TONGA

LAW REPORTS

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Court of Appeal

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Hon. Justice Peter Salmon (retired March 2015)
Hon Justice Michael Moore
Hon Justice Peter Blanchard
Hon Justice Kenneth Handley
Hon Justice 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

Magistrates

Petelo Soakimi
Manamo'ui Kaufusi
Penisimani Ma'u

Attorney General

'Asipeli 'Aminiasi Kefu

Solicitor General

Sione Finau Sisifa

Director of Public Prosecutions

'Asipeli 'Aminiasi Kefu

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P v V

Supreme Court, Family Divorce Jurisdiction, Nuku'alofa
Paulsen CJ
FD 168/2014

29 January 2015

Divorce law – petition under section 3(1)(g) – cumulative conduct of respondent sufficiently serious – petition granted

The parties were married on 28 June 2005 at Tongatapu. They have three children aged between 2 years and 8 years. The parties had been living apart since November 2013 when the respondent left the family home for the final time; the petitioner having left and returned at least five times previously. The petitioner claimed that the respondent had assaulted her to her head causing 'bodily harm', that throughout the marriage the respondent spent most of his weekend drinking, that as result of his drinking he did not make adequate provision for the three children of the marriage aged between 2 and 8 years, that he had an affair, and that the parties had been separated over five times but there had been no change in the respondent's behaviour. The wife petitioned for divorce under section 3(1)(g) of the Divorce Act. The respondent agreed to the dissolution and confirmed that the evidence of the petitioner was correct.

Held:

1. The court could not consider the allegation of adultery because the person with whom it was said adultery was committed should have been joined as a co-respondent. There was no co-respondent joined. Also, the allegation that the respondent did not provide for the maintenance of the children was not proved so the court disregarded that.
2. The issue was whether the cumulative conduct of the respondent was sufficiently serious in all the circumstances of the case that, judged from a reasonable person's point of view, the petitioner could not reasonably be except to live with the respondent.
3. The factors in support of the petition were: that the respondent assaulted the petitioner on two occasions during the marriage and the second occasion led to hospital treatment for the respondent; and that the respondent's drinking was excessive, frequent and repeated over the period of the marriage, had resulted in the separation of the parties on no less than five occasions and, importantly, had meant the respondent left the home and not returned to his family for extended periods.

4. The assessment of the particular facts was that the cumulative conduct of the respondent was such that it was unreasonable to expect the petitioner to live with him. The marriage solemnized on 28 June 2005 between the petitioner and respondent was dissolved unless sufficient cause was shown to the Court within six weeks why the decree should not be made absolute.

Cases considered:
Fe'ao v Fe'ao [2001] Tonga LR 44
Pulini v Masunu [2001] TOSC 6
Vaiangina v Lopeti [2009] Tonga LR 60

Statute considered:
Divorce Act (Cap 29)

Rules considered:
Divorce Rules

Counsel for the petitioner : Mrs Vaihu
The respondent appeared in person

Judgment

[1] This is a wife's application for divorce brought under Section 3(1)(g) of the Divorce Act (Cap 29). The section provides that the Court may dissolve the marriage if satisfied:

> "that the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent"

[2] The petition was not opposed. I heard evidence from the petitioner and the respondent appeared before me to confirm that he agreed to the dissolution of the marriage and he also confirmed that the evidence that I heard from the petitioner was correct.

[3] The parties were married on 28 June 2005 at Tongatapu. They have three children aged between 8 and 2 years. Custody and access arrangements for the children are not in issue and at the end of this brief judgment I will record them.

[4] The parties have now been living apart since November 2013 when the respondent left the family home for the final time; she having left and returned at least five times previously. Their contact since has been infrequent and related to the care of their children.

[5] The petition (which I note was not prepared by Mrs Vaihu who appeared on late instructions before me) alleged that the respondent had assaulted the petitioner to her head causing 'bodily harm', that throughout the marriage the respondent spent most of his weekend drinking, that as result of his drinking he did not make adequate provision for the three children of the marriage aged between 8 and 2 years, that the parties had been separated over five times but there had been no change in the

respondent's behaviour and that the respondent had engaged in an affair and in drinking with the 'affair woman' which had caused the petitioner 'grief, distress and loneliness'.

[6] I take guidance as to the meaning of s3(1)(g) from the decisions of Ford J in *Pulini v Masunu* [2001] TOSC 6 and *Fe'ao v Fe'ao* [2001] Tonga LR 44. In particular, I must decide whether the cumulative conduct of the respondent was sufficiently serious in all the circumstances of the case that judged from a reasonable person's point of view the petitioner cannot reasonably be except to live with the respondent.

[7] In this case I must disregard the allegation of adultery. Rule 5 of the Divorce Rules requires, in a case where an allegation of adultery is made, that the person with whom it is said adultery was committed be joined as a co-respondent (subject to exceptions that do not apply here). The failure to do so caused the Court to dismiss a petition in *Vaiangina v Lopeti* [2009] Tonga LR 60. In this case there was no co-respondent joined.

[8] I also disregard as not proved the allegation that the respondent has not provided for the maintenance of the children of the marriage when he goes drinking as that was not the petitioner's evidence.

[9] However I am satisfied that the grounds for the granting of the order sought are made out. My reasons are as follows.

[10] First, it is not disputed that the respondent has assaulted the petitioner on two occasions during the marriage. The last occasion was in June or July 2013 when the petitioner was punched repeatedly in the head. It appears this was a serious assault as the petitioner was admitted to hospital for treatment and criminal charges have been laid against the respondent which have yet to be heard. Although any form of domestic violence is intolerable in this case there are the aggravating features that violence has occurred on more than one occasion and on the second occasion was of sufficient seriousness as to require hospital treatment. I note that the respondent offered no excuses or justifications for the assaults.

[11] Secondly, it was also proved that the respondent undertook frequent and serious bouts of drinking which caused severe unhappiness in the marriage. Drinking by one spouse that makes the other unhappy is unlikely to satisfy s3(g). That might be thought of as what has been pejoratively described as part of the ordinary wear and tear of married life. In this case however I am concerned with the cumulative effects of the drinking. The evidence is that the drinking was excessive, frequent and repeated over the period of the marriage, had resulted in the separation of the parties on no less than five occasions and, importantly, had meant the respondent left the home and not returned to his family for extended periods.

[12] My assessment of the particular facts of this case is that the cumulative conduct of the respondent is such that it is unreasonable to expect the petitioner to live with him.

[13] Accordingly I order as follows:

1. The marriage solemnized on 28 June 2005 between the petitioner and respondent is dissolved unless sufficient
120 cause is shown to the Court within six weeks why this decree should not be made absolute.
2. Custody of the children of the family namely *S*, male, born 17 April 2006 and *M*, male, born 2 November 2007 is granted to the respondent with free access reserved to the petitioner.
3. Custody of the child of the family namely S, female, born 30 November 2012 is granted to the petitioner with free access reserved to the respondent.

Sitaleki v Sitaleki

Supreme Court, Family Divorce Jurisdiction, Nuku'alofa
Paulsen CJ
FD 49/2014

4 February 2015

Divorce law – petition under s 3(1)(f) – separated for more than two years – petition granted

The petitioner, 'Alaivaluloa Sitaleki, and the respondent, Foliaki Sitaleki, were married at Ha'apai on 18 May 1994. They have one child, Ane Sitaleki, born on 2 May 1995. The petitioner sought dissolution of the marriage on the ground that the respondent and petitioner have been separated for a continuous period of two years or more. The petition was filed on 4 April 2014 and alleged that the parties had been separated since February 2012 without both of them maintaining or intending to maintain or renew normal marital relations or co-habitation with each other. The respondent opposed the petition and alleged that the parties did not separate in February 2012 but in around March 2014 and that she did not want to get divorced from the petitioner.

Held:

1. "Have been separated" in section 3(1)(f) was the equivalent of "have been living apart" and there was no requirement that the separation be by consent, expressed or implied, of both parties. The court was satisfied on the balance of probabilities that the parties began living apart and did not maintain normal marital relations from February 2012.
2. The court was satisfied that the petitioner made out the grounds to obtain a divorce under Section 3(1)(f) of the Divorce Act (Cap 29). Accordingly the court ordered that the marriage solemnized on 8 May 1994 between the petitioner and respondent was dissolved unless sufficient cause was shown to the Court within six weeks why the decree should not be made absolute.

Cases considered:

Halapua v Tonga [2004] TOCA 5
Lemoto v Veikune (FD 17/2013)

Statute considered:

Divorce Act (Cap 29)

Counsel for the respondent : Mr Pouon

Judgment

1. The petitioner, 'Alaivaluloa Sitaleki, and the respondent, Foliaki Sitaleki, were married at Ha'apai on 18 May 1994. They have one child, Ane Sitaleki, born on 2 May 1995.

2. The petitioner seeks dissolution of the marriage. He relies on Section 3(1)(f) Divorce Act (Cap. 29) which provides as a ground for dissolution:

> 'that the respondent and petitioner have been separated for a continuous period of two years or more immediately preceding presentation of the petition without both of them maintaining or intending to maintain or renew normal marital relations or co-habitation with each other.'

3. The petition was filed on 4 April 2014 and alleged that the parties had been separated since February 2012 without both of them maintaining or intending to maintain or renew normal marital relations or co-habitation with each other.

4. The respondent opposed the petition relevantly alleging:

1. That the parties did not separate in February 2012 but in around March 2014; and
2. That she did not want to get divorced from the petitioner.

5. The case was set down for hearing on the basis that the only issue was whether the parties' separation commenced in February 2012 or March 2014.

The husband's case

6. The petitioner gave evidence that the respondent had taken many trips overseas. This included a lengthy trip to New Zealand in 2011 which it appears from the petitioner's perspective brought an end to the marriage. There is also evidence in the form of pages from the respondent's passport which show that she was a very frequent traveler. She took at least eleven (11) international flights in the period May 2012 to April 2013 alone.

7. The petitioner's evidence is that as far as he was aware the respondent remained overseas from when she left Tonga in 2011 until October 2013 and he only learned of her return to Tonga through the parties' daughter.

8. The petitioner said that before the parties separated they were living at Halaleva where he remained until February 2012. In February 2012 he left Halaleva and moved into a rental house at 'Anana where he has remained. He said he left behind all matrimonial property at Halaleva.

9. Under cross-examination the petitioner was asked whether in February 2012 he told the respondent that he wanted a divorce. He said that he had told her. It was put to him that the respondent had lived with him at 'Anana. He denied that. He also denied paying for the respondent's trips overseas or having sexual intercourse with

her after February 2012 or providing support except for the parties' child or as ordered under a maintenance order of the Magistrates Court that was made in May 2014.

10. The petitioner called evidence from a Mr. Lotu Mohokoi who lived with the petitioner for about a year from February 2013 at 'Anana. Mr. Mohokoi's evidence was that at no time while he lived at 'Anana had the respondent lived at that house.

The wife's case

11. The respondent's evidence was significantly different. She said that there was no separation in February 2012 but that she was travelling overseas so that the parties' adopted daughter could obtain medical treatment for an ear infection. She said that the petitioner paid for that trip which had originally been for three months but it was extended to put the adopted daughter into school as she had been born in New Zealand.

12. The respondent also said that during the trip she was in constant telephone contact with the petitioner. She said that when she returned from the trip (which her passport would indicate was in May 2012) she began living with the petitioner at 'Anana and when she traveled throughout 2012 and returned to Tonga she always stayed with him at 'Anana and this continued up to March 2014.

13. In her view the parties did not separate until March 2014 which was when she accepted that the petitioner had told her that he wanted a divorce. Shortly after that the respondent issued her proceedings for maintenance in the Magistrate's Court.

14. As to the evidence that had been given by Mr. Mohokoi the respondent said that he was lying.

15. Under cross-examination the respondent confirmed that she had traveled often including trips to New Zealand, Australia and the United States of America but she said that all these trips had been with the petitioner's agreement.

16. When asked why it was necessary for her to travel so often she said that her husband wanted her to travel and that it assisted him with his business. She said that she spent time overseas acquiring equipment for the petitioner's electrical business. She said it cost more money to have someone else provide equipment from overseas than if she did it. This was despite the fact that her role in the business was as a bookkeeper.

The requirements of Section 3(1)(f)

17. The Court of Appeal considered Section 3(1)(f) in *Halapua v Tonga* [2004] TOCA 5. Relevantly the Court of Appeal held that the phrase *'have been separated'* in Section 3(1)(f) is the equivalent of *'have been living apart'* and there was no requirement that the separation be by consent, expressed or implied, of both parties [at 20].

18. The second matter of importance decided in *Halapua* was that the plain meaning of the words *'without both maintaining ... normal marital relations*' is that if both the

petitioner and the respondent have maintained marital relations the petition will be refused but that *'if both do not, and obviously that will be the case if one of them does not, the petition can be granted* [at 23].

When did the parties separate?

19. On this issue I accept the petitioner's evidence and reject the evidence of the respondent. I found the petitioner to be an honest and compelling witness but I found much of what the respondent told me to be unbelievable.

20. The petitioner was clearly very upset about his wife's regular overseas travel. His conduct in February 2012 of leaving Halaleva, moving to 'Anana and leaving all the relationship property behind is a strong indication that from that point that parties had begun to live apart. I accept his evidence that he did not know that the respondent had returned to Tonga after February 2012 until October 2013. This is entirely plausible when one looks at the regularity of her travel. The fact that she returned to Tonga and did not contact the petitioner before leaving again is very clear evidence in my view that the parties were leading separate lives.

21. It is most likely that given the state of the relationship and his unhappiness about the respondents' trip overseas that the petitioner would have advised his wife in February 2012 of his desire to get a divorce. In cross-examination he said that he did tell her that he wanted a divorce. I have not overlooked the fact that in his evidence-in-chief the petitioner said that after she went overseas in 2011 his wife did not stay in touch by telephone. I think he is likely mistaken about that. Clearly there was some contact as the petitioner said the respondent did telephone their daughter who the petitioner was looking after when she was not at boarding school. The respondent's evidence was that she had regular contact with her husband by telephone while on that trip.

22. The evidence of Mr. Mohokoi is important as it confirms the petitioner's evidence that the respondent never lived with him at 'Anana. Although the respondent said that Mr. Mohokoi was lying his evidence was not discredited in cross-examination and the respondent did not call any witness who could confirm that she ever lived at 'Anana with the petitioner. I have no reason to disbelieve Mr. Mohokoi.

23. The respondent's evidence that the petitioner funded her trips overseas, that she travelled with his agreement and that the travel was beneficial because she could act as a buyer for his business is all so implausible that I do not accept it.

24. In this case I am satisfied on the balance of probabilities that the parties began living apart and did not maintain normal marital relations from February 2012.

The wife did not want to separate

25. As I have said the hearing proceeded on the basis that there was a single issue which was the date of separation. However, in his submissions for the respondent Mr. Pouono noted that the respondent did not want to separate and in reliance upon a decision of former Chief Justice Scott in *Tevita Tominiko Fangumahua 'I Vaiola Lemoto v Ilisapesi Veikune* (FD 17/2013) made the submission that before the Court

could grant the petition *'both parties must either maintain or intend to maintain or renew normal marital relations or co-habitation'.*

26. The case upon which Mr. Pouono relies was decided on the basis that the parties had not been living apart for 2 years immediately preceding presentation of the petition. In so far as the decision is inconsistent with the principles I have set out from *Halapua* I do not follow it.

27. There is another argument that Mr. Pouono appears to raise in reliance upon *Lemoto* which is that the petitioner cannot rely on his own desertion of the respondent to file for divorce. The simple answer to that is that he did not desert the respondent. However, I believe the comment made by Scott CJ in *Lemoto* at [13] that a *'petitioner cannot seek relief on the basis of his own desertion...'* can only relate to cases where the petition is based on Section 3(1)(c).

The result

28. I find that the petitioner has made out the grounds to obtain a divorce under Section 3(1)(f) of the Divorce Act (Cap 29).

29. Accordingly I order that the marriage solemnized on 8 May 1994 between the petitioner and respondent is dissolved unless sufficient cause is shown to the Court within six weeks why this decree should not be made absolute.

30. I note that the respondent has obtained a maintenance order and that their only child is now 19 years old. Mr. Pouono submits that any issues relating to matrimonial property can be brought as a separate proceeding. In those circumstances I certify that I am satisfied as to the matters in Section 11(1) Divorce Act (Cap 29).

31. No order for costs has been sought by the petitioner in his amended petition or in the respondent Counsel's written submissions and I make no order in respect of costs.

Pikula v Fukofuka

Supreme Court, Nuku'alofa
Paulsen CJ
AM 18/14

4 February 2015

Criminal procedure – private prosecution – application to dismiss the complaint refused by Magistrate – appeal against refusal – appeal dismissed

On 7 March 2014 the respondent commenced a private prosecution against the appellant. It was alleged that between the months of November 2013 and January 2014 while on a tour of Australia with the Tonga High School Ex Students Hahake Chapter the appellant 'embezzled' funds collected by the group amounting to $33,578. On 29 May 2014 the appellant, his Counsel and witnesses attended Court for the trial but without any notice or explanation neither the respondent nor his Counsel did so. The appellant's party waited for about 30 minutes at Court and then the appellant made an application that the complaint be dismissed. The Magistrate did not dismiss the complaint. He directed the appellant to file and serve a written application. On 14 June 2014 the appellant duly filed the application supported by an affidavit in which he sought the case to be struck out for non-appearance of the plaintiff or his legal counsel along with costs and the return of his passport. On 18 July 2014 the Magistrate refused to dismiss the complaint but awarded the appellant $600 for costs thrown away. The Magistrate noted that a new trial date would be set unless one party sought a Supreme Court decision. The appellant appealed from the decision of the Magistrate.

Held:

1. It would rarely be appropriate to dismiss a complaint unless the failure to do so would deprive the defendant of some recognised right (such as the right to a fair trial) or the defendant would suffer some serious prejudice or the complainant is guilty of an abuse of process. Even then the power to dismiss must be exercised sparingly and only in the most obvious of cases.
2. For the appellant to succeed he had to demonstrate that the Magistrate clearly fell into error. This might occur if for instance the Magistrate acted on wrong principles, had some fundamental misapprehension of the facts or took into account irrelevant considerations or failed to take into account relevant ones.
3. Overall the court was of the view that the Magistrate did not commit any error of approach that would justify the Supreme Court's intervention. In

any event even had the court decided that the Magistrate was wrong in his approach, it would not allow the appeal. In dealing with the failure of the respondent to appear on the first trial date, there was some explanation for the respondent's non-appearance, an expression of contrition and a lack of any real prejudice to the appellant, therefore it was inevitable that the Magistrate would adjourn the trial under section 22 and the court considered that he was right to do so.

Cases considered:

R v Filimoehala [1997] Tonga LR 140
Tu'ivai v Lokotui [2005] Tonga LR 178

Statutes considered:

Criminal Offences Act (Cap 18)
Magistrate's Court Act (Cap 11)

Counsel for the appellant	:	Mr Corbett
Counsel for the respondent	:	Mr Fakahua

Judgment

1. This is an appeal from a decision of a Police Magistrate of 18 July 2014 refusing an application by the appellant to dismiss a complaint.

2. The facts giving rise to the appeal are not in dispute.

The facts

3. On 7 March 2014 the respondent commenced a private prosecution against the appellant under Section 162(b)(c) of the Criminal Offences Act (Cap 18). It is alleged that between the months of November 2013 and January 2014 while on a tour of Australia with the Tonga High School Ex Students Hahake Chapter the appellant 'embezzled' funds collected by the group amounting to $33,578.

4. On the same day the Magistrate's Court made an order on the application of the respondent requiring the appellant to surrender up his passport to the Court on the grounds that the appellant was likely to abscond.

5. There followed a number of appearances by the appellant before the Court which, I am told, resulted in adjournments while the parties explored the possibility of settlement but when this proved unsuccessful the parties agreed to a trial date of 29 May 2014.

6. On 29 May 2014 the appellant, his Counsel and witnesses attended Court for the trial but without any notice or explanation neither the respondent nor his Counsel did so.

7. I pause to note that the respondent's Counsel was not Mr. Fakahua who appeared before me as he has only recently been instructed.

8. The appellant's party waited for about 30 minutes at Court and then the appellant made an application that the complaint be dismissed. The Magistrate did not dismiss the complaint. He directed the appellant to file and serve a written application.

9. I am not clear why the Magistrate considered this was necessary and would have thought that the application could have been dealt with on an oral application (after hearing from the respondent's Counsel) but as I was not addressed on the matter I say no more about it.

10. On 14 June 2014 the appellant duly filed the application supported by an affidavit in which he sought "*The case PR14 of 2014 is struck out for non-appearance of the plaintiff* or *his legal counsel ..."* along with costs and the return of his passport.

11. The application relied on Section 22 of the Magistrate's Court Act which provides as follows:

> 'If when the case is called the defendant appears or is brought before the Court under a warrant of arrest and the complainant having had due notice of the time and place of hearing (which shall be proved to the satisfaction of the magistrate) does not appear the magistrate may dismiss the complaint or if he thinks fit adjourn the hearing to some future day.'

12. It took the respondent until 1 July 2014 to file his opposition to the application and there was a further hearing before the Court on 3 July 2014 where a timetable was made for the exchange of submissions. I understand the submissions were received by the Court on 10 July 2014 and 15 July 2014.

13. In his submissions the respondent sought the Court's forgiveness. He had apparently gone overseas on an urgent matter without letting his Counsel know of his plans. As far as I can see no explanation has ever been proffered for his Counsel's failure to appear and ask for an adjournment.

