provides for the designation of countries by Order of Cabinet. It is not in dispute that the United States has been so designated.

[5] Section 5 deals with relevant offences. It provides:

> "(1) For the purpose of this Act an offence of which a person is accused or has been convicted in a designated country is a relevant offence if the offence however described is punishable both in Tonga and in the designated country concerned by imprisonment for a term of 2 years or more.
>
> (2) An offence that is a relevant offence under subsection (1) shall not cease to be such by reason only that it is purely fiscal in character".

[6] The focus of argument before the Lord Chief Justice and in this Court was on whether the offence of which the respondent is accused is punishable in Tonga as required by s.5(1). That requires in the first instance an examination of the offence the respondent is alleged to have committed in the United States.

The offending

[7] The respondent is charged with violating Title 18, United States Code, section 1343 which relevantly provides:

> "Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretences, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signal, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both".

[8] The indictment, returned by a Grand Jury in September 2013, recites that the respondent, then residing in California and Auckland, New Zealand, offered and sold investments in what was called the Maxum Gold Small Cap Trade Program (the Maxum Program). He is said to have induced investors to invest in the Maxum Program through false and fraudulent statements and written materials, including statements on the Maxum Program website. The false and deceptive statements are said to have included offering monthly returns of 4 to 8 percent; that an investor's money would be held in escrow and accessed only by the investor; that the investments were profitable;

that the Maxum Program was audited annually; and that the Maxum Program had been in existence for over 23 years and had over 6000 clients.

[9] The indictment recites that the respondent also offered investments in a company called FMP Renal Program. He claimed the company would operate kidney dialysis clinics in New Zealand, would be publicly traded and that for every $100,000 invested would return $28,000 immediately and between 2 and 5 percent quarterly.

[10] The indictment continues that the respondent failed to disclose that he would use investors' money to pay other investors, to pay sales commission and for his own person use; that account statements on the Maxum Program website showing investors their investment program were false; and that the investment programs were schemes to benefit the respondent personally.

[11] The scheme is said to have induced and attempted to induce investors to distribute over $5.6 million to the respondent. The eleven separate counts allege that on dates between December 2011 and December 2012, for the purpose of executing the scheme to defraud, the respondent and others "aided and abetted each other, transmitted, caused the transmission, and aided and abetted the transmission" by wire and radio communication of sums ranging from $5000 to $100,000 from the bank accounts of investors in the United States to Maxum Program bank accounts in New Zealand and, on two occasions, sums of $5,575 and $1,580 from Maxum bank accounts in New Zealand to the accounts of investors in the Unites States. We infer that the latter two transactions were returns made to investors for the purpose of maintaining their confidence in the scheme.

[12] The offending set out in the indictment describes a scheme to defraud or obtain money by 'false or fraudulent pretences, representation or promises', the first element of the offence of wire fraud under sec 1343. The indictment then details eleven occasions on which the respondent is alleged to have transmitted or caused to be transmitted sums of money for the purpose of executing the scheme, which, on the face of it, satisfies the second element of the offence. We pass now to consider the critical question of whether the offence of which the respondent is charged is punishable in Tonga by imprisonment for a term of 2 years as required by s.5(1) of the Act.

Double criminality – the test

[13] As the Lord Chief Justice noted (at [24]), s.5(1) of the Act gives effect to the principle of international law known as double or dual criminality which requires that extradition should not occur unless the conduct in issue is a crime in both the state seeking extradition and the state which is asked to extradite. Its rationale was explained as follows by Deane J in *Riley v The Commonwealth of Australia* (1985) 159 CLR 1 at 17:

> "Its essential utility is to provide an available safety mechanism whereby a state is not required to surrender up a person, possibly one of its own nationals, to be tried and punished for conduct which, according to the standards accepted by those within its boundaries is not deserving of punishment at all".

[14] The way in which the principle is applied, however, necessarily depends on the terms of the extradition statute in the requested state. Different provisions can lead to different outcomes as the extensive discussion in *Norris v Government of the United States of America* [2008] UKHL 16 shows. The report from the Appellate Committee of the House of Lords traverses the modern history of extradition legislation in the United Kingdom and (at [65]) identifies what it describes as the essential choice the legislature makes in deciding what the double criminality principle requires.

> "It is possible to define the crimes for which extradition is to be sought and ordered (extradition crimes) in terms either of conduct or of the elements of the foreign offence. This is the fundamental choice. The court can be required to make the comparison and to look for the necessary correspondence either between the offence abroad (for which the accused's extradition is sought) and an offence here or between the conduct alleged against the accused abroad and an offence here. For convenience these may be called respectively the offence test and the conduct test. It need hardly be pointed out that if the offence test is adopted the requested state will invariably have to examine the legal ingredients of the foreign offence to ensure that there is no mismatch between it and the supposedly corresponding domestic offence. If however, the conduct test is adopted, it will be necessary to decide, as a subsidiary question, where, within the documents emanating from the requesting state, the description of the relevant conduct is to be found".

[15] Reviewing the authorities, the Lord Chief Justice noted (at [51]) that the Courts of the Commonwealth have preferred an application of the double criminality principle which has regard to conduct rather than requiring a strict correspondence between the offences. As Deane J said in *Riley* (supra) at p17, it defines the principle of double criminality in terms of substance rather than technical form. He went on to say; (at pp 17-18)

> "On this view the requirement of double criminality is satisfied if the acts in respect of the requirement of double criminality is satisfied if the acts in respect of which extradition is sought are criminal under both systems even if the relevant offences have different names and elements... This view places primary emphasis upon the acts constituting the offence alleged against the accused in the warrant rather than upon general theoretical correspondence between the legal elements of the offence which he is alleged to have committed against the law of the requesting state and some offence recognized by the law of the requested state".

[16] Deane J emphasised, however, that the conduct to be considered must be confined to the acts necessary to prove a criminal offence in the requesting state. He said at (at p 18):

> "The principle of double criminality is satisfied, where, and only where, any alleged offence against the law of the requesting state in respect of which extradition is sought would necessarily involve a criminal offence against the law of the requested state if the acts constituting it had been done in that state".

He concluded (at p 20):

> "The result is that extradition pursuant to the relevant provisions of the Act is precluded except in a case where the acts or omissions alleged to constitute each extradition crime necessarily involved a criminal offence against the law of this country".

[17] The comments of Deane J must, of course, be read by reference to the legislative provision he was considering – a requirement that 'the act or omission constituting the offence, or the equivalent act or omission" would constitute an offence against the law of the requested state. The United Kingdom Fugitive Offenders Act 1967 was in substantially the same terms. It was held in *Government of Canada v Aronson* [1990] 1 AC 579 to require a consideration of the conduct of which the person is accused as distinct from the course of conduct revealed by the evidence. In contrast, following the passage of the Extradition Act 1989 which required, simply, "conduct which, if it occurred in the United Kingdom, would constitute an offence..... and which, however described, in the law of the foreign State..... is so punishable under the law" was held to permit a consideration of all of the evidence described in the request: *R v Secretary for the Home Department, ex p Hill* [1990] QB 886. The two United Kingdom statutes are respectively examples of what have been described as the narrow conduct test, permitting a consideration only of the conduct constituting the offence, and the wider conduct test which allows all of the evidence relied on by the applicant to be considered.

[18] The Lord Chief Justice rejected the elements test and opted for the narrow conduct test. His reasons are contained in the following passage of his judgment:

> "60. In my view, having regard to the scheme and purpose of the Act, the rationale underlying the requirement of double criminality and the relevant case law it is not necessary for the purposes of section 5 that there be a direct correlation or correspondence between the elements of an entire offence under the law of the requesting state and an entire offence under the law of a requested state. However, nor do I consider that it is sufficient if the relevant offence in both jurisdictions is only similar or that the conduct of the accused person viewed in its totality amounted to the commission of an offence according to the law of the requested state. I can find nothing in principle or in the words of the Act that support that approach.
>
> 61. In my view the appropriate focus is upon the relevant conduct of an accused which is said to constitute the offence in the requesting state, however that offence is described, and not the generality of his conduct as disclosed by the evidence submitted to the Court by the requesting state. The Court must ask itself whether that conduct, in total or in part, constitutes an offence under the law of Tonga. It follows from this that an

> accused person will not be subject to extradition in a case where the conduct that is the offence for which extradition is sought does not amount to an offence here in Tonga because of the absence of some essential ingredient required for an offence under the law of this country".

[19] Mr Niu SC for the respondent challenges the Lord Chief Justice's interpretation s.5(1). He submits that the words show an intention to import the offence test. He points to the fact that the legislation also extends to a person convicted of an offence and asks how evidence of conduct could be introduced for that purpose. Mr Niu also referred to the legislation the Act replaced, the Extradition Act [Cap 22], which he said indicated an intention on the part of the legislature to introduce a stricter test.

[20] We do not accept the narrow interpretation urged on us by Mr. Niu. In our view the Lord Chief Justice was right to reject the elements test. We also agree with his conclusion that the narrower conduct test is intended.

[21] We preface our reasons by noting the prevailing view of Commonwealth courts of high authority that a liberal approach to the construction of extradition statutes should be adopted. In *Norris*, after referring to a submission that a construction should be adopted that is more favourable to the liberty of the subject, the House of Lords said (at [86]) :

> "Against this, however, there is telling authority the other way. La Forest J, sitting in the Supreme Court of Canada, noted in *United States of America v McVey* [1992] 3 SCR 475, 513:
>
> "Consistent with the general principle that extradition law should be liberally construed so as to achieve the purposes of the Treaty, a much less technical approach to extradition warrants and to common law warrants has been adopted..."
>
> Similarly, in *In re Ismail* [1999] 1 AC 320, 326-327 Lord Steyn said that "a broad and generous construction" should be given to extradition statutes "intended to serve the purpose of bringing to justice those accused of serious crimes. There is a transnational interest in the achievement of this aim".

[22] The House of Lords also notes (at [89]) that a wider construction avoids the need always to investigate the legal ingredients of the foreign offence which it describes as "a problem long since identified as complicating and delaying the extradition process".

[23] There is nothing in the words of the Act to indicate that the Court must confine its enquiry to the elements of the offence. The fact that it may also be necessary to examine a conviction does not indicate otherwise. Precisely the same issue is raised by a conviction as by an allegation of offending – whether to consider only the elements of the offence or to broaden the enquiry into the conduct which underlies it. The words 'however described' which appear in the 1989 United Kingdom Act (see para [17] above) as well as the equivalent provision of the previous Tongan Act tend to confirm an expectation that the offending will be assessed in its wider context.

[24] The Act as a whole does not point to an intention on the part of the Legislature to narrow the approach to extradition as Mr. Niu submits. On the contrary, it permits greater flexibility than was possible under the previous Extradition Act which required the offence to fall within one of the description of crimes listed in the Schedule to the Act. The so-called enumerative approach has been replaced by the eliminative approach which simply refers to conduct punishable by a specified sentence – see the discussion in *United States of America v Cullinane* [2003] 2 NZLR 1 (CA) at [50] – [51].

[25] Indeed the Act as a whole supports our view that the narrow conduct test is applicable. In relation to situations, such as the present, where extradition is sought because the individual has been charged with an offence, liability to arrest and removal flows from s3 of the Act. What is necessary is that the person is "accused of a relevant offence" to use the language of s3. That expression invites consideration of the terms on which the "accusation" of criminal conduct has been made in the requesting state. What that might comprehend, again in a case such as the present, is the material provided by the requesting state under s7. In certain circumstances which depend on the terms of the Order made by Cabinet under s4 designating a particular country as a country to which the provisions of the Act apply, a requesting country should provide "a record of the case". Having regard to the terms of s7(3)(b) and (d) that record is to include "particulars of each offence and conduct in respect of which extradition is requested" as well as "a recital or summary of the evidence required to support the request for extradition". It is difficult to conceive how this material would be relevant if the task of the court of committal or the Supreme Court in an application for habeas corpus was simply to compare the elements of the offence alleged to have been committed in the country seeking extradition with those of an offence in Tonga. That such material might be provided points to the task of the court of committal or the Supreme Court being wider than a mere comparison of criminal elements. It is true that the need to provide "a record of the case" will depend on the terms of the Order made under s4 which may or may not enliven the proviso in s7(4). However in this case the Order designating the United States of America did enliven the proviso. But even if it had not, these elements of the legislative scheme requiring the production of "a record of the case" in certain circumstances point to the way the entire scheme is intended to operate including the scope and effect of the definition of "relevant offence".

[26] The difficulty of a narrow approach which focuses exclusively on the elements of the offence becomes apparent when regard is had to the offence the respondent is alleged to have committed. The first limb of s 1343 contemplates either a scheme or artifice to defraud or, alternatively, for obtaining money or property by one of the means listed. Unless the conduct alleged to constitute the offence is examined, it simply will not be possible to determine what the person is alleged to have done for the purpose of deciding whether it involves conduct that would be punishable in Tonga. Much the same can be said about the second limb. At a minimum, the assessment required by s.5(1) requires knowledge of what is alleged to have been transmitted.

Applying the test

[27] We turn to consider whether, having regard to the conduct which constitutes the alleged offending, the offence would be punishable in Tonga. For this purpose, it is common ground that the only available applicable offence is section 164 of the Criminal Offences Act which reads:

> "Every person who by any false pretence obtains for himself or for any other person any money, valuable security or other thing whatever shall be liable to the same punishment as if he had committed theft".

Obtaining money by false pretences is one of the extradition crimes listed in Article 3 of the Extradition Treaty 1931.

[28] On this aspect of the case the Lord Chief Justice's conclusion was as follows:

> "62. When applied to the facts of this case the result is clear. The offence of obtaining by false pretences under section 164 requires that it be proved that the accused has by making the false pretence obtained some money, valuable security or other thing. This is not a requirement of the offence of wire fraud under section 1343. The evidence that is in the record of the case that Mr. Pedras did, as a result of his fraudulent activities, obtain for himself and others over USD$5million forms no part of the material that the Court may consider when determining whether section 1343 is a relevant offence for the purposes of the Act.
>
> 63. It follows from this that section 1343 is not a relevant offence for the purposes of the Act".

[29] We respectfully disagree with the Lord Chief Justice's reasoning and conclusion on this issue. It is the case, as he says, that the offence of obtaining by false pretences under s.164 requires proof that the accused obtained for himself or another money, valuable security or other thing. It is also the case that obtaining a benefit is not an element of the offence of wire fraud under s.1343. However, it happens that in this case the allegation is that what was transmitted by wire was, in nine of the eleven counts, money which flowed from the bank accounts of investors to bank accounts controlled by the respondent. The conduct which is relied on to prove an essential element of the offence in the United States is evidence of an essential element of an offence under s164 of the Criminal Offences Act. We see no reason why this conduct should be excluded from consideration for the purpose of deciding whether the offence of which the respondent is accused is a relevant offence. As s 5(1) indicates, it does not matter how the offence is described. What is relevant is what the offending **is**. It is a rose by any other name. The requirements of s5(1) are satisfied because the conduct that constitutes the offence in the United States (and no more) is an offence in Tonga punishable by more than 2 years' imprisonment.

[30] While this is sufficient to dispose of the appeal, we would add that, even if the evidence of obtaining a benefit were excluded from consideration, the conduct would, in our view, still constitute an offence in Tonga punishable by more than two years imprisonment. That is the offence of attempting to obtain by false pretences. By section 4 and 5 of the Criminal Offences Act an attempt to commit an offence is itself an offence carrying a maximum sentence of one half of the maximum sentence provided for the completed offence. If, contrary to the view we have taken, the evidence of obtaining a benefit is excluded from consideration, what remains is clearly sufficient to constitute the offence under Tongan law of attempting to obtain by false pretences.

[31] For these reasons we conclude that the Lord Chief Justice erred in finding that the offence of which the respondent is accused in the United States is not a relevant offence under the Act.

Result

[32] The orders made setting aside the order committing the respondent to custody for return to the United States of America to stand trial and releasing him from detention are quashed. The orders made in the Magistrates' Court will, consequentially, be restored. The respondent must accordingly forthwith surrender himself into custody.

Kivalu v Church of Jesus Christ of the Latter Day Saints in Tonga Trust Board

Court of Appeal, Nuku'alofa
Moore, Blanchard, Hansen, and Tupou JJ
AC 24/2015

7 September 2016; 14 September 2016

Employment law – question of reasonable notice – two months – damages awarded

For the full facts and Land Court judgment, see Church of Jesus Christ of Latter Day Saints in Tonga Trust Board v Kivalu [2015] Tonga LR 335.

Taniela Kivalu (the appellant) appealed against the judgment of the Land Court dismissing the appellant's counter-claim against The Church of Jesus Christ of Latter Day Saints in Tonga Trust Board (the Church). The counter-claim was brought in proceedings the Church had initiated to obtain possession of a property then occupied by the appellant. Until his dismissal on or about 18 February 2012, the appellant had been a teacher employed by the Church and the premises he occupied were quarters made available to staff.

Held:

1. The Court observed that a suggestion in argument at the trial that there may have been an implied term of mutual trust and confidence, derived from the decision of the House of Lords in *Malik v Bank of Credit and Commerce International SA* [1998] AC 20 was not raised, at all, in the appeal. Had such an argument been raised and pursued in the Land Court, it possibly could have had a bearing on the outcome. The Supreme Court had held that this implied term required an employer to act reasonably when it exercised its right to dismiss an employee.
2. The common law of Tonga ordinarily implied a term into a contract of employment that an employer could dismiss an employee by giving the employee reasonable notice. The express terms of the contract did not displace that. The court proceeded on the basis that reasonable notice was two months' notice. Accordingly, that notice having not been given, the Church breached its obligation to give reasonable notice for which the appellant was entitled to damages. Those damages were an amount equivalent to the wages or salary for the period of notice.
3. As to the appellant's claim that he was entitled to be reimbursed for the costs associated with relocating to Tonga from the United States, there was no contractual obligation on the part of the Church to pay the appellant's costs

of relocation either generally or upon termination of the contract. That claim was rejected.

4. Both parties were partially successful and, accordingly, the just and appropriate result was that each party bear their own costs of the appeal.

Cases considered:

'Ilangana v Westpac Bank of Tonga [2014] TOCA 18
Koloa v Helu [1999] Tonga LR 227
Leiola Group Ltd v Moengangongo [2010] Tonga LR 85
Malik v Bank of Credit and Commerce International SA [1998] AC 20

Counsel for the appellant	:	Mr 'O Pouono
Counsel for the respondent	:	Mr LM Niu SC

Judgment of the Court

[1] This is an appeal by Taniela Kivalu (the appellant) against a judgment of Scott J of 7 August 2015 in the Land Court dismissing the appellant's counter-claim against The Church of Jesus Christ of Latter Day Saints in Tonga Trust Board (the Church). The counter-claim was brought in proceedings the Church had initiated to obtain possession of a property then occupied by the appellant. Until his dismissal on or about 18 February 2012, the appellant had been a teacher employed by the Church and the premises he occupied were quarters made available to staff.

[2] It is unnecessary to recount in any great detail findings of fact made by Scott J or, as will become apparent, facts alleged by the appellant to be relevant to his counter-claim insofar as it relates to his relocation costs. In outline, the relevant background is this. Until the appellant commenced teaching at a school operated by the Church in Tonga, he had been living in the United States of America. The appellant is Tongan. While he had visited the school on several occasions between the years 2000 and 2010, it was not until early 2011 that he entered into an agreement with the Church to teach at the school and commenced teaching. Obviously enough, he had to relocate from the United States of America to Tonga. He commenced teaching at the school in, it appears, March 2011 and in September 2011 the school board approved his appointment as a permanent teacher effective 14 September 2011. On a date that is not clear from the document, nor was any specific finding made by Scott J about it, the appellant signed a document entitled "Employment Agreement". The document itself recites that it was entered into on 1 October 2011. In any event Scott J found that this document (the October agreement) constituted a contract of employment operative in early 2012 when the Church purported to dismiss the appellant from his employment as a teacher. As a matter of combined fact and law, this finding is correct.

[3] On 5 January 2012, the appellant spoke to the school's headmaster informing him that he was going overseas (to the United States) but would be returning on 19 January 2012. The appellant was told he had to be back for pre-school training commencing in late January. In fact, the appellant was detained by the American authorities when he entered the United States. He was not released from custody until 7 February 2012. He did not return to Tonga until 19 February 2012. On 16 February 2012 a letter was signed on behalf of the Church addressed to the appellant terminating his employment. The letter set out the terms of clause 5.1 of the October agreement and concluded by saying:

> "The Employer hereby terminates this Agreement [a reference to the October agreement] and consequently your employment as teacher thereunder forthwith as from today."

In an email dated 18 February 2012, the appellant acknowledged having received an email informing him that his employment had been terminated. In addition, Scott J made a finding, which is not contested, that the appellant's wife gave him a copy of the letter dated 16 February 2012 on 22 February 2012. Thus the position appears to be that by no later than 22 February 2012, the appellant had been notified that his employment as a teacher by the Church had been terminated.

[4] It is convenient to set out, at this point, some of the provisions in the October agreement. Clause 5 of that agreement provides:

> 5.1 This Employment Agreement recognises the employee's employment starting on 14 Sep 2011. Either Employer or Employee may terminate this Agreement at any time upon written notice to the other, with or without cause. Thus, Employee's employment with Employer is at-will. Neither this Agreement, nor any oral or written representation or Employer policy may be considered a contract of employment for any specific period of time.
>
> 5.2 Unless otherwise agreed in writing between the Employer and the Employee, the Employee's employment with Employer will cease on 31 December of the year in which the Employee attains age 60.

[5] Two further provisions should be noted. One is clause 12.1 which provides that the October agreement is to be governed by the laws of Tonga. The second is clause 13.8 which provides:

> This Agreement, including any Exhibits, constitutes the only and entire agreement between the Parties on the subject matter of the Agreement. It replaces and cancels all other verbal or written agreements, express or implied, which may have existed in the past between the Parties and which deal with the subject matter of the Agreement.

[6] It is necessary to summarise briefly the way the appellant framed, in the pleadings, his counter-claim and also some elements of his defence. Paragraph 10 of the defence responded to paragraph 11 of the Church's statement of claim. That latter paragraph pleaded, in substance, that the Church was able to terminate the appellant's employment without notice and without cause in accordance with clause 5.1 after the appellant failed to attend pre-school training and the commencement of the academic year at the school on 31 January 2012. Paragraph 10 of the defence pleaded that the termination came as a surprise to the appellant and he had no opportunity to show cause as to the actual reason for his employment being terminated. The substance of this claim is repeated in paragraph 25 of the counter-claim. The relief sought was the quashing of the notice of termination and consequential relief (including the payment of wages since the purported termination and, it appears, a declaration that the employment continued) or, in the alternative, a declaration that the contract had been terminated and damages equal to the amount the appellant had spent relocating to Tonga, a little over US $59,000. In the appellant's submissions to Scott J, counsel alluded to the proposition that the appellant "[had] been wrongfully terminated".

[7] In paragraph 19 of the reasons for judgment of Scott J, his Honour identified the "central issue" as being "whether the [appellant] was wrongfully dismissed". "If he was, then he will be entitled to damages". It appears his Honour believed that clause 5.1, properly construed, enabled the Church to terminate the appellant's employment by the giving of written notice without specifying any period of notice. We disagree with this conclusion for reasons we will shortly explain.

[8] Before we do so, it is desirable for this Court to observe that a suggestion in argument at the trial, noted by Scott J, that there may have been an implied term of mutual trust and confidence, derived from the decision of the House of Lords in *Malik v Bank of Credit and Commerce International SA* [1998] AC 20 was not raised, at all, in this appeal. Indeed Scott J noted that it was not a matter pursued before him.

[9] We have mentioned it only because, had such an argument been raised and pursued in the hearing before Scott J and in this appeal, it possibly could have had a bearing on the outcome. It has been held by the Supreme Court that this implied term requires an employer to act reasonably when it exercises its right to dismiss an employee: *Koloa v Helu* [1999] Tonga LR 227 at 234. While this proposition has not yet been addressed by this Court, *Malik* has been adverted to on at least two occasions, namely in *Leiola Group Ltd v Moengangongo* [2010] Tonga LR 85 at 95 and *'Ilangana v Westpac Bank of Tonga* [2014] TOCA 18 at [17] and [30].