14. The respondent argued that the Magistrate should exercise his discretion under Section 22 to adjourn the trial as the crime alleged was serious and the sum said to have been taken was substantial.

15. The Magistrate issued his ruling on 18 July 2014. He refused to dismiss the complaint but awarded the appellant $600 for costs thrown away. The Magistrate noted that a new trial date would be set *"unless one party seeks Supreme Court decision which is allowed..."*

16. The appellant filed this appeal from the decision of the Magistrate on 28 July 2014.

The Magistrate's discretion

17. In refusing to dismiss the complaint the Magistrate exercised a discretionary power under Section 22 of the Act. The dismissal of a complaint under Section 22 is an extreme step. In deciding whether to dismiss the complaint or adjourn the trial the Magistrate must do justice between the parties. In my view it will rarely be appropriate to dismiss a complaint unless the failure to do so will deprive the

defendant of some recognised right (such as the right to a fair trial) or the defendant will suffer some serious prejudice or the complainant is guilty of an abuse of process. Even then the power to dismiss must be exercised sparingly and only in the most obvious of cases. *Tu'ivai v Lokotui* [2005] Tonga LR 178.

18. This Court is required to determine appeals from the Magistrate's Court on their merits but it will rarely interfere with the exercise of discretion by a Magistrate granting an adjournment of a trial.

19. For the appellant to succeed in a case like this he must demonstrate that the Magistrate clearly fell into error. This might occur if for instance the Magistrate acted on wrong principles, had some fundamental misapprehension of the facts or took into account irrelevant considerations or failed to take into account relevant ones.

The merits of the appeal

20. For the appellant Mr. Corbett did not suggest that the Magistrate proceeded on a wrong principle except perhaps in one respect. He argued that once it was proved to the satisfaction of the Magistrate that the complainant had due notice of the time and place of hearing (which in this case was never in doubt) the Magistrate was obliged to dismiss. That is not correct in my view. Proof of the fact that the complainant had notice of the hearing is required before the Magistrate can dismiss under Section 22 but it does not follow that he should dismiss.

21. The balance of Mr. Corbett's submissions largely focused on the conduct of the respondent and his Counsel. He said that it was at the respondent's insistence that the case was set down when his client was prepared to continue negotiations. He stressed that no notice was given of the respondent's unavailability for the hearing or of his intention not to appear. He pointed out also that the respondent's Counsel had associates who he could have sent along to Court. There is much force in Mr. Corbett's submissions but these are all matters that the Magistrate was aware of and clearly weighed up carefully before dismissing the appellant's application.

22. Another matter raised by Mr. Corbett is that the appellant has been prejudiced because he cannot travel overseas pending trial. The Magistrate considered that too. But in any event I note that the appellant has had his passport returned on one occasion to allow him to travel and there is no reason to believe this would not happen again in appropriate circumstances.

23. Mr. Corbett also argued that there has been unacceptable delay as a result of the respondent's actions. The Magistrate referred to this in his decision also and to the obligation of the respondent to prosecute the case diligently and the appellant's right to be tried '*as soon as possible*'. It is true that the appellant's trial has now been delayed 8 months but the delay has largely been the product of this appeal. While the appellant had every right to appeal the consequential delay is not the responsibility of the respondent.

24. In coming to his decision the Magistrate referred to a number of cases. All the cases cited are civil cases involving applications to strike out claims and for that reason were not directly applicable to the matter the Magistrate had to decide. It

appears that whilst it is not cited the Magistrate also quoted from a decision of Hampton CJ in *R v Filimoehala* [1997] Tonga LR 140 which is authority for the proposition that it is in the interests of everyone in the criminal justice system that cases proceed as soon as possible.

25. When one stands back and reads the decision of the Magistrate as a whole it is very clear that notwithstanding his citation of civil cases he considered and weighed in the balance carefully all of the matters that he was required to.

26. Specifically he understood that his obligation was to do justice between the parties and he addressed the right of the appellant to have his case heard quickly, the prejudice that was caused to the appellant by adjourning the case and the steps that could be taken to respond to that prejudice (in this case an award of costs and an early hearing *'to clear the defendant from this alleged accusation'*). He was alive to the possibility of abuse of the Court's processes but believed the respondent's apology was genuine.

27. Overall I am of the view that the Magistrate did not commit any error of approach that would justify this Court's intervention.

28. In any event even had I decided that the Magistrate was wrong in his approach I would not allow this appeal. As we are dealing with the failure of the respondent to appear on the first trial date, there was some explanation for the respondent's non-appearance, an expression of contrition and a lack of any real prejudice to the appellant it was inevitable in my view that the Magistrate would adjourn the trial under Section 22 and I consider that he was right to do so.

The costs claimed

29. The respondent also challenged the decision of the Magistrate to award only $600 costs. In the notice of appeal the respondent seeks $1,344 which I understand are wasted costs the appellant says were incurred as a result of the aborted hearing on 29 May 2014. In addition the notice of appeal seeks a further $1,200 which is described as *'thrown away costs …for non appearance of the plaintiff/complaint or his counsel on the trial date'*.

30. It appears to me that the appellant is claiming the same costs twice. I can find nothing in the papers to justify the amounts claimed and consider the Magistrate's award of $600 entirely appropriate in the circumstances.

Additional issues

31. The relief sought by the appellant in the notice of appeal included an order that "*The passport of the defendant is returned forthwith from the Magistrate's Court to the defendant*". When pressed neither Mr. Corbett nor Mr. Fakahua could tell me upon what authority the Magistrate made such an order. My own research has not thrown any light on the matter. In the absence of submissions from Counsel directed to the Magistrate's jurisdiction I am not prepared to interfere with the order.

32. I raised with Mr. Corbett and Mr. Fakahua whether the Magistrate's Court has jurisdiction to adjudicate in respect of acts that were performed entirely outside the territorial limits of the Kingdom of Tonga. Neither Counsel was in a position to address me on that matter. Mr. Fakahua correctly pointed out that this issue does not form part of the grounds of appeal.

33. Accordingly I do no more than note the point for Counsel's consideration. I also note the comments of the then Chief Justice in *Pohiva v Tu'ivakano* [2014] TSC 1 at [31] to [36] as to the role of the Attorney-General in private prosecutions which may be pertinent in this case.

Orders

34. For the reasons set out above I make the following orders:

a. The appeal is dismissed. The case must go back to the Magistrate's Court for a trial date to be set. The case should be accorded priority.

b. I reserve costs on this appeal. The parties are encouraged to agree on costs but if they cannot do so any party wishing to seek costs may file a memorandum setting out the basis for the claim and an itemised bill of costs within 28 days.

Free Wesleyan Church of Tonga v Samate

Land Court, Nuku'alofa
Paulsen, President
LA 1/2015

20 February 2015

Land law - interim order sought evicting defendant – balance of convenience and overall justice considered – application dismissed – case timetabled to be heard promptly

The plaintiff was the lessee of a property for a term of twenty five years beginning on 14 November 1992 and expiring on 13 November 2017. Mr Samate, the defendant, has operated the Gas Station at the property since August 2012. Mr Samate was allowed to operate the Gas Station by the plaintiff. The dispute was whether the defendant's right to operate the Gas Station was extant or had expired. The plaintiff claimed that Mr Samate was allowed to operate the Gas Station pursuant to an agreement entered into around 2 June 2012 for a period of only one year. When the agreement expired, Mr Samate remained in occupation of the Gas Station at the will of the plaintiff. In April 2014 the plaintiff gave notice to Mr Samate that he was required to vacate by 31 December 2014. The defendant did not accept the notice. Mr Samate claimed that the agreement was for him to operate the Gas Station for six years. The plaintiff applied for an interim order evicting the defendant, Mr Samate, from the Gas Station, which consists of a house, a building from which the Gas Station operates and equipment such as pumps.

Held:

1. The principles that the court must consider when dealing with interim injunction applications were well-known. The applicant must show that he had an arguable case and that the balance of convenience favoured making the orders sought. In considering the balance of convenience regard was to be had to whether an award of damages after a trial was a sufficient remedy, the ability of the other party to pay such damages, and whether greater harm would be done by granting or refusing the injunction. The court must also ask where the overall justice of the case lay.
2. There was a serious issue to be tried. The plaintiff was the holder of a registered lease and asserted ownership of the gas station. Mr Samate did not dispute that. The plaintiff was entitled to possession of the gas station, as against Mr Samate, unless Mr Samate had been granted an existing right to occupy it by the plaintiff. Both the plaintff and the defendant could

point to documents that supported their respective positions and the court could not decide who was right on just the affidavit evidence.

3. In determining the overall justice of the case the court found it relevant that the dispute had been contributed to in large part by the failure of the plaintiff to follow up and have an agreement with Mr Samate signed. It also gave conflicting information to him, on a number of ocassions, as to how long he could operate the gas station. It would be unjust to evict Mr Samate, in a summary way, before his case was fully heard in court.
4. The court noted that counsel presented their arguments on the basis that Mr Samate was granted a right to occupy the gas station only and had no interest in the land. Counsel should consider whether the Land Court had jurisdiction.
5. The plaintiff's application for an interim order of eviction was dismissed. The court put in place a timetable which would see the case heard promptly.

Cases considered:

Klissers Farmhouse Bakeries Ltd v Harvest Bakery Ltd [1985] 2 NZLR 129
Kolo v Bank of Tonga (Court of Appeal, 7 August 1998)
Mangisi v Koloamatangi (Unreported Appeal No 11/98, 23 July, 1999)
Mortimer and Anor v Fe'aomoeata and Ors (LA 12 of 2012, 18 December 2014)
Ongolea v Finau [2003] Tonga LR 147
'Unuaki 'o Tonga Royal University of Technology and Anor. v Kingdom of Tonga (LA 16/2013, 8 November 2013)

Counsel for the plaintiff : Mr Pouono
Counsel for the defendant : Mr Tu'utafaiva

Ruling

1. This is an application by the plaintiff for an interim order evicting the defendant, Mr Samate, from a Gas Station known as Siumafuaola at a property on Li Teng Hui Road, Fua'amotu. I understand the Gas Station consists of a house, a building from which the Gas Station operates and equipment such as pumps.

2. The plaintiff is the lessee of the property under Registered Lease No 5756 for a term of twenty five years beginning on 14 November 1992 and expiring on 13 November 2017.

3. Mr Samate has operated the Gas Station since August 2012. There is no dispute that Mr Samate was allowed to operate the Gas Station by the plaintiff. The dispute is whether his right to operate the Gas Station is extant or has expired.

4. The plaintiff's case is that Mr Samate was allowed to operate the Gas Station pursuant to an agreement entered into around 2 June 2012 for a period of only one year. The plaintiff contends that when the agreement expired Mr Samate remained in occupation of the Gas Station at the will of the plaintiff. In April 2014 the plaintiff gave notice to Mr Samate that he was required to vacate by 31 December 2014. Mr Samate did not accept the notice to vacate the Gas Station for the reasons set out

below. The steps taken by the plaintiff to recover possession of the Gas Station following 31 December 2014 have been successfully resisted by Mr Samate.

5. The plaintiff regards Mr Samate as a trespasser and seeks an interim order in these terms:

> The defendant, his family, friends, employees and workers are hereby ordered to vacate the Gas Station known as Siumafuaola at Li Teng Hui Rd, Fua'amotu and Lease No. 5756 immediately.

6. For his part Mr Samate says that prior to June 2012 the Gas Station was not operating and that at a meeting of the Trustees of the Fua'amotu Congregation of the plaintiff, held on 3 June 2012, it was agreed to let him operate the Gas Station for six years.

7. According to Mr Samate, the plaintiff's Church Minister, Reverend Pahulu, later gave him a written agreement to sign but he would not sign it because it did not accurately record what was agreed. One of his reasons for not signing was that the written agreement gave him only one year to operate the Gas Station and not the six years that, he says, was agreed. Mr Samate attempted to contact Reverend Pahulu several times to arrange a meeting but no meeting was ever held.

8. Mr Samate began operating the Gas Station and negotiated with Total Ltd (Tonga) for the supply of petroleum products to the Gas Station. As part of the negotiation he had to provide written confirmation of the terms upon which he was operating the Gas Station. It appears that the Head Steward of the plaintiff, Siosaia Kaufonoga, prepared a document for Mr Samate to give to Total Ltd (Tonga) which, although unsigned, relevantly provides as follows:

> Six continuous years is given to Filisione Samate to operate the petrol station.
>
> and
>
> If it [sic] there is a decision by estate order [sic] regarding the land, this agreement must be relaxed.

9. It seems clear that the last sentence is meant to read 'If there is a decision by the Estate Holder regarding the land, this agreement must be relaxed'. This enigmatic sentence is relevant because it may answer one of the main arguments advanced for the plaintiff by Mr Pouono. He submitted that the plaintiff could not have agreed to allow Mr Samate six years to operate the Gas Station because that would extend beyond the term of the plaintiff's lease. The sentence I have referred to in the document given to Mr Samate by the Head Steward of the plaintiff may suggest that the parties had contemplated this possibility when making their agreement.

10. Mr Samate also says that in September 2013 there was a further agreement between him and the plaintiff to extend the term of the agreement from six to twenty five years. Mr Pouono acknowledged that there had been a discussion of a twenty five year term but, having initially agreed to it, the Trustees changed their minds a month

later. I understand from Mr Tu'utafaiva that notwithstanding this further agreement Mr Samate argues for a six year term and not for a twenty five year term.

The Law

11. The principles that the Court must consider when dealing with interim injunction applications are well known. The applicant must show that he has an arguable case and that the balance of convenience favours making the orders sought. In considering the balance of convenience regard is had to whether an award of damages after a trial is a sufficient remedy, the ability of the other party to pay such damages, and whether greater harm will be done by granting or refusing the injunction.

12. There is a further consideration also. Having decided whether there is an arguable case and where the balance of convenience lies the Court must stand back and ask where the overall justice of the case lies. *Klissers Farmhouse Bakeries Ltd v Harvest Bakery Ltd* [1985] 2 NZLR 129, 142 (CA). The relative strengths or weaknesses of the parties' cases may be an important factor at this stage.

13. It must be remembered also that an interlocutory decison of this kind is essentially discretionary. It will often be better to order a prompt hearing, to determine once and for all the rights of the parties, than granting interim relief with a trial to follow at a much later date.

Serious issue to be tried

14. In my view there is a serious issue to be tried. The plaintiff is the holder of a registered lease and asserts ownership of the Gas Station. Mr Samate does not dispute that. The plaintiff is entitled to possession of the Gas Station, as against Mr Samate, unless Mr Samate has been granted an existing right to occupy it by the plaintiff. He says he has been granted such a right for a six year term from June 2012.

15. Both the plaintff and the defendant can point to documents that support their respective positions and I am unable to decide who is right on just the affidavit evidence I have before me.

16. I note that in his oral submissions Mr Pouono argued that Mr Samate only ever had a licence, or tenancy agreement, to occupy the Gas Station at a monthly rental and that the planitiff could terminate Mr Samate's licence at any time. In my view that submission is not correct. If the plaintiff did agree, as Mr Samate asserts, to allow him six years to operate the Gas Station then Mr Samate may well be able to successfully resist the plaintiff's claim as a matter of contract and/or estoppel. (See for instance *Ongolea v Finau* [2003] Tonga LR 147, 152.)

Balance of convenience

17. I am of the clear view that the balance of convenience favours Mr Samate and that I should refuse to make the order sought.

18. The plaintiff does not argue that damages will not be an adquate remedy if the injunction is not granted. Mr Samate occupies the Gas Station and is paying rent at the rate of $700 per month. He says that is the amount the plaintiff agreed to accept.

19. Notwithstanding this, Mr Pouono submits that the balance of convenience favours the plaintiff. He says Mr Samate has refused to comply with an order of the Church and the Church would prefer it if the Gas Station was under its care. In my view this does not take the plaintiff very far. The plaintiff was previously prepared to allow Mr Samate to operate the Gas Station for payment of rent. It is still receiving rent. There is no suggestion that the Gas Station is now at risk or that the plaintiff is suffering any financial loss.

20. Mr Pouono also submits that Mr Samate has a home to go to and does not need to live at the Gas Station. He also says that Mr Samate could find other work. Mr Samate does have a home but Mr Pouono's submission does not recognise that the making of the order sought will impose significant hardship on Mr Samate. He will lose his livelihood and possibly, regardless of the outcome of this case, his business. I understand he has incurred debts in relation to the setting up of the business and has entered into commercial arrangements for the operation of the business.

Overall justice

21. I am, on the state of the affidavit evidence, in no position to express a firm view of the relative strengths of the parties' cases.

22. It is relevant in determining the overall justice of the case that, on the evidence before me, the dispute has been contributed to in large part by the failure of the plaintiff to follow up and have an agreement with Mr Samate signed. It also gave conflicting information to him, on a number of ocassions, as to how long he could operate the Gas Station. It would be unjust in my view to evict Mr Samate, in a summary way, in those circumstances before his case is fully heard in Court.

23. Also relevant to my consideration is that I have been able to put in place a timetable which will see this case heard promptly. As the Court noted in *Klissers Farmhouse Bakeries*, an early hearing is often preferable to the granting of an interim injunction.

Jurisdiction

24. I note that Counsel presented their arguments to me on the basis that Mr Samate was granted a right to occupy the Gas Station only and had no interest in the land. Before proceeding further with this case Counsel should consider whether the Land Court has jurisdiction. *'Unuaki 'o Tonga Royal University of Technology and Anor. v Kingdom of Tonga* (LA 16/2013, 8 November 2013), *Mangisi v Koloamatangi* (Unreported Appeal No 11/98, 23 July, 1999), *Kolo v Bank of Tonga* (Court of Appeal, 7 August 1998) and also *Mortimer and Anor v Fe'aomoeata and Ors* (LA 12 of 2012, 18 December 2014). The last mentioned case is on appeal and likely to be heard in the next session of the Court of Appeal [**editor's note**: the appeal is reported at [2015] Tonga LR 91 (CA)].

The result:

25. For the reasons I have given the plaintiff's application for an interim order of eviction is dismissed.

26. Costs should usually follow the event but I have not heard argument on costs in this case. Any party seeking costs may file submissions and an itemised bill of costs for my consideration within 14 days of the date of this judgment.

The future conduct of the case

27. As discussed with the Counsel at the hearing, the following timetable has been agreed:

a. The plaintiff has filed what is incorrectly stated to be a counterclaim but is in fact simply an additonal claim for rent, damages for trespass and costs. The defendant is to file a defence to this additional claim by 2 March 2015;
b. Both parties are to complete discovery and inspection of documents by 27 March 2015;
c. The plaintiff is to exchange full written briefs of evidence of all witnesses it intends to call at the hearing by 2 June 2015. By the same date the plaintiff is to file a full paginated bundle of the documents it intends to rely upon at the hearing;
d. The defendant is to exchange full written briefs of evidence of all witnesses it intends to call at the hearing by 16 June 2015. By the same date the defendant is to file a full paginated bundle of the documents it intends to rely upon at the hearing;
e. The case will be called for mention again on 26 June 2015 to monitor compliance with timetable;
f. The case will be heard on 3, 4 and 5 August 2015.

Schaumkel anor v 'Aholelei anor

Land Court, Nuku'alofa
Scott J
LA 18/2007

20 February 2015

Land law – order for vacant possession – question of compensation for buildings – no compensation payable

The first defendant was the registered holder of a town allotment. The first plaintiff was living in a house which he built on the allotment after his marriage to the first defendant's late aunt and in which they lived prior to her death. The first plaintiff said he had spent over $135,000 in the construction of the buildings and fences. The plaintiffs commenced proceedings in 2007 and sought cancellation of the first defendant's registration. On 17 August 2012 it was held that the first defendant was entitled to registration and an order for vacant possession of the allotment (upheld in the Court of Appeal). On 4 June 2014 the first defendant filed an ex-parte application for an order for possession. On 6 June 2014 the Court ordered possession to be granted 90 days after service of the order. The first plaintiff did not vacate. On 22 August 2014 the first plaintiff applied for determination (assessment) of "the amount of compensation to be paid by the first defendant to the plaintiffs for the buildings and fences on the land of the town allotment".

Held:

1. Where money was spent following representations as to future conduct, breach of those representations may lead to the invocation of equity. However the first plaintiff never had any realistic expectation of being able to inherit the allotment which he only entered with permission after his first marriage. While it was a waste that the improvements he made to the allotment may potentially be demolished, the right of the first defendant to inherit this land free of accretions was not affected.
2. If the first defendant wanted the buildings and fences removed then he must allow a reasonable time for the first plaintiff to remove them. In order for this to be done he would have to allow access to the land. If such access was refused then the first plaintiff would have no alternative but to abandon them. There was no right to compensation.
3. The order for possession granted on 6 June 2014 was not complied with. It was still enforceable under section 151(2)(a) of the Land Act. The first plaintiff's application for compensation was dismissed.

Case considered:
Cowley v Tourist Services Ha'apai Ltd and Fund Management Ltd [2001] Tonga LR 183 (CA)

Statutes considered:
Land Act (Cap 132)
Probate Act

Counsel for the plaintiffs	:	Mr L M Niu SC
Counsel for the first defendant	:	Mrs A Taumoepeau SC
Counsel for the second defendant	:	Mr 'A Kefu SC (Acting AG)

Decision

[1] The First Defendant is the registered holder of a town allotment Taki Ki 'Okalani situated at Vaha'akolo Road, Kolomotu'a.

[2] The First Plaintiff is living in a house which he built on the allotment after his marriage to the First Defendant's late aunt and in which they lived prior to her death.

[3] In 2007 the Plaintiffs commenced proceedings seeking cancellation of the First Defendant's registration (effected by the Second Defendant).

[4] On 17 August 2012 this Court gave judgment in favour of the First Defendant. It held that the First Defendant was entitled to an order for vacant possession of the allotment, the precise terms of the order were however not specified but were left open for further argument.

[5] In April 2013 the Court of Appeal dismissed the Plaintiff's appeal. It held that the First Defendant was entitled to registration and to an order for vacant possession. The matter was then remitted to this Court "to determine, if necessary the terms of the order for possession and so that any issues as to compensation can be resolved".

[6] On 4 June 2014 the First Defendant filed an ex-parte application for an order for possession. On 6 June 2014 the Court ordered possession to be granted 90 days after service of the order. It is not in dispute that the order was served, that the 90 days period has expired and that the First Plaintiff has not vacated.

[7] On 22 August 2014 an application was filed by the First Plaintiff seeking determination (assessment) of "the amount of compensation to be paid by the First Defendant to the Plaintiffs for the buildings and fences on the land of the town allotment".

[8] In a supporting affidavit the First Plaintiff deposed that he had spent over $135,000 in the construction of the buildings and fences and had always maintained them in good order. He revealed that several proposals for the payment of compensation had been put to the First Defendant but had been rejected. In paragraph 9 of his affidavit he averred:

> "It is now clear that the First Defendant just does not want to pay me and my son any compensation and wants me to remove my buildings and fence from the allotment and thereby destroy them. That would be quite a waste and is unwarranted".

[9] In paragraph 7 of his affidavit the First Plaintiff stated that: "if rented out as residence it would fetch no less than $2500 per month. If rented out for commercial use, it would fetch no less than $5000 per month".

[10] The proposals referred to by the First Plaintiff and their rationale were expounded in written submissions filed by Mr Niu in support of the application. According to Mr. Niu it is "clear that the First Defendant [does] not have the funds to pay the compensation for the premises to the Plaintiffs". Therefore, three options were offered as follows:

> "(a) that the first Defendant borrowed the sum of compensation by way of loan from the bank and that the loan would be repaid by the monthly rent received from a tenant who would occupy the premises and who would ensure that the premises are well repaired and maintained and insured;
> (b) that the Plaintiffs occupy the premises for a several number of years, say 5 years, during which they can rent it out and receive their compensation but that they must repair, maintain and insure; and
> (c) that the first Defendant rents out the premises and pays the compensation by monthly payment, for a total amount which was half what they proposed under (a) above and deduct these from the costs of the appeal (as ordered by the Court of Appeal)".

[11] At the hearing of the application Mr. Niu filed further written submissions. After commenting on certain provisions of the Land Act and the Probate Act he submitted, echoing remarks made by this Court obiter in the last sentence of the judgment of 17 August 2012, that :

> "as is presently the practice, the heir takes the title to the allotment and keeps the dwellinghouse for himself simply because he claims he is legally the lawful owner of the allotment and that the dwellinghouse should be left there because to remove it, especially if it is a brick house or one with a concrete floor, it would be worth very little to any person. He thereby exerts unfair advantage upon the rest of his siblings and that it inequitable. The law of equity must apply to prevent it".

[12] In paragraph 29 of the submission Mr. Niu stated that the value of the buildings and fences was not agreed. In those circumstances evidence would be required including evidence of the amount of rent that the house might command.

[13] In her own written submissions filed on 31 October 2014 Mrs Taumoepeau took as her starting point the Court of Appeal's finding that the second Defendant was entitled to an order for *vacant* possession. As can be seen from the prayer of his Statement of Defence the Second Plaintiff had sought not only the dismissal of the

claim but also "an order for the First Defendant and his family to remove all their belongings from and to vacate" the allotment immediately. The Land Court held that the Second Defendant was entitled to an order for *vacant* possession and that finding has upheld by the Court of Appeal.

[14] As to compensation, Mrs Taumoepeau's position was that while negotiations had taken place in good faith as "serious attempts to save the family relationship" those negotiations had broken down. The Second Defendant and his family accepted that the buildings and fences belonged to the First Plaintiff; they did however not want them but rather wanted them removed in order that the possession to which they were entitled would indeed be fully vacant.

[15] Mr. Kefu told the Court that the Second Defendant's position was that the buildings and fences were not part of the allotment inherited by the First Defendant. (*Cowley –v- Tourist Services Ha'apai Ltd and Fund Management Ltd* [2001] Tonga LR 183), but appeared to belong to the First Plaintiff. In Mr Kefu's submission the Second Defendant, who had been awarded vacant possession of the allotment could not be forced to pay compensation to the First Plaintiff if for no other reason than that the consequence of forcing him to compensate might be to deprive him of his ability to enjoy the fruits of the award made in his favour. In my opinion the force of this submission is clearly illustrated by the three settlement proposals offered by the First Plaintiff and which have been set out on paragraph 10 above.

[16] Although Mr. Niu, while asking the Court to assess the quantum of compensation, did not request any specific sum, it is clear from the terms of the offers and the First Plaintiff's evidence that a substantial award was being sought, not less than $135,000 and that the Second Defendant was in no position to come up with such a sum except at the cost of forfeiting the actual possession of the allotment and the buildings upon it either to the First Plaintiff or another tenant for a period estimated at up to five years. This, I am satisfied, is quite incompatible with the orders for vacant possession made by the Courts.

[17] As has been seen, Mr Niu suggested that the "present practice" of applying the inheritance provisions of the Land Act may have unfair results. I have some sympathy with this proposition and several other examples come to mind. Some provisions of the Act, the rights of women and illegitimate children to identify but two are viewed by some as being in need of revision. It is not however for the Court to ignore the clearly expressed intent of Parliament.

[18] Where money is spent following representations as to future conduct, breach of those representations may lead to the invocation of equity and there are several well-known examples in Tonga where the Land Court has granted relief. In the present case however the First Plaintiff, as has been found by the Courts never had any realistic expectation of being able to inherit the allotment which he only entered with permission after his first marriage. It seems a pity, and a waste, that the improvements he made to the allotment are now, if the Second Defendant is taken at his word, to be demolished but this unfortunate outcome, understandable given the long and increasingly bitter litigation, cannot, as I find, affect the right of the First Defendant to inherit this land free of accretions.

[19] If indeed, the First Defendant wants to see the buildings and fences removed then he must allow a reasonable time, no longer than absolutely necessary, for the first Plaintiff to remove them. In order for this to be done he will have to allow access to the land. If such access is refused then the First Plaintiff will have no alternative but to abandon them. Whichever is of these courses is adopted there is, in my view, no right to compensation.

[20] The order for possession granted on 6 June 2014 has not been complied with. It is however still enforceable under section 151 (2)(a) of the Act.

[21] The First and Second Defendants' applications for costs included in their Statement of Defence have not yet been disposed of, and neither have the costs of the appeal been quantified. The Defendants are entitled to the costs of this application by the First Plaintiff which is dismissed. Such costs to be taxed if not agreed. There is also an outstanding order for payment by the First Defendant of $250 costs thrown away, made on 30 September 2014. I agree with Mrs Taumoepeau that the closure of this litigation is much to be desired. I therefore urge Counsel to arrange for the disposal of the remaining outstanding matters as soon as possible.

Result:

(1) First Plaintiff's application for compensation dismissed.
(2) Defendants' costs to be taxed if not agreed.

Prasad anor v Leonard anors

Supreme Court, Nuku'alofa
Scott J
CV 75/2012

27 February 2015

Civil procedure – application to strike out claim – trading in breach of Foreign Investment Act 2002 – losses caused by an activity shown to be illegal were not recoverable – claim struck out

For the facts, see the Court of Appeal decision reported in this volume at page 31.

The defendants claimed that the second plaintiff was trading illegally in Tonga, that its claims against the defendants could not be advanced without reliance on this illegal trading and that it was contrary to public policy to allow a claim so based to proceed. The defendants made an interlocutory application to strike out the second plaintiff's claim.

Held:

1. The clear intention of the Foreign Investment Act 2002 (the Act) was to differentiate between a Tongan and a non-Tongan investor. The court did not accept that it was possible to be both at the same time.
2. On the uncontradicted evidence before the court it was found that the second plaintiff had been trading under a business licence which would not have been issued to it had it not concealed the fact that it was actually a "foreign investor". Whether or not a criminal offence was committed was not the question that had to be answered in the interlocutory application. The scheme of the Act, which principally was to reserve the business activities in which the second plaintiff was engaged for Tongan subjects or Tongan controlled companies, was evaded. The second plaintiff wished to claim damages for diminution of profits derived from trading in breach of the provisions of the Act. Such an action was an abuse of the process of the Court and the Supreme Court Rules 2007 applied.
3. The claim of the second plaintiff was struck out.

Cases considered:

Euro – Diam Ltd v Bathurst [1990] QB 1
Les Laboratories Servier and Anr v Apotex Inc and Anr [2014] UKSC 55
Mackintosh v Truth (NZ) Ltd [1962] NZLR 137 (CA)

Statute considered:
Foreign Investment Act 2002

Rules considered:
Supreme Court Rules 2007

Counsel for the second plaintiff/respondent : B Goldsmith with Ms P Tupou
Counsel for the defendants/applicants : P Rzepecky with R Stephenson

Decision

[1] The first Plaintiff is the Managing Director of the second Plaintiff (the Company) which trades in Tonga as a grocery wholesaler and retailer. The Company was incorporated in Tonga in 2002 and it was re-registered in May 2010.

[2] The first Defendant was at all material times the General Manager of the second Defendant's business in Tonga which is a shipping company. He was also General Manager of the third Defendant which traded as Forum Shipping Agencies.

[3] A significant component of the Company's business is the import of frozen chickens from the United States. Some of the frozen meat was imported into Tonga in refrigerated containers carried on vessels operated by the second Defendant.

[4] In 2012 a dispute arose between the parties over demurrage charges and this led to several emails being sent by the first Defendant which the Plaintiffs say, in an amended Statement of Claim, were defamatory and resulted in loss and damage to them. A Defence has been filed in which defamation is denied and among other defences, the truth of the emails is asserted.

[5] This is an interlocutory application brought under the provisions of RSC O.8 r 8 (1) (b), (c) and (d) or alternatively in the inherent jurisdiction of the Court to strike out the second Plaintiff's claim. The Defendants say that the second Plaintiff has been trading illegally in Tonga, that its claims against the Defendants cannot be advanced without reliance on this illegal trading and that it is contrary to public policy to allow a claim so based to proceed.

[6] Both sides filed comprehensive and clear written submissions together with substantial other materials for which I am grateful.

[7] The Defendants' argument on the issue of illegality is set out in paragraphs 5 and 6 of the written submissions dated 26 November 2014. But simply it is said that:

(a) By virtue of section 2 of the Foreign Investment Act 2002 (the Act) a company incorporated in Tonga which is controlled by one or more non-Tongans is a "Foreign investor".
(b) According to undisputed evidence provided principally by the first and second Plaintiffs themselves the second Plaintiff is in

fact controlled by one or more non-Tongans and is accordingly a "Foreign investor".

(c) "Foreign investors" are not allowed to engage in business activities reserved for Tongan investors (Foreign Investment Regulations 2006). By failing to disclose that the second Plaintiff was actually a "Foreign investor" the Plaintiffs procured the issuance of business licenses to the second Plaintiff authorizing it to engage in business activity reserved for Tongan investors (affidavit of Distaquaine Tu'ihalamaka).

(d) By trading under business licenses to which the second Plaintiff was not entitled offences have been committed contrary to section 19 of the Business Licenses Act 2007.

[8] The principal authorities relied on by the Defendants are *Les Laboratories Servier and Anr. v. Apotex Inc. and Anr.* [2014] UKSC 55 and *Mackintosh v. Truth (New Zealand) Limited* [1962] NZLR 137. It is submitted that application of these authorities to the facts before the Court should be as set out on paragraph 8.1 of the written submissions dated 26 November.

[9] Mr Goldsmith's written submissions are also dated 26 November. These submissions led to additional submissions being filed by Mr Rzepecky on the 27th .

[10] In paragraph 9 of his submissions Mr Goldsmith submitted that there was no basis in the inherent jurisdiction of the Court to entertain an application of this kind: either RSC O.8 r8 could avail the Defendants or they could not succeed.

[11] In paragraph 12 it is conceded that the relevant facts are not in dispute and, importantly, it is conceded that the second Plaintiff is a "Foreign investor". (paragraph 15).

[12] Notwithstanding this concession Mr Goldsmith submitted that the second Defendant is a Tongan investor since section 2 of the Act defines a "Tongan investor" to mean:

> "a Tongan subject or body corporate incorporated in Tonga".

It is argued that the second Plaintiff is, as a matter of fact, incorporated in Tonga and therefore it is a Tongan investor.

[13] I do not accept this argument. In my view the clear intention of the Act is to differentiate between a Tongan and a non-Tongan investor. I do not accept that it is possible to be both at the same time. The definition of "Tongan investor" in the interpretation section 2 of the Act means no more than that a Tongan investor may be either

(a) a Tongan subject (ie a Tongan individual) or

(b) a company incorporated in Tonga a member of which who is not a Tongan subject does not control more than 25% of the company's voting shares.

[14] In paragraphs 23, 25 and 28 of his submissions Mr Goldsmith advanced several alternative arguments. First he suggested:

> "… the second named plaintiff does not found any part of its claim upon the alleged contravention of section 3 nor of course does it seek to benefit from the alleged criminal conduct. It merely seeks, compensation for the loss and damage suffered by it (as a direct and exclusive consequence of the defendants' tortious conduct)".

[15] With respect, I do not agree that *Euro – Diam Ltd v Bathurst* [1990] QB 1 is authority for the proposition that the claim must be *founded* on illegality, in this case a breach of section 3. In my view the correct position, as explained in *Mackintosh v Truth* (above) is that losses caused to an activity shown to be illegal are not recoverable.

[16] In paragraph 25 Mr Goldsmith submitted that the second Plaintiff:

> "has not in terms of its claims in the proceedings done anything wrong".

Essentially, the same argument is advanced in paragraph 28 and, in my view, must fail for the same reasons.

[17] In the same paragraph, 28, Mr Goldsmith suggested that the business licences had been issued to the Second Plaintiff "when it was apparent that the second-named Plaintiff was controlled by persons who were not Tongan subjects". This submission, as I find, is wholly inconsistent with the evidence of the Registrar of Companies, Distaquaine Tu'ihalamaka contained in her unanswered affidavit of 6 October 2014 and with the oral evidence given by her at the hearing.

[18] At this interlocutory stage it is the duty of the Court to evaluate the evidence placed before it on the application but it is not in a position to conduct a trial of the matters complained of. On the uncontradicted evidence before me I find it plain that the second Plaintiff has been trading under a business licence which would not have been issued to it had it not concealed the fact that it was actually a "Foreign investor". Whether or not a criminal offence has committed is not, in my view, the question that has to be answered in this application in this Court. I am however satisfied, on the evidence before me that the scheme of the Act, which principally is to reserve the business activities in which the Second Plaintiff was engaged for Tongan subjects or Tongan controlled companies, was evaded. The second Plaintiff wishes to claim damages for diminution of profits derived from trading in breach of the provisions of the Act. In my view such an action is an abuse of the process of the Court and RSC O.8 r8(1) (d) applies. There is no need to invoke the inherent jurisdiction of the Court.

Result:

The Application succeeds. The claim of the second Plaintiff will be struck out. The Defendants are to have the costs of the application, to be taxed if not agreed.

Prasad anor v Leonard anors

Court of Appeal, Nuku'alofa
Moore, Blanchard and Hansen JJ
AC 7/2015

9 September 2015; 16 September 2015

Civil procedure – appeal against decision to strike out claim – factual findings based on uncontested or incontrovertible evidence – appeal dismissed

For the decision of the Supreme Court, see page 27 of this volume.

The first appellant (Mr Prasad) was the managing director of the second appellant (Moapa). They alleged the first respondent (Mr Leonard) made false and defamatory statements about them in a series of published emails. They sued him and his employers, the second and third respondents (respectively PFL and Eckington) for defamation, injurious falsehood and making misleading and deceptive statements. The Supreme Court struck out the claim by Moapa. The strike out application was founded on an allegation that under the Foreign Investment Act 2002 (the Act) Moapa was a "foreign investor". A "foreign investor" was not permitted to engage in certain business activities including the retailing and wholesaling of groceries. Moapa engaged in those activities under business licenses that were procured by failing to disclose that it was a foreign investor. The respondents submitted that Moapa could not recover damages based on loss of profits derived from illegal trading. The Judge accepted the respondents' submission that Moapa had been illegally trading in Tonga and, as a result, could not recover damages. He held its claim could not succeed and was an abuse of process. Moapa appealed against the decision. Moapa identified fourteen grounds of appeal which were considered under the following headings:

a. The judge's power to make strike out orders.
b. The finding that Moapa was trading illegally.
c. Whether the illegality operated to bar the claim.

Held:

1. There was neither substance nor merit in the submission that the order was beyond the power of the court. "Pleading" included a statement of claim. Order 8, Rule 8 of the Supreme Court Rules empowered the court to strike out any part of it. The judge struck out that part of the pleading which comprised the claim by Moapa. The rule clearly empowered him to do that.
2. The question of whether Moapa was a foreign investor and not a Tongan investor was critical to the issue of illegality. There was no uncertainty or

ambiguity in the Act. Its scheme and purpose was plainly to reserve certain business activities exclusively for Tongan investors. The broad terminology used in the definition of Tongan investor must be qualified by the words of limitation in the definition of "foreign investor" to exclude a body corporate controlled by non-Tongan subjects.

3. There was a limited category of acts which were described as "quasi–criminal", one of which was the infringement of statutory rules enacted for the protection of the public interest and attracting civil sanctions of a penal character. The rules enacted by the Act were precisely of that category, and as Moapa was a foreign investor and not a Tongan investor, it was in persistent breach of the rules in two respects. It engaged in a reserved activity contrary to section 3 of the Act and it failed to obtain a foreign investment registration certificate in breach of section 5.
4. There was no reason why, in a proper case, the issue whether a claim should be barred for illegality could not be determined in advance of trial as long as any necessary factual findings could be made on the basis of uncontested or incontrovertible evidence.
5. Moapa's wrongdoing went to the root of its business. It would not have had the business if it had not, since 2007, persistently disregarded (to use a neutral term) the law governing the business activities of foreign investors. It would have made no profits. It would have had no business reputation to injure. Its ability to bring the claim was founded entirely on its illegal activities. It fell squarely into that category of cases where any recoverable losses were totally dependent on the illegal activity. That was as much the case with a loss of goodwill as it was with a loss of income where any goodwill has been built up solely by the illegal trading activities.
6. The appeal was dismissed.

Cases considered:

Holman v Johnson (1775) 1 Cowp 341
Les Laboratoires Servier v Apotex Inc [2015] AC 430
Mackintosh v Truth (NZ) Ltd [1962] NZLR 137 (CA)
Stone and Rolls Limited (in liquidation) v Moore Stephens (a firm) [2009] 1 AC 1391 (HL)
Tinsley v Milligan [1994] 1 AC 340

Statutes considered:

Business Licenses Act 2002
Companies Act (Amendment Act) 2009
Foreign Investment Act 2002

Rules considered:

Supreme Court Rules 2007

	Counsel for the appellants	:	Mr B Goldsmith and Mrs P Tupou
80	Counsel for the respondent	:	Mr R Rzepecky and Mr R Stephenson

Judgment

Introduction

[1] The first appellant (Mr. Prasad) is the managing director of the second appellant (Moapa). They allege the first respondent (Mr. Leonard) made false and defamatory statements about them in a series of published emails. They sue him and his employers, the second and third respondents (respectively PFL and Eckington) for defamation, injurious falsehood and making misleading and deceptive statements.

[2] Scott J. struck out the claim by Moapa. He accepted the respondents' submission
90 that Moapa had been illegally trading in Tonga and, as a result, could not recover damages. He held its claim could not succeed and was an abuse of process. Moapa appeals against the decision.

[3] Moapa made a late application for leave to file an amended notice of appeal. The application is not opposed and leave is granted accordingly.

Background

[4] Moapa was controlled by Mr. Prasad and his wife. It traded in Tonga as a grocery wholesaler and retailer. A significant part of Moapa's business involved the importation and distribution of frozen chicken from the USA. The chicken was shipped in refrigerated containers which were trucked to Moapa's store and used to
100 store the chicken. If the containers were held beyond a fixed period, Moapa was required to pay the shipping company a penalty (demurrage).

[5] PFL was one of the shipping companies which provided the service to Moapa. It also acted as agent for other shipping companies. Mr Leonard was the general manager of PFL's business in Tonga and also of Eckington, another shipping company.

[6] In 2012 a dispute arose over demurrage payable by Moapa. Mr. Leonard wrote a series of emails regarding sums allegedly owing by Moapa and recovery action contemplated or taken. It is the contents of these emails that are alleged to be defamatory of Mr. Prasad and Moapa.

110 Strike out application

[7] The strike out application was founded on an allegation that under the Foreign Investment Act 2002 (the Act) Moapa is a "foreign investor". Under the Act and regulations made under the Act a "foreign investor" is not permitted to engage in certain business activities including the retailing and wholesaling of groceries. Moapa engaged in those activities under business licenses that were procured by failing to disclose that it was a foreign investor. In the circumstances the respondents submitted

that Moapa could not recover damages based on loss of profits derived from illegal trading.