[10] This first issue raised by the appeal, though not with any real clarity on the part of the appellant, is the correctness of the central conclusion of Scott J, that there had not been a wrongful dismissal. The common law of Tonga ordinarily implies a term into a contract of employment that an employer can dismiss an employee by giving the employee reasonable notice: *Leiola Group Ltd v Moengangongo* at 96. Obviously such an implied term yields to the express terms of the contract and would be displaced by an express term to the contrary: *Leiola Group Ltd v Moengangongo* at 94. In the present case to say, as clause 5.1 does, that the employment could be terminated at any time by written notice without cause says nothing about the content or nature of the notice. The clause does not, in our opinion, displace that much of the term implied by common law requiring any notice to be reasonable notice. It is not at odds with the express intention of the parties to be gleaned from the terms of clause 5.1 to treat the notice referred to in the clause as reasonable notice. We read "at will" in context as affirming the Church's ability to give (reasonable) notice at any time.

[11] In this appeal, counsel for the appellant said reasonable notice in relation to the appellant's position was two months. Counsel for the Church did not contest this proposition. In these circumstances we are content to proceed on the basis that reasonable notice was two months' notice. Accordingly, that notice having not been given, the Church breached its obligation to give reasonable notice for which the appellant is entitled to damages. Those damages are an amount equivalent to the wages or salary for the period of notice: *Leiola Group Ltd v Moengangongo* at 89. We are not aware of the rate of remuneration of the appellant at the time of his dismissal. Accordingly our order will have to be expressed at a level of generality.

[12] A central aspect of the appellant's appeal is a claim that he is entitled to be reimbursed for the costs associated with relocating to Tonga from the United States. No attempt is made to identify the legal foundation of this claim. The dealings between the appellant and the Church before he relocated, when he first took up employment and later, do not support the implication of a contractual term that the Church would

pay for the cost of relocation. Indeed it is not asserted by the appellant that there was a term to that general effect and no claim for such payment was made before the employment was terminated. In any event the October agreement is, in terms, the entire agreement between the appellant and the Church. It does not contain any contractual obligation on the part of the Church to pay the appellant's costs of relocation either generally or upon termination of the contract. This claim must be rejected.

[13] As to the costs of the appeal, both parties have been partially successful and, accordingly, the just and appropriate result is that each party bear their own costs of the appeal.

[14] In the result, the Court orders:

(i) The Order of the Land Court dismissing the appellant's counter-claim is set aside.

(ii) The respondent pay the appellant damages in a sum equivalent to the gross sum the appellant would have earned for the two months immediately following the termination of his employment on 22 February 2012 plus any unpaid salary up to that date.

(iii) The appeal is otherwise dismissed.

Leger anor v Solicitor General

Court of Appeal, Nuku'alofa
Moore, Blanchard, Hansen, and Tupou JJ
AC 3/2016

7 September 2016; 14 September 2016

Adoption – inter-country adoption – best interests of the child paramount – appeal allowed and adoption approved

The appellants (Mr and Mrs Leger) applied to adopt a three year old girl, Victoria. The Supreme Court declined the application. The court acknowledged an argument that an adoption would be in Victoria's best interests but, because there were satisfactory childcare options available for her in Tonga, it declined the application. Mr and Mrs Leger appeal against his decision.

Held:

1. Where an inter-country adoption carries distinct benefits for the child and none of the disadvantages normally associated with a move to another country, in particular the loss of family ties and the child's inheritance of Tongan culture and language, the interests of the child were likely to favour approval of the application. The fact that satisfactory care arrangements were available in Tonga would always be a factor to be considered. The importance to a child of retaining and fostering ties with his or her culture, heritage and language could not be overstated. Ultimately, however, a judgment must be made which was informed by all of the factors which bore on the best interests of the child. Judgment required approval of an inter-country adoption notwithstanding the availability of satisfactory care arrangements in Tonga.
2. The appeal was allowed. The application for Letters of Adoption in respect of Victoria Rolein Nakita Leger was approved.

Case considered:

Saavedra v Solicitor General [2013] Tonga LR 60 (CA)

Counsel for the appellants : Mr S Tu'utafaiva
Counsel for the respondent : Mr S Sisifa SC

Judgment of the Court

Introduction

[1] The appellants (Mr and Mrs Leger) applied to adopt a three year old girl, Victoria. In a ruling made on 16 March 2016 Lord Chief Justice Paulsen declined the application. Mr and Mrs Leger appeal against his decision.

[2] The appeal requires this Court to give close consideration to its decision in *Saavedra v Solicitor General* [2013] Tonga LR 60 (CA) in which it was noted (at [5]) that an inter-country adoption 'should be approved only when all other means of caring for a child in Tonga have been exhausted'. Mr and Mrs Leger are resident in New Zealand. Victoria's mother and many members of her extended family live in Tonga. The Lord Chief Justice acknowledged an argument that an adoption would be in Victoria's best interests but, because there were satisfactory childcare options available for her in Tonga, saw himself as required by *Saavedra* to decline the application.

Further background

[3] Mr and Mrs Leger were married in New Zealand in 2010. Mr Leger is a Tongan, aged 29 years. He is Victoria's uncle, the brother of her mother. Mrs Leger's father is Tongan. Her mother is Maori. She was born in New Zealand and is now 40 years of age. They live in rented accommodation in Auckland which they share with members of Mrs Leger's extended family. Both have well-paid jobs. They are members of the Catholic Church and active in the Tongan community in Auckland.

[4] Victoria's mother lives in Tonga with her parents and other members of her extended family. When she became pregnant she agreed with her brother and sister-in-law that they would have the care of the child when she was born. Mr and Mrs Leger have been unable to have children of their own. The natural father of the child was uninterested in her upbringing. Her mother believed it would be best for her to be brought up by Mr and Mrs Leger in New Zealand.

[5] Victoria's mother moved to New Zealand to prepare for her birth. She lived with Mr and Mrs Leger. After Victoria's birth she was named and customarily adopted by Mr and Mrs Leger. She and her mother remained with them for three months. They then returned to Tonga though for six months when she was two Victoria lived and was cared for primarily by the Legers in New Zealand while her mother remained in Tonga.

[6] At all other times Victoria has lived in Nuku'alofa with her mother, her maternal grandparents and other members of the extended family. There are ten in all living at the property. Only one member of the household is employed and that on a casual basis. Mr and Mrs Leger send approximately TOP$200 per fortnight to help meet the costs of Victoria's upbringing and have regularly visited her in Tonga.

[7] The Solicitor-General, who was appointed guardian ad litem to represent Victoria, supported the application as in her best interests. His report, supported by a letter reporting on a visit to the home of Mr and Mrs Leger in Auckland, described them as honest and genuine in their application, hardworking, very fond of Victoria and capable and willing to provide her with a suitable home as well as "the appropriate necessities required for her wellbeing".

The Chief Justice's decision

[8] The Lord Chief Justice accepted that Mr and Mrs Leger would provide Victoria with a safe and secure home. He said they were clearly in a more financially secure position than the natural mother and her family in Tonga. He noted the view of all concerned that Victoria would have a better life in New Zealand and greater opportunities to obtain an education.

[9] Paulsen CJ also noted that an adoption would not sever Victoria's links to her Tongan culture, language and heritage. Mr and Mrs Leger have strong ties to the Catholic Church and the Tongan community in Auckland. Both speak Tongan. Family connections would be maintained through a large extended family in Auckland.

[10] The Lord Chief Justice concluded that, "on the face of it" there was an argument that adoption is in Victoria's best interests. However, he said, that is not the end of the matter. Referring to the dicta in *Saavedra* quoted at [2] above and to a further observation (at [5] of *Saavedra*) that an inter-country adoption is only to be granted as "a measure of last resort", he held that grounds for granting Letters of Adoption had not been made out. There being no suggestion that Victoria is not well cared for while residing in Tonga with her natural mother and members of her family, the Lord Chief Justice said he could not be satisfied that an adoption "is the last resort to provide for Victoria's case". (at [21])

Discussion

[11] It is important to note at the outset that the circumstances in *Saavedra* were materially different from those that arise for consideration in this case. The child was six and had no prior association with the applicants. They were American citizens and, while they lived in a city (Salt Lake City) with a large Tongan community, the child's connection with his family and Tongan culture and language would be severed by an adoption. This Court endorsed (at [7]) as relevant the view of the Chief Justice that the child would be taken to an environment quite different from that he had known all his life, and which continued to offer him a loving, stable and secure home environment (at [11]). Further, by the time of the hearing the mother had withdrawn her consent to the adoption and the child himself was resistant to the move. This Court had no difficulty accepting that the child's best interests would be served by his remaining in Tonga.

[12] As the Court in *Saveedra* noted (at [4]) the United Nations Convention on the Rights of the Child, to which Tonga is a party, recognises that when considering adoption the best interests of the child is the paramount consideration. It will be helpful if we set out Article 21 in its entirety;

"Article 21

States Parties that recognize and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration and they shall:

(a) Ensure that the adoption of a child is authorized only by competent authorities who determine, in accordance with applicable law and procedures and on the basis of all pertinent and reliable information, that the adoption is permissible in view of the child's status concerning parents, relatives and legal guardians and that, if required, the persons concerned have given their informed consent to the adoption on the basis of such counselling as may be necessary;

(b) Recognize that inter-country adoption may be considered as an alternative means of child's care, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child's country of origin;

(c) Ensure that the child concerned by inter-country adoption enjoys safeguards and standards equivalent to those existing in the case of national adoption;

(d) Take all appropriate measures to ensure that, in inter-country adoption, the placement does not result in improper financial gain for those involved in it;

(e) Promote, where appropriate, the objectives of the present article by concluding bilateral or multilateral arrangements or agreements, and endeavour, within this framework, to ensure that the placement of the child in another country is carried out by competent authorities or organs.

[13] Reading Article 21 as a whole, it is clear that each of the specific measures agreed has the objective of advancing the paramount goal of serving the interests of children who are being considered for adoption. This is underlined in *Concluding Observations of the Committee on the Rights of the Child, Mexico (UN Doc. CRC/C/15Add. 13,1994)*, at para 16:

"The Committee emphasizes that the best interests of the child must be a guiding principle in the application of the Convention and that the authorities should undertake all appropriate measures to the maximum extent of their available resources to ensure that sufficient resources are allocated to children, particularly children living and/or working in the streets, children belonging to minority groups or indigenous communities and other vulnerable children".

[14] The Committee went on at para 18 to make the remarks quoted in *Saavedra* (at [5]), which in context read:

> "In the framework of the adoption process, due consideration should be given to the provisions of article 12 of the Convention, [as to the child's right to be heard]. Furthermore, intercountry adoption should be considered in the light of article 21, namely as a measure of last resort".

[15] It is distinctly arguable that in characterising inter-country adoption as a measure of last resort, the Committee sacrificed accuracy for brevity. It may have been more accurate to say (as it had earlier acknowledged) that an inter-country adoption should take place only if it would be in the best interests of the child.

[16] The specific provisions of Article 21 cannot have been intended to displace the paramount requirement to have regard for the child's best interests. That is also the way *Saavedra* should be read. In the circumstances of that case the interests of the child were plainly best served by his remaining in Tonga. But in cases such as the present, where an inter-country adoption carries distinct benefits for the child and none of the disadvantages normally associated with a move to another country, in particular the loss of family ties and the child's inheritance of Tongan culture and language, the interests of the child are likely to favour approval of the application. The fact that satisfactory care arrangements are available in Tonga will always be a factor to be considered, and will often be decisive. The importance to a child of retaining and fostering ties with his or her culture, heritage and language cannot be overstated. Ultimately, however, a judgment must be made which is informed by all of the factors which bear on the best interests of the child. And in a proper case that judgment may require approval of an inter-country adoption notwithstanding the availability of satisfactory care arrangements in Tonga. This is undoubtedly such a case.

Result

[17] The appeal is allowed. The application for Letters of Adoption in respect of Victoria Rolein Nakita Leger is approved.

Toloke anor v Australia & New Zealand Banking Group Ltd

Court of Appeal, Land Jurisdiction, Nuku'alofa
Moore, Blanchard, Hansen, and Tupou JJ
AC 2/2016

7 September 2016; 14 September 2016

Appeal against summary judgment – allegation of forgery – allegation was improbable – summary judgment justified

Australia & New Zealand Banking Group Ltd held a registered mortgage by way of lease over Mr Toloke's town allotment at Veitongo. That mortgage was dated 19 May 2004 and was registered by the Minister of Lands on 18 January 2005. The Deed of Grant held by the bank was endorsed accordingly by the Ministry. The mortgage was expressed to be for 30 years from 19 May 2004 which was the longest term permitted under the Land Act for a mortgage lease. Mr Toloke and his wife, to whom the bank made joint advances for housing purposes related to the land, claimed however that they never agreed to more than a 7 year term and that the signature of Mr Toloke appearing on the mortgage and on the application for its registration by the Minister were forgeries. They claimed that a mortgage was signed by Mr Toloke but it was for 7 years only and was not the document which the bank now relied upon in seeking an order for possession now that the Tolokes have made default by failing to repay the loan. The bank sought and received summary judgment in the Land Court against the Tolokes. The court did not believe the affidavit evidence of Mr and Mrs Toloke and was satisfied that the Tolokes had no arguable defence to the bank's claim. They were ordered to deliver up vacant possession of the land in the Deed of Grant within 14 days. Mr and Mrs Toloke appealed against that decision and claimed that it was not a suitable case for summary judgment.

Held:

1. There was a dispute about whether the signature of Mr Toloke had been forged. The Tolokes argued that the President ought not to have resolved a factual dispute about Mr. Toloke's signature without a full hearing at which there could be cross-examination of the witnesses. The court was not bound to accept inherently improbable defence evidence claimed to give rise to a factual dispute. The Land Court's analysis showed how improbable it was that the bank would ever have agreed to a 7 year term for the mortgage in the first place and even more improbable that, if it had actually done so, it would have been content to extend the loan in 2008 beyond that 7 year term without a new mortgage, particularly after a default. Against that background, the President did not have to accept that there might be a doubt

about whether Mr Toloke had signed the registered mortgage. He did not believe Mr Toloke's claim of forgery and nor did the Court of Appeal.

2. Where the claim of forgery was, on the evidence before the Court, not believable, the Court was entitled to proceed to enter summary judgment. The appeal was dismissed.

Case considered:

Moehau v Westpac Bank of Tonga [2013] Tonga LR 71

Statute considered:

Land Act (Cap 132)

Counsel for the appellants	:	Mr S Tu'utafaiva
Counsel for the respondent	:	Mr W Edwards

Judgment of the Court

[1] Australia & New Zealand Banking Group Ltd holds a registered mortgage by way of lease over Mr. Toloke's town allotment at Veitongo. That mortgage is dated 19 May 2004 and was registered by the Minister of Lands on 18 January 2005. The Deed of Grant held by the bank is endorsed accordingly by the Ministry. The mortgage is expressed to be for 30 years from 19 May 2004. That is the longest term permitted under the Land Act for a mortgage lease: s.100. The evidence for the bank in the Supreme Court is that it invariably insists on taking such mortgages for a full 30 year term.

[2] Mr. Toloke and his wife, to whom the bank made joint advances for housing purposes related to the land, claim however that they never agreed to more than a 7 year term and that the signature of Mr. Toloke appearing on the mortgage and on the application for its registration by the Minister are forgeries. They say that a mortgage was signed by Mr Toloke but it was for 7 years only and was not the document which the bank now relies upon in seeking an order for possession now that the Tolokes have made default by failing to repay the loan.

[3] The bank sought and received summary judgment in the Land Court against the Tolokes. Lord Chief Justice Paulsen, in his capacity as Lord President, did not believe the affidavit evidence of Mr and Mrs Toloke and was satisfied that the Tolokes had no arguable defence to the bank's claim. He ordered them to deliver up vacant possession of the land in the Deed of Grant within 14 days. Mr and Mrs Toloke appeal against that decision saying that this was not a suitable case for summary judgment.

[4] Most of the facts are not in dispute. The only question is whether the mortgage which was registered and is now relied upon by the bank is the document Mr. Toloke admits he signed in 2004. We have already set out the basic facts. But it also needs to be mentioned that the housing loan was restructured in 2008 after default by the Tolokes. The bank's letter of offer of 24 April 2008 recorded that the amount of the loan then outstanding was TOP$239,176 which would now be repayable with interest by monthly instalments over a 5 year term running from 31 May 2008. The letter of offer referred to the fact that the bank held a first registered mortgage over the land but the letter did not propose any variation of its terms and conditions.

[5] If the contention of the Tolokes were to be accepted, the bank must have been content in 2008 to extend the term of the housing loan to 2013 despite the expiry date of its mortgage being in 2011. In other words, the Tolokes are saying that their loan was to be unsecured for the final 2 years. That unusual arrangement is nowhere mentioned in the 2008 letter of offer.

[6] After further defaults the bank demanded repayment on 3 February 2011 and issued proceedings in the Supreme Court seeking judgment for the outstanding balance of the housing loan and other amounts owing in respect of business loans. On 10 October 2014 Scott J gave summary judgment against the Tolokes for sums including TOP$120,087.89 in respect of the housing loan indebtedness. Because that was not paid the bank has sought to enforce its security over the land.

The judgment below

[7] The Lord President helpfully set out the guiding principles of summary judgment. To these we add what this Court said in *Moehau v Westpac Bank of Tonga* [2013] Tonga LR 71 at [17]:

> Under Order 15 rule 2 and comparable rules in other jurisdictions a defendant should not be deprived of his right to contest a plaintiff's claim at trial unless his defence is so clearly untenable that it must fail. The Supreme Court must be satisfied, in other words, that the asserted defence has no prospect of succeeding at trial. In a case in which there is a factual contest it may not be proper to enter summary judgment and deprive the defendant of the exercise of the right to a trial. But merely because it is contended that there is factual dispute the court is not bound "to accept uncritically, as raising a dispute of fact which calls for further investigation, every statement in an affidavit however equivocal, lacking in precision, inconsistent with contemporary documents or other statement by the same deponent or inherently improbable in itself it may be" :Eng Mee Yong v Letchumanan [1980] AC 331 (PC) at 341 per Lord Diplock. Nonetheless the court should proceed with appropriate caution bearing in mind the consequences of summary judgment for a defendant.

[8] The President carefully went through and analysed the evidence given for the Tolokes. He noted the acknowledgement given that a mortgage (said to be for 7 years) had indeed been signed. Mr Toloke had deposed that the signature on the 30 year mortgage was not his. He said he signed himself as "V. Toloke", not "S. Toloke" as on the mortgage relied on by the bank. He said he was not given copies of the signed documents. He had requested a copy in 2008 when he said he was approached by the bank to sign new loan documents because all of the loan documentation had been destroyed in the riot in 2006.

[9] There was an affidavit from Mrs. Toloke who did not accept that her husband could have signed a mortgage for 30 years. She had done the negotiations for all the Tolokes' loans. Part of the discussion with the bank in 2004 was for the mortgaging of the land to be for the same term as the term of the loan, namely 7 years. The bank had never told them the mortgage would be for 30 years. She too said there had been a request for re-signing of documentation in 2008 because documents had been burnt in the riot.

[10] The Tolokes also put forward an affidavit from a former employee of the bank, Mrs Heta Tupou, who said that in 2004 she was looking after the loan accounts of the Tolokes at the bank. She recalled a housing loan but says she was not the witness to Mr. Toloke's signature on the bank's documents. She said that the signature of the witness was similar to her's but was not her signature. She also said that Mr. Toloke's purported signature on the mortgage differed from his signature on a letter of offer in 2004. She further said there had been departures from usual banking practices in that the name of the bank officer who witnessed the mortgagor's signature was not printed next to the signature of the witness; and variations of the loan had not been recorded as variations of mortgage.

[11] The President reminded himself of the onus of proof and the summary judgment principles. But he said he had come to a very clear view that the onus had been satisfied by the bank. He considered that the defence raised by the Tolokes was both inherently improbable and contrived. The suggestion that the bank had Mr. Toloke sign mortgage documents but then forged and registered other mortgage documents, apparently for no other reason than to alter the term of the mortgage to 30 years, was demonstrably improbable. The signatures on Mr. Toloke's affidavit and on the 2004 and 2008 loan offers (all of which he did sign) were "strikingly" similar to that on the mortgage. We pause to say that we too have looked carefully at the signatures. We fully agree with the President about their similarity.

[12] The President said that it was inconceivable that the bank should provide the Tolokes with a loan of more than TOP$200,000 repayable over 7 years and take as a security a mortgage for a term of only 7 years because of the grave risk of holding no or inadequate security in the event of a default. The undisputed evidence of the Lending and Security Administrator of the bank was that it was the bank's policy only to take mortgages for the full term allowable under the Land Act of 30 years. The mortgage in this case was for the full term of 30 years "like every other Mortgage registered with the Ministry of Land over Town Allotment land". The Tolokes had had a number of loans with the bank and security had been taken by way of mortgage over other interests in land. They had produced no evidence that in any other case the bank had agreed to a term of less than 30 years.

[13] The judge said that it was significant that after the restructure in 2008, if the Tolokes were correct, the bank would have held no security for the last 2 years of the loan.

[14] No benefit was obtained by the Judge from the evidence of Mrs. Tupou. She had said that she did not witness the signature of Mr. Toloke and therefore could not say whether he signed the mortgage or not. The bank had not asserted that she was the witness. Her view that Mr. Toloke's signature on other documents was different was "inadmissible and mischievous". The fact that a witness did not print his name was not evidence of fraud. As the Lending and Security Administrator had said, there was never a need for a variation of mortgage. Mrs. Tupou had said she did not recall the bank having a Deed of Grant to the land with an endorsement for 30 years, but the bank did hold a deed of grant and had held it in 2005 when the mortgage was registered. (We comment that it does not appear that the term of a mortgage lease is normally shown on the endorsement of the registration).

[15] For these reasons, the President found there was no arguable defence.

This appeal

[16] The argument for the Tolokes on this appeal essentially was that the President ought not to have resolved a factual dispute about Mr. Toloke's signature without a full hearing at which there could be cross-examination of the witnesses. There was a dispute about whether the signature of Mr. Tolokes had been forged. The Tolokes should have been given the opportunity of obtaining expert evidence about that. The evidence of Mrs. Tupou, said to be an independent witness, should not have been set to one side, as had been done.

[17] But, as the passage from *Moehau* and other authorities cited by the President make clear, the court is not bound to accept inherently improbable defence evidence claimed to give rise to a factual dispute. The President's analysis, which we respectfully agree with and adopt, shows how improbable it was that the bank would ever have agreed to a 7 year term for the mortgage in the first place and even more improbable that, if it had actually done so, it would have been content to extend the loan in 2008 beyond that 7 year term without a new mortgage, particularly after a default. Against that background, the President did not have to accept that there might be a doubt about whether Mr. Toloke had signed the registered mortgage. He did not believe Mr. Toloke's claim of forgery and nor do we.

[18] The affidavit of Ms. Tupou proves nothing at all. She says she was not the witness so she cannot say whether Mr. Toloke was the signatory.

[19] The bank was said by the Tolokes to have asked for new mortgage documentation in 2008 but none was sought in the 2008 letter of offer and the evidence for the bank was that the branch at which the Tolokes' documentation was kept was not damaged in the fire after the riot.

[20] The Tolokes were accusing the bank of fraudulent conduct. Their accusation was not supported by the evidence apart from Mr. Toloke's claim that the signing of his name on the mortgage was a forgery. In such circumstances the Tolokes could have been expected to provide expert evidence from a document examiner as part of the evidence resisting the bank's application for summary judgment. The bank's application was made early in October 2015. It was not heard in the Land Court until the end of January, nearly 4 months later. Even allowing for the Christmas holidays, there was ample time to engage the services of an expert, or at least to seek further time to do so. No such step was taken. In circumstances where the claim of forgery was, on the

evidence before the Court, not believable, the Court was entitled to proceed to enter summary judgment.

Result

[21] We are not persuaded that the President was wrong to enter summary judgment
210 and we dismiss the appeal with costs to be taxed if not agreed upon.

Tonga v Rex

Court of Appeal, Nuku'alofa
Moore, Blanchard, Hansen, and Tupou JJ
AC 10/2016

7 September 2016; 14 September 2016

Criminal appeal against sentence – apparent that wrong offence was charged – conviction quashed and replaced with earlier offence – sentence reduced

Mr Tonga appealed against a sentence of two and a half years' imprisonment, with the final year suspended, imposed upon him after he pleaded guilty to a charge of serious fraudulent conversion of property. Such offending had a maximum penalty of imprisonment for 10 years. Since the sentencing it was understood that Mr Tonga should never have been charged with serious fraudulent conversion, which was a new offence introduced only in 2012, sometime after the offending. The appropriate charge was one of fraudulent conversion under the version of s 162 in force before 2012.