[8] The Judge agreed that Moapa had been trading illegally. He rejected a submission that it was a Tongan investor, as defined in the Act, which would have enabled it to lawfully trade as a wholesaler and retailer of groceries. Relying on *Mackintosh v Truth* [1962] NZLR 137 (CA) he found that Moapa could not recover for damage caused to its business.

[9] The Judge rejected a submission that business licenses had been issued to Moapa when it should have been apparent to the issuing authority that it was controlled by persons who were not Tongan subjects. He found on "the uncontradicted evidence" before him that Moapa had concealed information that would have revealed it was a foreign investor.

[10] The Judge concluded that Moapa could not succeed in its claim and struck it out as an abuse of process under Order 8 Rule 8 of the Supreme Court Rules 2007 (the Rules).

Grounds of appeal

[11] In its amended notice of appeal Moapa identified fourteen grounds of appeal. They can conveniently be considered under the following headings:

a. The judge's power to make strike out orders.
b. The finding that Moapa was trading illegally.
c. Whether the illegality operated to bar the claim.

The Court exceeded its powers

[12] The precise terms of the order made in the court below was: "The claim of the second plaintiff will be struck out". Mr. Goldsmith argued that this is equivalent to an order that the causes of action brought by Moapa should be struck out. He says this is beyond the power of the court as the only power conferred on the court by Order 8 Rule 8 is to strike out a pleading.

[13] Order 8 Rule 8 reads as follows:

> "The Court may at any time order that any pleading or part thereof be struck out if:
>
> a) It discloses no reasonable cause of action or defence, as the case may be: or
> b) It is scandalous, frivolous or vexatious; or
> c) It is unclear or may otherwise prejudice or delay the fair trial of the action; or
> d) Is otherwise an abuse of the process of the Court.
>
> And may order the action to be stayed or dismissed, or judgment to be entered accordingly."

[14] In our view there is neither substance nor merit in the submission. "Pleading" includes a statement of claim. The rule empowers the court to strike out any part of it. The judge struck out that part of the pleading which comprised the claim by Moapa. The rule clearly empowered him to do that.

The finding of illegality

[15] It is not in dispute that from 2007 when the Act came into force until at least 2010 more than 25% of the shares in Moapa (in fact 76%) were controlled by Mr and Mrs Prasad who were not Tongan subjects. Moapa clearly came within the definition of "foreign investor". However, it was submitted that, as it was a body corporate incorporated in Tonga, Moapa was also a Tongan investor for the purpose of the Act.

[16] The question of whether Moapa is a foreign investor and not a Tongan investor is critical to the issue of illegality. By s.3 of the Act foreign investors are not entitled to carry on any business which is a reserved or prohibited activity. The reserved activities established under regulations made under the Act include the activities in which Moapa was engaged, wholesaling and retailing which consists of the distribution of grocery product for final consumption.

[17] A foreign investor carrying on business is required to hold a valid foreign investment registration certificate – s5 of the Act. Unless a foreign investor holds such a certificate it cannot obtain a business license under the Business Licenses Act 2002 – ss 5 and 7 of that Act. It is an offence to carry on business without a valid business licence. It is also an offence to contravene any provisions of the Act. By s15 any person who commits an offence is liable to a fine up to $10,000, in default 18 months imprisonment.

[18] The terms 'foreign investor' and 'Tongan investor' are defined as follows in the Act:

> "**foreign investor**" means –
>
> (a) ...
> (b) ...
> (c) In the case of a company-
> (i) A company incorporated outside Tonga; or
> (ii) A company incorporated in Tonga where a person who is not a Tongan subject controls more than 25% of the company's voting shares
>
> "**Tongan investor**" means a Tongan subject or body corporate incorporated in Tonga.

[19] In rejecting the submission that Moapa was a Tongan investor, Scott J said (at [13]) that in his view the clear intention of the Act is to differentiate between a Tongan and non-Tongan investor. "I do not accept it is possible to be both at the same time."

[20] Mr Goldsmith submitted that the interpretation of the Act was 'at the very least' an arguable issue and should not have been determined at the strike out stage. He argued that the Judge was not entitled to 'resort to the apparent intention of the Act'. That, he said, demonstrated the ambiguity and uncertainty of the Act.

[21] We do not agree. The question of whether Moapa is a foreign investor and not a Tongan investor is critical to the issue of illegality. Like the judge, we detect no such uncertainty or ambiguity in the Act. Its scheme and purpose is plainly to reserve certain business activities exclusively for Tongan investors. It would run completely counter to this intention if any company incorporated in Tonga could qualify as a Tongan investor. The distinction between the two categories of investors is critical to the operation of the Act. The broad terminology used in the definition of Tongan investor must be qualified by the words of limitation in the definition of "foreign investor" to exclude a body corporate controlled by non-Tongan subjects.

Whether the illegality barred the claim

[22] Scott J rejected the submission that Moapa did not found its claim on the (alleged) illegal activities or that it did not seek to benefit from its wrongful conduct. For Moapa it was submitted that in reaching this conclusion the judge erred in the legal principles he applied and in his factual findings.

[23] What is often referred to as the ex turpi causa defence is based on public policy and was stated as follows in the oft-quoted dictum of Lord Mansfield CJ in *Holman v Johnson* (1775) 1 Cowp 341 at p 343:

> "No Court will lend its aid to a man who founds his cause of action upon an immoral or illegal act. If, from the plaintiff's own stating or otherwise, the cause of action appears to arise ex turpi causa, or the transgression of a positive law of this country, there the Court says he has no right to be assisted. It is upon this ground the Court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff."

[24] The way in which the defence is to be applied has been widely debated and the question of what acts constitute turpitude for the purpose of the defence and the relationship the turpitude must have to a claim has been the subject of conflicting lines of authority. For the purposes of Tongan law the inconsistencies have been authoritatively resolved by the recent decision of the Supreme Court of the United Kingdom in *Les Laboratoires Servier v Apotex Inc* [2015] AC 430.

[25] Lord Sumption's judgment provides clear direction on two pivotal issues in this case. The first concerns the acts that constitute the illegality. The paradigm case, as Lord Sumption said (at 446), is a criminal act. But there is, in addition, a limited category of acts which he described as "quasi–criminal", one of which is the infringement of statutory rules enacted for the protection of the public interest and attracting civil sanctions of a penal character. The rules enacted by the Act are precisely of that category, and if, as we have decided, Moapa is a foreign investor but not a Tongan investor, it has been in persistent breach of the rules in two respects. It

engaged in a reserved activity contrary to s.3 of the Act and it failed to obtain a foreign investment registration certificate in breach of s.5.

[26] The second issue concerns the relationship of the illegality to the claim. In *Laboratoires* the Supreme Court confirmed the earlier decision of the House of Lords in *Tinsley v Milligan* [1994] 1 AC 340 which rejected a test that would require the court to decide whether it would be "an affront to the public conscience" to grant the plaintiff relief. The value judgment required by such a test was recognized as likely to give rise to uncertainty and, potentially, to injustice.

[27] While unanimous in dismissing the public conscience test, the House in *Tinsley v Milligan* had been divided on what should take its place. The majority preferred the "reliance test" whereby the claim would be barred only if the claimant needed to rely on (i.e. to assert, whether by way of pleading or evidence) facts which disclosed the illegality. The minority preferred a test that would bar any claim tainted by a sufficiently close factual connection with the illegal purpose. For present purposes it does not matter which test is adopted. As Lord Sumption commented in *Laboratoires* at 442

> "Both are intended to exclude those consequences of an illegal act which are merely collateral to the claim. Neither makes the application of the illegality defence dependent on a value judgment about the significance of the illegality or the consequences for the parties of barring the claim. For present purposes, it is enough to point out that neither test is discretionary in nature. Neither of them is based on achieving proportionality between the claimant's misconduct and his loss, a concept derived from public law which is not easily transposed into the law of obligations."

[28] At the forefront of Mr. Goldsmith's arguments was a submission that a final decision on whether a claim should be barred for illegality should not be made until trial. He contended that facts could emerge at trial that could materially affect the question of illegality and its relationship to the claim. He said that his researches had not uncovered any case where the defence of ex turpi causa had been determined in advance of trial. There may be other explanations for that including a preference in earlier times for a test that involved a significant subjective component. But there is no reason why, in a proper case, the issue cannot be determined in advance of trial as long as any necessary factual findings can be made on the basis of uncontested or incontrovertible evidence. *Stone and Rolls Limited (in liquidation) v Moore Stephens (a firm)* [2009] 1 AC 1391 (HL) to which we refer later (at [33]) is such a case.

[29] Moapa accepts that it was controlled by Mr and Mrs Prasad and that they were not Tongan subjects. It accepts that it carried on a business that was not on the reserved list and that it did not obtain a foreign investment registration certificate. Mr. Goldsmith sought to persuade us (as he had Scott J) that Moapa's claim was nonetheless not founded on an illegality because it had obtained the requisite licences under the Business Licenses Act 2002. But those licences were themselves obtained illegally. As a foreign investor Moapa was not entitled to obtain a licence unless it held a valid foreign investment registration certificate which, by s.8(2) of the Act, would not in any event have been issued in respect of a reserved activity. From 2

April 2007 when the Act came into force, Moapa was able to operate its business only by ignoring or circumventing legislation directed to regulating the involvement of non-Tongans in Tongan commerce.

[30] Mr. Goldsmith further contended that it was relevant to consider whether the unlawful actions of Moapa were deliberate or innocent. The motives of Mr. Prasad, who admits to being the "guiding mind" of Moapa, cannot affect the illegality of its actions. Regardless, there was ample evidence to support the judge's finding that Moapa "concealed" that it was a foreign investor and "evaded" the reserved activity regulations.

[31] Mr. Prasad swore an affidavit for the purpose of an application for security for costs in which he deposed that on 20 May 2012 he and his wife transferred 76% of the shares in Moapa to two Tongan subjects pursuant to a memorandum of understanding and management agreement. That was the last date by which Tongan companies could apply to re-register under the Companies Act (Amendment Act) 2009. The memorandum has all the hallmarks of a sham, its essential character confirmed by Mr. Prasad's admission that he retained control of the company and the production of accounts which showed Mrs. Prasad held shares with 100% of the voting rights. The evidence, which included an affidavit from the Registrar of Companies and Business Licensing for the Ministry of Commerce Business and Labour (the Registrar), who was cross-examined, was consistent with the respondents' hypothesis that the share transfer took place in order to conceal from the Registrar (who was also responsible for issuing business licenses) that Moapa was a foreign investor.

[32] It is unnecessary for us to reach any concluded view on these aspects of the appeal. It is sufficient to say that we find the judge's findings to be fully supported by evidence which Mr. Prasad chose not to answer. The uncontested facts are sufficient to found the finding of illegality.

[33] The final argument advanced by Mr. Goldsmith on the imputation of illegality to Moapa was that it should not be fixed with the (allegedly) fraudulent acts of Mr. Prasad. While the general rule is that it would be unjust to fix a company with the fraudulent intention of its directors, that does not apply when the director is the beneficial owner and directing mind and will of the company – *Stone and Rolls Limited (in liquidation) v Moore Stephens* (*a firm*) (above at [28]).

[34] It remains to consider whether, as required by the tests in *Tinsley v Milligan*, there was the requisite reliance on the illegality or a sufficiently close connection between the claim and the illegal activity.

[35] The legal basis for the connection is not in issue. A company can sue for defamation in respect of statements which affect its business or trading reputation. Statements which suggest wrongdoing, dishonesty or insolvency are actionable. However, companies can only be injured in their pocket and can recover damage only in respect of actual or probable financial loss arising from loss of income or damage to goodwill.

[36] Moapa submits that the issue of whether there is a sufficient relationship between the illegality and the claim is also a matter for trial. We disagree. In our view

the judge was able to determine this issue, and with it the strike out application, on the uncontested evidence available to him.

[37] Moapa's wrongdoing went to the root of its business. Indeed, it would not have had the business if it had not, since 2007, persistently disregarded (to use a neutral term) the law governing the business activities of foreign investors. It would have made no profits. It would have had no business reputation to injure. Its ability to bring the claim is founded entirely on its illegal activities. It falls squarely into that category
330 of cases – of which *Mackintosh v Truth* is an example - where any recoverable losses are totally dependent on the illegal activity. That is as much the case with a loss of goodwill as it is with a loss of income where any goodwill has been built up, as here, solely by the illegal trading activities.

Result

[38] For these reasons the appeal is dismissed. The respondents are entitled to costs to be taxed if necessary by the Registrar.

Public Service Association Inc anor v Tu'ivakano anor

Supreme Court, Nuku'alofa
Scott J
CV 49/2014

6 March 2015

Civil procedure – applications for transfer – should be made in the court where proceedings were – application dismissed

In May 2014 two actions were commenced in the Magistrate's Court against the Public Service Association and its Secretary General Mele 'Amanaki (MC CV87 and 95/2014) by Lord Tu'ivakano and William Clive Edwards claiming damages (limited to $10,000) for defamation arising out of the publication of various statements in which the plaintiffs say the defendants untruthfully claimed that the payment out of the grant aid funds was unlawful and, inter alia, that the plaintiffs were dishonestly responsible. The defendants/applicants sought orders transferring the actions to the Supreme Court, alternatively to have them stayed until final judgment in CV 48/14. They said that the actions for defamation in the Magistrate's Court would inevitably involve consideration of whether the payments out were indeed unlawful and, if so, whether the plaintiffs/respondents were to be held to account. It was said that consideration of this vexed and as yet unresolved issue would involve difficult question of law and fact which could not suitably be disposed of in the Magistrate's Court. The application was opposed.

Held:

1. Where numerous proceedings were commenced that arose out of substantially the same facts there was a danger of inconsistency and the Court must intervene to ensure that confusion was avoided. The court had no doubt that the unlawfulness or otherwise of the payments to Tongasat, if not already determined elsewhere, would inevitably fall for consideration. The Magistrate's Court was not suitable for an enquiry into that alleged unlawfulness.
2. However, the applications for transfer or stay were procedurally defective. First, the application should have been commenced by writ rather than by "application notice". Second, the application for transfer should be made to the Court which was already seized of the proceedings in respect of which the application was made – the Magistrate's Court. Third, none of the provisions referred to by the applicants authorised a stay or a transfer.
3. The application was dismissed.

Cases considered:

Thames Launches Ltd v Trinity House [1961] 1 All ER 26

Royal Bank of Scotland v Citrusdal Investments [1971] 3 All ER 558

Rules considered:

Supreme Court Rules 2007

Counsel for the applicants	:	RE Harrison QC SC
Counsel for the respondent	:	SJ Stanton SC with WC Edwards

Decision

[1] On 19 April 2011 the Government of the People's Republic of China agreed to provide the Government of Tonga with "a grant aid of USD$25,450,000.00" and the money was received by the Tongan Government in about the following month.

[2] In about June 2011 all or almost all of the money is alleged to have been paid to or for the benefit of Friendly Islands Satellite Communications Limited (Tongasat) and/or H.R.H. Princess Salote Pilolevu Tuita.

[3] The First Respondent was the Prime Minister of Tonga when the payments out were made and the Second Respondent was the Minister of Justice.

[4] The Leader of the Opposition in the Legislative Assembly was Mr Samuela 'Akilisi Pohiva, now the Prime Minister. The opposition took the view that the grant aid was "public money" as defined in the Public Finance Management Act and that its application to Tongasat and Princess Pilolevu was unlawful.

[5] In February 2013 Mr Pohiva commenced private criminal prosecutions against the First and Second Respondents and against Tongasat and Princess Pilolevu. The four accused were variously charged with conspiracy, theft, conversion or receiving the grant aid.

[6] Owing to the seriousness of the charges, the Magistrate's Court held a preliminary enquiry. On 26 April 2013 the Magistrate held that there was no case for the accused to answer and they were discharged.

[7] On 17 January 2014 this Court dismissed Mr Pohiva's appeal (AM 20/2013). There is an application for the costs of the appeal awaiting judgment.

[8] When he found no case to answer the Magistrate awarded substantial costs against Mr Pohiva. Mr Pohiva sought leave to move for judicial review of the Order against him (CV 75 of 2014), however that application was withdrawn on 7 November 2014 and in its place an appeal against the Magistrate's order was filed on 10 February 2015 (AM 4/2015). That appeal is awaiting judgment.

[9] On 8 July 2014 the first Applicant herein and Mr Pohiva commenced proceedings (CV 48/14) in the civil Jurisdiction of the Supreme Court against (i) The Kingdom of Tonga (ii) The Attorney General and (iii) Tongasat seeking:

(a) a declaration that the grant aid money was unlawfully paid out; and
(b) an order that Tongasat repay the money received, or alternatively damages in lieu.

[10] There are three applications filed by the Defendants:

(a) Seeking security for costs to be provided by the Plaintiffs;
(b) To have the claim struck out; and
(c) Opposing the Plaintiffs' (belated) alternative application to move for judicial review.

Those applications are also awaiting judgment.

[11] On 17 July 2014 four separate fresh actions were commenced in the Supreme Court (CV 55-58) by Lord Tu'ivakano, William Clive Edwards, Tongasat and Princess Pilolevu against Mr Pohiva claiming that his private prosecution against them was motivated by malice and seeking damages. In November 2014 it was agreed by counsel that further consideration of those actions would await the outcome of the present application.

[12] This application follows the initiation in May 2014 of two actions in the Magistrate's Court against the Public Service Association and it's Secretary General Mele 'Amanaki (MC CV87 & 95/2014) by Lord Tu'ivakano and William Clive Edwards claiming damages (limited to $10,000) for defamation arising out of the publication of various statements in which the Plaintiffs say the Defendants untruthfully claimed that the payment out of the grant aid funds was unlawful and, inter alia, that the Plaintiffs were dishonestly responsible.

[13] The Applicants say that the actions for defamation in the Magistrate's Court will inevitably involve consideration of whether the payments out were indeed unlawful and, if so, whether Lord Tu'ivakano and Mr Edwards are to be held to account. It is said that consideration of this vexed and as yet unresolved issue will involve difficult question of law and fact which cannot suitably be disposed of in the Magistrate's Court. They seek orders transferring the actions to the Supreme Court, alternatively to have them stayed until final judgment in CV 48/14. Dr Harrison's arguments and authorities are set out in full in his written submissions filed on 25 November 2014.

[14] The application was opposed. Mr Stanton and Mr Edwards set out their grounds of opposition in full in a written submission also filed on 24 November. Mr Stanton rejected the suggestion that consideration of the claimed defamation would inevitably involve consideration of the lawfulness of the Plaintiffs' actions:

> "A fair reading of the Magistrate Court's claims has nothing to do with the legality but rather that in the course of a publication which is alleged to be defamatory, is coincidentally concerned with the issue of payment."

[15] Mr Stanton also pointed out that CV 48/14 could be taken no further until the outstanding applications mentioned in paragraph 10 had been resolved in the Plaintiffs' favour and this, he suggested was by no means certain.

[16] Where numerous proceedings are commenced arising out of substantially the same facts there is a danger of inconsistency and the Court must intervene to ensure that confusion is avoided. "If there are two Courts which are faced with substantially the same question, it is desirable to be sure that the question is debated in only one of those Courts if by that means justice can be done" (*Thames Launches Ltd v Trinity House* [1961] 1 All ER 26; *Royal Bank of Scotland v Citrusdal Investments* [1971] 3 All ER 558).

[17] Having read the Respondents' claims in the Magistrate's Court as "fairly" as I can, I have no doubt that the unlawfulness or otherwise of the payments to Tongasat, if not already determined elsewhere, would inevitably fall for consideration. I also agree with Dr Harrison that the Magistrate's Court is not at all suitable for an enquiry into that alleged unlawfulness.

[18] The problem however facing these alternative applications, either for transfer or stay, is that they are procedurally defective. RSC O.6 requires an action to be commenced by writ. These proceedings were however commenced by "Application Notice". There is no writ on the file. An application is commenced under RSC O.13 which makes it quite clear (as is well understood) that save in cases of exceptional urgency and upon undertaking being given by counsel, an application cannot be made until proceedings have already been commenced.

[19] Secondly, where it is wished to apply for stay as transfer, that application should be made to the Court which is already seized of the proceedings in respect of which the application is made. In this case it is the Magistrate's Court.

[20] True, the Magistrate's Court is subject to prerogative orders issued by the Supreme Court but no such orders have been applied for in this case. These are not judicial review proceedings.

[21] Thirdly, I have examined the provisions relied on by Dr Harrison and set out in paragraph 13 of his written submissions. I do not accept that any of them authorise either a stay or a transfer in the circumstances of this application.

Result: Application dismissed.

R v Tu'iha'ateiho

Supreme Court, Nuku'alofa
Cato J
CR 116/2013

6 March 2015

Sentencing – possession of firearm without a licence – discharge without conviction applied for – serious offence – declined – fine imposed

Lord Tu'iha'ateiho was convicted of being in possession of a firearm without a licence contrary to section 4(2)(b) of the Arms and Ammunition Act. The defence applied for his client to be discharged under section 204 of the Criminal Offences Act. This was the first time the provision had been considered in court.

Held:

1. Section 4(2)(b) of the Act provides that the only penalty was one of a maximum of five years imprisonment. This was a clear message that Parliament intended a violation of section 4 to carry with it serious consequences. However, under Section 30 of the Criminal Offences Act, a court had the power to impose a fine where it was considered appropriate in lieu of a sentence of imprisonment.
2. Lord Tu'iha'ateiho was a man of good character, a Noble, a member of Parliament, and a first offender. He was found in possession of only one gun in circumstances where the court considered he had the firearm for protection. It was retained near his bed with ammunition, in the near proximity. This was an appropriate case where the court could apply section 30 of the Criminal Offences Act, and deal with the sentence by way of fine rather than imprisonment.
3. The court considered whether the accused should be discharged without conviction. Parliament set a clear directive to the courts that serious consequences should follow a conviction for being in possession of an unlicensed firearm. Although the penalty of imprisonment was mitigated by imposing a fine under section 30 of the Criminal Offences Act, to go further would be wrong, and would diminish the importance of the need to ensure compliance with the legislation and promote firearms' security and control.
4. Lord Tu'iha'ateiho was convicted on the charge of unlicensed possession of a firearm and sentenced to a fine of $2500 to be paid within two months or in default three months imprisonment. The firearm was forfeited.

Case considered:
Fisheries Inspector v Turner [1978] 2 NZLR 233 (CA)

Statutes considered:
Arms and Ammunition Act (Cap 39)
Criminal Offences Act (Cap 18)
Criminal Offences Amendment Act 2012
Sentencing Act 2002 (NZ)

Counsel for the Crown	:	Mr Kefu, Acting Attorney-Gneral
Counsel for the accused	:	Mr Barron-Afeaki SC

Sentence

[1] Lord Tu'iha'ateiho was convicted on 21st November, 2014 after a trial before me of being in possession of a firearm without a licence contrary to sections 4(1) (2) (b) and 47 of the Arms and Ammunition Act. The firearm in question was a .22 semi-automatic pistol. On the 19th January 2015, the sentence hearing was adjourned further to the 27th February 2015 on the application of defence counsel, Mr Afeaki SC, for him to collect evidence to proceed with an application that his client be discharged under the provisions of *Section 204 of the Criminal Offences Act*, as provided for by *Section 28 of the Criminal Offences Amendment Act, 2012*. This is a new provision which I will turn to later. Both counsel agreed that it would be helpful because the section was new that I reserve my sentencing judgment to enable it to be put in written form. This was the first time the section had been considered in this Court.

[2] Before I do so, other matters more generally related to the sentence should be considered. After verdict was given by me in the case, I had occasion to sentence Lord Tu'ilakepa (CR172/2014) on 4 counts of possession of unlicensed firearms and one count of unlicensed ammunition on each of five counts after his guilty pleas. He was fined $2000.00 on each count imposed cumulatively making the penalty one overall of $10,000 which by Tongan standards is a substantial fine.

[3] In the sentencing of Lord Tu'ilakepa, I considered aspects of sentencing principles relating to section 4 of the Arms Act and the penalty for being in possession of a firearm without a licence. Section 4(2)(b) of the Act provides that the only penalty is one of a maximum of five years imprisonment. Unlike other provisions of the Act such as section 20 relating to unlawful importing, it does not provide a fine as an alternative or a possible additional penalty to a sentence of imprisonment. In my view, this is a clear message that Parliament intended a violation of section 4 to carry with it serious consequences.

[4] However, under *Section 30 of the Criminal Offences Act*, a Court has the power to impose a fine where it is considered appropriate in lieu of a sentence of imprisonment. In the case of Lord Tu'ilakepa, having heard counsel for both parties, I considered that, because the defendant was of good character, was a first offender, had contributed extensively to the Tongan community over many years, and had

unwittingly inherited the firearms from a relative, who had lived at the defendant's premises before he had died, the matter should be dealt with by way of fine, and not by way of a term of imprisonment. This was not a case where the firearms had been associated with a criminal enterprise or obtained for trafficking purposes. It was acknowledged, in my view, appropriately by the Crown after hearing extensive submissions from the defendant's counsel, Mr Clive Edwards, who argued that a substantial fine would be an appropriate penalty in all the circumstances, that the matter could be disposed of in this way.

[5] Although in this case, Lord Tu'iha'ateiho pleaded not guilty, unlike Lord Tu'ilakepa, and was convicted after a trial, I consider the same approach should apply here. Lord Tu'iha'ateiho also is a man of good character, a Noble, a member of Parliament, and a first offender. He was found in possession of only one gun (Lord Tu'ilakepa had 4 unlicensed guns) in circumstances where I considered he had the firearm for protection. It was retained near his bed with ammunition, in the near proximity. Mr Afeaki explained that the defendant had two other licensed guns and ammunition but he did not advance any satisfactory reason why the defendant had not chosen to license this pistol, also aside from a suggestion it was an ornament.

[6] Having said this, I accept that when Lord Tu'iha'ateiho discovered his residence had been burgled and the firearm stolen, he informed the police that it was missing. The firearm was, I am satisfied, used in the commission of another serious crime either directly or indirectly by the burglar, and this is an illustration of the importance of ensuring that firearms are licensed and secure.

[7] As I have said, I consider, however, this is an appropriate case where I can apply *Section 30 of the Criminal Offences Act*, and deal with the sentence by way of fine rather than imprisonment. The defendant is a man of good character as Mr Afeaki emphasised, he is a first offender, and in his case there was only one firearm, involved. I take the view that the defendant was in possession of the firearm should a need for protection arise, and not for any more sinister criminal purpose. I consider also his decision to come forward and alert the police to the existence of the firearm was a factor which further justifies mitigating a more serious penalty. Mr Kefu, again, appropriately, in my view, did not suggest that I should deal with this matter other than by way of a fine. The appropriate fine in my view is $2500.00.

[8] However, Mr Afeaki suggested that I should go further than this. He submitted that, under *Section 204 of the Criminal Offences Act*, I should decline to enter a conviction which operates under the Tongan legislation as an acquittal. Section 204 provides;

> "(1) Where a court is of the opinion, having regard to the circumstances including the nature of the offence and the character of the offender, that it is inexpedient to inflict punishment and that a probation order is not appropriate, it may make an order discharging him absolutely or alternatively discharging him subject to the condition that he commits no offence during such period, not exceeding 3 years from the date of the order, as may be specified therein.

(2) A discharge under this section this section is deemed to be an acquittal.

(3) A court discharging an offender under this section may-

(a) Make an order for payment of costs or the restitution of any property; or

(b) Make any order for the payment of any sum that the court thinks fair and reasonable to compensate any person, who, through, or by means of the offence , has suffered-

i. loss of, or damage to property

ii. emotional harm; or

iii. loss or damage consequential on any emotional or physical harm or loss of or damage to property."

[9] In a very comprehensive review of New Zealand authorities where similar but not exact statutory provisions relating to discharge without conviction exist, Mr Afeaki argued that I should not impose a conviction because the defendant would likely be considerably inconvenienced in relation to travelling to other countries either privately that is to be with relatives who lived in the United States or in Australia and elsewhere, or as an incident of his parliamentary life. He gave as examples Canada and the United States where permission to enter has to be applied for in advance if one has a criminal conviction, and in some cases file a certificate of rehabilitation. He contended that this would make it extremely difficult for the defendant to travel to those countries should he have to do so, or, for some reason, urgently. He also emphasised that in connection with performing his parliamentary duties the defendant could be expected to have to travel and a conviction might limit his ability to properly perform these duties. Indeed, in connection with his parliamentary activities, he has had to travel to many countries including, China, the United Kingdom, Australia, New Zealand and the United States as well as other Pacific Island Countries in the past.

[10] He suggested a conviction might even impair his security of tenure if he were unable to perform as a Member of Parliament. He could not say, however, that any country would deny Lord Tu'iha'ateiho admission with certainty. He argued also that Lord Tu'iha'ateiho 's responsibilities as a noble of the realm where he has a considerable burden of community duties might be impaired if a conviction were imposed and travel made more difficult. He argued that the defendant was unlikely to ever re-offend. He also argued as a further factor that he had volunteered the information concerning the unlicensed gun and brought it to the attention of the police.

[11] Mr Afeaki mentioned a number of New Zealand authorities where he argued that in cases of quite serious offending such as involvement in drugs, discharges without conviction had been given where to impose conviction would have consequences to the offender which would be regarded as disproportionate to the offending. *Section 107 of the New Zealand Sentencing Act 2002* provides;

> "The Court must not discharge an offender without conviction unless the Court is satisfied the direct and indirect consequences of a conviction would be out of all proportion to the gravity of the offence."

[12] The cases Mr Afeaki mentioned were set out in his memorandum and in his book of authorities. I am grateful for his industry and have read those authorities. Whilst the provisions of the New Zealand legislation and predecessors are more broadly expressed than section 204, I consider the same approach should apply. Some judicial guidance, although it was based on earlier legislation in New Zealand, is to be found in the judgment of Richardson J in the Court of Appeal *Fisheries Inspector v Turner* [1978] 2 NZLR 233. *Richardson J* observed;

> "The real question then is whether the statutory consequences of a conviction may be taken into account and given appropriate weight as considerations relevant to the exercise of the discretion. Put in that way, there can be only one answer. In considering the exercise of discretion under section 42 the Court is required to balance all the relevant public interest considerations as they apply in the particular case.

His Honour went on to say;

> It must have regard to the seriousness of the offence and to the gravity with which it is viewed by Parliament; to the seriousness of the particular offending; to the circumstances of the particular offender in terms of the effect on his career, his pocket, his reputation and any civil disabilities consequential on his conviction; and indirect consequences. And if the direct and indirect consequences of a conviction are, in the Court's judgment, out of all proportion to the gravity of the offence, it is proper for a discharge under section 42 to be given."

Finally, His Honour went on to note that; '

> "The jurisdiction to discharge under section 42 is one that must be exercised sparingly."

[13] I have considered the cases Mr Afeaki referred me to in his comprehensive memorandum. Most of the cases, however, where discharges have been successfully applied for are cases of less serious offending where the consequences because of the youth of an offender, or other subjective factor pertaining to the offender, has meant that the imposition of a conviction would have a serious and disproportionate effect on an offender in terms of his or her future life. Even where the offence itself could be characterised as a serious offence, the circumstances suggested in the New Zealand cases generally involve lower level offending. Foremost, in my view, amongst the considerations here must be the nature of the offence and the importance of obtaining security and control of firearms in the Tongan community. This raises the issue of whether the offence of possession of an unlicenced firearm and the circumstances of the offending should be considered sufficient to outweigh the subjective considerations advanced in support of a discharge by Mr Afeaki such as the good character of the defendant, his role in Tongan society as a Noble and as a

politician with the likelihood that he will be inconvenienced by restrictions on travel that may apply if he were not discharged without conviction. He also advanced the fact that he had volunteered the theft of the gun to the police a factor which I did take into account when accepting that a fine was an appropriate penalty. He also submitted that there was a firearm's amnesty granted shortly after the defendant had approached the police and that, in these circumstances, he should not have been prosecuted. I do not, however, regard this as a factor which is relevant to my considerations, here.

[14] In my view, Parliament has set a clear directive to the Courts that serious consequences should follow a conviction for being in possession of an unlicensed firearm. Although I have mitigated the penalty of imprisonment by imposing a fine under *Section 30 of the Criminal Offences Act*, which Mr Kefu, in the circumstances of this case was in agreement with, to go further would in my view be wrong, and would diminish the importance of the need to ensure compliance with the legislation and promote firearms' security and control. Mr Kefu submitted that it would be wrong to discharge Lord Tu'iha'ateiho under section 204 in these circumstances. He submitted that discharge without conviction should be reserved for only exceptional cases, and that deterrence to other offenders as well as prominent members of society was an important issue here.

[15] He emphasised also the need to ensure that sentences are proportionate to the offending which he submitted was serious offending, and that it was important to uphold the public interest in protecting the public from unlicensed and unregulated access to firearms. He contended that consequences of offending was a matter that should not influence the court here - and included within that, the ability to freely travel overseas. Further, he submitted that the defendant had demonstrated less than a fully co-operative approach to the prosecution in defending the proceedings, and indeed in the manner in which the case had been defended, by suggesting that the gun was an ornament. This was it seems in answer to the submission advanced by Mr Afeaki that I should take into account the fact that Lord Tu'iha'ateiho had volunteered information to the police that his firearm had been stolen.

[16] I have weighed up all the factors both as they pertain to the seriousness or nature of the offending and the character of the offender. In my view, the licensing and security of firearms in any society is a matter of great importance, and in this case the paramount consideration. I consider that Parliament in providing that imprisonment was the appropriate penalty for being in possession of an unlicensed firearm, evidenced its intent plainly. I consider that Mr Kefu is correct when he submits that, as a very senior member of the Tongan community, with his societal and professional responsibilities, Lord Tu'iha'ateiho should have known better and respected the legislation. He had licensed other firearms I was informed. It would be a wrong message for the Tongan community that persons could avoid conviction for being in possession of unlicensed firearms by essentially an appeal to the avoidance of possible travel restrictions. I share the view that he had the weapon by his bed with access to ammunition as a protective measure and not simply as an ornament.

[17] Having said that I have not considered this later factor as any makeweight in my approach to section 204 and its application. I accept that there may well be certain inconvenience and even hardship associated with travel restrictions for Lord

Tu'iha'ateiho but I do not think that this outweighs the objective public interest factors which I have mentioned and the need to impose a conviction for offending as objectively serious as this. I consider Mr Kefu is correct when he submitted

> "… given the entirety of the circumstances of this case, this is not an appropriate case for a discharge without conviction, but rather it is an appropriate case for a non-custodial sentence to be imposed, in the form of a fine."

[18] I indicate also that I do not think the Tongan legislation is wide enough to allow, as Mr Afeaki submitted could be the case, and some New Zealand examples exist, a Court to impose in addition to costs, a payment of a sum to a charity or other similar body in lieu of a fine. The legislation is specific as to what penalties a court may impose and they are restricted to costs, compensation and restitution.

[19] Accordingly, on the charge of unlicensed possession of a firearm I convict and sentence Lord Tu'iha'ateiho to a fine of $2500.00 to be paid within 2 months of today's date or in default three months imprisonment. The firearm is forfeit.

Westpac Bank of Tonga v Fonua anor

Land Court, Nuku'alofa
Scott J
LA 14/2013

6 March 2015

Land law – mortgage default – section 109 order – serious default by defendants – plaintiff entitled to possession of lease – did not include dwellinghouse

The defendants were the joint registered lessees of a lease and were also the owners of a dwelling house built on the land. On about 9 March 2007 the defendants mortgaged the land and dwelling house to the plaintiff (the bank) in consideration of advances to them amounting to $326,234. The defendants fell into arrears, then resumed payments for a time before ceasing repayments altogether in November 2011. The bank claimed that by failing to make repayments as agreed the defendants breached section 109 of the Land Act. On 23 May 2013 the bank demanded repayment both of the arrears, $61,416, and the whole sum advanced and owed to the bank amounting to $379,202.94. Notice was given that failure to comply with these demands would result in a section 109 notice being issued. The defendants made various proposals to vary the agreement. No payment was made by the defendants in response to the demands and on 13 June 2013 a section 109 notice was issued. The defendants did not vacate the land. The bank applied for summary judgment on 10 February 2014 and sought a declaration that it was entitled to possession of the leased land and an order for possession of the land. Also included in the application was the dwellinghouse erected on the land.

Held:

1. The conduct of the defendants clearly amounted to serious default and the plaintiff was entitled to issue the section 109 notice and, if not complied with, to have it enforced.
2. Because of the prevailing view that buildings were not part of the land the section 109 notice did not apply to the dwellinghouse. It was unclear whether however it would be practical to retain possession of the house if access across the land surrounding it was denied.
3. The defendants were not prevented from challenging the validity of the plaintiff's claim to the disputed element of the sum claimed. But that challenge would have to be in the Supreme Court, as would any claim by the bank in respect of the dwellinghouse.

4. The court declared that the plaintiff was entitled to possession of the lease and the defendants were to give vacant possession of that land within 28 days.

Case considered:

Cowley v Tourist Services Ha'apai Ltd and Fund Management Ltd [2001] Tonga LR 183 (CA)

Statute considered:

Land Act (Cap 132)

Rules considered:

Land Court Rules 2007
Supreme Court Rules 2007

Counsel for the plaintiff	:	Mrs D Stephenson
Counsel for the defendants	:	Mr L Niu SC

Decision

[1] The Plaintiff (the bank) is a bank carrying on business in Tonga.

[2] The Defendants are the joint registered lessees of lease number 4837. They are also the owners of a dwelling house built on the land.

[3] On about 9 March 2007 the Defendants mortgaged the land and dwelling house to the bank in consideration of advances to them amounting to $326,234.

[4] The Defendants fell into arrears, then resumed payments for a time before ceasing repayments altogether in November 2011. At this date according to Exhibit E to a supporting affidavit filed by Sioeli Nu'uhiva, bank officer, the sum owed was $323,485.42. According to a second supporting affidavit filed by Daniel Henson, bank officer, on 23 July 2013, the date the writ was issued the sum owed was $352,603. According to paragraph 18 of the Nu'uhiva affidavit the loan arrears at the same date stood at $71,739.90.

[5] The bank claims that by failing to make repayments as agreed the Defendants have breached section 109 of the Land Act. This section provides as follows:

> "In the event of the mortgagee taking possession of the lands mortgaged following default by the mortgagor of any of the obligations to the mortgagee set out in the mortgage deed or in any other document lodged with the Minister in terms of the next succeeding section the mortgagee shall give notification both to the mortgagor and the Minister of his intention to take possession of the lands mortgaged and may thereafter take possession at any time after the expiry of 14 days from the date of said notification".

[6] Section 110 reads as follows:

> "Except as provided by this as any other Act a mortgage deed (or any agreement or bond relating thereto) is effective according to its terms between the parties to it".

It was not submitted by Counsel that any exception to the section applied in this case.

[7] In February 2012 the bank demanded payment of arrears which then stood at $7,016.00. (Exhibit G to the Nu'uhiva affidavit) On 23 April repayment of the whole sum owed, said to be $339,618, was demanded. In October 2012 demand was again made, this time for arrears which were said to stand at $34,216. On 23 May 2013 the bank demanded repayment both of the arrears, then stated to stand at $61,416 and the whole sum advanced and owed to the bank amounting to $379,202.94. Notice was given that failure to comply with these demands would result in a section 109 notice being issued.

[8] No payment was made by the Defendants in response to the demands and on 13 June 2013 a section 109 notice was issued (Exhibit A). The Defendants have not vacated the land. This is an application for summary judgment filed on 10 February 2014 pursuant to RSC. O.15 as applied by O.2 r.2 of the Land Court Rules. The Plaintiff seeks (a) a declaration that it is entitled to possession of the leased land following issuance of the S109 notice and (b) an order for possession of the land. Also included in the application is the dwellinghouse erected on the land.

[9] When the application first came on for hearing on 17 April 2014 Mr Niu suggested that the summary judgment procedure was either unavailable or unsuitable for the disposal of issues in the Land Court. I disagree. The procedure (unlike judgment in default of defence) is not excluded by the Rules and I can see no advantage in requiring a plaintiff faced with an obviously unarguable defence to go to trial. As is well understood summary judgment should only be granted in the clearest cases and when there are no arguable issues of fact. Since Mr Niu had filed no evidence and suggested that the evidence filed by the Plaintiff was disputed he was given leave to file affidavits in answer. The application was then adjourned for continuation in the presence of an assessor.

[10] On 27 June the Defendants filed the first of two affidavits. As may be seen from the first affidavit and the amended statement of defence filed on the same day the Defendants do not dispute the accuracy of the Plaintiffs' calculations and that they owe the bank at least $201,147.22 nor that they are in arrears with their repayments.

[11] The Defendants say that the total sum claimed by the bank includes various sums wrongly taken into account and which should be deducted from the debt. They say that these sums were unlawfully debited to their account and this unlawful debiting justified their decision to stop making their monthly repayments. In paragraph 3 of the first affidavit the Defendants propose that the $201,147.22 conceded to be owed be repaid by them over a three year period free of interest.

[12] This is not the first time that the Defendants have proposed that interest be waived or that other repayment terms be waived. In paragraphs 5 to 10 of their second

affidavit filed on 18 February 2015 they explain that after experiencing difficulty adhering to the terms agreed they had approached the bank asking for some or all of the interest on the loan to be waived. The bank however refused: "We stopped payment because despite our requests to waive interests or part of the interests of our loan, the bank refused to do so or to talk with us about it".

[13] In paragraphs 10 and 11 of the same affidavit the Defendants explain that had the bank accepted their proposal to waive interest resulting, they suggest, in a reduction of the loan "from $350,000 or so to $200,000 we would have gladly continued to pay the monthly payments and our loan would have been manageably reduced".

[14] Unfortunately, the terms of contracts in general and mortgages in particular cannot be altered unilaterally. I am satisfied that the bank's refusal to accept the Defendants' proposal for variation cannot afford them any justification for ceasing repayments.

[15] The second ground advanced as excusing repayments was the alleged unlawful charges, particulars of which are set out in paragraph 2 (a) – (d) of the Defendants' first affidavit. These are said to be:

(a) Loan administration charges : $32,000
(b) Late payment fees : $4667.50
(c) Interest upon interest : $81,027.34
(d) Legal fees : $31711.62

[16] Mrs Stephenson addressed these matters in paragraphs, G and H of her written submissions. She referred to clause 1(g) of the mortgage deed and suggested that all the charges debited to the Defendants' account could be justified by the agreement reached. As I find, it is not necessary to decide this issue at this stage. Neither it is necessary to examine the effect of the Defendants' agreement recorded on 21 October 2009 and referred to in paragraph 17 of the submission.

[17] In his own submissions filed on 19 February 2015 Mr Niu summarized the main principles governing summary judgment. He restricted himself however to the grant or refusal of *unconditional* leave to defend and did not address the Court's power to grant *conditional* leave to defend *all or part* of a claim.