Held:

1. Mr Tonga was 43 and of previous good character. He had represented Tonga at rugby. The offence arose out of the failure of his business and he was remorseful. These matters were taken into account in sentencing. Also his wife and family were American citizens but to his credit he chose to remain in Tonga and face the charge. The Judge remarked that the conviction might well mean that joining his family in the United States would be really difficult.
2. The words "the verdict found by such judge" should be read as referring to the acceptance of the guilty plea and entry of a conviction; and the words "a verdict of guilty of that other offence" as referring to acceptance of a guilty plea and entry of a conviction for the other offence. Accordingly, the court was empowered to quash the conviction under the new s.162 and to substitute a conviction under the section as it stood in 2009 when the offending took place.
3. The maximum penalty under the old s 162 was only 7 years. The appropriate starting point was 3 years with a deduction of 18 months for the mitigating factors, including the guilty plea, and the suspension of the last 12 months of imprisonment.
4. The appeal against conviction was allowed and the conviction under s.162 as amended in 2012 was quashed. A conviction under s.162 as it stood before the 2012 Amendment Act was substituted under s.18(2) of the Court of Appeal Act and Mr. Tonga was sentenced to imprisonment for 18 months to run from 21 July 2016. The final 12 months of that sentence was

suspended for 2 years on condition that Mr. Tonga committed no further crime punishable by imprisonment during the period of the suspension.

Case considered:
R v Pohahau [2003] Tonga LR 270

Statutes considered:
Court of Appeal Act (Cap 9)
Criminal Offences Act (Cap 18)
Interpretation Act (Cap 1)

Counsel for the appellant	:	Mr WC Edwards SC
Counsel for the respondent	:	Mr 'A Kefu SC

Judgment of the Court

[1] Mr. Tonga has appealed to this Court against a sentence of two and a half years' imprisonment, with the final year suspended, imposed upon him after he pleaded guilty to a charge of serious fraudulent conversion of property under s.162(1)(a) of the Criminal Offences Act. Such offending has a maximum penalty of imprisonment for 10 years: subs (3)(a).

The Facts

[2] Mr. Tonga owned and managed a small business. He expanded it and began buying cars and trucks from New Zealand sources and re-selling them in Tonga. To finance this expansion he borrowed TOP $200,000 from Westpac Bank of Tonga. The business was not successful, in part at least because of the weakening of the Tongan currency. By 2009 the business was in trouble. It had a liquidity problem and there were difficulties meeting repayments due to the bank.

[3] In these circumstances, the appellant entered into an arrangement with the Prison Department pursuant to which it paid to him TOP$225,000 which was to be used to purchase on behalf of the Department six vehicles from New Zealand. This money was paid into the bank account of the business but only one vehicle was purchased, for TOP$60,000, and delivered. A large part of the balance of TOP$165,000 was used to pay business creditors. In utilising the Prison Department's money in his business the appellant seems to have hoped that the fortunes of the business would change for the better and enable him to pay for and deliver the other five vehicles. That never happened, the bank froze the account and the business became insolvent.

[4] It took a very long time before any criminal charge was brought in 2014. In the meantime the Department had pursued a civil action, obtaining judgment but no payment. Further delays followed until eventually a trial date was set for 10 June 2016. But on that day Mr. Tonga pleaded guilty.

The sentence

[5] Mr Tonga is 43 and of previous good character. He has represented Tonga at rugby. It is accepted by the prosecution that the offence arose out of the failure of his business and that he is remorseful. In sentencing him on 21 July 2016 Cato J took these matters into account, noting also that Mr. Tonga had had the matter hanging over his head for a long time though "partly he is the author of his own misfortune in that regard". His wife and family are American citizens but to his credit he had chosen to remain in Tonga and face the charge. The Judge remarked that the conviction might well mean that joining his family in the United States would be really difficult.

[6] Cato J referred to the 10 years maximum penalty. He said that the fixing of a starting point for sentencing in cases of this kind was difficult. In the circumstances he believed a starting point of 4 years was appropriate. He took into account what he called an early guilty plea, remorse and previous good character, for which he deducted 18 months. That brought the judge to a sentence of two and a half years' imprisonment. He suspended the final 12 months for two years on condition that Mr. Tonga commits no further crimes punishable by imprisonment during that period.

The wrong charge

[7] Only since the sentencing has it been appreciated that Mr. Tonga should never have been charged with serious fraudulent conversion, which is a new offence introduced only in 2012, some time after the offending. The appropriate charge was one of fraudulent conversion under the version of s.162 in force before 2012. The old s.162 was repealed by the 2012 Amending Act but is preserved for previous offending by s.15(b) of the Interpretation Act (Cap 1) which reads:

> Whenever any Act repeals either in whole or in part a former Act the repeal shall not, in the absence of any express provision to the contrary, affect or be deemed to have affected .....
>
> (b) Any offence committed, or any right, liberty, obligation or penalty acquired or incurred under the repealed Act; …

[8] Counsel were content that we treat the appeal as one against the invalid conviction as well as against the sentence and that this Court should use its power under s.18(2) of the Court of Appeal Act (Cap 9) to substitute a conviction under the previous s.162. Section 18(2) reads:

> (2) Where an appellant has been convicted of an offence and the judge, or in the case of a trial by jury, the jury could on the indictment have found him guilty of some other offence, and on the findings of the judge or jury, as the case may be, it appears to the Court of Appeal that the judge or jury must have been satisfied of facts which proved him guilty of that other offence, the court may, instead of allowing or dismissing the appeal, substitute for the verdict found by such judge or jury a verdict of guilty of that other offence and pass such sentence in substitution for the sentence passed at the trial as may be warranted in law for that other offence, not being a sentence of great * severity [sic].

* This must be a misprint for "greater severity".

120 [9] It will be observed that the subsection is not very aptly worded for application to a situation where the conviction has followed a guilty plea because it speaks in terms of a "verdict" of guilty. When, however, reference is made to s.16, which sets out the right of a convicted person to appeal against conviction and sentence, it is noteworthy that it speaks only of a person "convicted on a trial". Yet it could never have been intended that a person who had been convicted after a plea of guilty should have no right to appeal against sentence, with leave, under s.16(c). It has rightly been assumed that "trial" in s.16 includes a proceeding in which a plea of guilty is made and a conviction entered by the Court and a sentence is imposed.

[10] The same approach has to be taken under s.18 (2) to adapt it to circumstances like
130 the present, to which we are sure that, consistently with s.16, it is meant to apply. The words "the judge could on the indictment have found him guilty of some other offence" should be read as referring to the acceptance by the judge of a plea of guilty to some other offence for which, but for the plea, the appellant could on the indictment have been found guilty. In this context "on the indictment" has been held by the Supreme Court, in a judgment concerned with same expression in s.42(3) of the Criminal Offences Act, to refer to a situation where the allegations in the indictment "amount to or include an allegation of the other offence expressly or impliedly": *R v Pohahau* [2003] Tonga LR 270 at 277 per Ward CJ.

[11] Similarly the words "the verdict found by such judge" should be read as referring
140 to the acceptance of the guilty plea and entry of a conviction; and the words "a verdict of guilty of that other offence" as referring to acceptance of a guilty plea and entry of a conviction for the other offence.

[12] Accordingly, we are empowered to quash the conviction under the new s.162 and to substitute a conviction under the section as it stood in 2009 when the offending took place.

A new sentence

[13] Section 18(2) requires that we pass "such sentence in substitution for the sentence passed at the trial as may be warranted in law for that other offence, not being a sentence of [greater] severity".

150 [14] Mr. Kefu responsibly conceded that Cato J's starting point of four years, whilst appropriate where the maximum penalty was 10 years, was not appropriate for this offending under the old s.162 which had a maximum penalty of 7 years. Mr. Kefu suggested a new starting point of 3 years. Mr. Edwards submitted that it should be two and a half years.

[15] This was serious offending involving the loss of a large sum of public money and a betrayal of the trust reposed in Mr Tonga by the Prison Department, although we can accept that he did not originally set out to defraud the Department and did so only as a means of trying, unsuccessfully, to save his business from insolvency. We agree with Mr. Kefu's assessment of the appropriate starting point.

160 [16] There was no disagreement by either counsel with the other components of Cato J's sentence, namely a deduction of 18 months for the mitigating factors to which he

referred, including the guilty plea, and the suspension of the last 12 months of imprisonment.

Result

[16] The Orders of the Court are:

(1) The appeal against conviction is allowed and the conviction under s.162 as amended in 2012 is quashed;

(2) A conviction under s.162 as it stood before the 2012 Amendment Act is substituted under s.18(2) of the Court of
170 Appeal Act;

(3) Mr. Tonga is sentenced to imprisonment for 18 months to run from 21 July 2016.

(4) The final 12 months of that sentence is suspended for 2 years on condition that Mr. Tonga commits no further crime punishable by imprisonment during the period of the suspension.

R v Mapapalangi

Supreme Court, Nuku'alofa
Cato, Acting CJ
CR 71/2016

7 October 2016

Criminal offences – obtaining money by false pretences – unsupported evidence – not guilty

The accused, Meleate Mapapalangi, originally stood indicted on 15 counts of obtaining moneys by false pretences from Kaufo'ou 'Amato. The first 8 counts alleged as particulars that she had asked her for various sums of money as a loan on the condition that she would pay back the money, and Kaufo'ou Amato relied on that condition which had resulted in the accused receiving the money. In all, the Crown alleged under the first 8 counts that she obtained $52,814. Also in this indictment, were a further 7 counts alleging that she had obtained moneys by false pretence from Kaufo'ou 'Amato when she pretended to be 'Luseane' of ANZ Bank and instructed Kaufo'ou 'Amato over the phone to give her the money so that it could be used to pay process fees at the ANZ bank, in order for the bank to repay in full the money Kaufo'ou 'Amato had given her. It was alleged that Kaufo'ou 'Amato relied on the prospect of getting repaid in full so she gave the money. That related to a sum of a further combined total of $71,715. She pleaded not guilty to the charges.

Held:

1. The complainant was a self-admitted thief and was a senior person in a church charity from which she stole. The court had to take care before acting on her evidence which was largely unsupported. The case depended for success entirely on proof that moneys were obtained by the accused beyond reasonable doubt and also beyond reasonable doubt that this was according to the terms that would be repaid. The evidence left the court short of being satisfied beyond reasonable doubt this was so.
2. Verdicts of not guilty were entered on each count.

Cases considered:

Greene v R (1949) 70 CLR 353
R v Bens (1989) 168 CLR 110
R v Dent [1955] 2 All ER 806
Ratten v R [1972] AC 378

Counsel for the Crown : Mr 'Aho
Counsel for the defendant : Mr Tu'utafaiva

Verdict and reasons

[1] The accused, Meleate Mapapalangi, originally stood indicted on 15 counts of obtaining moneys by false pretences from Kaufo'ou 'Amato. The first 8 counts alleged as particulars that she had asked her for various sums of money as a loan on the condition that she would pay back the money, and Kaufo'ou Amato relied on that condition which had resulted in the accused receiving the money. In all, the Crown alleged under the first 8 counts that she obtained $52,814.00 in this way.

[2] Also in this indictment, were a further 7 counts alleging that she had obtained moneys by false pretence from Kaufo'ou 'Amato when she pretended to be 'Luseane' of ANZ Bank and instructed Kaufo'ou 'Amato over the phone to give her the money so that it could be used to pay process fees at the ANZ bank, in order for the bank to repay in full the money Kaufo'ou 'Amato had given her. It was alleged that Kaufo'ou 'Amato relied on the prospect of getting repaid in full so she gave the money. That related to a sum of a further combined total of $71,715.00.

[3] She had pleaded not guilty to these charges.

[4] After the trial commenced, Mr 'Aho consolidated all the counts into one rolled up count of obtaining $124,529.00 by false pretences from Kaufo'ou 'Amato when she asked her for loans, on the condition that she will pay her back the money, and Kaufo'ou 'Amato relied on that condition which resulted in her giving the said money. The accused was not asked to plead to the amended indictment which was by consent.

[5] During the course of the evidence but not before the central witness, Mrs Amato, had given her evidence, I drew to the attention of Mr 'Aho that, as framed, the indictment counts 1 – 8 seemed to me to have no prospect of success because the false pretence was not a representation of existing fact as the common law requires but in fact a promise or undertaking to repay in the future. I pointed out that there was high authority to this effect. *Greene v R* (1949) 70 CLR 353; *R v Dent* [1955] 2 All ER 806 CCA per Devlin J at 807-808. In some jurisdictions, New Zealand being one, the law has been amended so that a representation includes a promise to do a future act, but that has not been the case in Tonga where what may constitute a false pretence is not defined. Plainly, legislative reform is necessary in this area so that a false pretence may include a representation of intention to do a future act.

[6] Mr 'Aho after considering the issue overnight, accepted this was the case and proposed that he proceed on the indictment that had originally been presented and upon which the accused had been arraigned confined only to the 'Luseane' counts. I saw no impediment to proceeding in this way, because the amended rolled up indictment through inadvertence had not been the subject of re-arraignment, and, in any event, there would have, to my mind, been no prejudice in allowing a further amendment in effect reinstating the Luseane charges, at that stage of the trial. In the event, Mr Tu'utafaiva made no objection to the trial proceeding on the Luseane charges in the original indictment with the other counts involving a promise to repay being effectively the subject of an acquittal.

[7] The trial proceeded on the Luseane charges only. Although the trial proceeded over a number of days with an adjournment in between, the evidence was within a narrow compass. The complainant and principal witness, Mrs Amato, gave evidence that she had borrowed moneys from friends and fellow members of her Church which were included in exhibit one of a book of exhibits, and that this was with the intention of lending it to the accused with whom, she said, she had formed a relationship like a sister. As well, she admitted she had stolen or embezzled money from a charitable organization associated with her church of which she was a manager and senior representative. In all, it was claimed, in exhibit one, that she had obtained $103,903 including $35,477.00 from the charitable source. I had sentenced her shortly before she had given evidence for embezzlement to which she had pleaded guilty of the charitable moneys and she had been sentenced to a term of imprisonment. There had been no inducement offered to her by the Crown in consideration of her giving evidence against the accused.

[8] Mrs 'Amato, gave evidence that the accused had befriended her and asked her initially for money to assist a sick relative and to purchase airline tickets for family which she had done. Her evidence concerning the airline tickets was unclear and she was unclear also about how much she had lent the accused for this purpose. It seems she understood that part at least of the tickets were to be refunded. Thereafter, she had advanced the accused very significant sums of money which had been paid into the accused's bank between 28th August 2014 and the 11th March 2015 totalling $52,814.00. Dates and amounts which had been taken from her diary and substantiated with bank deposit slips as Exhibit 6 were produced in evidence. These amounts formed counts 1- 8 of the indictment and for reasons given these counts were dismissed because the alleged promise to repay was not in law a representation that could constitute a false pretence.

[9] During the course of cross-examination of the witness, Mr Tu'utafaiva suggested these moneys had been paid into the accused's bank account because the complainant wanted a cover or to hide the borrowings which the complainant denied was the case. There was no evidence given by the accused to support this and so there is no basis for Mr Tu'utafaiva's submission that I should act upon this suggesting. I consider that the evidence established a large number of significant deposits and I accept the complainant when she said the accused befriended her and obtained these significant advances on the basis she would pay them back.

[10] The accused did, however, admit to paying for certain household items out of moneys she had borrowed or stolen although the impression she gave was that these were not significant. I will turn to this issue later in relation to the Luseane counts.

[11] The accused gave evidence also in regard to exhibit three that she had paid a further $71,715.00 as processing fees in order to obtain repayment of the money advanced principally it seems for air tickets that were to be refunded. This formed the basis of the Luseane counts constituting 9 – 15. Her evidence at best I found was confusing, but after lengthy examination in chief and cross-examination she said essentially, as I understood her, that in relation to a refund of the airline tickets a person by the name of Sina had rung her on several occasions to ask for further moneys to be deposited to secure a refund to the accused which she referred to as processing fees. At trial, she mentioned the Sina requests and payments made to airline as those she had noted in her diary the false pretence relating to Luseane, and payments made at the request of Sina

fell outside the pretence alleged. Mr Aho was taking by surprise because the witness had not apparently mentioned the involvement of Sina during interviews with Police, but only at trial. Mr Aho did not suggest that Sina was also fictitious or that at that late stage of the trial the complainant being the final Crown witness, he could suggest a further amendment, and rightly in my view did not do so. Mrs Amato was questioned about her diary entries from which she had drawn up exhibit 3 and she said that payments recorded as to the airline related to payments to Sina for processing, and those made out to bank were for Luseane also processing fees. In some cases, according to Mrs Amato, Sina had she said spoken to her about processing and reference had also been made by Sina to Luseane at the bank.

[12] The sums mentioned as paid to the airline in her diary over this period on my calculation appears to be about $35,875.00 and those to the bank or to ANZ bank amounted to only about $15,383.00. That left a sum of about $20,457.00 when deduction the airline (Sina) deposits and the BNZ (Luseane deposits) from the amount $71,715.00 being the total sum of cash alleged to be paid to the accused between 12th March 2015 and the 25th September 2015, the purpose of those payments to the accused allegedly being unclear.

[13] In my view, considering the false pretence in counts 9-15 alleged only the amounts referred to as payments to ANZ bank the amount falling within the indictment relates only to about $15,383.00, that is nothing like the $71,715.00 claimed as obtained by Luseane, in those counts. There may have been some relationship to airline payments to Sina for processing and Luseane, but the false pretence is couched strictly in terms of Luseane's demands.

[14] Mr Tu'utafaiva I considered made a very valid point when he cross-examined Mrs Amato suggesting the money paid to the bank was in fact applied in reduction to her arrears with the ANZ bank in regard to her home loan. Mrs Amato said that she was responsible for paying off the loan under the arrangement she had with her husband. As at the 29th June 2015 according to her diary, her loan was in arrears by $5,700.00 with an outstanding balance of $33,600.34. Mr Tu'utafaiva pointed out that payments were made to the bank between the 9th July and the 17th July 2015 totalling $5,780. There were 10 further payments after this he said. The witness denied as was suggested to her by Mr Tu'utafaiva that she had paid off her home loan from these moneys although she admitted using some money that had been stolen for household expenses. I am left concerned about this matter. The issue of whether she had spent some of this money on paying off her home loan as in my view was reasonably put to her could have been readily resolved by producing her house loan account with the ANZ bank. The bank did not call up the loan, Mrs Amato said, because an accommodation had been arranged and her daughter had taken over the loan. I remained unsure of the reliability of Mrs Amato's evidence on this point which was a central aspect of the case as it had evolved.

[15] I remind myself that the complainant Mrs Amato is a self-admitted thief and was a senior person in a church charity from which she stole. I must take care before acting on her evidence which is largely unsupported. Whilst I consider it is very possible, if not probable, that pressure was placed upon her over an extensive period of time by the accused to loan her money and that one of the deceptions for achieving more money was to represent to her through Sina and Luseane who could quite possibly have been impersonations by the accused, that those moneys were required for processing of her refund, the case as prosecuted depends for success entirely on proof that moneys were

obtained by the accused beyond reasonable doubt and also beyond reasonable doubt that this was according to the terms that would be repaid, and that very possibly both Luseane and Sina were fictitious inventions by the accused to dupe the accused into thinking she would get her money back by processing fees, the evidence leaves me short of being satisfied beyond reasonable doubt and for other reasons that this is so.

[16] I have already stated that the original counts 1-8 cannot be made out and the Crown did not persist with them. Of the Luseane counts, it seems that many of the payments were made other than by way of any impersonation of Luseane. Sina was involved it seems in many of the alleged deposits said to have been made to the accused arising in schedule or exhibit 3. The ANZ bank payments were very much more limited and said by the witness to be as a consequence of Luseane's request. On the evidence, as it appears in her diary $15,383.00 only was paid to a bank or ANZ. However, as I have already explained, I am left with a doubt that some at least if not all of those payments to the ANZ bank may have been made by Mrs Amato to extinguish the loan arrears, and maintain the loan payments. Taking into account also that Mrs Amato was a self-confessed thief from a charity of which she was a senior representative, in the absence of evidence showing these payments were not made to reduce her bank loan, I decline also to find the accused guilty of the Luseane money.

[17] I would also note that Mr Tu'utafaiva drew my attention to the substantial disparity between the amounts stolen or borrowed in exhibit one the amounts said to be applied to the accused in exhibits two and three. He submitted that there was plainly a disparity causing even more concern about the reliability of Mrs Amato's evidence and I agree.

[18] I was also concerned about her continuing to give large sums of money she says to the accused for processing costs when the original plane ticket loans could not have been very high. She says effectively she felt trapped into doing so knowing that if she did not advance more money then any prospect she had of getting repaid would be unsuccessful. That may be so, but she was a mature woman and senior in the charity, and I have some difficulty in accepting that she was so obtuse as to believe that such large sums of money were required to process airline refunds. All in all I found difficulty in treating her as a witness in whom I could rely.

[19] There was one point that did arise in the hearing of which I will make some mention. In order to advance the case of impersonation, the Crown adduced evidence by a police officer that he had rung the number given to him by Mrs 'Amato and said to be taken from a phone record she had of Luseane ringing her. The occupant of the house had said his daughter, the accused, lived there but there was no Luseane at the address. There was other evidence given in the case that the ANZ bank did not employ a person by the name of Luseane. The Crown relied on the evidence of the phone call as admissible under exception 89 (a) which allows hearsay this where the statement forms part of the fact or transaction which is being investigated by the Court, alternatively as res gesta citing *Ratten v R* [1972] AC 378. It is difficult to ascertain the extent of section 89 (a) which on its face could be said to be so wide as to allow much hearsay evidence. That cannot have been the intention of Parliament. Rather, I interpret this to apply not to hearsay conversation of a narrative kind emerging as here from an inquiry by a police officer of a third party, but a verbal assertion or utterance closely connected with an act that is relevant as part of the fact or transaction before the court. An example might be seen in the bookmaking cases where the substance of telephone calls relating to bets made on a repeated basis might lead to an inference that the callers

were dealing with a bookmaking operation. *R v Bens* (1989) 168 CLR 110 is another example. There, the Crown had appealed the exclusion of evidence from the driver of a car passing along a bridge in Queensland where the driver, who had passed over the bridge on the night when a murder was said to have occurred, said that he spoke to two women who were facing over the edge of the bridge at about its centre; that he had asked them if everything was all right and that one turned to him and said her mother was feeling sick. The Crown's case was that Benz and her mother were complicit in the murder of the mother's boyfriend and the deceased, although possibly still alive at the time, had been thrown over the bridge into the water below where he had been found with stab wounds to his body and throat. This evidence had been excluded by the Queensland Court of Criminal Appeal as hearsay and convictions for murder had been quashed, with the mother being granted a retrial and her daughter being acquitted. The High Court of Australia appeared to differ in approach with some of the Judges admitting the evidence on the basis it was res gesta, whilst others preferred the view it was original evidence, that is evidence admissible as closely associated with a fact in issue in this case the identity and relationship of the two women on the bridge. In the event, there was a disagreement on whether leave should be granted, in the circumstances and, by a majority, it was declined. *Ratten* was a different case. The evidence was a spontaneous call from a fearful woman about the time of an incident involving her murder. The answer of the receiver of the policeman's call in this case is no more than a hearsay response to a request for information. As such, this Court cannot under section 89 of the Act admit the evidence or rely on such evidence. The maker of the statement should have been called.

[20] That said, I do not agree with Mr Tu'utafaiva that the Crown could not make out impersonation. If I were to accept the evidence of the complainant that Luseane had phoned her as a representative of the ANZ bank on several occasions and it was accepted she had not worked there, then an available inference was that the person who she says the money was paid to, namely the accused, on each occasion she had in fact inferentially impersonated Luseane. On the view I have taken of this evidence, however, I do not need to make this finding.

Verdict

[21] For the reason I have given verdicts of not guilty were entered on each count and the accused is discharged.