[18] In paragraph 13 of her submissions Mrs Stephenson emphasized that the bank was not in this application (or indeed in the action itself) making a claim for money owed to it by the Defendants. Rather, it was seeking an interlocutory declaration as to proprietary rights, in this case the right to invoke section 109, following breach.

[19] In preliminary discussion both Counsel agreed that it is not every default, however technical or minor, which would justify a section 109 notice being issued. Although the wording of the section suggests that it operates automatically, it was accepted that the court has power, at the instance of either party, to rule whether or not a default has in fact occurred and, if so, whether it may be remedied or relieved.

[20] I rather doubt that all the charges complained of by the Defendants can be answered by reference to the mortgage deed but suspect that some will be supported by the terms of the overall contractual relationship between the parties. Whether,

however, this is or is not the case, I am satisfied that the imposition of charges thought by the Defendants to be unlawful did not entitle them to cease paying the amount which they concede was lawfully due.

[21] In my opinion the conduct of the Defendants clearly amounted to serious default and the Plaintiff was entitled to issue the section 109 notice and, if not complied with, to have it enforced.

[22] Because of the prevailing view that buildings are not part of the land (*Cowley v Tourist Services Ha'apai Ltd and Fund Management Ltd* [2001] Tonga LR 183) the notice cannot apply to the dwellinghouse. Whether however it would be practical to retain possession of the house if access across the land surrounding it is denied, I do not know.

[23] The granting of the declaration sought does not, of course, prevent the Defendants from challenging the validity of the Plaintiff's claim to the disputed element of the sum claimed. But that challenge would have to be in the Supreme Court, as would any claim by the bank in respect of the dwellinghouse.

Result:

(i) It is declared that the Plaintiff is entitled to possession of lease 4837;
(ii) Defendants are to give vacant possession of the land comprised in the lease in 28 days.
(iii) Defendants to pay the Plaintiff's costs of this application, to be taxed, if not agreed.

In the matter of Holani

Supreme Court, Nuku'alofa
Paulsen CJ
FA 100/2014

3 March 2015; 11 March 2015

Adoption – inter-country – purpose not to create genuine parent-child relationship – not in best interest of child – application refused

The applicants, 'Atomi Ma'ake Holani and Mele Soakimi Holani, sought to adopt Manu'opea Holani, a female Tongan child who was 16 years old. The male applicant was Manu'opea's uncle. The applicants were 71 and 74 years old and had been married for 45 years with 5 children of their marriage. They were both born and raised in Tonga and have for many years resided in New Zealand. If the application was granted the applicants intended to have Manu'opea live with them in New Zealand on a permanent basis. The application was supported by Manu'opea's mother and also by Manu'opea herself. The natural father had nothing to do with Manu'opea's upbringing. The mother said that the applicants offered Manu'opea 'better upbringing, better education, better church teachings and good discipline'. Although she had never been to New Zealand Manu'opea said that she believed New Zealand offered her a better future and that she will be able to get a good job and earn money to help her family in Tonga. The Solicitor-General provided a report as Guardian ad Litem dated 10 February 2015 and took the position that it should be left to the discretion of the Court to decide whether to grant or deny the application.

Held:

1. The proper purpose of adoption was to assist the development of, or confirm the existence of, a genuine parent-child relationship between the child and the applicants. The purpose of this application was not to create a genuine parent-child relationship between Manu'opea and the applicants and she was not in need of new parents. The purpose was to provide a means by which Manu'opea may reside in New Zealand and take the benefits that it was perceived New Zealand would offer her by way of education and employment. It was not proper for the Court to legally sever or distort existing family relationships other than in pursuit of a genuine parenting purpose and could refuse the application on this ground.
2. Inter-country adoption should only be approved where the proposed adoption was a matter of last resort or that all other means of caring for

Manu'opea in Tonga had been exhausted. Manu'opea had a suitable home in Tonga so the court could refuse the application on that ground.

3. The applicants did not satisfy the court that they were capable of caring for and maintaining Manu'opea. The court had concerns regarding the health and age of the applicants as well as their financial means.
4. The social and cultural dislocation and damage to Manu'opea's educational prospects outweighed the opportunities available to her by a move to New Zealand.
5. The paramount consideration in adoption cases was whether the proposed adoption was in the best interests of the child. The court found that it was not in the best interests of Manu'opea to grant the application. Accordingly the application for the issue of Letters of Adoption was refused.

Cases considered:

Funganitao, In re [2011] TOSC 6; FA 152 of 2010 (27 October 2011)
Hatch v Solicitor-General [2010] Tonga LR 177
Saavedra v Solicitor General [2013] TOCA 7

Statute considered:

Maintenance of Illegitimate Children Act (Cap 30)

Rules considered:

United Nations Convention on the Rights of the Child

Counsel for the Guardian ad Litem : Ms Fineanganofo
Holani appeared in person

Ruling

[1] The applicants, 'Atomi Ma'ake Holani and Mele Soakimi Holani, are seeking to adopt Manu'opea Holani, a female Tongan child who is 16 years old and was born on 11 December 1998. The male applicant is Manu'opea's uncle.

[2] The applicants have been married for 45 years and have 5 children of their marriage. It appears that they are aged 71 and 74 years respectively. The applicants have for many years resided in New Zealand although they were both born and raised in Tonga. If the application is granted the applicants intend to have Manu'opea live with them in New Zealand on a permanent basis.

[3] The application is supported by Manu'opea's mother and also by Manu'opea herself. I understand that the natural father has nothing to do with Manu'opea's upbringing. Manu'opea's mother says in her affidavit, that the applicants offer Manu'opea 'better upbringing, better education, better church teachings and good discipline'. Although she has never been to New Zealand Manu'opea told me that she believes New Zealand offers her a better future and that she will be able to get a good job and earn money to help her family in Tonga.

[4] The Solicitor General has provided a report as Guardian ad Litem dated 10 February 2015 and has taken the position that he leaves it to the discretion of the Court to decide whether to grant or deny the application.

[5] The paramount consideration in adoption cases is whether the proposed adoption is in the best interests of the child. *Hatch v Solicitor-General* [2010] Tonga LR 177 and *Saavedra v Solicitor General* [2013] TOCA 7. I have formed the clear view that it is not in the best interests of Manu'opea to grant the application. My reasons are set out below.

The child

[6] Manu'opea is an illegitimate child. Until she was about 12 years old she lived with her grandmother. When her grandmother died she went to live with her mother, her stepfather and four siblings. She appears to be a well adjusted young child. Her relationships with her immediate family members are happy and secure. I asked her about her stepfather. She gets on well with him. The mother says the stepfather treats Manu'opea well.

[7] Manu'opea is in her fourth year at Liahona Middle School and she does well in her studies. She has some knowledge of English but could not speak to me directly other than with the assistance of a translator.

[8] Whilst there is some conflict between what is in the affidavits, on the one hand, and what is in the Guardian ad Litem's report and what I was told at the hearing, on the other, I find that the idea of the applicants adopting Manu'opea was first raised in 2014. Before that Manu'opea had some contact with the applicants on their visits to Tonga. Manu'opea told me that she had never lived with the applicants except when they visited Tonga and stayed with her family. She said that has occurred only once but the other evidence would suggest more visits had occurred than that.

The purpose of adoption

[9] Adoption involves the substitution of new parents for existing ones. It benefits the child by providing it with a permanent substitute family where it is necessary to do so. The proper purpose of adoption is to assist the development of, or confirm the existence of, a genuine parent-child relationship between the child and the applicants. That might be, for instance, because the natural parents do not want the child or because they cannot provide a suitable family environment for it.

[10] The mother, who is 36 years old, is unemployed. The applicants say that she does not have enough income to provide for her family and this is a reason they should be allowed to adopt Manu'opea. I note that in her affidavit the mother says only that it is desirable that Manu'opea be with the applicants. There is no evidence about the stepfather's employment or what income is available to the family. What is clear to me is that throughout her life Manu'opea has been well cared for and there is no reason to believe that anything will change in that regard.

[11] This is not a case where the mother does not want Manu'opea or cannot provide for her. She clearly loves Manu'opea and it could never be suggested that she does not

want her as a daughter. She has provided for Manu'opea very well to date. In my view, the purpose of this application is not to create a genuine parent-child relationship between Manu'opea and the applicants and she is not in need of new parents. The purpose is to provide a means by which Manu'opea may reside in New Zealand and take the benefits that it is perceived New Zealand will offer her by way of education and employment.

[12] I do not consider that it is proper for the Court to legally sever or distort existing family relationships other than in pursuit of a genuine parenting purpose and would refuse the application on this ground.

Inter county adoption

[13] The application is also one for inter-country adoption. In *Saavedra v Solicitor General* the Court of Appeal, in reliance upon Article 21 of the United Nations Convention on the Rights of the Child, stated at [5]:

> Consequently, inter-country adoption should be approved only when all other means of caring for a child in Tonga have been exhausted. It is a measure that the Committee on the Rights of the Child has described as "a measure of last resort" …

[14] There can be no suggestion here that this proposed adoption is a matter of last resort or that all other means of caring for Manu'opea in Tonga have been exhausted. Manu'opea has a suitable home in Tonga. On this ground too I would refuse the application.

Do the applicants have the ability to provide for Manu'opea?

[15] Counsel for the Guardian ad Litem noted that this is an unusual case because of the ages of the applicants and the large age gap between them and Manu'opea. The female applicant is 58 years older than Manu'opea and the male applicant is 55 years older than Manu'opea. These are factors that the Court has taken into account in other cases in deciding whether to grant or refuse an application for adoption. *In re Funganitao* [2011] TOSC 6; FA 152 of 2010 (27 October 2011) Chief Justice Scott said at [7]:

> Thirdly, the female applicant is 60 years older than the child and her husband is only slightly younger. It appears that neither of the applicants is working and that they are dependent on welfare benefits. Where there is a very great age gap between the child and the applicants there must be concern that adoption is not really in the best interests of the child.

[16] It has been the practice in Tonga for some years to require that applicants for adoption spend at least 6 months with the child to allow a proper assessment to be made of the relationship between them. This is not an unyielding rule or a precondition to an adoption order being made. *Hatch v Solicitor General*. There are features of this case, such as the ages of the applicants and the inter-country nature of the applications, which mean that even if there were no other impediments, I would

not make an adoption order until Manu'opea had lived with the applicants for a reasonable period. This would ensure that she is able to settle down happily with the applicants and that the applicants prove themselves suitable persons to be responsible for her care. There has not been such a period of living together.

[17] Furthermore, I have very real doubts about the ability of the applicants to provide care for Manu'opea. This is not only because of their ages. The female applicant did not appear before me in support of the application because she was having medical treatment in New Zealand. I was told that she has had a medical condition for over a year and has had a tumor removed from her stomach. The male applicant said that her most recent appointment, that prevented her from travelling to Tonga, was for a 'check up'. Given the female applicant's age this is a serious matter and I am not prepared to assume that she is fit to care for Manu'opea in the absence of clear medical evidence.

[18] As in re *Funganitao* the applicants are of modest means. They are both on superannuation and get other benefits from the New Zealand government upon which they support themselves. They also have four other family members living with them.

[19] It appears to me also that little, if any, consideration has been given to what would become of Manu'opea should one or both of the applicants fall ill or die. This must realistically be considered in this case. When I raised the matter I was told that the male applicant has a daughter who could look after Manu'opea but I have no information about that daughter's circumstances or her willingness, and indeed ability, to care for Manu'opea if that was needed.

Other factors

[20] It also concerns me that whilst the major impetus for this application is said to be the educational and employment opportunities that New Zealand will offer Manu'opea, a move to New Zealand might well prejudice her future prospects. She has never been to New Zealand and there will be substantial dislocation for her socially and culturally.

[21] Furthermore, her continued educational success may well influence the employment opportunities available to her for the rest of her life. She does not have a firm grasp on the English language to the extent that she could converse with me. I consider that, however well intentioned the applicants are, putting Manu'opea in a New Zealand school environment, where lessons are conducted largely in English, would put her at risk of failure at a crucial time in her life.

[22] I have not overlooked that Manu'opea is of an age where she is able to make decisions for herself. She wants the adoption order to be made. Despite giving her wishes full weight I am not satisfied that it is in her interests to accede to them.

The result

[23] For the reason set out above I am not satisfied that it is in Manu'opea's best interests to make the adoption order that is sought. This is because I consider:

[23.1] The application, although well meaning and genuine, has not been made for a proper purpose;

[23.2] The application is for inter-country adoption and is not necessary to provide a home for Manu'opea as a matter of last resort;

200 [23.3] The applicants have not satisfied me that they are capable of caring for and maintaining Manu'opea;

[23.4] That the social and cultural dislocation and damage to Manu'opea's educational prospects outweigh the opportunities available to her by a move to New Zealand.

[24] Accordingly the application for the issue of Letters of Adoption is refused.

To'a v Taumoepeau and Minister of Lands

Land Court, Nuku'alofa
Scott J and Mr Assessor G Blake
LA 10/2012

13 March 2015

Land law – determining availability of land for grant responsibility of Minister – Ministry did not handle regrant properly – breach of natural justice – plaintiff's registration set aside

The plaintiff was aged 71 and retired. He was a matapule (hereditary spokesman) of HM The King. The plaintiff applied for the land to be granted to him on 13 April 2011. Matei had died on 6 November 2005, therefore the rules of succession (section 82) applied, but Dr Maka could not inherit since he was not as a matter of fact "born in wedlock" (section 82(b)) and his legal adoption did not operate to overcome section 82(b). Therefore, as Matei had no natural legitimate son section 82(e) came into play. However Matei's brother Siosifa already had an allotment of his own; but by virtue of section 84 Siosifa was not permitted to choose between the land and the allotment he already held. Therefore the land reverted to the Crown on 6 November 2005 (section 83). Dr Maka then continued to occupy, work from and occasionally reside on the land undisturbed by any claim against him either by a claimant to the land or by the Crown for a period of approximately 5 ½ years.

Held:

1. While the responsibility for determining availability may not be clear what was beyond any doubt was the responsibility of the Ministry to make proper enquiries, to comply with the rules of natural justice and to avoid obvious mistake before a decision was reached.
2. The Ministry did not handle the regrant of this land properly. First, it did not process Dr Maka's section 43 application with reasonable despatch, or at all. Secondly, it accepted the plaintiff's application and decided in his favour *before* making proper enquiries (which would *inter alia*, have revealed the allotment 2 and 3 confusion). Thirdly, the enquiries that were made, principally the visit to the land by Semisi Moala were carried out in a slapdash manner resulting in a brief to the Minister which was seriously misleading.
3. The way in which this matter was handled by the Ministry was in the clearest breach of the principles of natural justice and accordingly the registration in favour of the plaintiff must be set aside and the competing

applications referred back to the Minister for due consideration, according to law. There was nothing to prevent the allocation of another piece of Crown Land to the plaintiff which was available.

4. The plaintiff's claim was dismissed and the plaintiff's registration of allotment 3 dated 7 June 2011 was set aside. The matter was referred back to the Hon Minister of Lands for further consideration.

Cases considered:

Cocker v Palavi anor [1997] Tonga LR 203
Cowley v Tourist Services Ha'apai Ltd and Fund Management Ltd [2001] Tonga LR 183 (CA)
Finau v Minister of Lands anor [2012] Tonga LR 127 (CA)
Hakeai v Minister of Lands & Ors [1996] Tonga LR 142
Hausia v Vaka'uta anor [1974-1980] Tonga LR 58
Ongolea v Finau [2003] Tonga LR 147
Tafa v Viau anors [2006] Tonga LR 125 (LC)
Tafa v Viau anors [2006] Tonga LR 287 (CA)
Vai v 'Uliafu [1989] Tonga LR 56

Statute considered:

Land Act (Cap 132)

Counsel for the plaintiff	:	Mr L Niu SC
Counsel for the defendant	:	Mrs Tupou
Counsel for the third party	:	Mr S Sisifa with Ms Lutui

Judgment

The parties

[1] The Plaintiff is aged 71 and retired. He is a matapule (hereditary spokesman) of H. M. The King. He told the Court that he resides at Campbell Down, New South Wales, Australia but is a Tongan citizen.

[2] On 7 June 2011 the Plaintiff was registered as the holder of a town allotment known as "Konga o Kape" at Kolofo'ou having an area of 1626 square metres reference Vol 109 Folio 42, Survey plan 5342, Lot 1. (the land).

[3] This is the same piece of land which was previously held by Matei Taumoepeau who died on 6 November 2005.

[4] Matei Taumoepeau (Matei) was the (customarily) adopted son of Fetutuki Talakai who was the daughter of Metuisela Talakai whose brother Vita Mapili To'a was the Plaintiff's grandfather. Disregarding the fact that Matei was adopted it may be said that he and the Plaintiff were, in effect, second cousins.

[5] Matei did not marry and had no children. He did however legally adopt the Defendant (Dr Maka) who was the illegitimate son of Matei's elder brother Siosifa.

[6] These rather complicated relationships are illustrated, to a degree, by document D-2-20 of the Third Party's production (wrongly entitled "Second Defendants" production). All the documents were produced by consent with the First Defendant's being referred to as D-1-1 etc. and the Third Party's as D-2-1 etc.

[7] Although there is no blood relationship between the Plaintiff and Dr. Maka, the Plaintiff's father's grandfather Semisi To'a was also the grandfather of Matei's adoptive mother Fetutuki. It is in that rather narrow sense that the Plaintiff and Dr Maka may be said to be "related".

The original land

[8] The land is roughly one quarter of a piece of land (the original land) comprising 1 acre 2 roods and 23.5 perches which was granted to Metuisela Talakai (Metuisela) on 22 November 1926. This is Crown land and it appears that prior to the grant in 1926 it was unoccupied.

[9] Between 1947 and 1953 the original land was divided into four pieces of roughly the same size. The subdivisions are shown in documents D-2-5 and 6 and a helpful and simplified diagram is included at paragraph 1 (3) of the Third Party's Statement of Defence. It is to this diagram that reference will henceforth be made.

[10] The four allotments are numbered 1 to 4. Allotment 3, the land in dispute, was surrendered by Metuisela in 1947 and was then granted to Matei. This surrender and grant by consent presumably was effected under the provisions of section 54 (as it then stood) and the practice referred to by Ford CJ at paragraphs [42] and [43] of his judgment in *Tafa v Viau anors* [2006] Tonga LR 125 at 137.

[11] In 1949 allotment 4 was surrendered and then leased to Katalina Hansen who had also been adopted by Fetutuki Talakai and her husband Saimone Taumoepeau.

[12] The remaining two allotments 1 and 2 were surrendered in 1953. Allotment 1 was granted to Sione Nisa To'a who was Metuisela's nephew and the Plaintiff's father. As will later be explained, this allotment is now held by the Plaintiff's son Semisi To'a as his town allotment.

Allotment 2

[13] Allotment 2 was surrendered and leased to Metuisela's daughter Palu Talakai who was the sister of Fetutuki. No copy of the lease was produced but according to D-2-8 & 9 lease 3009A ran from 30 September 1973 to 29 September 1994. I suspect that the commencement date may be incorrect however nothing turns on it; it is what happened in August and September 1994 which is of importance.

[14] On 24 August 1994 Semisi To'a, the Plaintiff's son, applied for the grant to him of allotment 2 as his town allotment. In the Form 9 application (Documents D-2-8 & 9) he stated that the last registered owner of the allotment had been Metuisela. He did not disclose that the allotment was held by lessee Matei and that the lease was to expire on 29 September following. Enquiries were however made by the Lands Registry and these revealed the existence of the lease and the fact that, in

circumstances which are not at all clear (but may include the breakdown of her marriage) the lease, originally granted to Palu Talakai had been transferred to Matei.

[15] The then Minister, Dr S. Ma'afu Tupou endorsed Form 9 as follows:

> "[Registrar] keep the application to the expiration of the lease and do not renew but execute land application".

[16] On 6 October 1994 Dr Tupou gave instructions for the land comprised in the lease (which by then had expired) to be surveyed (D-2-10 & 11). On 13 January 1995 he instructed "hold the survey". He also noted:

> "Tu'ipelehake had issued directions regarding the said allotment. All applications regarding this allotment shall be placed on hold until things are rectified".

What Tu'ipelehake's directions were and what needed to be rectified was not disclosed to the Court.

[17] Notwithstanding Dr Tupou's instructions, in circumstances which are again unclear, Matei apparently applied for the renewal of his lease for a further 50 years. No copy of Matei's application was produced however D-2-14 &15 reveal that on 21 February 1996 Cabinet approved the application (on the recommendation of the then Acting Minister of Lands Hon. Fakafanua, it must be presumed, see section 19 (3) of the Land Act – the Act).

[18] In further unclear circumstances the lease was then transferred from Matei to Dr Maka, was renumbered as Lease 5980 and is currently held by him, not expiring until 29 September 2044.

[19] The relevance of Semisi To'a's unsuccessful application for the grant to him of allotment 2 will in due course become clear.

Allotment 3

[20] The land in dispute is allotment 3, the registered holder of which, prior to the grant to the Plaintiff in 2011, was Matei.

[21] Matei customarily adopted Dr Maka "at a very young age". In paragraphs 3.1 of his brief of evidence – Exhibit 2 – Dr Maka described his upbringing by Matei, his schooling, his education in New Zealand, his scholarship to the Fiji School of Medicine, his marriage, his return to his father's land, his children and bringing them up on the land. Matei legally adopted Dr Maka in 1962 when he was 19 years old (D-1-1)

[22] Dr Maka told the Court that in addition to the family house first erected either by Matei or his father, there are two other principal buildings on the land. The first is an old style shop situated close to the boundary with the Hansen allotment and the other is a substantial building which houses a morgue.