Manceau anor v Endangered Encounters Ltd

Supreme Court, Nuku'alofa
Paulsen LCJ
CV 68/2014

3, 4, 5, 9 and 12 August 2016; 24 October 2016

Company law – major transaction – needs special resolution – none obtained – claim dismissed

The plaintiffs alleged that they built the Proteus (a 10 metre aluminium catamaran) and that in September 2007 it was sold to the defendant, Endangered Encounters Limited (EEL), for USD$287,500 but that the price was not paid. They sought payment of the price. Alternative claims, including a claim in restitution, were abandoned. EEL argued it acquired Proteus from the second plaintiff and that the agreement was that it was to reimburse the second plaintiff for the build cost only and had done so. EEL also argued that the second plaintiff could not enforce payment of any sum that may be owed to it as EEL's acquisition of Proteus was a major transaction for which no special resolution of the shareholders was obtained. This was a property dispute following the breakdown of the marriage between the first named plaintiff, Mr Manceau, and his former wife Mrs Brenda Cox. They had incorporated and managed the businesses of Sapafa Limited (Sapafa) and EEL at Vava'u. It was a feature of the case that throughout its progress the plaintiffs added and removed both parties and causes of action. The parties agreed upon the specific issues that they considered required resolution.

Held:

1. The first named plaintiff, Mr Manceau, gave evidence in chief and whilst being cross examined that the Proteus was owned by Sapafa before being sold to EEL. It was therefore only Sapafa that could sue for recover of the price of the boat. Mr Manceau's claim was dismissed for that reason.
2. The court was satisfied that there was no agreement that income earned by Sapafa would be set off against Proteus's build costs.
3. The agreement that EEL would acquire Proteus was a major transaction for the purposes of section 128 (of the Companies Act 1995) because it 'constituted an agreement by EEL to acquire assets with a value of more than half of EEL's assets prior to the acquisition of Proteus'. There was no dispute that the acquisition of Proteus was not approved by a special resolution of the shareholders of EEL. It was not possible for Sapafa to sue on an agreement for the sale of Proteus to EEL and its claim was dismissed.

Cases considered:

Cabaret Holdings Ltd v Meeanee Sports and Rodeo Club Inc [1982] 1 NZLR 673
Hansard v Hansard [2013] NZHC 1692
Jacomb v Wikely [2013] NZHC 707
Kava v Australia and New Zealand Banking Group Ltd [2009] Tonga LR 420
Story v Advance Bank Australia Ltd (1993) 11 ACLC 69

Statute considered:

Companies Act 1995

Counsel for the plaintiffs	:	Mrs D Stephenson
Counsel for the defendant	:	Miss L Tonga

Ruling

Nature of the case and observations

[1] This case concerns a 10 metre aluminium catamaran called Proteus. The plaintiffs allege that they built the Proteus and that in September 2007 it was sold to the defendant, Endangered Encounters Limited (EEL), for USD$287,500 but that the price was not paid. They seek payment of the price.

[2] A matter of some significance is that alternative claims, including a claim in restitution, were abandoned.

[3] EEL argues it acquired Proteus from the second plaintiff and that the agreement was that it was to reimburse the second plaintiff for the build cost only (the build cost) and has done so.

[4] EEL also argues that the second plaintiff cannot enforce payment of any sum that may be owed to it as EEL's acquisition of Proteus was a major transaction for which no special resolution of the shareholders was obtained (section 128 of the Companies Act 1995 (the Act)).

[5] On the face of it this is a straightforward civil dispute to enforce payment of a debt. However, my curt description of the case conceals a complex milieu. At the outset I feel I must make some observations.

[6] This action is in truth a property dispute following the breakdown of the marriage between the first named plaintiff, Mr. Manceau, and his former wife Mrs. Brenda Cox. They had incorporated and managed the businesses of Sapafa Limited (Sapafa) and EEL at Vava'u. The boundary between personal and business affairs was blurred and they disagreed about many business matters and maintained only poor records. Today they still keep grievances over business and personal matters. To a greater or lesser degree the grievances are inter-related. The focus of this action on just one transaction lends an air of artificiality to the whole proceeding.

[7] Mr. Manceau and Mrs. Cox do not impress as having keen business acumen. The positions they adopted were often illogical, implausible and, importantly, at odds with their companies' financial statements which in my view are misleading and cannot be relied upon. Neither party called the accountant to provide explanations of the financial statements.

[8] It has been a feature of this case that throughout its progress the plaintiffs have added and removed both parties and causes of action. They have shifted both the legal and factual basis of their claim; most recently after the close of the evidence. As a result of the latest ground shift, which involved the wholesale adoption by the plaintiffs of the kernel of the defendant's case, the pleadings and much of the evidence were rendered redundant. As it has transpired the parties have agreed upon the specific issues that they consider require resolution. The issues fall within a small compass and it is on those issues alone that I have been asked to provide a ruling.

[9] On a related point, the first named plaintiff, Mr. Manceau, gave evidence in chief and whilst being cross examined that the Proteus was owned by Sapafa before being sold to EEL. It is therefore only Sapafa that can sue for recover of the price of the boat. Mr. Manceau's claim is dismissed for that reason.

[10] Finally, I wish to note that Mr. Manceau and Mrs. Cox ought to have resolved their disputes upon the division of their matrimonial assets but did not do so. They entered into a settlement of their matrimonial assets that was approved by a San Diego Court. It was entirely inadequate and did not reflect the complexity of their affairs or the unresolved issues between them. I have little hope that this ruling, focused as it is on just one issue, will provide any sort of resolution for them.

The facts

[11] Sapafa was incorporated on 21 September 2005. At the time of the sale of Proteus Mr. Manceau and Mrs. Cox were directors of Sapafa. Mr. Manceau held 81,400 of the 100,000 shares. Mr. Manceau remains a director and the majority shareholder in Sapafa.

[12] The other company with which we are concerned is EEL. EEL was incorporated on 26 September 2007. Upon its incorporation Mr. Manceau was the sole director and owned 65,000 of the 100,000 shares. Mrs. Cox owned 20,000 shares and the balance were owned by a family member. The position has changed since the parties separated. Mrs. Cox is now a director and holds the majority of shares in EEL.

[13] Without wishing to state the obvious, it should be noted from what I have just said that at the time of the sale of Proteus, Mr. Manceau owned the majority of the shares in both Sapafa and EEL and was also a director of both companies.

[14] Mr. Manceau and Mrs. Cox moved to Vava'u from the United States in 2005. They were then married. Upon their arrival they incorporated Sapafa. Sapafa ran bed and breakfast accommodation (known as Pangai Villa), made wholesale liquor sales and conducted whale watching tours. Mrs. Cox said the money to move to Tonga and to purchase a boat and other items came from the sale of her house, business and other property in the United States. I did not understand Mr. Manceau to dispute this.

[15] In late 2006 the couple made a decision to focus on whale watching charters and sell Sapafa's bed and breakfast operation. They applied to incorporate EEL with the intention that they would purchase a new boat to be owned by EEL. EEL would conduct up-market whale watching charters. They thought that was an untapped niche market. However, it was too expensive to buy a boat and they decided that as Mr. Manceau had the necessary skills they would build the boat themselves with a kitset from New Zealand. That is what they did. The boat was Proteus.

[16] Sapafa applied for and was granted a development licence which gave it an exemption from customs duty on the importation of materials to build Proteus. The build was financed by a bank loan of USD$90,000 to Sapafa by Westpac Bank, money that a friend from America had paid in the expectation that he would get shares in EEL and from advances made by Mr. Manceau's father once the bank loan was exhausted (although the advances were not fully spent on Proteus).

[17] The evidence was that in June 2007 Mr. Manceau's father advanced sums of USD$79,977.14 and USD$83,995.11 (document 7.1 of the defendant's documents) which were deposited into Sapafa's account, and USD$51,745.15 was spent at the same time to buy Kamo outboards for the Proteus. There is a dispute as to the extent to which Mrs. Cox was aware and approved of a later advance from Mr. Manceau's father but that is not presently material.

[18] Sapafa had a licence to conduct whale watch charters which was renewable annually. Its licence for the 2007 year was issued in the name of "Endangered Encounters Ltd also known as Sa Pa Fa Ltd". The licence authorised the use of only two vessels, namely Islandia (the boat Sapafa had been using) and Proteus (which was not then fully built).

[19] Proteus was not completed until August 2007. The whale watching season was underway. Mr. Manceau and Mrs. Cox decided that Sapafa would complete the season using Proteus. They disagree as to how the income from these charters was to be treated and I shall return to this later in the ruling.

[20] There was some evidence about attempts to insure the Proteus and whether it was insured in the name of Sapafa or EEL. It is not clear to me whether the boat was insured at this time and the evidence was of little assistance to me.

[21] In October 2007 Mrs. Cox returned to the United States as her father was ill. Mr. Manceau joined her in late November when Mrs. Cox's father passed away. Mr. Manceau said that it was while in the United States that the couple decided to document what EEL owed Sapafa for the Proteus and for another smaller boat that they intended to build. This boat was to be called Tachyon.

[22] Mr. Manceau said that they agreed that Sapafa was to be paid USD$287,500 by EEL which was to be treated as an advance to EEL. Interest was to be paid and the principal sum was due for payment on 1 May 2015, mirroring the terms of the advances Mr. Manceau had obtained from his father. According to Mr. Manceau this was documented in a promissory note which he prepared and Mrs. Cox approved. He said that he signed the promissory note on 3 March 2008 for himself and in his capacity as a director of EEL. Mr. Manceau strongly denied that he would ever have agreed to sell Proteus for anything less than its fair market value (which in 2008 he put at TOP$550,000).

[23] Mrs. Cox does not accept any of this. She says that it was agreed that Sapafa was to be reimbursed Proteus's build cost only. She also denies any knowledge of the promissory note. She says that the first time she saw the promissory note was in August 2014 when Mr. Manceau presented it to her along with an offer to buy her shares in EEL.

[24] Mr. Manceau returned to Vava'u in March 2008 but Mrs. Cox stayed in the United States for a time. Mr. Manceau had to deal urgently with the late lodgment of Sapafa's tax returns. The Commissioner of Revenue had sent a letter dated 16 January 2008 threatening Sapafa with prosecution for its failure to file tax returns for the 2006 and 2007 financial years. Mr. Manceau consulted an accountant, Helena Tuiono, to prepare the tax returns.

[25] He wrote a letter to Helena Tuiono dated 30 April 2008. It dealt with the division of assets between Sapafa and EEL. Attached to the letter was a schedule of assets under the headings 'Pangai Villa Assets/Sapafa Ltd' and 'Endangered Encounters Assets'. EEL's assets included Proteus at a value of TOP$454,545.45, a jet boat Ika Pepe at a value of TOP$20,833.33 and an inflatable dingy with outboard at a value of TOP$5,577.65. The letter was silent both as to the fact of any sale of Proteus to EEL or as to what (if anything) EEL was to pay for Proteus except to the limited extent that it states the Westpac Bank loan was to be transferred to EEL. Relevantly the letter read:

> I have attached a list of assets and have classified and valued them. They are listed by business activity or company for clarity…
>
> Starting in early 2007 we began construction of a new boat for our whale watching business "Endangered Encounters Charters" and again that money came predominantly from me and again for expediency it went through the Sapafa accounts. That boat is part of Endangered Encounters Limited a company I formed last year. There is also a loan through Westpac Bank for about 50K USD that was used to complete the construction of the boat and that loan is also in the name of Sapafa. This loan needs to be transferred to Endangered Encounters for this year's taxes.
>
> Next we are getting ready to import materials and engines for the construction of a new boat that we plan to have ready for the 2009 season. This boat will be part of the Endangered Encounters Ltd as well and again that capital is coming from me.

[26] In May 2008 Sapafa entered into an agreement to sell its bed and breakfast operation. The agreement was dated 21 May 2008. A deposit was paid and the sale was completed in September 2008.

[27] Mrs. Cox returned to Vava'u in June 2008. She worked with Helena Tuiono to prepare EEL's financial statements and tax return. Mr. Manceau said that he was not involved in the preparation of EEL's financial statements or tax returns. This is not correct, at least to the extent that he directed that the Westpac Bank loan be transferred to Endangered Encounters 'for this year's taxes'. It is also the case that the asset values in his letter of 30 April 2008 were adopted in EEL's financial statements.

[28] Around August 2008 Mr. Manceau and Mrs. Cox separated (they have since divorced) and Mr. Manceau returned to the United States after completion of the sale of Pangai Villa. He returned to Vava'u in December 2008 before going back to live in the United States in January 2009. There was at this time a further dispute between the parties as to the disbursement of the proceeds of sale of Pangai Villa which resulted in Mr. Manceau freezing bank accounts. It is not relevant to the issues here. For her part, since the separation Mrs. Cox has remained living in Vava'u operating EEL.

[29] In paragraph 85 of her brief of evidence Mrs. Cox calculated what she considers EEL owes Sapafa to reimburse Proteus's build cost. She relied upon spreadsheet figures of the build cost prepared by Sapafa's accountant. She applied credits that she considered were due to EEL. The result was that EEL owed Sapafa just USD$660.54. I set out her table below, which I have modified but not in any material respect.

COST/CREDIT SUMMARY

Boat cost		$104,521.56 USD
Paid from EEL USD Account #2000678322	($37,208.66 USD)	
Paid from Brenda Cox USD Account #2000706990	($5,307.82 USD)	
USD Balance	($42,516.48 USD)	$62,005.08 USD
Deposits to Washington Mutual Account USA	($53,475.00 USD)	
USD Balance		$8,530.08 USD
Additional cost to build Proteus incurred by EEL as per financial accounts of SaPaFa, Ltd 2007	$30,584.43 TOP	
Income received by SaPaFa, Ltd through Endangered Encounters Ltd Charters 2007	($48,336.62 TOP)	
TOP credit to EEL	($17,752.19 TOP)	($7,869.54 USD)
Outstanding debt to SaPaFa Ltd		$660.54 USD

[30] This paragraph of Mrs. Cox's evidence has become the field of battle upon which the parties now engage. I will shortly explain how that has come about.

[31] EEL did not pay Sapafa USD$287,500, or any other amount for that matter, on 1 May 2015. On 31 July 2015 a demand for payment was made but nothing was paid. These proceedings are the result.

The plaintiffs' change of position

[32] After the evidence had been heard, Counsel presented and spoke to their written submissions on 9 August 2016. For the plaintiffs Mrs. Stephenson asserted that the parties had entered into a contract for the sale of Proteus but now argued that the agreed price was not USD$287,500 but TOP$454,545.45 being the value, the plaintiffs submitted, at which the Proteus had been entered into the financial accounts of EEL (page 76 of the plaintiffs' bundle of documents). Mrs. Stephenson submitted that it was

simply not credible that EEL had agreed to purchase Proteus for what she described as the costs of materials. The promissory note was now said to be 'flawed' but nevertheless should be regarded as an indicator of what Mr. Manceau had intended as the price to be paid by EEL for Proteus. It was accepted that credits were due to EEL for payments it made to the Westpac Bank loan with the result that the debt was now said to be TOP$297,347.75.

[33] Then in further submissions filed on 12 August 2016 the plaintiffs made another change of position. The plaintiffs no longer argued that the agreed price for the Proteus was TOP$454,545.45 (or even USD$287,500) but now conceded that the agreed price was (subject to one qualification) as set out in paragraph 85 of Mrs. Cox's evidence. The position the plaintiffs now advanced was stated in Mrs. Stephenson's submissions as follows:

> The contract as it is pleaded by the Plaintiffs in paragraph 10 of the claim was for the sale of Proteus to the Defendant in an amount of USD$287,500 in September 2007.
>
> Based on the evidence provided to the Court the Plaintiffs now concede that the figure agreed between the parties was USD$104,521.56 plus the figure of USD$30,584.43 (mistakenly referred to in TOP) as set out in paragraph 85 of Mrs. Cox's brief of evidence. The total amount agreed was therefore USD$135,105.99….
>
> Furthermore, the contract was performed by the giving over of possession of Proteus to the Defendant. The Plaintiffs accept that the following payments were made by the Defendant on account of Proteus:
>
> USD$37,208.66 paid by EEL
> USD$ 5,307.82 paid by Mrs. Cox
> TOTAL: USD$42,516.48
>
> When this total is deducted from the agreed contract amount of USD$135,105.99, the resulting debt owed is USD$92,589.71

[34] I called Counsel into Chambers. I was frankly concerned that the plaintiffs had departed so significantly from their pleadings. I wanted to know if EEL considered itself prejudiced by that and if so whether it objected to me determining the case on the basis the plaintiffs now advanced. Miss. Tonga advised me that EEL did not wish to hold the plaintiffs to their pleadings, preferring to have a ruling on the amount (if anything) owing to the second plaintiff. There was a discussion of the issues that the parties wished the Court to determine which I recorded in a minute. Counsel subsequently confirmed that those issues are as follows:

> 1 Was there an agreement for the defendant to acquire Proteus from the second plaintiff at the actual cost of its construction?

2 If so, what was the cost of construction?

3 What (if any) payments/credits are due to the defendant against the cost of construction?

4 What (if any) balance is owing by the defendant to the second plaintiff under the agreement?

5 Is the agreement unenforceable against the defendant as being a major transaction entered into in breach of section 128 Companies Act 1995?

[35] I now turn to consider these issues.

The cost of construction

[36] I do not need to spend a great deal of time on the first two issues. EEL's position is that it was obliged to reimburse Sapafa the build cost of Proteus (see for instance paragraphs 21, 36 and 50 of Miss. Tonga's submissions) and the plaintiffs now accept that was the agreement. In her answers to questions from the Court Mrs. Cox said:

> Witness: ...we discussed that Sapafa would be reimbursed for the building of Proteus because we could not build it under Endangered Encounters because it was not incorporated yet.
>
> Court: So when did you agree that?
>
> Witness: When Endangered Encounters account was opened up and some money went into Sapafa account and some money was sent back to Washington account and reimburse of – after the sale of Pangai villa.
>
> Court: So just to be clear, are you saying that you recall a discussion with Mr. Manceau about that or are you assuming?
>
> Witness: No that was a discussion with all the shareholders who wanted to make sure that the building of Proteus was being reimbursed back to Sapafa's account.

[37] There is disagreement as to the quantum of the build cost in one respect. Mrs. Cox's evidence is that the build cost was the sum of the figures described in her table as 'Boat cost' of USD$104,521.56 and "Additional cost incurred by EEL as per financial accounts of Sapafa Ltd, 2007' of TOP$30,584.43 (documents 7.1 and 7.2 of EEL's documents). Helena Tuiono's spreadsheets, from which these figures were taken, were included in EEL's bundle of documents without objection. The point of difference between the parties is as to the figure of $30,584.43, which the plaintiffs say is an amount in United States dollars not Tongan pa'anga. As the spreadsheets record transactions in Sapafa's United States dollar loan account the plaintiffs are correct.

[38] On this basis I find that EEL was to reimburse Sapafa for the build cost of Proteus in an amount of USD$135,105.99 (being the sum of USD$104,521.56 and USD$30,584.43).

The payments/credits due to EEL against the build cost

[39] The plaintiffs accept that EEL is entitled to credits of USD$37,208.66 and USD$5,307.82 representing payments by EEL and Mrs. Cox to the Westpac Bank loan account. This is the sum of USD$42,516.46.

[40] Referring to Mrs. Cox's table, the amounts that are in dispute are:

[40.1] USD$53,475 described as 'Deposits to Washington Mutual account USA'

[40.2] TOP$48,336.62 described as 'Income received by Sapafa Ltd through Endangered Encounters, Ltd charters 2007'

[41] In relation to the amount in [40.1], Mr. Manceau and Mrs. Cox had a joint bank account with Washington Mutual. Mrs. Cox's evidence was that proceeds of whale watch charters totalling USD$53,475 were deposited into the Washington Mutual account to 'cover the cost of the engines' purchased for Proteus (paragraph 61 of her evidence and documents 5.1-5.4 of EEL's bundle of documents). Mr. Manceau denies this and I accept his denial.

[42] Mrs. Cox's evidence was scant. I can find nothing in the documents to support her contention that the deposits were reimbursement for the cost of the motors. It is the case that Kamo outboard motors were purchased for Proteus on 14 June 2007 for USD$51,745.15 but the money used to purchase them did not come from the Washington Mutual bank account. On or about 12 June 2007 Mr. Manceau's father had advanced $79,977.14 which was deposited into Sapafa's bank account. That money was used to purchase the Kamo outboards. There was no payment (at least in respect of the purchase of the outboard motors) from the Washington Mutual account for which reimbursement needed to be made.

[43] Furthermore, the deposits to the Washington Mutual account were made over an extended period from 16 November 2007 to 5 October 2008 (documents 5.1-5.3 of the defendant's bundle) and did not equate with the cost of the Kamo outboards. This suggests to me that the deposits were for other purposes. I find that EEL is not entitled to this credit.

[44] In relation to the credit sought by EEL in [40.2], Mr. Manceau and Mrs. Cox agreed that Proteus was built intending that it would be an asset of EEL. They also agree that when it was built EEL had not been incorporated and that Sapafa operated the boat during the 2007 whale watch season. Where they disagree is how the income earned by Sapafa is to be treated. Mrs. Cox said that the income was to reimburse Sapafa for the build cost of Proteus. Mr. Manceau denies this and says that the income belonged to Sapafa. Counsel in their submissions had little to say about this issue.

[45] It is proper at this juncture that I should note that I am not greatly assisted in resolving this issue by making a general assessment of the relative credibility of Mr. Manceau and Mrs. Cox. I found neither to be more credible than the other. Both harbour animosity which guides their interpretation of events. While the changes in the plaintiffs' position does nothing to enhance Mr. Manceau's credibility I am mindful that in litigation such decisions are made upon advice and for tactical reasons and it cannot be assumed from that alone that his evidence was untruthful. Mrs. Cox's evidence was often implausible and in some respects clearly incorrect. I got the distinct impression that much of the evidence of both Mr. Manceau and Mrs. Cox reflected their expectations as to what should have happened rather than what did happen.

[46] I am satisfied on the evidence before me to the appropriate civil standard that there was no agreement that income earned by Sapafa would be set off against Proteus's build costs.

[47] Mrs. Cox's evidence is stated with a high degree of generality. It contains none of the detail I would expect as to the time and circumstances under which this issue was discussed, its implications and the reasons for the decision made.

[48] I can see no logical reason why Sapafa would incur all the risk and costs (wages, fuel etc.) of whale watching charters only to have the income benefit EEL. In my view, such an arrangement would defeat the parties' primary intention that Sapafa would be reimbursed by EEL for the build cost of Proteus.

[49] To accept Mrs. Cox's evidence I would need to also accept that the parties were mindful of maintaining a separation of the affairs of Sapafa and EEL, which clearly was not the case. They were not sophisticated business people and in the circumstances that pertained at the time, when embarking on an exciting business venture with apparently no talk of separation, I would be very surprised if the issue even crossed their minds.

[50] Furthermore, there is no mention of any such agreement in any of the documents nor can I see anything in them which supports a reasonable inference of an agreement. Importantly, there is no mention of it in Mr. Manceau's letter to Mrs. Tuiono of 30 April 2008, as one would expect when the subject matter of the letter was the preparation of Sapafa's financial accounts and tax returns.

What is the balance to reimburse Sapafa for the Proteus

[51] It follows, based on these findings (and subject to the defence under section128 of the Act), that there is a sum of USD$95,589.51 owing by EEL to Sapafa as follows:

Build cost of Proteus	USD $135,105.99
Less paid by EEL	USD $37,208.66
Less paid by Mrs. Cox	USD $5,307.82
TOTAL:	USD $95,589.51

Major transaction

[52] Under the heading 'Major Transactions' sections 128(1) and (2) of the Act provide:

> (1) A company shall not enter into a major transaction unless the transaction is —
> (a) approved by special resolution; or
> (b) contingent on approval by special resolution.
> (2) In this section:
> "assets" includes property of any kind, whether tangible or intangible; and
> "major transaction", in relation to a company, means:
> (a) the acquisition of, or an agreement to acquire, whether contingent or not, assets of the value of which is more than half the value of the company's assets before the acquisition;
> (b) the disposition of, or an agreement to dispose of, whether contingent or not, assets of the company the value of which is more than half the value of the company's assets before the disposition; or
> (c) a transaction that has or is likely to have the effect of the company acquiring rights or interests or incurring obligations or liabilities, including contingent liabilities, the value of which is more than half the value of the company's assets for the transaction.

[53] It is accepted by Sapafa that the agreement that EEL would acquire Proteus was a major transaction for the purposes of section 128 because it 'constituted an agreement by EEL to acquire assets with a value of more than half of [*EEL's*] assets prior to the acquisition of Proteus' (paragraph 3 of the plaintiffs' further submissions). There is no dispute either that the acquisition of Proteus was not approved by a special resolution of the shareholders of EEL.