[23] According to Dr Maka the shop was run by Matei, by himself and by his brother and sister. In about 1996 Dr Maka converted the shop into a medical clinic and at about the same time he and some others set up the morgue operation. Both the clinic and the morgue are still operating.

[24] Dr Maka does not live on the land. As a Government doctor, he is entitled to Government quarters in which he resides, although he occasionally stays in the house. Relatives of his live in the house and in the house on the adjacent leased land, allotment 2.

The death of Matei

[25] By 2005 Matei was 87 years old. According to Dr Maka, Matei decided that it was time to surrender the land and have it transferred to Dr Maka. On 17 February 2005 Dr Maka wrote to the Minister asking for the land to be transferred to him. In the letter witnessed by Matei (D-1-6 & 7) Dr Maka explained that he was Matei's adopted son, that he was living with Matei and caring for him and that he held no allotment of his own. The letter was accompanied by a Form 9 application for the grant of an allotment, again witnessed by Matei (D-1-7 & 8).

[26] On 7 March 2005 Matei changed his mind. He wrote to the Minister (D-2-25 & 26) cancelling his earlier request.

[27] On 14 March 2005 Matei again amended his request. He now wanted part of the land to be leased to one Zhu Ai Yu with the balance and the reversion to be held by Dr Maka (D-1-10 & 11). On receipt of this letter the surrender and regrant to Dr Maka was put on hold (D-1-12 & 13). There then followed several letters by Dr Maka explaining that Matei was suffering from suspected Alzheimer's disease and cancer and only had a few months to live. He was allegedly being coerced by Zhu Ai Yu who had paid him a substantial sum of money. Dr Maka expressed the family's strong opposition to the lease plan and renewed the request for the land to be transferred to him.

[28] In October 2005 Dr Maka again wrote to the Minister renewing his request for the land. On 6 November 2005 Matei died. Dr Maka then wrote to Hon. Tuita, the new Minister, on 10 November 2006 (D-1-36 to 41 & 43 to 46). In this lengthy document he gave a detailed chronology of the land, its history, dealings and claims. Apparently Zhu Ai Yu had pressed so far forward that a lease to him was on the verge of being granted. This led to proceedings in Court by Zhu Ai Yu against Dr Maka which were settled [D-1-35] upon payment by Dr Maka of $17,000.

[29] Dr Maka asked the Minister to consider his pending applications:

(i) Surrender and claim D-1-4 & 5 and D-1-6 & 7;
(ii) Claim as heir D-1-27 & 28; and
(iii) Application for town allotment submitted on "2 August 2005" (probably an erroneous reference to D-1-31 & 32 dated 1 August 2006).

[30] No reply by the Minister to this letter was produced. Asked about it, Land Registration Officer Semisi Moala, who was called by the Third Party, told the Court

that no reply by the Minister could be found on the file. It is notable that between paragraph 24 of his brief of evidence (Exhibit 4) and paragraph 27, a gap of just under five years, no correspondence is referred to. Dr Maka's evidence was that the Minister never replied to his claim or application and I accept that fact as proved.

[31] The Plaintiff applied for the land to be granted to him on 13 April 2011. The position on the eve of that application I find to be as follows:

(a) Matei had died on 6 November 2005, therefore:
(b) The rules of succession (section 82) applied, but:
(c) Dr Maka could not inherit since he was not as a matter of fact "born in wedlock" (section 82 (b)); and
(d) His legal adoption could not operate to overcome section 82 (b); therefore, as Matei had no natural legitimate son:
(e) Section 82 (e) came into play; however
(f) It is accepted that Matei's brother Siosifa already had an allotment of his own; but
(g) By virtue of section 84 Siosifa was not permitted to choose between the land and the allotment he already held; and therefore:
(h) The land reverted to the Crown on 6 November 2005 (section 83).
(i) Dr Maka then continued to occupy, work from and occasionally reside on the land undisturbed by any claim against him either by a claimant to the land or by the Crown for a period of approximately 5 ½ years.

The plaintiff claims the land

[32] As has already been noted, allotment 1 was surrendered by Metuisela (the Plaintiff's great-uncle) in 1953 and was regranted to the Plaintiff's father Sione Nisa To'a. Sione died in 1992 and his mother took the section 80 life estate. According to paragraph 14 of the Plaintiff's brief of evidence (Exhibit 1):

> "when [my mother] died in 2001 I requested the Minister of Lands to transfer the allotment to my only son Semisi and the Minister did".

[33] The decision not to take his father's allotment was not examined in any detail however it appears clear that this reflected the fact that the Plaintiff's grandfather Vita Mapili To'a had held a town allotment at Neiafu, on Vava'u. It may be that this is the reason that Metuisela's surrender and regrant was in favour of Sione, rather than his father. Be that as it may, the Plaintiff, upon the death of his mother had, as the section 82 (c) heir, the right to elect between that allotment and the Vava'u allotment which he had apparently inherited from his grandfather in the 1960's. He chose the latter and his son took the former. This, it must be emphasised, was in 2001.

[34] According to paragraph 16 of his brief of evidence, the Plaintiff discovered by chance, on a visit to the Ministry that consideration was being given to granting allotment 3 to one Koli Afuha'amango who was said to be the closest blood relative to Metuisela. Whether or not this was in fact the case, I do not know; his name does

appear in the family tree at D-2-19 & 20 but, Mr Niu informed me, in the wrong place.

[35] When the Plaintiff discovered what was planned "I went and saw the Minister of Lands Tuita" and convinced the Minister that his claim was much to be preferred. The Minister agreed "and instructed his officer Maka Matekitonga to process the registration of the allotment in my name".

[36] According to paragraph 19 of his brief, officers of the Ministry "kept delaying" the implementation of the Minister's instruction until, about 8 months later, he went to see the new Minister Lord Ma'afu, who instructed Semisi Moala "to effect the registration in my name right away". This was on 13 April 2011.

[37] At this point it must be noted that apart from the fact that Dr Maka was still in de facto occupation of the land, and that his application for its grant to him was as yet undealt with section 48 of the Act provides that:

> "No person who already holds a tax allotment or town allotment shall be granted a second allotment of the same kind as he already holds and any such grant shall be null and void".

[38] Semisi Moala told the Court that after receiving the Minister's directive he advised the Plaintiff how to proceed. He prepared a Form 9 application for the grant of the allotment (D-2-52 & 53) and attached to it a letter to the Minister which he wrote and which the Plaintiff signed (D-2-54 & 55). In it he stated that the land had reverted to the Crown, that he wanted to surrender his allotment on Vava'u under the provisions of sections 72 and 73 of the Act and that he wanted his surrendered allotment to be granted to his nephew Viliami Moengangongo Vatuvei.

[39] Sections 72 and 73 provide a mechanism whereby an allotment holder "who desires to remove permanently from the district in which his allotment is situated" may apply to the Minister for the grant of a similar allotment to him in the district to which he wishes to remove:

> "(2) The Minister shall thereupon, *if land in the estate or Crown Land specified as aforesaid is available* grant to the applicant an allotment" (emphasis added).

Upon delivery of the deed of the newly allocated land the allotment formerly held by the applicant reverts to the Crown.

[40] The Ministry handled the Plaintiff's application with commendable despatch: the Minister approved the application on 27 April (D-2-58) and the deed of grant was issued on 7 June. The Plaintiffs former allotment was granted to his nephew Viliami 12 days later.

[41] Semisi Moala was asked about form D-2-58 which he acknowledged he had prepared. In particular he was asked about the "site inspection" – which he had carried out. Semisi Moala accepted that the statement on paragraph 6 that there was only a timber house on the land was not in fact correct. "I did not notice the shop". "I did notice the shop but it was closed". "I did notice the morgue but I did not include it

in my brief to the Minister because I thought it was on the adjacent allotment". "I did not try to establish the boundaries of the land, it was just a rough assessment". "I did not speak to anyone there".

[42] Semisi Moala told the Court that the Minister had decided to grant the land to the Plaintiff before he carried out the site inspection, that the Minister had not instructed him to make any enquiries at the land; he had gone on his own initiative. He was unable to explain what he meant by inserting the letters "OK" next to the "due diligence" item. He accepted that there was no reference to Dr Maka's occupation or claim for the land in the "Comments" section of the form.

[43] When Dr Maka heard that the land had been allocated to the Plaintiff he went to see his lawyer. Mr Posesi Bloomfield then went to see the Minister. According to Semisi Moala no minutes of this meeting can be found. On 15 September 2011, however, the Ministry wrote to Mr Bloomfield. The letter is D-2-68. The letter speaks for itself: "The Hon. Minister for Lands granted the town allotment to [the Plaintiff] on the basis of a decision made by the former Minister of Lands Dr S. Ma'afu Tupou". "Lord Ma'afu ... was compelled by the previous decision of Dr S. M. Tupou taking into consideration the family background and the competing claims to the town allotment".

[44] This explanation was not satisfactory to Dr Maka who then went to see the Minister. According to Dr Maka whose evidence on this point was not challenged, "he did not agree to cancel the Plaintiff's registration". "It was obvious that he had confused the land with the leased land with Palu's house on it". "He asked his staff to write a letter to explain what he had done". It is not clear whether this letter was D-2-68 or whether a second letter was sent but not discovered or whether no second letter was sent at all.

[45] It is at this point that the relevance of the unsuccessful attempt by Semisi To'a to have allotment 2, the allotment which had been leased by Palu, allocated to him, becomes clear [see paragraphs 13 – 19 above]. It was in respect of allotment 2, not allotment 3, the land, that Dr Tupou had issued instructions which were apparently overlooked or overruled by his successor Hon. Fakafanua. The previous decision of Dr Tupou had nothing whatever to do with Dr Maka's claim to allotment 3. In my view Dr Maka's suggestion that the two allotments had been confused was clearly correct. Furthermore, I reject the implication that a Minister is "compelled" to follow the decision of one of his predecessors, whether that decision was right or wrong.

[46] It should also be pointed out that the reasons for the decision in favour of the Plaintiff advanced in D-2-68 do not appear in the Defence of the Third Party (see paragraphs 23 – 27 of the Statement) nor in the brief of evidence of Semisi Moala who, at paragraph 25 stated:

> "the [Third Party] did not approve the devolution of Matei Taumoepeau's town allotment to the First Defendant because the First Defendant is not the heir of Matei Taumoepeau".

This explanation however, is no explanation for refusing (by non-action) to process Dr Maka's section 43 application.

[47] In his writ issued on 8 June 2012 the Plaintiff pleaded his registration, asserted that the Defendant Dr Maka "runs a business of a medical clinic and a morgue at the allotment, although he is not staying at the allotment. Yet he used the allotment as if he is the holder". He sought a "declaration that he is the lawful holder of the land" and an order for vacant possession".

[48] In an amended Statement of Defence filed in October 2012 the Defendant pleaded:

(1) That as the legally adopted son of Matei "he has continued to lawfully use the allotment to date because he is the lawful owner and proper registrant";
(2) That Matei clearly indicated his wish that Dr Maka hold the land following his death;
(3) That the Defendant had applied for the land to be granted to him within 12 months of Matei's death;
(4) That the Defendant had "defended the allotment" from the claim made by Zhu Ai Yu;
(5) That the Plaintiff was not the heir to the land;
(6) That the Plaintiff's application was made several years after the Defendant's claim;
(7) That the land was not available as required by section 73 (2) since it was lawfully occupied by the Defendant;
(8) That the Minister's decision to grant the land to the Plaintiff breached the rules of natural justice; and
(9) That the Minister misidentified the allotment which he granted to the Plaintiff.

[49] After a Third Party notice was issued, the Minister filed a Defence. It was pleaded:

(1) That the Minister "did not approve the devolution of Matei's allotment because the Defendant is not the heir of Matei Taumoepeau";
(2) In the absence of "a valid claim" the land reverted to the Crown;
(3) Dr Maka had "no legal right under law or in equity to the town allotment"; which
(4) The Minister decided to grant to the Plaintiff "based on the family background and the claims for the allotment".

Consideration of the issues

[50] In my opinion the critical issues to be addressed in this matter are as follows:

(i) Was Dr Maka Matei's heir?
(ii) Did the land revert to the Crown after Matei's death?
(iii) Was Dr Maka's continued occupation of the land after Matei's death lawful?
(iv) Was Dr Maka entitled to apply for the grant of the land to him?

(v) Was it a requirement that the land be available before it could lawfully be allocated to the Plaintiff?
(vi) What were the duties of the Ministry/the Minister?

[51] As to (i) I have already explained in paragraph 31 that in my opinion Dr Maka was not Matei's heir within the meaning of section 82 of the Act.

[52] I have also answered (ii) in paragraph 31: the land reverted to the Crown.

[53] In my view the reversion of the land to the Crown by operation of law did not render Dr Maka's continual use of the land unlawful. He did not become a trespasser. While I accept that his licence to reside there came to an end with Matei's death there is nothing to suggest that the Crown which was prima facie entitled to possession took any steps to evict him. Accordingly, he was in possession *nec vi, nec clam, nec precario.* (see Nicholas, *Roman Law*, Oxford 1962). Secondly, it is notorious that applications for grant and registration typically take months to process. It would be absurd, for example, to suggest that the lawful occupant of land subject to a section 83 reversion occupied the land unlawfully while his section 43 application was being processed (and see *Tafa v Viau* – above, paragraphs 36 – 39).

[54] Although Dr Maka was not Matei's heir it does not follow that he was not entitled to make the section 43 applications which were lodged in February and October 2005. The Ministry seems to have taken the view that since Dr Maka could not claim as heir it was not open to him to claim the land or any other basis. This view, if held, was quite wrong. It cannot be denied that Dr Maka had a very strong claim to the land founded on his residence there for many years as Matei's adopted son.

[55] Question (v), the requirement for availability has been the subject of much judicial consideration. In *Ongolea v Finau* [2003] Tonga LR 147, 151 the Court expressed the view that, save in the case of trespassers, land which was as a matter of fact, occupied was not "available" as required by section 50. In arriving at this conclusion the Court referred to *Vai v 'Uliafu* [1989] Tonga LR 56 in which Webster J had held (line 390) "that the land was not available … because a house had been built on the land". Whether this conclusion can now be supported given the prevailing view that buildings are not fixtures (*Cowley v Tourist Services Ha'apai Ltd and Fund Management Ltd* [2001] Tonga LR 183) is not clear.

[56] In *Tafa v Viau* (above) the Land Court held that Crown land granted under section 50 (d) could only lawfully be granted if it was available as is specifically required in the case of grants from hereditary estates. The Court stated (p141-2):

> "To have a situation therefore when the Minister of Lands is able to make a grant of an allotment in total disregard for the rights of a long-term lawful occupant of the same piece of land is quite untenable and a recipe for lawlessness. I cannot accept that such a consequence could ever have been intended by the legislature".

[57] On appeal, the Judgment of the Land Court was upheld [2006] To. L.R 287. Referring to sections 43 and 50 the Court stated:

> "the scheme as a whole seems to make availability an essential requirement, before a grant can be made".

[58] In *Finau v Minister of Lands & Heimuli* AC 9/12, 12 October 2012 the Court of Appeal pointed out that the Court of Appeal in *Tafa v Viau* "did not endorse the ultimate finding at trial that because [the land was occupied by the Respondents who had built a house on it] the land was not available for grant". Commenting on the statement of the Court of Appeal quoted in paragraph 60 above, the Court said:

> "that sentence cannot be taken as a declaration that any provisions in the Act, other than possibly section 50 which authorises the making of a grant is subject to a condition precedent that the land is available in whatever sense that word is used in section 50".

[59] The Court concluded by stating:

> "We have not sought to determine what "available" means for the purposes of section 50. ... there is a real question which may have to be determined in another case or another 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 section 50 having regard to the circumstances of any particular case, or whether "available" has a legal meaning to be determined by a 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".

[60] In the light of these observations it is clear that for this Court itself to attempt to arrive at a conclusion whether the section 73(2) requirement that the land be available had been satisfied is not the most satisfactory approach.

[61] While the responsibility for determining availability may not be clear what is beyond any doubt is the responsibility of the Ministry to make proper enquiries, to comply with the rules of natural justice and to avoid obvious mistake *before* a decision is reached. (see *Hausia v Vaka'uta* & Anr [1974-1980] Tonga LR 58; *Hakeai v Minister of Lands & Ors* [1996] Tonga LR 142; *Cocker v Palavi & Minister of Lands* [1997] Tonga LR 203 and *Tafa v Viau* [2006] Tonga LR 287, 293 in which 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 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 enquiry. In the second place the administrative decision to make the

> particular grant cannot properly be made in the absence of the same enquiry 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 enquiries personally. He 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 was a failure by the Minister",

[62] In my view the Ministry did not handle the regrant of this land properly. First, it did not process Dr Maka's section 43 application with reasonable despatch, or at all. Secondly, it accepted the Plaintiff's application and decided in his favour *before* making proper enquiries (which would *inter alia*, have revealed the allotment 2/3 confusion). Thirdly, the enquiries that were made, principally the visit to the land by Semisi Moala were carried out in a slapdash manner resulting in a brief to the Minister (D-2-58) which was seriously misleading.

[63] In my view the way in which this matter was handled by the Ministry was in the clearest breach of the principles of natural justice and accordingly the registration in favour of the Plaintiff must be set aside and the competing applications referred back to the Minister for due consideration, according to law. There is, of course, nothing to prevent the allocation of another piece of Crown Land to the Plaintiff which is available.

[64] In conclusion I acknowledge with thanks the assistance of Counsel who filed very helpful submissions. I also wish to thank Assessor George Blake for his guidance through the rather complicated family connections. The judgment is, however, my own.

Result:

(1) Plaintiff's claim dismissed.
(2) Plaintiff's registration of allotment 3 dated 7 June 2011 is set aside.
(3) The matter is referred back to the Hon Minister of Lands for further consideration.
(4) I will hear Counsel as to costs.

Australia and New Zealand Banking Group Ltd v Kavaefiafi anor

Supreme Court, Nuku'alofa
Scott J
CV 161/2009

13 March 2015

Banking – mortgage agreement – defence of unconscionable dealing pleaded – bank failed to prove it would not be unconscionable to enforce mortgage – judgment for bank for capital amount

On about 17 May 2006 the plaintiff bank agreed to lend the defendants $64,015 via a housing loan facility. The defendants were already indebted to the plaintiffs at that time. The first defendant had joined the bank as a driver in about 2000 and in 2001 he took advantage of his position as an employee to take several small loans of several hundreds of dollars each to meet family commitments. A further more substantial loan was approved in 2002 amounting to $5,500. In due course the various accounts were consolidated. The defendants fell into arrears with the repayments and on the date the writ was issued were said to owe the bank $109,372.52 with interest accruing at 12.5%. In August 2012 the bank applied for summary judgment. On 26 October 2012 the court dismissed the application. It noted that the defendant pleaded that the loan agreement was "unconscionable and/or inequitable" and expressed the view that the defence was not obviously unarguable.

Held:

1. The elements of the equitable doctrine of unconscionable dealing were: (i) a relationship that placed a party at a special disadvantage vis-a-vis the other party; (ii) knowledge of that special disadvantage in the stronger party; and (iii) unconscientious exploitation by the stronger party of the weaker party's disadvantage. If the weaker party proved the first two elements the burden then shifted to the stronger party to prove that it was not behaving unconscionably in seeking to enforce the transaction.
2. It was clear that there was no equality of arms between the parties, on the one hand a major financial institution and on the other a driver and handyman and his then unqualified and still relatively modestly paid wife. In these circumstances it was essential to produce some contemporary evidence of what occurred when the loan and mortgage were first negotiated.

3. The second element, knowledge by the bank of its advantageous position, was self-evident.
4. The onus then shifted to the bank to prove that it would not in fact be unconscionable to take advantage of the mortgage contract. The court found that the bank fell short of discharging the burden.
5. The finding that the bank could not take advantage of the mortgage agreement did not mean that the capital sum advanced need not be repaid. The result therefore was that there would be judgment for the bank for the sum advanced, $64,015. If satisfactory terms for the repayment could not be negotiated the bank would have to resort to whatever means it may have to enforce repayment apart from those afforded to it by the mortgage.

Case considered:

O'Rorke v Bolingbroke (1877) 2 App Cas 823

Counsel for the plaintiff : Mrs P Tupou

Counsel for the defendants : 'O Pouono with K Piukala

Judgment

[1] This judgment follows my Decision of 26 October 2012.

[2] It is not in issue that on about 17 May 2006 the Plaintiff (the bank) agreed to lend the Defendants $64,015.00 via a housing loan facility. The Defendants were already indebted to the Plaintiffs at that time. The First Defendant had joined the bank as a driver in about 2000 and in 2001 he took advantage of his position as an employee to take several small loans of several hundreds of dollars each to meet family commitments (Documents 1 to 10). It seems that a further more substantial loan was approved in 2002 amounting to $5,500.00 (Document 11).

[3] In due course the various accounts were consolidated. The Defendants fell into arrears with the repayments and on the date the writ was issued were said to owe the bank $109,372.52 with interest accruing at 12.5%. The bank seeks judgment in this amount.

[4] The housing loan was secured by a mortgage over a town allotment belonging to the First Defendant's father and of which he was the heir apparent. Unfortunately, the mortgage document and the letter of offer were not produced, apparently having been destroyed by fire during the events of November 2006. The closest contemporary document is 43 which discloses a loan advance of $73,000. It is not clear how this sum relates to the sum of $64,015.00 which appears in paragraph 3 of the Statement of Claim.