[54] EEL argues that as the agreement to acquire Proteus was not approved by a special resolution of its shareholders it was unlawful and Sapafa cannot enforce payment of the price. Sapafa rejects this defence.

[55] Sapafa argues that Mrs. Cox's evidence was that she agreed to the acquisition of Proteus by EEL and accordingly the necessary shareholder approval was obtained for the purposes of section 128.

[56] Next, Sapafa argues that a major transaction which is not approved by a special resolution of the shareholders is not to be regarded as *ultra vires* the company and unenforceable for that reason. I was referred to *Morrison's Company and Securities Law* (loose-leaf ed, LexisNexis) at [10.3] – [10.5] and *Kava v Australia and New Zealand Banking Group Ltd* [2009] Tonga LR 420, 441 where Shuster J held, *obiter dicta*, that a breach of section 128 could not have been intended to render transactions void *ab initio* as that would, in his view, effectively render section 183 of the Act (which deals with shareholder remedies) redundant.

[57] A further argument advanced by Sapafa is that it would be unduly harsh in the context of the 'relatively unsophisticated commercial environment' in Tonga to find that a breach of section 128 renders a transaction void.

[58] Before turning to consider Sapafa's submissions I set out some other relevant sections of the Act.

[59] Section 21(1) of the Act provides:

> No act of a company and no transfer of property to or by a company is invalid merely because the company did not have the capacity, the right or the power to do the act or to transfer or to take a transfer of the property.

440 [60] Section 22(1) of the Act provides:

> A company or a guarantor of an obligation of a company may not assert against a person dealing with the company or with a person who has acquired property, rights or interests from the company that –
>
> (a) this Act or the constitution of the company has not been complied with; …
>
> Unless the person has, or ought to have, by virtue of his position with or relationship to the company, knowledge of the matters referred to in any of the paragraphs (a) to (e), as the case may be.

[61] Turning now to Sapafa's position, Mrs. Stephenson argues that the necessary
450 shareholder approval was obtained because Mrs. Cox agreed to the purchase of Proteus and together she and Mr. Manceau held more than 75% of EEL's shares. There is nothing in this point which, if accepted, would circumvent the clear requirements of section 128 of the Act. No meeting of shareholders of EEL was called and no special resolution was obtained authorising the acquisition of Proteus. The decision was not subsequently ratified by the shareholders either (section 186 of the Act).

[62] As to the argument that a breach of section 128 does not render a major transaction void and unenforceable, the effect of sections 21 and 22 of the Act are as described in Farrar and Watson (eds) '*Company and Securities Law in New Zealand*' (2nd Ed, Thomson Reuters - Brookers Ltd, New Zealand, 2013) at [12.4] as follows:

460 > Failure to obtain a special resolution of the shareholders before entering into a major transaction will not normally make the transaction unenforceable by a third party unless the other party was aware, or ought to have been aware, of the irregularity by virtue of that party's position with, or relationship to, the company.

[63] I note that this is the same position expressed in the extracts from *Morrison* to which Mrs. Stephenson referred me at [10.4] and [10.5] and which read:

> A transaction which is unauthorised, or which is against the Act or the company's constitution, is normally enforceable against the company unless the outsider was in a position of knowledge. Outsiders dealing with the company are therefore protected against almost all ultra vires acts.
>
> and
>
> Section 17 of the Companies Act 1993 *[NZ]* is not limited to acts or transactions beyond the company's capacity. It also provides that a transaction will not be invalidated merely because the company had no power or right to enter into it. This means that, for example, entry by the company into a major transaction without the shareholders' consent will not be automatically invalid as far as the other party is concerned. However, as in the case of ultra vires transactions, such an action will be an unauthorised transaction by the directors, and outsiders will not be protected if they have knowledge of the lack of authority.

[64] It has been recognised that breach of the major transaction provision may render the enforcement of payment of a debt irrecoverable in circumstances where the party seeking payment was in a position of knowledge. This was the view of Ellis J in *Hansard v Hansard* [2013] NZHC 1692 Ellis J at [41] (which went on appeal in [2014] NZCA 433 but not on this point). *Jacomb v Wikely* [2013] NZHC 707 was an action to enforce a guarantee where Kós J noted that he would have to accede to a defence that the guarantee was unenforceable for breach of section 129 (NZ) upon it being established that the loans in question were major transactions which had not been ratified by the shareholders.

[65] In so far as the *obiter* comment of Shuster J in *Kava* suggests that the only consequence of a breach of section 128 is to give rise to shareholders remedies, it is plainly incorrect.

[66] The final point advanced for Sapafa was that it would be unduly harsh in a Tongan context to find that the breach of section 128 rendered unenforceable EEL's obligation to pay for Proteus. It is the legislature's role to make the law and the Court's role to interpret it. When the law is clear the Court cannot choose to disregard it on the basis that it is ill-advised or harsh.

[67] More substantially, Mrs. Stephenson's submission contains within it the assumption that if Sapafa was prevented from recovering money in debt it had no other avenue open to it. As is noted in Mitchell, Mitchell and Watterson '*Goff and Jones: The Law of Unjust Enrichment'* (8th Ed, Sweet & Maxwell, London, 2011) at [24-30], there have been cases where the recipients of benefits transferred by companies under ultra vires contracts were ordered to make restitution (see also *Cabaret Holdings Ltd v Meeanee Sports and Rodeo Club Inc* [1982] 1 NZLR 673, 674). In this case, Sapafa abandoned its cause of action in restitution at the commencement of the hearing. I cannot therefore concern myself with the possibility that had some other approach been taken Sapafa might (I certainly put it no higher than that) have obtained a different outcome.

[68] The final issue is whether, for the purposes of the proviso to section 22(1) of the Act, Sapafa ought to have had knowledge, by virtue of its relationship to EEL, that

section 128 had not been complied with. There was no evidence that Sapafa (or Mr. Manceau) had actual knowledge of the breach of section 128.

[69] Mr. Manceau was both a director and majority shareholder of EEL and Sapafa at the time EEL acquired Proteus. There can be no doubt to my mind that he ought to have had knowledge of the breach of section 128 and that such knowledge must therefore be attributed to Sapafa by reason of its relationship to EEL. Mrs. Stephenson made no attempt to argue otherwise (*Story v Advance Bank Australia Ltd* (1993) 11 ACLC 69, 638-639 per Gleeson C J).

520 [70] For the reasons given I conclude that it is not possible for Sapafa to sue on an agreement for the sale of Proteus to EEL in the circumstances of this case and its claim must be dismissed.

Result

[71] The plaintiffs' claim is dismissed.

[72] The defendant is entitled to costs to be fixed by the Registrar if not agreed.

R v Shinjkashvili anors

Supreme Court, Nuku'alofa
Cato J
Cr 118-123/2016

26 October 2016

Sentencing – using a forged passport – guilty plea – 2 years suspended on condition that they leave Tonga

The charge was that each accused on or about 22 September 2016 knowingly used a false document when he or she submitted a Greek passport to the employees of the New Zealand Immigration Office and knew that the passport was false and intended to deceive the employees to act upon it as if it were genuine. Each defendant pleaded guilty to one count of knowingly dealing with a forged document.

Held:

1. It was a serious matter to use fraudulent means to enter Tonga for any reason and also as a platform from which to illegally enter other countries. The court must send out a deterrent message that offenders would be treated harshly by the courts. Security of borders was a paramount consideration. All defendants were convicted and sentenced to two years' imprisonment.
2. However, they all co-operated with Tongan authorities and pleaded guilty with an assurance that they intended to leave Tonga as soon as their return flights were obtained which they would pay for. The court allowed a period of two weeks for them to remain in Tonga to organize their return flights. Acknowledging the reality of their position, the court fully suspended their sentences with conditions.

Case considered:
R v Paeamoelotu and 'Iongi [2007] TLR 83

Statute considered:
Criminal Offences Act (Cap 18)

Counsel for the prosecution : Mrs Langi
Counsel for the defendants : Mr Niu SC

Sentence

[1] The defendants appeared before me today and each pleaded guilty to one count of knowingly dealing with a forged document contrary to section 172 of the Criminal Offences Act. I adjourned the proceedings for sentence this afternoon.

[2] The particulars of the charge is that each accused on or about 22 September 2016 at Fua'amotu knowingly used a false document when he or she submitted a Greek passport to the employees of the New Zealand Immigration Office and knew that the passport was false and intended to deceive the employees to act upon it as if it were genuine.

[3] The essence of the charge is that the defendants, citizens of Georgia, flew to Turkey and there obtained passports that were Greek and had been stolen from a person more popularly known as a people smuggler for sum of about $8000 USD, each. They used these passports to enter into Tonga intending to later gain entry to New Zealand. They discovered a permit was required to enter New Zealand and when they attempted to obtain one in Tonga, their deception was discovered. They were, however co-operative with the authorities and subsequently were charged. One, a minor, was travelling with them and has not been charged.

[4] Both Mr Niu SC and Mrs Langi made submissions to me. Mr Niu SC originally submitted that a fine only should be imposed but conceded if a sentence of imprisonment it should be suspended. Mrs Langi contended a suspended sentence and a fine also was appropriate.

[5] I made inquiry of what the intentions of the defendants were and I was assured by Mr Niu that they had the means and with valid Georgia passports which they also had with them, intended to leave Tonga as soon as travel arrangements could be facilitated. I learned from Mrs Langi that because they intended to depart voluntarily there would be no reason to use immigration procedures for their deportation. Their decision to co-operate with immigration authorities and the police and leave voluntarily consequently will mean that their departure is facilitated without further trouble or expense to Tongan authorities and that is something I will bear in mind in relation to the sentence I impose.

[6] It is a serious matter to use fraudulent means to enter Tonga for any reason and also as a platform from which to illegally enter other countries. This Court must send out a deterrent message that offenders will be treated harshly by the Courts for offending of this kind. Security of borders is a paramount consideration. It is an offence against the State of Tonga as Andrews J said in *R v Paeamoelotu and 'Iongi* [2007] TLR 83 to deceive Immigration authorities in this way. I consider I would be failing in my duty to communicate the right message should I impose any less a sentence of imprisonment than two years. All defendants are convicted and sentenced to two years' imprisonment.

[7] However, they have all co-operated with Tongan authorities and have pleaded guilty today with an assurance that they intend to leave Tonga as soon as their return flights have been obtained which they will pay for. Mr Niu asked for a period of two weeks for them to remain in Tonga to effect this. I intend to allow them this period to organize their return flights. Acknowledging the reality of their position, I fully suspend their sentences on the following conditions;

a. They are not to commit any offences punishable by imprisonment whilst they remain in Tonga.
b. As a further condition of suspension they are each to pay within 7 days hereof a sum of $1000 Tongan into Court.
c. They are to reside at an address, which individually is to be communicated to the prosecution, throughout their remaining stay in Tonga.
d. They are to leave Tonga no later than 14 days from today's date. Mr Niu may apply to this Court for an extension of time to remain for very limited period if there are exceptional difficulties in facilitating travel departure for any defendant on written notice to the prosecution.
e. Their Georgian passports are to be released individually only to enable them, as individuals, to obtain tickets where required and travel.
f. They are not to leave Tongatapu.

[8] A failure to abide by any of these conditions may mean that the Prosecution applies to have the suspended period of imprisonment activated and the period of imprisonment served.

R v Kolo

Supreme Court, Nuku'alofa
Cato J
AM 19 and 22/ 2016

10 November 2016

Appeal against sentence – reconsidered – more conditions imposed

The appellant pleaded guilty to one count of serious indecent assault and one count of common assault. The maximum sentences for the offending were, in the case of serious indecent assault, 5 years imprisonment and, in the case of common assault, one year imprisonment. The Principal Magistrate imposed the sentence of imprisonment for two years and 6 months but fully suspended for three years. A probation visit once very month by this family in the report and if he reoffended those penalties would apply. The first appeal was brought by the police against the sentence passed on the Respondent Pita Kolo by Principal Magistrate Mafi on 14 June 2016. The second was an appeal by Mr Kolo against a subsequent sentence imposed by Magistrate Kaufusi in which he ordered Mr Kola to serve a sentence of imprisonment of two years and six months which had been imposed on him by Principal Magistrate Mafi for his earlier offending, but had been fully suspended. Magistrate Kaufusi did not impose any sentence on Mr Kola for the offending that was involved in that case.

Held:

1. There were two factors which could legitimately have been taken into account by Principal Magistrate Mafi in determining that some part of the sentence should be suspended. The first was that, albeit late, there were pleas of guilty and an expression of remorse, the second was that whilst his offending had been extensive, he had no earlier history of sexual offending and no record of offending after 2006. The final factor of importance was his family's dependence on him for support. Against these considerations, however, was the countervailing factor that he had pleaded guilty to quite serious sexual offending against the child victim. Had the appeal arrived before the court more quickly that the three to four months it took for it to arrive after filing, he might have been ordered to serve at least some part of the sentence of imprisonment. Because of the delay, the court declined to interfere with Principal Magistrates Mafi's decision to fully suspend the sentence.
2. However, the court imposed further conditions and to that extent it varied the sentence. The offending required some counselling in relation to sexual abuse and violence against women rather than probation visits to the family every month as the Magistrate ordered. Mr Kolo was warned that if he did

not perform any of the conditions imposed, he could be recalled to serve a period of imprisonment.

Statute considered:
Criminal Offences Act (Cap 18)

Counsel for the appellant : Mr Aho
Mr Kolo was unrepresented

Judgment

[1] These two appeals are interrelated. The first was an appeal brought by the police against the sentence passed on the Respondent Pita Kolo by Principal Magistrate Mafi on the 14th June 2016. The second was an appeal by Mr Kolo against a subsequent sentence imposed by Magistrate Kaufusi in which he ordered Mr Kola to serve a sentence of imprisonment of two years and six months which had been imposed on him by Principal Magistrate Mafi for his earlier offending, but had been fully suspended. Magistrate Kaufusi did not impose any sentence on Mr Kola for the offending was involved in that case.

[2] In the case before Principal Magistrate Mafi the appellant had pleaded guilty to one count of serious indecent assault and one count of common assault under sections 124(1) and (3)(a), and section 112 (f) respectively of the Criminal Offences Act. The maximum sentences for this offending are in the case of serious indecent assault 5 years' imprisonment and in the case of common assault, one year imprisonment. The facts relating to the first offending were briefly set out in a summary attached to the Appeal. These read;

> "On or about 15th January 2014, the complainant had accompanied an aunt one Monalisa Vai to a Chinese store by their house in Houmakelikao. Upon arriving at the store, Monalisa told the complainant to go make their purchase whilst she stood there talking to the accused. Whilst the complainant was making the purchases, Monalisa and the accused began to walk back to their house leaving the complainant to catch up from behind.
>
> As they were walking, Monalisa's mobile phone rang so she walked on ahead to answer it leaving the accused and complainant. It is alleged that as soon as Monalisa was out of view, the accused pulled the complainant and carried her into the nearby bush. In doing so, the accused lost his balance causing them both to fall to the ground. The complainant's head landed on hard object which caused her to become unconscious. The accused then ran to Monalisa at their house nearby and told her that the complainant had fainted. They then rushed her to the hospital where she was able to gain consciousness a little while after.
>
> Furthermore, in January 2014 on an unknown date, it is alleged that the complainant was asleep in her room when she awoke because she felt she was naked. She got up to see the accused who then held her mouth. He then sucked on her breasts. She then lied to him that someone was approaching which caused him to stop and leave.

> The accused is 37 years old and is not a first time offender. He chose to remain silent in his record of interview to the police."

[3] This prosecution had by consent been transferred from the Supreme Court to the enhanced jurisdiction of the Principal Magistrate for trial. The Respondent had been represented by counsel. The Respondent had pleaded guilty but this was later set aside and his counsel withdrew. He later changed his plea once again to guilty. The Principal Magistrate had received a probation report which principally referred to a plea from his wife for mercy because he was the family's breadwinner and they could not survive without him. He expressed remorse for his offending.

[4] Principal Magistrate Mafi gave no reasons for the sentence he passed on Mr Kolo. The notes record;

> "Accused, listen to the verdict. Assault – convicted and discharge
>
> Indecent assault imprisonment for two years and 6 months but fully suspended for three years. A probation visit once very month by this family in the report and if he reoffends those penalties will apply."

[5] This Court has emphasised on several occasions in appeals from Magistrates judgments, that reasons must be given for decisions made in that Court. All too frequently, this Court has been asked to intervene in cases where there is little or no reasoning to support a sentence. It would seem in suspending the sentence of imprisonment of two years and six months, Magistrate Mafi acceded to the wife's plea for mercy.

[6] Mr Aho does not challenge the sentence of imprisonment of two years and six months, but submits this was not a case where there should have been suspension. Mr 'Aho, who had filed a comprehensive submission for the Magistrate submitted in this Court that the circumstances of the offender's background and indeed his ambivalent approach to the guilty plea with only belated remorse reflected an overall lack of co-operation with the police or prosecution, and this coupled with the seriousness of his offending involving a serious sexual assault on a child meant that he should serve his sentence of imprisonment. He also drew to my attention that the Respondent had a list of convictions, 54 for theft, housebreaking assault and other offences. I examined the record and pointed out that whilst he had an unenviable record he had not appeared to have offended since 2006, and not in any sexual way.

[7] I agree with Mr Aho that it was, straining Mo'unga [1998] TLR 154 principles to assert that there was any great degree of cooperation by the Respondent in his belated and repeated changes of plea, and that had the matter appeared before me I may well not have suspended any part of his sentence of imprisonment. First, both offences involving assaults on a child of 11 were serious. As to the sexual assault, it occurred at night when she was sleeping. He was related to the child who was a cousin and lived in proximity to the victim's residence on common ground. Furthermore, this incident had occurred after the first offending when he had taken her into bushes and he had lost his balance and both had fallen to the ground, she striking her head and losing consciousness. I see no good reason why he would have forced her into bushes unless at that point, he intended to pursue some kind of sexual activity with her.

[8] The seriousness of his offending must also be taken into account when it comes to deciding whether or to what degree the sentence of imprisonment for the serious indecent should have been suspended, or else the underlying rationale for stern sentences namely the protection of women and children in Tonga will be undermined. The maximum period for which a sentence of imprisonment can be suspended under section 24 of the Criminal Offences Act is three years during the course of which the offender must not commit any offence punishable by imprisonment or he can be recalled to serve his sentence. The Principal Magistrate must have been unduly influenced by the Respondent's family situation in suspending the sentence fully. Whilst I accept that a Court may take an offender's family situation into account, in considering whether suspension is appropriate, because the acceptance and performance of family responsibilities may in fact promote rehabilitation, this must be balanced against the seriousness of the offending.

[10] In this case, there were in my view two factors which could legitimately have been taken into account by Principal Magistrate Mafi in determining that some part of the sentence should be suspended. The first is that, albeit late, there were pleas of guilty and an expression of remorse, the second is that whilst his offending had been extensive, he had no earlier history of sexual offending and no record of offending after 2006. The final factor of importance, as I have stated, was his family's dependence on him for support. Against these considerations, however, was the countervailing factor that he had pleaded guilty to quite serious sexual offending against the child victim. Had the appeal arrived before me more quickly that the three to four months it took for it to arrive in this Court after filing, I might have ordered him to serve at least some part of the sentence of imprisonment. Because of the delay, I decline now to interfere with Principal Magistrates Mafi's decision to fully suspend the sentence. However, as I explained to the Respondent at the hearing I intend to impose further conditions and to that extend I vary the sentence.

[11] First, I consider this offending required some counselling of the Respondent in relation to sexual abuse, and violence against women rather than probation visits to the family every month as the Magistrate ordered. I am strengthened in this view because it appears that earlier the Respondent had been involved in other sexual offending for which he later appeared for sentence before Magistrate Kaufusi after Principal Magistrate Mafi had dealt with him. This later offending is considered below in AM 22/2016.

[12] In my view, fully suspending the two and half years imprisonment does not adequately emphasise the seriousness of his offending, and is an inadequate judicial response. Whilst declining to interfere with suspension, I consider the Respondent should perform 100 hours community work with the recommendation that he join the group cleaning the Vuna Road as retribution or punishment for his offending. I increase this to 130 hours to reflect my approach to the additional offending considered in AM 22/2016.

[13] I consider the sentence of conviction and discharge for the assault involving taking the child into the bushes to be manifestly inadequate. This was a serious assault on an unsuspecting child which resulted in her injury, and merited a sentence of 9 months imprisonment which I order should be served concurrently with the sentence imposed by the Magistrate of two years and six months for the serious sexual assault, and suspended also. Women and children in Tonga will be protected against sexual or other assaults, and sentences must reflect this.

[14] The appeal is allowed. The sentence of the Principal Magistrate is varied to this extent;

a. The sentence of two and a half years imprisonment for serious sexual assault is fully suspended on the following conditions;
   i. The Respondent is not to commit any offences punishable by imprisonment during the period of his suspension.
   ii. The Respondent is placed on probation for 12 months from the date of this judgment with the following conditions;
      1. He lives where directed;
      2. He is attend a course of sexual abuse and violence under the direction of probation with the appropriate agency
      3. He is, under the direction of probation, to perform 100 hours community work with the recommendation this be cleaning the Vuna road between Sopu and Popua
      4. The Respondent is to attend Probation within 48 hours of the date of the judgment.
b. On the charge of common assault, he is convicted and sentenced to 9 months imprisonment fully suspended and concurrent with the charge of serious sexual assault.

[15] In relation to the matter which Mr Kolo appeals namely the sentence of Magistrate Kaufusi on the 16th September 2016 which committed him to serve the period of 2 years and 6 months sentence previously imposed by Principal Magistrate Mafi on the 24th June, 2016, because he had appeared before Magistrate Kaufusi on a further charge of common assault and a charge of simple indecent assault. He was not sentenced by Magistrate Kaufusi on either of these charges but simply committed to serve the period of imprisonment that had been earlier suspended by Principal Magistrate Mafi. Mr Aho rightly (because the file is very limited in the supply of information) drew my attention to the fact that both offences were charged on dates earlier than the date on which Principal Magistrate Mafi had sentenced the appellant to a fully suspended prison sentence of 2 and half years. Accordingly, the Appellant was not in breach of Principal Magistrate's Mafi's order and should not have been ordered to serve that sentence under section 24 (3)(c) of the Criminal Offences Act. His order committing Mr Kola to serve the sentence of 2 and half years imprisonment is quashed.

[16] Because I had limited information, I initially ordered the Appellant to appear before Magistrate Kaufusi for sentencing however, I indicated at yesterdays' hearing I would deliver a written judgment. I consider the best interest of justice and finality would be achieved by imposing on each of the two charges which the appellant pleaded guilty to, before Magistrate Kaufusi and is now convicted to additional short periods of community work to be served cumulatively with 100 hours imposed by me in relation to the earlier appeal. The sentence on the assault count 295/16 which was a punch to a male is 10 hours community work to be served cumulatively on the 100 hours imposed by me in relation to Appeal AM 19/2016. The second offence of simple indecent assault involves touching of woman on the breast and he is convicted on this charge (296/16) and sentenced to 20 hours community work to be serve cumulatively

also on the 100 hours imposed by me in relation to Appeal AM 19/2016. The overall sentences of community work of 30 hours is to be served cumulatively upon the 100 hours referred to in para 14. Should Mr Kolo not serve this additional period of 30 hours in default he is to serve one month imprisonment.

[17] Mr Kolo is warned that if he does not perform any of the conditions imposed, he may well find himself recalled under section 24 of the Criminal Offences Act to serve a period of imprisonment. He should ensure that he takes this opportunity to remain out of any further offending.

[18] A copy of this judgment is to be sent to Probation. Mr Kolo is to attend Probation within 48 hours of the delivery of this judgment to him.

[19] He is released from bail.

R v Kaumavae anors

Supreme Court, Nuku'alofa
Cato J
Cr 15-18/2016

18 November 2016

Sentencing – passport offences and forgery – very serious
Sentencing – one accused had bipolar disorder – transferred to psychiatric unit

All four accused pleaded guilty to serious criminal offending. Mr 'Ahohako pleaded guilty to one count of making a false declaration for the purpose of obtaining a passport; Mr Kaumavae pleaded guilty to one count of forgery; Mr Heleta pleaded guilty to one count of causing to be made a false statement for the purpose of obtaining a passport; and Ms Tameifuna pleaded guilty to obtaining a passport by making a false statement. All the offences under the Passports Act carried a maximum sentence of 10 years imprisonment and forgery carried a maximum sentence of 7 years imprisonment.

Held:

1. The court must impose terms of imprisonment which reflected the seriousness of the offending which constituted a criminal act against the Kingdom of Tonga. For a single episode of offending, in the case of the passport offences, where the maximum was ten years, the starting point should be three years' imprisonment. In the case of the forgery, it being a lower maximum penalty of 7 years, but none the less forgery intended to undermine the passport system, two and half years imprisonment. The court stressed that an offender who was proven to have indulged repeatedly in such activity for profit or who had corrupted others by repeatedly inveigling them into such schemes could expect a higher starting point. The starting point must reflect the seriousness of the offending, be an adequate deterrent and be protective of the integrity of the Tongan Passport regime.
2. Mr 'Ahohako was a public servant with several years standing. His breach in making a false statement and in corruptly persuading Mr Kaumavae to assist by forging a birth certificate was reprehensible. His gross breach of trust was a serious aggravating feature for which the court imposed an additional year of imprisonment. The overall starting point in his case was 4 years imprisonment. Mr Kaumavae was also a public servant and corruptly breached the trust and confidence that the people of the Kingdom of Tonga were entitled to expect of a public servant. His role was also integral to the fraud but his involvement was less than Mr 'Ahohako who was an organiser. He was sentenced to an additional 6 months for his breach of trust or confidence. The starting point in his case was an overall three years' imprisonment. Mr Heleta and Ms Tameifuna may have been influenced by

a friendship with the third party who had lived at the premises of Mr Heleta for a period but they must have appreciated that their conduct was very dishonest, and should not have become involved. Both adopted serious parts or roles in furthering the illegal enterprise. A starting point of three years was appropriate also in their cases. Mitigating factors were considered and the final sentences were imposed.

3. Ms Tameifuna had bipolar affective disorder and was on medication. The court was concerned that the prison regime could not adequately deal with the accused for any length of time. The court directed under sections 70-71 of the Mental Health Act, that the Superintendent of Prisons take steps to transfer the prisoner in his custody to the Psychiatric unit of Vaiola Hospital to be under the care of Dr V Tupou in furtherance of a term of imprisonment.

Statutes considered:
Criminal Offences Act (Cap 18)
Mental Health Act 2001
Passports Act (Cap 61)

Counsel for the Crown	:	Mr Aho
Counsel for Kaumavae	:	Mr Niu SC
Counsel for 'Ahohako	:	Mr Tu'utafaiva
Counsel for Heleta and Tameifuna	:	Mr Corbett

Sentence

[1] Submissions were heard on Friday the 11th November, 2016 and I adjourned until today for sentence to be delivered. In the case of the accused Ms Tameifuna, I requested the Crown to report as to whether in the light of her medical condition, a bipolar disorder, she could be adequately accommodated in prison.

[2] This sentencing arose from offences in which all accused were involved in various ways in seeking to obtain a false passport in the name of Connor James Tameifuna at the request of a third party, a Tongan, who is I am told is overseas. He had approached a friend, the accused Mr 'Ahohako, who was a long serving clerk at the Magistrate's court to assist him to obtain a passport. Mr 'Ahohako had certified that he had known the applicant Connor James Tameifuna for 25 years. On being interviewed by Police, Mr Ahohako admitted that he did not know a Connor James Tameifuna nor had he met the person that appears in the passport photograph on the application who purported to be the aid Connor James Tameifuna.

[3] Mr 'Ahohako had subsequently approached Mr Kaumavae, a friend with whom he had previously worked and who at the time of the offending was employed as a Public Servant to obtain a false birth certificate which he did engaging in forgery.

[4] Mr Heleta, at the time of the offending, had Ms Tameifuna residing with him as had been the third party. Mr Heleta instructed Ms Tameifuna to write a letter to Immigration to confirm that she was the mother of the Applicant, and what details were to be put in the letter. She obliged and wrote a letter to Immigration Tonga in support of the application in which she confirmed that the Applicant was her illegitimate son when she knowingly knew that the Applicant was not her son. Tameifuna admitted this when interviewed by the Police.

[5] It is unclear as to whether any of the accused received remuneration or were motivated by this except Mr Kaumavae who admitted he was expecting some financial reward. Mr Niu SC for Mr Kaumavae did not depart from this assertion which appeared in the probation report and indeed suggested that the offer had been made by Mr 'Ahohako. Ms Tameifuna suggested she received a small amount as reward. I think it very unlikely any of these accused, particularly those involved in public service positions would take part in such an obviously dishonest scheme unless they expected to receive payment. I cannot, however, speculate. I am content to treat what Mr 'Ahohako and Mr Kaumavae did as serious abuses of their trust as public servants. They both acted in dereliction of their duty to approach their duties with probity, and I will treat this as an aggravating feature of their offending.

[6] The deception failed. On or about the 14th September 2015, Immigration officer Bernadette Fifita was approached by Mr 'Ahohako and asked to assist in expediting an application for a new passport. He then handed Ms Fifita an envelope containing a completed application form, the birth certificate of the purported applicant (Connor James Tameifuna), the fee, and other supporting materials. During the following week, Ms Fifita made some preliminary enquiries into the application. She could not find any information on the Applicant's natural mother as shown on the birth certificate. However, when she made inquiries with various sources, she was told that the natural mother on record, Ms Tameifuna did not have an illegitimate son by the name of Connor James Tameifuna. Ms Fifita and she should be commended for her insight, reported the matter to her superior, Mr Viliami Lolohea, who reported it to the police.

[7] All four accused have pleaded guilty to serious criminal offending. Mr 'Ahohako pleaded guilty to one count of making a false declaration for the purpose of obtaining a passport under section 21(1) (a) of the Passports Act. Mr Kaumavae pleaded guilty to one count of forgery under section 170(1) (a), 3(b), (4) and 171 of the Criminal Offences Act. Mr Heleta pleaded guilty to one count of causing to be made a false statement for the purpose of obtaining a passport under section 21(1) (a) of the Passport Act. Ms Tameifuna pleaded guilty to obtaining a passport by making a false statement under section 21(1)(a) of the Passports Act. All offences under the Passports Act carry a maximum sentence of 10 years' imprisonment. Forgery carries a maximum sentence of 7 years' imprisonment.

[8] This is, as I have said, serious offending and it is one of the first cases where seriously deceptive conduct has been involved an attempt to obtain a false passport to have come before a Court in Tonga. Mr Aho, for the Prosecution, in a thoughtful submission, contended that the creation of a false passport impugned the very integrity of the passport regime which is fundamental to the administration of Tongan passports to be used as evidence of identity and citizenship of Tongan subjects travelling internationally. The actions of the accused, he argued, undermined the capacity of Government to administer passports and the Act, and obstructed the proper regulation of movement of people into and out of Tonga and its treaty obligations in that respect.

[9] I agree and this Court must respond by imposing terms of imprisonment which reflect the seriousness of this offending which constitutes a criminal act against the Kingdom of Tonga. I had discussions with counsel concerning the starting point for such offending. For a single episode of offending such as arose here, I consider that, in the case of the passport offences, where the maximum is ten years, the starting point should be three years' imprisonment. In the case of the forgery, it being a lower maximum penalty of 7 years, but none the less forgery intended to undermine the

passport system, two and half years imprisonment. I stress that an offender who is proven to have indulged repeatedly in such activity for profit or who has corrupted others by repeatedly inveigling them into such schemes could expect a higher starting point. The starting point must reflect the seriousness of the offending, be an adequate deterrent and be protective of the integrity of the Tongan Passport regime.

[10] In the case of Mr 'Ahohako, or any of the accused, I do not accept that any friendship with the third party who commissioned their assistance was a mitigating factor. All should have had the good sense and honesty to refuse entreaties from the third party. As a public servant and one of several years standing, Mr 'Ahohako's breach in making a false statement and in corruptly persuading Mr Kaumavae to assist by forging a birth certificate is reprehensible. His gross breach of trust is a serious aggravating feature for which I impose an additional year of imprisonment. The overall starting point in his case is 4 years imprisonment.

[11] As to Mr Kaumavae, he was candid enough to admit he expected a reward for his corrupt behaviour. He too should have known better. He also had a career of some years as a public servant and corruptly breached the trust and confidence that the people of the Kingdom of Tonga are entitled to expect of a public servant. I view his role as also integral to this fraud but his involvement as less than Mr 'Ahohako who was an organiser. I sentence him to an additional 6 months for his breach of trust or confidence. The starting point in his case is an overall three years' imprisonment.

[12] As to Mr Heleta and Ms Tameifuna, they may also have been influenced by a friendship with the third party who had lived at the premises of Mr Heleta for a period but they must have appreciated that their conduct was very dishonest, and should not have become involved. Both adopted serious parts or roles in furthering the illegal enterprise. In my view, a starting point of three years is appropriate also in their cases.

[13] By way of mitigation, I have read the probation reports of the accused. In the case of Mr 'Ahohako, it reveals that he is aged 37, is married and has one child. They are separated as a consequence of this offending. He was appointed a civil servant in 2000 and was suspended in October 2015 from the Magistrate's Court. He had worked in the Ministry of Justice since 2010. He expressed remorse for his actions. He accepts he has significantly breached his employer's trust and that of his family and others. He is a first time offender. He denies any financial benefit but says he acted out of peer pressure. He will plainly find employment more difficult to find now, but to the extent that is the case he is the author of his own misfortune. The Crown submission states he was co-operative.

[14] In my view, his guilty plea, expression of remorse, the fact he is a first offender and was co-operative merit a reduction in his sentence of 15 months imprisonment. He will be sentenced to a term of imprisonment of two years and nine months. I consider that he is a suitable candidate for his sentence to be partially suspended. I suspend the final 12 months of his sentence on condition he does not commit any offences punishable by imprisonment during the period of his suspension.

[15] In relation to Mr Kaumavae, he admitted his corrupt motive, and indicated he expected financial gain. His counsel blamed Mr 'Ahohako for making this offer. Mr 'Ahohako had been his best friend in their earlier careers, he said. He expressed remorse and regret. He has no previous convictions. He is aged 30 and he and his wife have fostered two daughters. He appears, though having a difficult childhood, to have done

well academically. He has been suspended since 2015 having been appointed a civil servant in 2008. He had been promoted to his current position as a computer Assistant at the Ministry of Justice in October, 2015. He also has ruined his career by his corrupt behaviour.

[16] In my view, he is entitled to 12 months mitigation for his guilty plea, obviously genuine remorse and co-operation. Accordingly, the sentence imposed upon him is one of two years' imprisonment. He is also a worthy candidate for rehabilitation and I similarly suspend the final year of his sentence on the condition he commit no offence punishable by imprisonment for the period of his suspension.

[17] Mr Heleta seems to have become involved in this offending also because of his acquaintance with the third party, when Ms Tameifuna also shared accommodation with him. He is aged 26. He has one illegitimate child. He has no stable income and relies on his aunt for support. He expressed in his probation report a desire to set aside his plea suggesting he has limited remorse for what has occurred. He did not persist with this application on sentence. He had one previous conviction for manslaughter by negligent driving for which he was sentenced to 18 months imprisonment and his sentence suspended for two years. I consider the only mitigating factor in his case is his guilty plea for which I allow him 9 months discount. He did not appear to me to show any genuine remorse, and was influential in corrupting his cousin Ms Tameifuna to participate in the scheme. He is sentenced to 2 years and 3 months imprisonment.

[18] Although he has a previous conviction that was about 8 years ago. He seems to have performed his sentence satisfactorily on that occasion and remained out of trouble until this offending. Because of his guilty plea, I also suspend the final 12 months of his sentence on the condition that he not commit any offences punishable by imprisonment for 12 months.

[19] In relation to Ms Tameifuna, I do not accept that she did not know the criminality inherent in what she was doing. She is aged 55 and obviously, in my view must have appreciated that she was furthering a very corrupt activity that is consistent with her plea. She admitted to receiving a small sum for her participation. She was staying at her cousin, the accused Heleta's home, where she met the third party. The third party became a friend, it seems also. She has a diagnosis of bipolar affective disorder and is on medication. Her employment is domestic duties. She receives remittances from a son who is in the United States. She has no previous convictions. She expressed contrition for her activity. She has experience in community activities, and there is support for her, expressed in the probation report. I take the view that she acted fraudulently in order to accommodate the aspirations of the third party and her cousin Heleta and obtain knowingly a false passport. I consider her guilty, plea, remorse, and previous good character including her community work as entitling her to 12 months mitigation. The sentence I pass upon her is two years' imprisonment.

[20] I come now to Mr Corbett's submission that I should fully suspend her sentence. I am reluctant to do this because, in my view, offending against the passports regime of the kind she participated in should generally carry some period of actual custody. I do, however, consider that there may be difficulties in her being imprisoned at Hu'atolitoli Women's prison for any length of time. The information, I have received from the Prison service is that the prison has no special facility for such character disorder but has no problem in carrying out its duty if the Supreme Court orders that a person with bipolar affirmative disorder is sent to Hu'atolitoli prison. Against, this is a letter or

certificate from Dr Violet Tupou, a psychiatric specialist at the psychiatric unit at Viola Hospital, who suggests that she be remanded there. She says a recent review showed Mrs Tameifuna was extremely upset and the Ministry were concerned she may be showing early signs of relapse of her illness. She also observed that the Ministry's experience with bipolar affective disorder was that it had proven to be extremely
230 difficult for its staff and the staff of the female prison as in the past, persons with bipolar affective disorder who were sent to Hu'atolitoli prison were aggressive and disruptive during their incarceration. This had resulted in transferring those persons back into the psychiatric unit as it was extremely difficult for its staff to monitor and treat them whilst they were incarcerated. This letter confirmed my concern that the prison regime could not adequately deal with the accused for any length of time. I direct under sections 70-71 of the Mental Health Act, the Superintendent of Prisons take steps forthwith to transfer the prisoner in his custody to the Psychiatric unit of Vaiola Hospital to be under the care of Dr V Tupou in furtherance of a term of imprisonment. I enclose with a copy of this judgment the letter to the Police Commissioner from Dr Tupou of the Ministry
240 of Health which in my view is a sufficient basis for the Superintendent of Prisons to effect an immediate transfer under section 72.

[21] If there are any further problems with this sentence, the Crown is at liberty to place the matter before this Court.

Vaka'uta anors v R

Supreme Court, Nuku'alofa
Cato J
AM 14/2016

18 November 2016

Appeal against sentence – first time offenders – appeal allowed – sentences reduced

In September 2013 Mr Vaka'uta killed a cow belonging to the complainant by beating him with a hammer before arranging with Mr Pale and Mr Fotu to take the cow to third persons so that the meat and part of the carcass could be sold. Later Mr Vaka'uta received payment of about $700 for the cow although the market value of the cow was assessed by the Chief Magistrate as being $2000. It was unclear how much the others received for their part in the offending. The Chief Magistrate considered that the theft of the cow was a serious offence in Tonga and he observed that Vaka'uta had a record including one for theft. He imposed a sentence of 6 months imprisonment on Mr Vaka'uta with the final two years suspended. He then sentenced both Mr Pale and Mr Fotu to 5 months imprisonment with the last two suspended. Both men were also ordered to pay to the complainant compensation for the market value of the cow being $2000. Mr Vaka'uta was ordered to pay $800 within a month and in default three months imprisonment. The other appellants were ordered to pay $600 within a month or face 3 months imprisonment. Mr Pale and Mr Fotu were first offenders and both contended their sentences were manifestly excessive. Mr Vaka'uta did not appear.

Held:

1. The sentences that involved imprisonment of first offenders for their secondary role in the theft were manifestly excessive, or inappropriate. The more appropriate sentences were sentences of 120 hours community work, in default one month's imprisonment which would have provided a sufficient deterrent or message to the community.
2. The appellants, Pale and Fotu, should perform 40 hours community work with the recommendation that it be served cleaning up the Vuna Road under the direction of Probation, and in default one month imprisonment. They were also ordered to pay compensation to the complainant as ordered by the Chief Magistrate in the sum of $600 each. The default period was varied to be one rather than three month's imprisonment.
3. The Magistrates Court (Amendment) Act 2015 expressly gave the court the power to extend time and, indeed, also extended the time of appeal from 10 to 28 days. Accordingly an extension was granted and Mr Pale's appeal against sentence was upheld.

Case considered:

Tukuafe v Police AM 10 of 2015

Statute considered:

Magistrates Court (Amendment) Act 2015

No appearance for Vaka'uta
Counsel for S Fotu : Mr Tu'utafaiva
Counsel for S Pale : Mr Niu SC

Judgment

[1] Mr Pale and Mr Fotu, appellants, appeared before me and both contended their sentences were manifestly excessive. Mr Pale, represented by Mr Niu SC also contended he should not be convicted but abandoned this part of his appeal and proceeded only to appeal his sentence. Mr Vaka'uta, who was the principal party to these offences which involved the theft of a cow during which it was killed and after its meat sold did not appear and I was informed he is now overseas.

[2] The appeals arose out of an incident in September 2013 in which Mr Vaka'uta had killed a cow belonging to the complainant by beating him with a hammer before arranging with Mr Pale and Mr Fotu to take the cow to third persons so that the meat and part of the carcass could be sold. Later, it seems Mr Vaka'uta received payment of about $700 for the cow although the market value of the cow was assessed by the Chief Magistrate as being $2000.00. It is unclear how much the others received for their part in this offending.

[3] The Chief Magistrate in his rulings found that the cow had indeed been killed and stolen by the accused Mr Vaka'uta and had belonged to the complainant. On the evidence I have read he was entitled to come to this view. He was also entitled to find the appellants Pale and Fotu guilty as parties to theft for their secondary roles in removing the animal and disposing of it by way of sale.

[4] For his part in stealing the cow, the Learned Chief Magistrate considered that the theft of this cow was a serious offence in Tonga. He observed that Vaka'uta had a record including one for theft. He also pointed to the fact a number of cows had been taken in the area and that the offending was prevalent. He imposed a sentence of 6 months imprisonment on Mr Vaka'uta with the final two years suspended.

[5] I consider he was entitled to impose such a sentence on Mr Vaka'uta for an act which involved the deliberate slaughter and theft of a cow for profit which did not belong to him, and he was entitled to regard this as a particularly serious criminal act in Tonga for which deterrence was required. Many animals are not secured well by their owners and it is easy for thieves to take advantage of this fact as occurred, here. Mr Vaka'uta was, perhaps, fortunate to have had any part of his sentence suspended. It would seem he defended the proceedings, was not co-operative and had previous convictions. Accordingly, I see no reason to interfere with his conviction or sentence and his appeal is dismissed.

[6] As for the other appellants Mr Pale and Mr Fotu, the evidence indicates that they were secondary parties to the offending being involved in disposal of the animal after it had been slaughtered. The Chief Magistrate sentenced both to 5 months

imprisonment with the last two suspended. In my view, these sentences involving imprisonment of first offenders for their secondary role in this theft were manifestly excessive, or inappropriate. In my view, more appropriate sentences in their cases were sentences of 120 hours community work in default one month's imprisonment which in my view would have provided a sufficient deterrent or message to the community.

[7] In this case, the period in which the process has taken for this matter to come before this Court for disposal is grossly excessive. The matter relates to an incident in 2013. The trial occupied a year and after that there was another lengthy period between the filing of appeals in or about July or August 2014 and the file arriving in this Court, on the 13th September 2016, which is unacceptably long. There have been other delays in recent times in appeals from decisions of Magistrates and the record being transmitted to this Court. Steps have been taken to prevent this further occurring and expedite appeals. Justice can be seriously compromised by delays in trial hearings and in the hearing of appeals, also.

[8] Both men have been ordered to pay to the complainant compensation for what the Court assessed was the market value of the cow being $2000.00. Mr Vaka'uta was ordered to pay $800 within a month and in default three months imprisonment. The other appellants were ordered to pay $600.00 within a month or face 3 months imprisonment.

[9] Taking into account these orders to pay compensation and the inordinate delay in resolving this case, the delays being almost entirely reflective of systemic problems in the Magistrates' Court, I order the appellants, Pale and Fotu, should perform 40 hours community work with the recommendation that it be served cleaning up the Vuna Road under the direction of Probation, and in default one month imprisonment. They are also ordered to pay compensation to the complainant as ordered by the Chief Magistrate in the sum of $600 each. I, however, vary the default period to be one rather than three month's imprisonment. The obligation to perform community work and pay compensation are, however, several obligations. If both obligations are disregarded, the appellants are each liable to a combined period in default of two months' imprisonment.

[10] In the case of Mr Fotu, I order that he commence his community work as soon as Probation are able to accommodate him and in default of performance one month imprisonment. He is to further pay compensation within three months of this judgment to the complainant or serve one month imprisonment in default. In the case of Pale, who is serving a sentence of imprisonment, I have discussed with Mr Niu SC his obligations and he confirmed that this client would perform his community work once he had been released from prison or in default serve one month's imprisonment. In this case, he also is required pay compensation of $600.00 to the complainant within three months of his release from prison or in default serve one month imprisonment. Their appeals against sentence are, accordingly, allowed.

[11] In the case of Mr Pale, the Crown opposed his appeal as having been out of time. I have been referred to the judgment of the Chief Justice in *Tukuafe v Police* AM 10 of 2015 and the ruling that a ten day time limitation on filling an appeal was mandatory. Although I may well have been more accommodating and have granted leave to appeal out of time, because the short delay was explained by counsel as his, in my view understandable, oversight and, consequently, in my view justified an extension of the time in the inherent jurisdiction of this Court, to avoid a miscarriage of justice. This opinion is, however, academic. Mr Aho provided me with the Magistrates Court

(Amendment) Act 2015 which reformed the law as the Chief Justice dealt with it and
130 expressly gave this Court the power to extend time and, indeed, also extended the time of appeal from 10 to 28 days. Accordingly an extension is granted and I have upheld Mr Pale's appeal against sentence.

Jurangpathy v Commissioner for Public Relations

Supreme Court, Nuku'alofa
Paulsen LCJ
CV 54/2016

10 and 11 November 2016; 21 November 2016

Civil procedure – stay of Commissioner's investigation sought – no jurisdiction – refused

The plaintiff was the Chief Executive Officer of the public enterprise, Tonga Communications Corporation (TCC). His conduct in that role was the subject of an investigation by the defendant (the Commissioner) under the Commissioner for Public Relations Act 2001 (the Act). Prior to the commencement of the Commissioner's investigation, the plaintiff filed a defamation action in the Magistrates' Court against the Newspaper Kele'a, a member of the Legislative Assembly (Mr Mateni Tapueluelu), the publisher of the Kele'a (Mrs Laucala Tapueluelu), and the editor of the Kele'a (Mr 'Ofa Vatikani). He claimed that the issues arising in the defamation action and in the Commissioner's investigation were substantially the same and he sought an interim stay of the Commissioner's investigation until his defamation action was heard and determined. The plaintiff also argued that the Commissioner exceeded his powers in the conduct of his investigation and failed to observe natural justice. As a second cause of action he sought a declaration that the investigation was vexatious and an abuse of process, or was conducted unfairly in excess of jurisdiction. Finally, the plaintiff sought an order that an affidavit of Mrs Fololeni Tolu, which the Commissioner had before him, be released to him so that he could commence a prosecution against her for perjury.

Held:

1. The Supreme Court did not have jurisdiction to order a stay of the Commissioner's investigation. The courts have recognised and exercised jurisdiction to supervise the administration of justice over subordinate tribunals performing judicial functions. However, firstly, the Commissioner for Public Relations was not exercising a judicial function, secondly, the existence of such jurisdiction was contrary to section 20 of the Act which provided that proceedings before the Commissioner were not to be subject to any challenge in any court except on the ground of a lack of jurisdiction, and thirdly while the court might in judicial review proceedings make an order prohibiting the Commissioner from proceeding with an investigation in excess of his powers, the plaintiff would need to obtain leave of the court before commencing such an action and had not done so.
2. The application for a stay was refused. If the court had found that even it did have jurisdiction to grant a stay, it would not have done so. In relation

to the alleged commonality of issues, while some common questions of fact would arise, that was as far as the similarities extended. The proceedings before the Magistrates' Court and the investigation before the Commissioner were of a very different nature, involving different enquiries, utilising fundamentally different processes and ultimately would result in very different outcomes. There was no basis for the plaintiff's contention that he was prejudiced because the Commissioner's investigation was proceeding at the same time as his defamation action. Also, there was no basis in logic or in the evidence for the submission that it was likely that the Magistrates' Court and the Commissioner would reach different conclusions on the facts. However, should that prove to be the case, the plaintiff's rights under the ruling of the Magistrates' Court would not be affected.

3. The plaintiff's allegation that he was denied natural justice because he was not being afforded the same rights he would have in court proceeded from the erroneous position that the Commissioner was conducting a judicial proceeding. The Commissioner was not a judge, he did not preside over a court and proceedings before him were not judicial proceedings. It was well-established that the obligations of natural justice may be modified or excluded entirely at the will of the legislature. The Act made it clear that the Commissioner had a very wide discretion over the conduct of his investigations.
4. The plaintiff's claim was dismissed.

Cases considered:

Airport Restaurants Ltd v Southend on Sea Corporation [1960] 2 All ER 888
Bretttingham-Moore v Municipality of St Leonards (1969) 121 CLR 509
British Columbia Development Corporation v Friedmann (Ombudsman) [1984] 2 SCR 447
Glass v The President of the Legislative Council and Anor [2016] VSC 507
Herron v McGregor (1986) 6 NSWLR 246
Minister of Revenue and Customs v Prasad anor [2016] Tonga LR 379 (CA)
NSW Bar Association v Muirhead (1988) 14 NSWLR 173
R v Chief Constable of Merseyside Police; Ex parte Calveley [1986] QB 424
Slough Estates Ltd v Slough Borough Council and Another [1967] 2 All ER 270
Thames Launches Ltd v Corporation of the Trinity House of Deptford Strond [1961] 1 All ER 26
The Royal Bank of Scotland Ltd v Citrusdal Investment Ltd [1971] 3 All ER 558
Walton v Gardiner (1992-1993) 177 CLR 378

Statutes considered:

Constitution of Tonga Act (Cap 2)
Commissioner for Public Relations Act 2001
Ombudsman Act 1973
Supreme Court (Amendment) Act 2012

Rules considered:

Supreme Court Rules 2007

Counsel for the plaintiff : Mr W Edwards Jnr
Counsel for the defendant : Mr 'A Kefu SC

Ruling

Nature of the case

[1] The plaintiff is the Chief Executive Officer of the public enterprise, Tonga Communications Corporation (TCC). His conduct in that role is the subject of an investigation by the defendant (the Commissioner) under the *Commissioner for Public Relations Act 2001* (the Act).

[2] Prior to the commencement of the Commissioner's investigation, the plaintiff filed a defamation action in the Magistrates' Court against the Newspaper Kele'a, a member of the Legislative Assembly, Mr. Mateni Tapueluelu, the publisher of the Kele'a, Mrs. Laucala Tapueluelu, and the editor of the Kele'a, Mr. 'Ofa Vatikani. He says the issues arising in the defamation action and in the Commissioner's investigation are substantially the same and he is seeking an interim stay of the Commissioner's investigation until his defamation action has been heard and determined.

[3] The plaintiff also argues that the Commissioner has exceeded his powers in the conduct of his investigation and has failed to observe natural justice. As a second cause of action he is seeking a declaration that the investigation is vexatious and an abuse of process or has been conducted unfairly in excess of jurisdiction.

[4] Finally, the plaintiff seeks an order that an affidavit of Mrs. Fololeni Tolu, which the Commissioner has before him, be released to him so that he may commence a prosecution against her for perjury.

The facts

[5] In comprehensive submissions Mr. Edwards set out the facts in detail. There is no need for me to do so to the same extent for the purposes of this ruling.

[6] In June 2015, Mr. Mateni Tapueluelu made allegations against the plaintiff which were subsequently the subject of an article in the Newspaper Kele'a. The allegations were, broadly speaking, that in his capacity as the Chief Executive Officer of TCC the plaintiff had committed indecent acts upon, and was having affairs with, staff members, was misusing funds of TCC and dismissing employees for improper reasons. The plaintiff denied the allegations.

[7] On 13 July 2015, the Prime Minister, Hon. S. 'Akilisi Pohiva, wrote to the plaintiff to express his serious concerns about the plaintiff's conduct as CEO of TCC. He recommended that the plaintiff resign. The Prime Minister wrote:

> The weigh [sic] of these allegations such as the misuse of position, company resources, invading the private calls of customers including the indecent moral [sic] behaviour, is a serious breach of public trust in the public enterprise.

[8] The plaintiff did not resign. In response to the publication of the allegations in the Kele'a he commenced his defamation action in the Magistrates' Court, which is presently part heard.

[9] Mr. Tapueluelu then referred the allegations to the Commissioner under section 11(1) of the Act. The Commissioner was of the view that Mr. Tapueluelu was not a person affected for the purposes of the section but otherwise considered the allegations fell within his functions and should be investigated. In August 2015, the Commissioner decided to conduct an own motion investigation (section 11(2) of the Act). However, following submissions from the plaintiff's lawyer the Commissioner put his investigation on hold pending the completion of the defamation action.

[10] There the matter might have rested but that on 15 July 2016 the Prime Minister wrote to the Commissioner advising that he had received a complaint against the plaintiff from more than 60 employees of TCC (the complaint) and asking the Commissioner to consider the matter and provide advice as to the appropriate action to be taken in respect of the plaintiff. The complaint from the TCC employees listed seven specific issues of concern including disrespectful and inappropriate conduct towards female staff, inappropriate touching, kissing and texting of female staff, buying a car for a staff member the plaintiff was dating and buying an air ticket at the request of a female staff member he was dating. The complaint also referred to divisions within TCC, which it was said were mainly a result of the behaviour of the plaintiff, and that attempts to have the employees' concerns addressed within TCC had failed and were swept under the carpet. The complaint also noted that there were other matters the employees wished to raise.

[11] The Commissioner regarded the Prime Minister's letter as a referral by the Prime Minister under section 11(3) of the Act. On 29 July 2016, he wrote to the Prime Minister that he consented to an investigation, which he would commence forthwith.

[12] Incidentally, on 26 July 2016 the Board of TCC also referred the TCC employees' complaint to the Commissioner for investigation. The Commissioner has acknowledged that referral. The Board of TCC has put the plaintiff on suspension pending the outcome of the Commissioner's investigation.

[13] On 29 August 2016, the Commissioner advised the plaintiff that he had received a complaint against him and summoned him to provide information. The plaintiff was questioned on 1 September 2016.

[14] The Commissioner's office has been conducting its investigation. To date this has involved interviews with over 70 people. I understand that the investigation has some way to go before it will be complete.

The application for an interim stay

[15] The plaintiff submits that in the defamation action the Magistrate will have to resolve issues of fact which are also the subject of the Commissioner's investigation. Examples include whether the plaintiff is having an affair with a staff member, whether he acted indecently towards female staff and whether he bought a car for a female employee he was dating.

[16] Mr. Edwards argued that it is "all a little too convenient" that when Mr. Tapueluelu and his wife were served with the defamation proceedings the Prime Minister, who is the father of Mrs. Laucala Tapueluelu, should receive the same complaints from TCC employees and require the Commissioner to investigate the plaintiff. The plaintiff considers that the making of the complaints and the referral of them to the Commissioner has been driven by Mr. Tapueluelu and others close to the Prime Minister who have their own agendas and interests to protect. It is unfair, he says, that he should have to fight the allegations on two fronts.

[17] The plaintiff also argues that because of the procedures adopted by the Commissioner, where there is no hearing and he has no right to call witnesses or cross-examine, it is highly likely that the Magistrate and the Commissioner will reach different conclusions on common issues of fact which will undermine the function of the judiciary.

[18] Mr. Edwards referred me to a number of cases concerning applications to stay or adjourn court proceedings where there were concurrent proceedings involving the same issues before distinct tribunals or courts (*Slough Estates Ltd v Slough Borough Council and Another* [1967] 2 All ER 270, *Airport Restaurants Ltd v Southend on Sea Corporation* [1960] 2 All ER 888, *Thames Launches Ltd v Corporation of the Trinity House of Deptford Strond* [1961] 1 All ER 26 and *The Royal Bank of Scotland Ltd v Citrusdal Investment Ltd* [1971] 3 All ER 558).

[19] These cases concerned the court exercising its undoubted jurisdiction to order a stay or adjourn proceedings to prevent abuses of its processes. That jurisdiction arises under the inherent jurisdiction of the court or is conferred by court rules. The plaintiff is not seeking a stay of a court proceeding. He seeks a stay of an investigation of the Commissioner. Therefore the issues arise whether jurisdiction to order a stay exists and, if so, upon what it is based.

[20] The courts have recognised and exercised jurisdiction to supervise the administration of justice over subordinate tribunals performing judicial functions. This has included ordering a stay to prevent an abuse of process where the court is satisfied that the continuation of a proceeding would involve unacceptable injustice (*Walton v Gardiner* (1992-1993) 177 CLR 378, *R v Chief Constable of Merseyside Police; Ex parte Calveley* [1986] QB 424 and *Herron v McGregor* (1986) 6 NSWLR 246, 254).

[21] These cases concerned judicial tribunals, which are typically charged with receiving and investigating complaints, determining them by adopting conventional court processes and, upon finding a complaint proved, imposing a disciplinary or other sanction.

[22] I accept that in Tonga such jurisdiction is conferred on the Supreme Court by section 5 *Supreme Court (Amendment) Act 2012*, which provides that the Supreme Court has the same powers for the time being vested in the High Court of Justice of England and Wales. However, in my view such jurisdiction must be confined to tribunals exercising a judicial function (for the indicia of which see *NSW Bar Association v Muirhead* (1988) 14 NSWLR 173, 208-214, 215-216) and such jurisdiction is subject, of course, to contrary statutory direction. My present view is that the Supreme Court does not have jurisdiction to order a stay of the Commissioner's investigation for these reasons.

[23] First, the Commissioner is not exercising a judicial function, for reasons I will set out below.

[24] Secondly, the existence of such jurisdiction appears contrary to section 20 of the Act, which provides that proceedings before the Commissioner are not to be subject to any challenge in any court except on the ground of a lack of jurisdiction. The plaintiff does not advance an argument that the stay should be ordered because of a lack of jurisdiction.

[25] Thirdly, whilst I accept that the court might in judicial review proceedings make an order prohibiting the Commissioner from proceeding with an investigation in excess of his powers, the plaintiff would need to obtain leave of the court before commencing such an action (O. 39 *Supreme Court Rules*) and has not done so here.

[26] In any event, had I considered jurisdiction did exist to grant a stay I would not have granted one. The plaintiff's application is based on the premise that the proceedings before the Magistrates' Court and before the Commissioner are in truth between the same parties and concern the same issues. I do not accept this submission.

[27] In relation to the identity of the parties, none of the defendants in the Magistrates' Court action are involved in the investigation before the Commissioner. I do not accept the submission Mr. Edwards made that I should regard the Prime Minister (or the TCC employees) as doing the bidding of Mr. Tapueluelu. There is nothing at all to suggest to my mind that the Prime Minister is motivated by anything other than the best interests of TCC.

[28] In relation to the alleged commonality of issues, whilst I accept some common questions of fact will arise, that is as far as the similarities extend. The proceedings before the Magistrates' Court and the investigation before the Commissioner are of a very different nature, involving different enquiries, utilising fundamentally different processes and ultimately will result in very different outcomes.

[29] The action before the Magistrates' Court is obviously a judicial proceeding. The processes the Magistrates' Court must follow are those conventionally adopted by courts involving an adversarial contest where there is a hearing, the parties have a right to be present and may call evidence, cross-examine and address the court on the law or the facts. The principal questions for determination are whether the plaintiff has been defamed and, if so, what monetary compensation will right that wrong. The Magistrates' Court's decision is, subject to rights of appeal, final and binding on the parties. The decision will itself create new rights enshrined in the judgment of the court which will be the basis for further action or enforcement.

[30] On the other hand, the Commissioner's investigation is not a judicial proceeding. The Commissioner decides what inquiries are to be made and it is not necessary for the Commissioner to hold a hearing (section 14(1) of the Act). There is no right for the subject of an investigation, or any other person interested in the matter, to be heard or to call evidence or to cross-examine witnesses (s.14(3) of the Act). The Commissioner and his staff are bound by secrecy obligations in respect of all matters which come to their knowledge in the exercise of their functions, which will of course include evidence from people interviewed in the course of an investigation (section 17(1) and (3) of the Act). The Commissioner is not concerned with questions of liability or compensation. The purpose of the investigation is to right administrative wrongs in the public sector and to promote open and accountable government. The Commissioner

can only report and make recommendations; he cannot issue binding rulings (sections 11(3) and 18 of the Act). His findings are not subject to reconsideration or appeal (except by way of judicial review) and no new rights are created. The plaintiff's rights will remain unaffected regardless of the Commissioner's findings.

[31] I do not see any basis for the plaintiff's contention that he is prejudiced because the Commissioner's investigation is proceeding at the same time as his defamation action. Mr. Edwards submitted that there was a risk that should the report of the Commissioner be issued before the judgment of the Magistrates' Court the Board of TCC might rely on his findings to dismiss the plaintiff. There is nothing in this point. The Board could not rely on the findings of the Magistrates' Court or the Commissioner to conclude that there are grounds to dismiss the plaintiff. The Board would be required to reach a decision based on its own inquiries.

[32] Nor can I see any basis in logic or in the evidence for the submission that it is likely that the Magistrates' Court and the Commissioner will reach different conclusions on the facts. However, should that prove to be the case, the plaintiff's rights under the ruling of the Magistrates' Court will not be affected.

[33] The application for a stay is refused.

Affidavit of Fololeni Tolu

[34] The plaintiff learned of a serious allegation that was made against him by Mrs. Tolu in an affidavit which had been provided to the Commissioner. The plaintiff's counsel asked for the affidavit, intending to bring a prosecution against Mrs. Tolu for perjury. The Commissioner refused his request. The plaintiff has sought what is described as an order for discovery of Mrs. Tolu's affidavit.

[35] The Commissioner has produced Mrs. Tolu's affidavit. It is an annexure to the affidavit of the Chief Executive Officer of the Commissioner's Office, Mrs. Linda Folaumoetu'i.

[36] I have grave doubts that I had any jurisdiction to make the order the plaintiff has sought but I do not need to now concern myself with that. Mr. Kefu accepts that the affidavit is now in the public arena and that the plaintiff may make use of the document, subject to the qualification that its admissibility is a matter to be resolved in any court proceeding in which the plaintiff seeks to produce it.

Has the Commissioner exceeded his jurisdiction

[37] The plaintiff alleges that the Commissioner has acted without jurisdiction for three principal reasons. First, he argues that not all of the TCC employees who have signed the complaint have been affected by the conduct in issue. Secondly, he says that the Commissioner is making enquiries about matters which are not raised in the complaint and which are the responsibility of the Board of TCC. Thirdly, he argues that the Commissioner has not observed the requirements of natural justice.

[38] At this point I note again section 20 of the Act which provides:

> No proceeding of the Commissioner shall be held bad for want of form, and except on the ground of a lack of jurisdiction, no proceeding or decision of the Commissioner shall be liable to be challenged, reviewed, quashed or called into question in any Court.

[39] A question that arose in argument was whether, before being able to challenge the Commissioner's jurisdiction, the plaintiff had first to obtain leave to seek judicial review (O. 39 *Supreme Court Rules*). Mr. Edwards argued that leave was not required as the plaintiff seeks only a declaration and not judicial review. The Court of Appeal recently noted the long established jurisdiction of the court to entertain proceedings which seek only declaratory relief (*Minister of Revenue and Customs v Prasad anor* [2016] Tonga LR 379 (CA). For the purposes of this proceeding, Mr. Kefu was prepared to accept that the court has jurisdiction to grant declaratory relief.

[40] In relation to the question of the scope of the Commissioner's inquiries, under section 11(3) of the Act the Prime Minister is able to refer to the Commission 'any matter' other than a matter concerning a judicial proceeding which the Prime Minister considers should be investigated.

[41] The courts in other jurisdictions have adopted a broad, purposive interpretation to Ombudsman's legislation (of which the Act is an example) consistent with the unique public role that an Ombudsman is intended to fill (*British Columbia Development Corporation v Friedmann (Ombudsman)* [1984] 2 SCR 447). That is an approach with which I agree.

[42] Mr. Kefu argues that the Commissioner's power under section 11(3) of the Act to investigate 'any matter' is very broad and not limited by reference to the functions of the Commissioner under section 11(1) of the Act to investigate matters of 'administration'. In his submission the Prime Minister may, under section 11(3) of the Act, refer to the Commissioner any subject that he may choose for inquiry. Such power is, he noted, subject to the safeguard that it is ultimately the Commissioner who must give consent to an investigation. I agree with Mr. Kefu's submission.

[43] This was the approach taken by the Supreme Court of Victoria in *Glass v The President of the Legislative Council and Anor* [2016] VSC 507. The case concerned provisions in the *Ombudsman Act 1973* allowing the Legislative Council to make referrals to the Ombudsman in respect of 'any matter, other than a matter concerning a judicial proceeding' which it considered ought to be investigated by him. At paragraph [210] of that judgment Cavanough J said:

> Nevertheless at first sight, at least, the expression 'any matter' in s 16(1) of the Ombudsman Act 1973 appears to be used....in the sense of 'any subject matter that may be chosen for inquiry'. It is true that that is a very broad concept. However, it is difficult to think of any more narrow meaning which the expression 'any matter' might ordinarily bear in the context of a statute providing for one body to refer any unspecified thing to another body for investigation.

[44] The question that arises is, what was the matter that the Prime Minister referred to the Commissioner for investigation?

[45] The plaintiff's challenge to the Commissioner's investigation focuses unduly upon the content of the TCC employees' complaint and in particular the seven specific issues listed in it. It overlooks that the Commissioner's investigation is not being undertaken upon the complaint but upon a referral by the Prime Minister under section 11(3) of the Act.

[46] The Prime Minister's referral of 15 July 2016 refers to the complaint but it is plain that the 'matter' that is being referred is not the complaint itself. The Prime Minister is concerned generally with what he describes as volatility in the workplace of TCC resulting from the conduct of the plaintiff. That is the matter under investigation.

[47] The plaintiff also argues that the complaint does not set out how each and every TCC employee who signed the complaint was affected by the allegations. The plaintiff would argue that in relation to the allegation that the plaintiff was kissing a staff member in his office it is only the one staff member who was kissed who could be affected by that behaviour. There is no merit in this submission. First, as I have noted, the investigation is pursuant to the Prime Minister's referral and it is certainly not necessary that he be personally affected by the subject of the investigation. Secondly, even if that were not the case the behaviour alleged in toto could reasonably be said to affect all employees of TCC by demoralising the workplace and creating a hostile work environment.

[48] The plaintiff also argues that the Commissioner has exceeded jurisdiction because he is investigating matters concerning the staff sick bonus, the CEO's bonus, the 910 call centre and the Next Generation Network. There is evidence that questions have been put to TCC employees about these issues by the Commissioner in the course of his investigation (see the affidavits of Teisa Atiola, Kilisitina Taufa, Kosema Pameti, and Ane Mailangi). The plaintiff says that these subjects are matters of policy made by the Board of TCC for which he is not responsible. His primary concern is that when interviewing him the Commissioner did not advise him that these subjects were under investigation or give him an opportunity to comment on them.

[49] The plaintiff argues this was a breach of his rights under clause 11 of the Act of Constitution and section 14(3) of the Act. Clause 11 is not apposite as it is concerned with criminal proceedings before a court. Section 14(3) provides that a Department, organisation or person adversely affected by any report or recommendation of the Commissioner should first be given an opportunity to be heard.

[50] Much of the plaintiff's concern will have been eliminated by the evidence of Mrs. Folaumoetu'i that the Commissioner's intention is to ensure the process of his investigation is fair and that this will include calling the plaintiff back to respond to any matters which may be adverse to his interests. Mrs. Folaumoetu'i said that this has always been the Commissioner's intention. The plaintiff was interviewed early in the investigation and as the investigation has progressed new issues have been raised which the plaintiff will be heard on.

[51] That leaves the plaintiff's objection that these subjects are not relevant to the Commissioner's investigation. The court is not going to declare an investigation which is clearly within the Commissioner's jurisdiction vexatious or an abuse in excess of jurisdiction simply because some questions have been asked which the subject of the investigation contends are not relevant. It is certainly not clear to me that the subjects in issue can have no relevance to the Commissioner's investigation or that there is any risk of an adverse finding being made against the plaintiff in respect of them. It would create a very bad and chilling precedent if this court was to involve itself in the minutiae of the Commissioner's work, which, it seems to me, is what section 20 of the Act was intended to avoid.

[52] The plaintiff also alleges that he has been denied natural justice because he is not being afforded the same rights he would have in court (paragraph 5.17.5 of the plaintiff's submissions). The plaintiff submits that he is entitled to full disclosure of all the evidence that is given in the investigation, a right to a hearing where witnesses will give their evidence, a right to cross-examine and a right to call his own witnesses in rebuttal.

[53] I do not accept this submission which proceeds from the erroneous position that the Commissioner is conducting a judicial proceeding. The Commissioner is not a judge, he does not preside over a court and proceedings before him are not judicial proceedings.

[54] It is well established that the obligations of natural justice may be modified or excluded entirely at the will of the legislature. As was noted in *Bretttingham-Moore v Municipality of St Leonards* (1969) 121 CLR 509, 524 by Barwick CJ:

> [Where] the legislature has addressed itself to the very question...it is not for the court to amend the statute by engrafting upon it some provision which the court might think more consonant with a complete opportunity for an aggrieved person to present his views.

[55] The Act makes it clear that the Commissioner has a very wide discretion over the conduct of his investigations. Proceedings are conducted in private (section 14(2) of the Act) and there is no right of full disclosure as the Commissioner shall maintain secrecy in respect of all matters which come to his knowledge in the exercise of his functions (section 17 of the Act). It is not necessary for there to be a hearing, from which it must follow that there is no right of cross-examination of witnesses (section 14(3) of the Act) and no party is entitled as of right to be heard by the Commissioner, subject only to the qualification that there is a right to respond to adverse findings or recommendations (proviso to section 14(3) of the Act). It follows that the plaintiff's submission that he has been denied natural justice is misconceived and must fail.

[56] I would add at this juncture that I am not without some sympathy for the plaintiff's concerns about process. Whilst not wishing to imply that the Ombudsman is legally obliged to follow any particular process, it appears to me that there has been, as far as the plaintiff is concerned, a lack of transparency. Specifically, the letter advising the plaintiff of the investigation did not make it clear that it was upon referral from the Prime Minister under section 11(3) of the Act and referred to the complaint. This caused much confusion at the hearing. There does not appear to have been any clear advice given to the plaintiff as to the process the Commissioner intended to follow or that he would be called back to be heard on any matters that arose in the course of the

investigation which were adverse to his interests. These are steps that could have easily
430 been taken and may possibly have averted this action.

Result

[57] The plaintiff's claim is dismissed.

[58] If the Commissioner wishes to seek costs he should apply within 28 days.

Pelesikoti v 'Anau anor

Land Court, Nuku'alofa
Paulsen, President
LA 1/2016

14-16 November 2016; 24 November 2016

Land law – Minister needed to make reasonable enquiries about availability of land – grant invalid – fresh decision to be made

On 5 January 2009 by deed of grant 377/71 the first defendant was granted 810m² of land at Kolomotu'a (RP 6318 Lot 20A) as his town allotment. The plaintiff asked the Court to order the Minister to cancel the deed of grant. The issue was whether the Minister fulfilled his duty to make reasonable enquires to determine whether there were any impediments to the making of the grant. The plaintiff claimed that had the Minister made such enquires he would have found that the plaintiff had developed and was living upon the land and that it was not available to be granted to the first defendant. The Minister's view was that he was only required to consider those facts that were before him when deciding whether to make a grant. The plaintiff was not physically occupying Lot 20A and he could not have applied for Lot 20A for himself and there was no competing application for Lot 20A on behalf of his sons or anyone else that would have suggested to the Minister that an inspection should be carried out. It was the Minister's view that the plaintiff was wrong to have developed the land without a legal title and that he took the risk of that.

Held:

1. The Minister was required, when making a grant, to make such enquires as the information before him made reasonably necessary. The Minister failed in his duty to make reasonable enquiries about the availability of Lot 20A and that consequently the grant of that land to the first defendant was invalidly made.
2. There was no rule that an application for land which was first in time must prevail over any other competing claims. If that was the case the Minister would have no obligation under any circumstances to make enquiries. The court was satisfied that the plaintiff was in lawful occupation of all of Lot 20. He was authorised to occupy and build on the land. Upon Lot 20 being surrendered the Minister made no attempt to remove the plaintiff from the land despite knowing he had built and was living on it. Until some step was taken to remove him from the land he remained in lawful possession.
3. Whilst it was true that the plaintiff had no right to apply for Lot 20A as his own town allotment that would not preclude him, had he been consulted, from seeking a lease of the land or asserting a claim on behalf of his sons or making submissions to the Minister that the land was not available for grant

to the first defendant. The court could not be sure that had the plaintiff been consulted the Minister would still have granted Lot 20A to the first defendant.

4. The court declared the deed of grant in favour of the first defendant was invalid and directed that the Minister should cancel the deed of grant. The Minister was to make a fresh decision on the first defendant's application for Lot 20A after carrying out an inspection of the land and after giving both parties an opportunity to be heard.

Cases considered:

Cocker v Palavi and anor [1997] Tonga LR 203
Finau v 'Alafoki [1989] Tonga LR 6
Finau v Minister of Lands [2012] Tonga LR 127 (CA)
Hakeai v Minister of Lands and ors [1996] Tonga LR 142
Hausia v Vaka'uta and anor [1974 – 1980] Tonga LR 58
Manu v Aholelei [2015] Tonga LR 135 (LC)
Naulu v Tupou and Others (Court of Appeal of Tonga, AC 21/15, 8 April 2016
Piukala v Fonohema [2002] Tonga LR 200
Tafa v Viau and others [2006] Tonga LR 125 (LC)
Tafa v Viau and others [2006] Tonga LR 287 (CA)

Counsel for the plaintiff : Mr L Niu SC
Counsel for the first defendant : Mr WC Edwards SC
Counsel for the second defendant : Mr S Lutui

Ruling

The nature of the case

1. On 5 January 2009 by deed of grant 377/71 the first defendant was granted 810m² of land at Kolomotu'a (RP 6318 Lot 20A) as his town allotment. The plaintiff asks the Court to order the Minister to cancel the deed of grant. What is at issue is whether the Minister fulfilled his duty to make reasonable enquires to determine whether there were any impediments to the making of the grant. The plaintiff says that had the Minister made such enquires he would have found that the plaintiff had developed and was living upon the land and that it was not available to be granted to the first defendant.

The facts

2. The disputed land had previously formed part of the tax allotment granted in September 1978 to one Manase Kaho Tonga. Manase Tonga has now died.

3. The first defendant (Mr. 'Anau) and his family were from Ha'apai. His father, 'Apolosi Finau 'Anau, was related to Manase Tonga. Manase Tonga had plans to subdivide his tax allotment. Drawings were prepared dividing the property into a number of lots. In around 1999 Manase Tonga allocated an area from his tax allotment for 'Apolosi 'Anau and family to occupy intending that it would be given to 'Apolosi 'Anau as his own town allotment. 'Apolosi 'Anau was shown the land that he was to be given. The family then cleared the bush and built a little dwelling on the land, which the family occupied for approximately 2 years. 'Apolosi 'Anau and his wife both died

in 2001. From around January 2002 the family dispersed from where they were living. Mr. 'Anau went with his wife to Tofoa.

4. In a letter of 26 March 2002, Manase Tonga and his heir, Sateki Tonga, requested the Minister to surrender part of the tax allotment so that Mr. 'Anau could make an application for it. The letter referred to Lots 26 and 27 and 28. It appears that this meant Lots 26 and 27 on the scheme plan which was Lot 28 of the survey plan. This was not the land allocated for 'Apolosi 'Anau. That land was part of Lot 15 on the scheme plan and Lot 20 on the survey plan.

5. On 14 April 2003, the Minister applied for Cabinet approval to the surrender of Lot 28 (on the survey plan), which was an area of 1135m² for re-allocation to Mr. 'Anau. On 30 April 2003, by decision No. 705, Cabinet approved the surrender of Lot 28 and on 8 May 2003 Manase Tonga was advised of this by the Ministry of Lands.

6. On 12 May 2003, the Minister of Lands directed that the surrender application be re-submitted to Cabinet because he had given instructions that allotments from Manase Tonga's land be reduced from 1 rood 24 perches to 30 perches each. In a handwritten note of 12 May 2003 he wrote:

> VILIULA
>
> (1) I think this is ALL WRONG. I gave instructions that the allotments be reduced from 1R 24 p to 30p each and then surrendered accordingly (there was another map to this effect).
> (2) Have these resubmitted to Cabinet i.e. for Tu'italikitahi 'Anau..."

7. On 14 May 2003, an application was submitted by the Minister to Cabinet to amend Cabinet decision No. 705 so that the area surrendered was Lot 20A consisting of 810m² instead of Lot 28 consisting of 1135m². Lot 20A was the southern half of what was Lot 20 on the survey plan. Lot 20 had a total area of 1620 m^2 and this was equally divided to create a reduced Lot 20 and Lot 20A. On 28 May 2003 Cabinet approved the Minister's application and issued a decision in these terms:

> Area to be surrendered under CD No.705 of 30/04/2003 is 810m² (Lot 20A) instead of 1135m² (Lot 28).

8. On the survey plan (document 6 of the Minister's bundle) there is a boundary line drawn across Lot 20 to indicate the division of Lot 20 into Lot 20, as the northern half, and Lot 20A, as the southern half, with words handwritten on the southern half "Surr, CD 927 (285.03)" to indicate the approval of the surrender of that half by Cabinet on 28 May 2003.

9. There is no evidence that Manase Tonga consented to or was advised of the Minister's intention to seek an amendment to Cabinet decision No. 705, nor was there any explanation for the change from Lot 28 to Lot 20A. There was no evidence either that Manase Tonga was advised that Cabinet decision No. 705 had been amended after Cabinet approved the change. His subsequent behaviour would suggest that he was not aware.

10. In about September 2003, Manase Tonga and the plaintiff (Mr. Pelesikoti) agreed that Mr. Pelesikoti would pay $16,000 to Manase Tonga in return for which Manase Tonga would surrender all of Lot 20 (by which I mean the full 1135m² incorporating Lot 20A) so that Mr. Pelesikoti could make an application for it.

11. It is relevant to note at this juncture that Mr. Pelesikoti already had a town allotment at Hofoa and he retains this allotment. By law of course, he could not have two town allotments.

12. The agreement between Manase Tonga and Mr. Pelesikoti was that Mr. Pelesikoti would pay $10,000 as a deposit with the balance to be paid upon the surrender of Lot 20. I am satisfied that these sums were paid and also that upon payment of the deposit Manase Tonga gave Mr. Pelesikoti permission to occupy and build on the land.

13. Mr. Pelesikoti immediately began laying and filling the road to Lot 20 and then filled the whole of Lot 20 with gravel rocks and soil, and in November 2003, began constructing his dwelling house. Mr. Pelesikoti said that the expenses associated with this work totalled $179,480. Although he did not produce any receipts, the figure was not challenged and on viewing the property does not seem excessive. By April 2004, the house was completed and Mr. Pelesikoti moved into the house and has lived in it and occupied the whole of Lot 20 from then up to the present.

14. I conducted a site visit. Only by doing so did I obtain an appreciation of the extent of the development of Lot 20. The land that surrounds Lot 20 is low lying, undeveloped and covered in overgrown and dense bush. In wet weather that land would undoubtedly be swampy. Lot 20 has been raised by perhaps 2 to 3 feet. It is filled with coral rock and has been levelled with finer rock and soils. The work involved was significant and must have been back breaking. A modern dwelling house is built on the northern half of the property. The southern half (that is what is now Lot 20A) is attractively grassed but also has on it a sceptic tank and a piggery. It is quite obvious to anyone inspecting the property that this is one residence.

15. On 4 February 2004, Manase Tonga wrote to the Ministry of Lands and requested to surrender the whole of Lot 20 in favour of Mr. Pelesikoti. On 22 March 2004, the Ministry of Lands submitted that request to Cabinet and on 14 April 2004, by Cabinet decision No. 484, Cabinet approved the surrender of Lot 20. It is unlikely Manase Tonga would have sought to surrender Lot 20 had he been aware that the Minister had obtained an amendment to Cabinet decision No. 705 to surrender Lot 20A in favour of Mr. 'Anau.

16. On 27 April 2004, the Ministry of Lands Assistant Secretary wrote to Manase Tonga and informed him of Cabinet's approval of his surrender of Lot 20 and required him to pay TOP$36 for the notice of surrender to be published in the newspaper. Manase Tonga gave that letter to Mr. Pelesikoti and he took the letter to the Lands Office and paid the TOP$36. He said he was told by a Lands Officer, by the name of Tevita, that it would be one year before he could make an application for the land.

17. Mr. Pelesikoti said that he also spoke to the Lands Registration Officer Warrick Vea (Mr. Vea) and that he told Mr. Vea that it was his intention that his two sons would apply to each have half of the land when they turned 16 years old. Mr. Pelesikoti's sons were then just 9 and 4 years of age respectively. He said that Mr. Vea told him that there was no time limit within which an application had to be made for the land and

that it was all right to wait until his sons were 16 years old and then they could apply for the land.

18. Mr. Vea gave evidence. He frankly confirmed that he did have a conversation with Mr. Pelesikoti, although I understood him to say this conversation occurred later in time and after Lot 20 had reverted to the Crown. He was aware that Mr. Pelesikoti had already developed and built a house on Lot 20 and that he could not apply for it as his own town allotment as he already owned a town allotment at Hofoa. He acknowledged that Mr. Pelesikoti told him that he wanted Lot 20 for his two sons. Mr. Vea said he informed Mr. Pelesikoti that as Lot 20 had been surrendered, intending that he apply for it, the usual practice was that the land would not be given to anyone else. He told Mr. Pelesikoti that nothing was to be done until his sons turned 16 at which time they could apply for the land. However, in giving that advice Mr. Vea was not aware that Lot 20 had been subdivided into Lot 20 and Lot 20A. Mr. Vea also said that he did not inform Mr. Pelesikoti to go and occupy and build on Lot 20 and he did all of that at his own risk.

19. There is no suggestion that Mr. Vea intended to mislead Mr. Pelesikoti. His evidence is significant as it confirms that he was aware that Mr. Pelesikoti had built on and was occupying Lot 20 and also that Mr. Pelesikoti intended to sub-divide Lot 20 and have his sons apply for it as their own town allotments.

20. On 22 September 2004, the Minister published the public notice of Cabinet's approval for the surrender of Lot 20. By 22 September 2005 no person had made any claim to the land so that it reverted to the Crown and was available for grant.

21. An issue arose as to whether the Minister of Lands, who in 2004 was Noble Fielakepa, was also aware that Mr. Pelesikoti had built on Lot 20 and was occupying the land. Mr. Pelesikoti said that Fielakepa was aware of this. His evidence was that Fielakepa had attended celebrations (including a wedding) on a nearby property and that Manase Tonga told him that Fielakepa had said that the work that Mr. Pelesikoti had done filling the land was beautiful. In other circumstances that might not be thought particularly significant except that Fielakepa was related to Manase Tonga and the evidence suggests that he was also closely involved in the subdivision of Manase Tonga's land. Specifically, there is the evidence of his direction in May 2003 to amend Cabinet decision No. 705 with no record of any notice having been given of this to Manase Tonga. As I have noted, Manase Tonga's subsequent conduct in agreeing to surrender all of Lot 20 in favour of Mr. Pelesikoti suggests that he may never have been consulted. In cross examination, when asked about this change, Mr. Vea said that it was made because of the personal relationship between the Minister and Manase Tonga. I am satisfied that Fielakepa was aware that Mr. Pelesikoti had developed and was occupying Lot 20.

22. On 28 April 2006, the Minister published a public notice of Cabinet's approval to the surrender of Lot 20A. By this stage, however, Lot 20, which incorporated Lot 20A, had already been surrendered and had reverted to the Crown. There was no explanation for the delay in advertising the surrender of Lot 20A following the issue of the amended Cabinet decision No. 705 on 28 May 2003.

23. On a date which was likely in 2007 (the application cannot be found) Mr. 'Anau applied for the grant of Lot 20A. In a Savingram dated 25 September 2007, the Minister, who by this stage was Noble Tuita, wrote to the Secretary for Lands, Survey

and Natural Resources advising that he had granted Mr. 'Anau's application on 12 September 2007 and that the survey fee was paid on 17 September 2007. He directed that the section be surveyed and a draft deed of grant be prepared and referred back to him to complete registration. Mr. 'Anau's deed of grant for Lot 20A was issued on 5 February 2009.

24. There is no evidence that before granting Lot 20A to Mr. 'Anau there was any inspection of the land by the Ministry to determine whether it was occupied nor is there any evidence that anyone at the Ministry searched the Ministry's own records as to the history of dealings with Lot 20A.

25. Mr. Pelesikoti's evidence was not clear as to when exactly he learned that Lot 20A had been registered to Mr. 'Anau but it appears most likely that he was advised of this in around 2013 by Manase Tonga's heir, Sateki Tonga, who told him to check out the status of his land at the Lands Office as something had happened to it. Mr. 'Anau recounted that in April or May 2013 he visited the allotment and Mr. Penesikoti was angry that he had registered the land in his name and told him to correct "the forged registration".

26. On 21 May 2013 Mr. Penesikoti wrote to the Minister expressing concern that a part of the land surrendered for him (that is Lot 20) had been registered in Mr. 'Anau's name. He noted that he intended to subdivide the land for his two sons to hold as their town allotments and asked that "this wrongful registration be corrected." He never received a response to his letter.

The legal submissions.

27. For Mr. Pelesikoti, Mr. Niu argues that the grant to Mr. 'Anau was invalid and should be set aside. This is because, he said, Mr. Pelesikoti had lawfully occupied and developed Lot 20 with the consent of the previous holder, Manase Tonga, and the land (including Lot 20A) was not available for grant.

28. Alternatively, Mr. Niu argues that the Minister failed to make reasonable enquires before granting the land to Mr. 'Anau and was unaware of the substantial presence that Mr. Pelesikoti had on the land. Mr. Niu submitted that the Minister proceeded on a wrong assumption that the land was unoccupied. Mr. Niu relied upon *Tafa v Viau and others* [2006] Tonga LR 287 (CA), *Finau v Minister of Lands* [2012] Tonga LR 127 (CA) and *Manu v Aholelei* [2015] Tonga LR 135 (LC).

29. For Mr. 'Anau, Mr. Edwards argued that Mr. 'Anau had a prior claim to Lot 20A and that Mr. Pelesikoti had no standing to bring this action. He submitted that Mr. 'Anau's prior right arose by virtue of the fact that Cabinet had approved the surrender of Lot 20A to enable him to apply for it on 28 May 2003 and it was not until 14 April 2004 that Cabinet approved the surrender of Lot 20.

30. As to the issue of Mr. Pelesikoti's standing, Mr. Edwards argued that Mr. Pelesikoti had no interest in Lot 20A which could support this claim. He placed particular reliance upon the following matters; that Mr. Pelesikoti was not applying for Lot 20A for himself, that he was (so it was submitted) party to an illegal arrangement to acquire the land from Manase Tonga in breach of sections 12 and 13 of the Land Act, that Mr. Pelesikoti already had a town allotment and was prohibited by section 48 of the Land Act from applying for another and that Mr. Pelesikoti did not advise Manase Tonga or the Minister that he already had a town allotment when the surrender of Lot 20 was

approved by Cabinet so that the approval must be regarded as null and void. Mr. Edwards emphasised that Mr. 'Anau took no issue with Mr. Pelesikoti's right to occupy the land upon which he has built his house, but says that he should be happy with that land.

31. For the Minister, Mr. Lutui's starting point was that the Minister is only required to consider those facts that are before him when deciding whether to make a grant. Mr. Lutui relied upon the evidence of Mr. Vea that it was not the Ministry's practise to carry out an inspection when dealing with the subdivision of tax allotments as there is a presumption of vacancy in respect of such land. He argued that Mr. Pelesikoti was not physically occupying Lot 20A and noted that Mr. Pelesikoti could not have applied for Lot 20A for himself and there was no competing application for Lot 20A on behalf of his sons or anyone else that would have suggested to the Minister that an inspection should be carried out. It is the Minister's view that Mr. Pelesikoti was wrong to have developed the land without a legal title and that he took the risk of that.

The law

32. It is well established that the Minister is required, when making a grant, to make such enquires as the information before him makes reasonably necessary (*Naulu v Tupou and Others* (Court of Appeal of Tonga, AC 21/15, 8 April 2016 at [13]).

33. In *Tafa v Viau* the Court of Appeal noted two aspects of the Minister's functions and duties which combined to require him to take steps which must be reasonable in the particular circumstances, to ascertain whether the land is in fact subject to some other claim that might be an impediment to a grant or make it unavailable. At paragraph [12] the Court said:

> Two aspects of the Minister's functions and duties, in a case such as this, combine to require him to take steps, which must be reasonable in the particular circumstances, to ascertain whether the land is in fact not subject to some other claim that might be an impediment to a grant or make it unavailable. In the first place, he cannot properly sign a declaration on behalf of the Crown that there is no impediment if the truth is that he simply does not know because he has made no sufficient inquiry. In the second place, the administrative decision to make the particular grant cannot properly be made in the absence of the same inquiry in any case where the Minister does not actually know whether the land is available, or whether any competing claim has been appropriately resolved. Of course, in both respects, the Minister does not have to make inquiries personally. He may rely on his officers, but if he does so, and they fail to perform the tasks properly, a person affected may have a remedy for that failure as if it were a failure of the Minister.

34. At paragraph [13] the Court found that a decision maker can be held to account if he fails to have regard to circumstances that he would have known had he acted reasonably and fairly. The Court said:

> Where that knowledge would have imposed a duty to accord natural justice to some person … "the Court must place itself in the shoes of the repository

> of the power to determine whether the procedure adopted was reasonable and fair".

35. In *Finau v Minister of Lands & Heimuli* the Court of Appeal considered (at paragraph [14]) that *Tafa* is authority that before making a grant a Minister must consider whether land is available and a failure to do so "vitiates the grant" (see also *Hausia v Vaka'uta and anor* [1974 – 1980] Tonga LR 58; *Hakeai v Minister of Lands and ors* [1996] Tonga LR 142 and *Cocker v Palavi and anor* [1997] Tonga LR 203).

36. Where to the Minister's knowledge the making of a grant has the potential to adversely affect some identifiable person by dispossessing him from a home of longstanding, the Minister can reasonably be expected to seek his views and give him an opportunity to adduce probative material before making a decision. As was noted in the Land Court in *Tafa v Viau and others* [2006] Tonga LR 125 (LC), at [66]:

> To have a situation, therefore, where the Minister of Lands is able to make a grant of an allotment in total disregard for the rights of a long-term occupant of the same piece of land, is quite untenable and is a recipe for lawlessness. I cannot accept that such a consequence could ever have been intended by the legislature.

37. In *Naulu* (supra) the Court of Appeal set aside a grant of a tax allotment on the grounds that there was significant information available to the Ministry that the appellant, who had not himself applied for the land, had been farming the land. The Court noted at [21]:

> That surely should have alerted the Ministry to the fact that there was some form of occupancy, which might well involve the growing of crops. That might not be a short-term project … In our view the Ministry should have investigated what was happening on the land by way of farming and only then, in light of what it found, should the Minister have decided whether the land was available.

38. Two other points should be noted from *Naulu*. First, the Court did not say that there is a requirement that the Minister must undertake an inspection of the land in every case, although that might be desirable. Whether an inspection is required will depend upon there being anything in the circumstances to put the Ministry on alert. At paragraph [20] the Court said:

> In the present case, as we have noted, a declaration of no impediment was made by the estate holder. There was no competing application from Tevita. If there was nothing else to put the Minister or the officer handling the application on alert it might be reasonable for the Minister to rely upon the estate holder's certification, though better practice would be for an inspection of the allotment to be made in every case and anything of concern it revealed followed up. We say this in the hope that such a change of practice may reduce the incidence of litigation challenging the making of a grant.

39. The second point was that occupation of the land does not necessarily render land unavailable for grant. The Court noted at [21] that that will depend upon the nature and history of the occupation.

Discussion

40. I am of the clear view that the Minister failed in his duty to make reasonable enquiries about the availability of Lot 20A and that consequently the grant of that land to Mr. 'Anau was invalidly made.

41. There is no evidence that prior to making the grant to Mr. 'Anau the Ministry considered its own records in relation to the history of dealings with Lot 20A. Had it done so it would have found that Lot 20 (which incorporated Lot 20A) had been surrendered by Manase Tonga intending that it be re-allocated to Mr. Penesikoti. Not only that, but Mr. Vea was aware that Mr. Pelesikoti intended that Lot 20 be subdivided so that his sons could apply for it upon attaining the age of 16 years. He was also aware of the advice that he had given Mr. Pelesikoti that there was no time limit on making such an application and that the land was unlikely to be granted to anyone else. The Ministry was on notice of a competing claim to the land which required an inspection and investigation before making the grant.

42. The Ministry also had knowledge that Mr. Pelesikoti had developed Lot 20, had built his house on the land and was occupying the land. All of this was known to Fielakepa and also Mr. Vea. I reject Mr. Lutui's argument that Mr. Pelesikoti is not occupying Lot 20A. Whilst Lot 20A is largely a grassed area it is perfectly plain that it has been developed along with the house and is part of one property. There can be no question that with this knowledge the Ministry was obliged to carry out an inspection of Lot 20A and Mr. Pelesikoti should have been given an opportunity to be heard in relation to Mr. 'Anau's application. The failure to inspect and consult with Mr. Pelesikoti vitiated the grant to Mr. 'Anau.

43. There is nothing in the arguments advanced for Mr. 'Anau and the Minister that Mr. Pelesikoti was not entitled to be heard on Mr. 'Anau's application because Mr. 'Anau had a prior claim to the land, or that Mr. Pelesikoti was not in lawful occupation of the land, had no right to apply for the land himself or was party to an unlawful arrangement to acquire the land.

44. There is no rule that an application for land which is first in time must prevail over any other competing claims. If that was the case the Minister would have no obligation under any circumstances to make enquiries.

45. I am satisfied that Mr. Pelesikoti was in lawful occupation of all of Lot 20. He was authorised to occupy and build on the land by Manase Tonga. Upon Lot 20 being surrendered the Minister made no attempt to remove Mr. Pelesikoti from the land despite knowing he had built and was living on it (*Manu v 'Aholelei* (*supra*) and *To'a v Taumoepeau and Minister of Lands* (Unreported Land Court, LA 10/2012, 13 March 2015, Scott J)). Until some step was taken to remove him from the land he remained in lawful possession.

46. Whilst it is true that Mr. Pelesikoti had no right to apply for Lot 20A as his own town allotment that would not preclude him, had he been consulted, from seeking a lease of the land or asserting a claim on behalf of his sons or making submissions to the Minister that the land was not available for grant to Mr. 'Anau. I can certainly not

be sure that had Mr. Pelesikoti been consulted the Minister would still have granted Lot 20A to Mr. 'Anau.

47. Finally, Mr. Pelesikoti's claim is not founded on the agreement with Manase Tonga which Mr. Edwards submits was unlawful, which submission I note appears contrary to authority in any event (*Finau v 'Alafoki* [1989] Tonga LR 6; *Piukala v Fonohema* [2002] Tonga LR 200).

48. I am compelled to cancel Mr. 'Anau's registration but not without considerable sympathy for him as he has plainly done nothing wrong and was entitled to believe, and clearly did believe, that he was able to apply for and be granted Lot 20A as his own town allotment.

49. Nothing I have said in this ruling should be taken as indicating that Lot 20A is not available for grant. I am also making no comment on whether Mr. 'Anau or Mr. Pelesikoti (or his sons) has the superior claim to the land. That is for the Minister to decide based on all the information that is available to him once he has made such further enquires as are reasonably necessary and then assessing the competing positions.

Result

50. I declare deed of grant 377/71 in favour of Mr. 'Anau was invalid and direct that the Minister is to cancel the said deed of grant.

51. The Minister is to make a fresh decision on Mr. 'Anau's application for Lot 20A after carrying out an inspection of the land and after giving both Mr. 'Anau and Mr. Pelesikoti an opportunity to be heard. If Mr. Pelesikoti or his sons wish to make a formal application for the land they should do so forthwith.

52. Any party wishing to apply for costs should do so within 28 days.