[5] The First Defendant told the Court that as well as driving for the bank he also did odd jobs for the Loan Manager Rakesh Ram. According to the First Defendant, Rakesh was interested in his personal circumstances, established that he as yet had no home of his own but was expecting to inherit his father's land and suggested that he take a housing loan with which to build a home for himself, his wife and children on his father's land.

[6] According to the First Defendant he told Rakesh that he did not think he would be able to service such a loan as he was only earning $50 per week and his wife not much more. According to the First Defendant Rakesh told him not to worry, he could have whatever he required. He advised him to make enquiries to find out how much it would cost to build a house. Once he had made enquiries he found out that the house would cost about $73,000 and that was the sum he applied for.

[7] The First Defendant told the Court that the loans department at the bank at first rejected his application on the ground that it was beyond his means to service a loan of such a size. He then spoke to Rakesh and the loan was approved. Over the next months he drew down on the loan until his indebtedness appears to have reached $90,207.43 in October 2005 (Documents 25 & 26).

[8] The repayment amount on the housing loan was $807.00 per month and these repayments were made fairly regularly during 2005 and the first half of 2006. In 2007 the First Defendant resigned from the bank; his wife, the Second Defendant was expecting their third child and "there was nobody else to help". After the First Defendant stopped working the account fell into arrears. Several attempts were made to restructure the loan but in April 2009 repayment of the whole sum due was demanded. Nothing was paid and proceedings were commenced the following June.

[9] In answer to questions, the First Defendant said he had left school at Form 5. He had worked as a waiter, a shop assistant and at an aquarium before taking the driving job with the bank. He accepted that it was wrongly stated that he was only earning $50 per week and that in fact, at the time of the loan his take home pay was $147.15 per week. He was also getting about $20 per week cash in hand from Rakesh. He and his wife did not run a shop at this time. He was worried that they would not be able to service the loan "but Rakesh insisted". Since leaving the bank in 2007 he has not worked.

[10] The second witness was the Second Defendant. She is the Finance Manager of the Tonga Community Development Trust (see Document 63) and now earns $25,000 per annum with the use of a motor car. She has obtained certificates in bookkeeping and accounting. She stated that she was earning only $80 per week when the loan was approved but when shown Document 86 accepted that the correct figure was nearer to $143.85 per week. It was not clear when she had begun with the TCDT but by July 2007 she was already earning $15,000 (Document 63).

[11] The Second Defendant told the Court that when her husband told her about Rakesh's suggestion she regarded it as "the door being opened by the Lord". "Let us pray about it". They did not discuss their ability to repay the loan and she did not know what the monthly repayments were. She first saw the $807 figure when she went to the bank to sign the contract. "It never crossed my mind that we were borrowing more than we could repay, I was so excited". According to the Second Defendant, the terms and effect of the documents signed by them were not explained to them.

[12] Mrs Tupou asked the Second Defendant about a shop that she and her husband operated. The Second Defendant denied that the shop was operating in 2006 when the

loan was taken out; no profits from the shop were taken into account when the loan was applied for.

[13] The only significant witness for the bank was Leilani Va'enuku who produced a brief of evidence (Exhibit 1). Although she was a member of the loans unit at the Bank she did not give any evidence of her own personal dealings with the Defendants. At paragraph 3 she stated:

> "the bank simply does not lend money if the borrowers do not meet its criteria and this includes staff. I believe the Defendants' case was no different".

[14] At paragraph 15 to 21 she explained that according to her information the Defendants' income qualified them for a loan of about $58,500 with repayments of $646.66 per month. Given that document 43 reveals the initial indebtedness to be $73,000:

> "I believe that the defendants did satisfy the bank to have been in that income bracket from their other income for their loan to have been given".

[15] At paragraph 30 she stated:

> "there is no record on the bank's file that the Defendants once complained that the bank had taken advantage of them".

[16] At paragraph 33 she stated:

> "In December 2008, according to the Bank's records the account was in order, clear evidence that the Defendants were well capable of repaying their debt when they wished to".

[17] In August 2012 the bank applied for summary judgment. On 26 October 2012 I dismissed that application. I noted that the Defence pleads that the loan agreement was "unconscionable and/or inequitable" and expressed the view that this defence was not obviously unarguable.

[18] The elements of the equitable doctrine of unconscionable dealing are helpfully explained in Chapter 9 of Dal Pont & Chalmers "Equity and trusts in Australia" Lawbook Co. 2007. Paragraph 9.05 states:

> "Equity has a jurisdiction to prevent a stronger party to an unconscionable dealing acting against equity and good conscience by enforcing or retaining the benefit of that dealing. It is not a paternal jurisdiction protecting or assisting those who repent of imprudent, foolish or onerous bargains or undertakings. Nor does it arm the Courts with a general power to set aside bargains simply because they appear unjust, onerous or harsh. Rather, it protects those under a disadvantage from those who take advantage of that fact. It follows that the exercise of the jurisdiction is an

> exceptional one; the Courts enforce legal rights except in circumstances which are so far out of the ordinary course, so much an enormity and a departure from ordinary standards of conduct that the position of a person who relies on legal rights should rightly be adjudged unconscionable. It arises from a concatenation of three elements:
>
> (i) A relationship that places a party at a special disadvantage vis-a-vis the other party;
>
> (ii) Knowledge of that special disadvantage in the stronger party; and
>
> (iii) Unconscientious exploitation by the stronger party of the weaker party's disadvantage.
>
> If the weaker party proves the first two elements the burden then shifts to the stronger party to prove that he or she [or it] is not behaving unconscionably in seeking to enforce the transaction".

[19] Discovering the precise circumstances in which the agreement between the parties was established in 2006 was not made any easier by the bank's failure to call any witnesses who actually had dealings with the First Defendant. In paragraph 9 of my Decision of 26 October 2012 I pointed out that no evidence had been filed to counter the Defendants' assertion that the bank "induced them to enter into a contract which it knew perfectly well they could not afford to honour". The evidential situation in March 2015 is essentially the same. In particular the bank chose not to call Rakesh (apparently now working for the bank in Fiji) to answer the Defendant's claim. The Second Defendant's assertion that no explanation of the mortgage was given to them was unrebutted.

[20] In my view the evidence of Leilani Va'enuku tended to assist the Defendants rather than the bank. To argue that they were lent more than their salaries entitled them to and therefore unspecified income must have been taken into account overlooks the fact that mistaken decisions and calculations occur in banks just as they do elsewhere and also provides some admittedly tenuous support for the First Defendant's evidence that the initial refusal of the loans department was overruled after he had reported the matter to Rakesh.

[21] It is clear to me that there was no equality of arms between the parties, on the one hand a major financial institution and on the other a driver and handyman and his then unqualified and still relatively modestly paid wife. In these circumstances it was, in my view, essential to produce some contemporary evidence of what occurred when the loan and mortgage were first negotiated. In my view it would be quite wrong simply to assume that everything was done properly. I am also of the view that the subsequent restructuring is of little relevance to the formation of the contract. Once the Defendants got into difficulties they would sign anything in an attempt to hold on to their house, whether they believed what they signed was true or not. The statement in paragraph 33 of Leilani's brief of evidence already quoted is simply misleading. The account was in order not because there were not substantial arrears but because the debt had been restructured. This provides no evidence at all that the Defendants were able to service the loan in 2008. Furthermore, the important question is not whether they were subsequently able to service the loan but whether they were in any realistic position to do so when it was first taken out.

[22] The second element, knowledge by the bank of its advantageous position I find, in the circumstances of this case, to be self-evident.

[23] In my opinion the Defendants have established *prima facie* that the first two elements identified in the passage quoted on paragraph 18 have been satisfied. The onus then shifted to the bank to prove that it would not in fact be unconscionable to take advantage of it:

> "The burthen of shewing the fairness of the transaction is thrown on the person who seeks to obtain the benefit of it".
> (*O'Rorke v Bolingbroke* (1877) 2 App. Cas. 823).

[24] In my judgment the bank has fallen some way short of discharging the burden cast upon it. I was not in fact especially impressed with the frankness of either of the Defendants however in the absence of almost anything to rebut their evidence it has, on the balance of probabilities, to be accepted.

[25] The final question is: What follows from the conclusion that it would be inequitable to allow the mortgage contract to be enforced? As I see it, a distinction must be drawn between the money advanced and the security and its terms as required by the Bank. The finding that the bank cannot take advantage of the mortgage agreement does not mean that the capital sum advanced need not be repaid. The result therefore is that there will be judgment for the bank for the sum advanced, $64,015.00. If satisfactory terms for the repayment of this sum cannot be negotiated the bank will have to resort to whatever means it may have to enforce repayment apart from those afforded to it by the mortgage.

Result: Judgment for the Plaintiff for $64,015.00 with interest accruing at the rate of 10% from judgment until satisfaction.

R v Latu

Court of Appeal, Nuku'alofa
Salmon, Moore, Blanchard, and Tupou JJ
AC 14/2013

23 March 2015; 31 March 2015

Criminal appeal – Crown appealed against discharge – summary charge available to be considered as alternative to indictable charge – appeal allowed

Mr Latu was charged on indictment with housebreaking and theft. The charge of possession of stolen property was expressed to be in the alternative to the other two charges. Mr Latu was acquitted on the housebreaking and theft charges. In relation to the possession charge, the judge said only that it was not triable on indictment. Section 153 expressly said that proceedings were to be commenced by summons to a Magistrate's Court and determined by a Magistrate. Therefore, the Judge said, the offence was not triable before him in the Supreme Court and he dismissed the charge. The Crown appealed the discharge.

Held:

1. The court considered that the trial Judge erred in the case. The proviso to s 4 of the Supreme Court Act stated that a summary offence arising from the same facts as an offence triable in the Supreme Court may be heard together, in the Supreme Court. In other words, a non–indictable offence could be heard together in that Court with an indictable offence where both arose from the same facts.
2. Therefore the court should not have discharged Mr Latu without considering whether in light of the evidence the requirements of s 4 of the Supreme Court Act and s 42(3) of the Criminal Offences Act (Cap 18) were met and, if so, whether Mr Latu was guilty of that offence.
3. The court set aside the discharge and remitted the case to the Supreme Court for the trial Judge to decide whether the requirements of s 4 and s 42(3) were in fact met and, if so, whether the Crown proved Mr Latu's guilt on the charge of possession of stolen property.

Case considered:

R v Hala'ufia & Ors Cr 35, 36, 91, 92, 93/2013

Statutes considered:
Criminal Offences Act (Cap 18)
Magistrates' Courts Act (Cap 11)
Supreme Court Act (Cap 10)

Counsel for the appellant : Mr S Sisifa SG
The respondent appeared in person

Judgment

[1] The question before this Court is whether in the particular circumstances the Crown has a right of appeal against a decision by the Hon. Justice Cato in the Supreme Court discharging the respondent on a charge of possession of stolen property contrary to s.153 of the Criminal Offences Act (Cap 18).

[2] The circumstances in which that decision was made are these. Mr. Latu was charged on indictment with housebreaking contrary to s.173 (b) of the Act and theft contrary to ss 143 and 145 (b). The charge of possession of stolen property was expressed to be in the alternative to the other two charges. Cato J acquitted Mr. Latu on the housebreaking and theft charges.

[3] In relation to the possession charge, Cato J said only that it was not triable on indictment. Section 153 expressly said that proceedings were to be commenced by summons to a Magistrate's Court and determined by a Magistrate. Therefore, the Judge said, the offence was not triable before him in the Supreme Court and the charge had to be dismissed.

[4] The application for leave to appeal was made out of time but the Lord Chief Justice has granted leave.

[5] In support of its appeal the Crown refers to s.4 of the Supreme Court Act:

> "4. Jurisdiction
> (1) The Supreme Court shall have jurisdiction to hear any proceedings, other than proceedings which -
> (a) are excluded from the jurisdiction of the Supreme Court by the Act of Constitution of Tonga; or
> (b) by law, are within the exclusive jurisdiction of another court or tribunal:
> Provided that a summary offence arising from the same facts of an offence triable in the Supreme Court may be heard together in the Supreme Court."

and to s.42 (3) of the Criminal Offences Act:

> "(3) Where on a person's trial on indictment for any offence except treason or murder, the jury find him not guilty of the offence specifically charged in the indictment but the allegations in the indictment amount to or include (expressly or by implication) an allegation of another offence

> falling within the jurisdiction of the Court of trial, the jury may find him guilty of that other offence or of an offence of which he could be found guilty on an indictment specifically charging that other offence."

[6] It is apparent that Cato J was not referred to either of these provisions. As it happens, in a later case, *R v Hala'ufia & Ors* Cr 35, 36, 91, 92, 93/2013, to which the Crown has referred in its submissions, the same Judge (at [18] – [21]) addressed whether he could find verdicts on an unindicted offence (common assault as an alternative to manslaughter and wilfully causing death) and accepted the submission for the Crown that s.4 and s.42(3) gave him the power. He said:

> [21] In my view, section 4 is sufficiently broad a provision for me to infer that Parliament intended this Court to be able to enter verdicts for charges which, although being summary charges, were available as an alternative to the indictment because of the operation of section 42(3) of the Criminal Offences Act. Had the provision been limited to the determination of summary offences that had been the subject of a charge and formal committal by the magistrate under the Magistrates' Court Act, then the section would have provided for this limitation. I am satisfied that this interpretation enables this Court to sensibly resolve cases on their merits. This means that I regard myself as able where appropriate to return verdicts of common assault under section 12 of the Criminal Offences Act, as an alternative.

[7] We consider that the Judge was correct in *Hala'ufia* and erred in the present case. The proviso to s.4 states that a summary offence arising from the same facts as an offence triable in the Supreme Court may be heard together, in the Supreme Court. In other words, a non–indictable offence can be heard together in that Court with an indictable offence where both arise from the same facts.

[8] Section s.42(3) confirms that where someone is tried on indictment for an offence (except treason or murder) and is found not guilty by the Jury (or by the Judge where trial by Judge alone has been elected under s.12 of the Magistrates' Courts Act (Cap 11)) but the allegations in the indictment amount to or include (expressly or by implication) an allegation of another offence falling within the jurisdiction of the Court of trial (which is a reference to s.4) the Jury or the Judge may find the person guilty of that other offence (or of an offence of which the person could be found guilty on an indictment specifically charging that other offence).

[9] The summary offence of possession of stolen property could be tried in the Supreme Court if, as appears, it arose from the same facts as the charges of housebreaking and theft. The summary offence then, in terms of s.42(3), was one "falling within the jurisdiction of the Court of trial". Provided, as also appears, that the allegations in Counts 1 and 2 of the indictment amounted to or included (expressly or by implication) the allegation made in the alternative count of possession of stolen property, it would follow that the Judge could find Mr. Latu guilty of that possession. He therefore should not have discharged Mr. Latu without considering whether in light of the evidence the requirements of s.4 and s.42(3) were met and, if so, whether Mr. Latu was guilty of that offence.

[10] We accordingly set aside the discharge on count 3 and remit the case to the Supreme Court for the trial Judge to decide:

120 (a) whether the requirements of s.4 and s.42(3) are in fact met and, if so,

(b) whether the Crown has proved Mr. Latu's guilt on the charge of possession of stolen property.

Finau v Heimuli

Court of Appeal, Nuku'alofa
Salmon, Moore, Blanchard, and Tupou JJ
AC 24/2014

23 March 2015; 31 March 2015

Damages – claim for mesne profits – no loss to appellant – appeal dismissed

For the full facts and the substantive decision, see the Court of Appeal decision at *Finau v Minister of Lands anor* [2012] Tonga LR 127 (CA). For the Supreme Court decision realting to damages and mesne proftis, see *Finau v Heimuli* [2014] Tonga LR 187.

The appellant was unsuccessful. The respondent brought a claim to recover damages described as "mesne profits" relating to the occupation by third parties, but permitted by the respondent, of the house and an adjoining shop.

Held:

1. There was no evidence of any loss to the plaintiff arising from the occupation of her home. She had no right herself to put tenants in the house while it was on the respondents land. If there had been evidence of monetary benefit to the respondent, restitutionary or other principles may have come into play. However there was no evidence that the respondent obtained payment for allowing the occupation of the house. The only benefit was to third parties who were not parties to the proceedings.
2. The court concluded that while the appellant did not lose her right to remove the house and water tank, she was not entitled to any damages for its occupation. Should she wish to move the house and/or water tank she must act promptly.
3. The appeal was dismissed. The court did not award costs to the respondent. His behaviour in allowing the occupation of house and the demolition of a shop not belonging to him disentitled him to costs.

Cases considered:

Baldwin v Cole (1705) 6 Mod 212;87 ER 964
Fouldes v Willoughby (1841) 8 M&W 540; 151 ER 1153
Penfolds Wines Pty Ltd v Ellcott (1946) 74 CLR 204 (HCA)

Counsel for the appellant : Mr Niu SC
Respondent appeared in person

Judgment

[1] The Chief Justice, from whose decision this appeal is brought, described the action as "the latest in a long saga of litigation ..." We agree with this assessment. From 1997 until 2012, when this Court found against the appellant, she fought a battle in the Land Court to prevent the respondent from obtaining title to land on which was situated a house and other buildings inherited by the appellant from her mother. In 1997 she was ordered to leave the land following its reversion to the Crown.

[2] As already indicated the appellant was ultimately unsuccessful in this litigation. The current proceedings, issued after the above mentioned Court of Appeal decision, sought to recover damages, described in the statement of claim as "mesne profits", relating to the occupation by third parties, but permitted by the respondent, of the house and an adjoining shop.

[3] The damages claimed were calculated by reference to rents paid for similar property. In the case of the house and a water tank, this calculation was from the expiry of an order of the Court permitting the continuing occupation by the respondent's nominees. The rental claimed for the shop was for a longer period apparently from the date of the use of the shop by the respondent's wife's mother.

[4] Evidence was given at trial of what was said to be the rental of comparable buildings. It appears that at the time the court permitted the continuing occupation of the house by the existing occupants no provision was made for any compensation to the appellant. The appellant instructed her then solicitor to take proceedings to evict the occupiers but no such proceedings were taken.

[5] The Chief Justice dismissed the claim finding that a claim for mesne profits was misconceived. He said that at no time since the land reverted to the Crown has the Respondent had any right to the land except access to it to remove her chattels (the house and any other moveable buildings). He said that right must be exercised within a reasonable time and that such a time had expired. The right to enjoy the benefits of the ownership of the chattels had expired.

[6] We have concluded that the Chief Justice was right to dismiss the claim although our reasons for so deciding differ in some respects from those of the Chief Justice. The plaintiff's claim was clearly one for damages for what she maintained was the unauthorised (by her) occupation of her property. All other things being equal the categorisation of those damages as "mesne profits" would not be fatal.

[7] We agree with the Chief Justice that from the time the land reverted to the Crown her only right was to access the land for the removal of her house. Indeed the respondent in his statement of defence acknowledged that she still had that right. Given the relatively short time since the final decision of this court in October 2012 we do not consider that the right has been abandoned. The claim for damages was made in February 2013 so that she has continued to assert a right arising from her

ownership of the house. The position in relation to the shop is rather different. It was demolished and completely rebuilt. The appellant may well have a claim in conversion arising from that but her damages would probably be limited to the value of the building as a removal prospect. No such claim was advanced in the present proceeding.

[8] So far as the house is concerned we have considered whether the appellant is entitled to damages for conversion or trespass to chattels. We have considered the judgment of Dixon J in *Penfolds Wines Pty Ltd v Ellcott* (1946) 74 CLR 204 (HCA) and have concluded that the following extract from The Law of Torts in New Zealand 3rd Edition p576 correctly states the law:

> "The dictum of Dixon J to the effect that no conversion could be committed where "there is no act, and no intent, inconsistent with the appellants' right to possession and nothing to impair or destroy it" is, it is suggested, correct and not contradicted by the findings of the individual judges. It is also supported by the logic inherent in the nature of the tort of conversion itself. Previous authority also justifies the opinion of Dixon J. For example, the view of Holt CJ[1] that conversion requires the assumption upon oneself of property and right of disposing of another's goods is to the same effect, and Lord Abinger CB in *Fouldes v Willoughby*[2] said that if the ferryman in that case had, rather than simply putting the plaintiff's horses ashore, thrown them into the water so that they drowned, conversion would have been committed. It is, therefore, suggested that the reason that mere using or handling of another's goods is unlikely to be conversion is not that the conduct complained of is trivial; rather, such conduct is perhaps unlikely to amount to a denial of the plaintiff's rights."

[9] In this case there is no evidence of any loss to the plaintiff arising from the occupation of her home. She has no right herself to put tenants in the house while it sits on the respondents land. If there had been evidence of monetary benefit to the respondent restitutionary or other principles may have come into play. However there is no evidence that the respondent obtained payment for allowing the occupation of the house. The only benefit has been to third parties who are not parties to the proceedings.

[10] We emphasise that the respondent had no right during the period before and after the operation of the Court Order referred to in para 3 of this judgment to allow occupation of the appellant's buildings and she could have required that the occupants be removed. Had there been damage to the house caused by the respondent or his occupants the appellant may have had a claim for trespass. But as best as we can tell from the evidence, the work done on the house by the occupants has probably resulted in it being in better condition than it was originally.

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[1] In Baldwin v Cole (1705) 6 Mod 212;87 ER 964
[2] (1841) 8 M&W 540 at 547; 151 ER 1153 at 1156

[11] For all the above reasons while we conclude that the appellant has not lost her right to remove the house and water tank, she is not entitled to any damages for its occupation. We add that should she wish to move the house and/or water tank she must act promptly.

120 [12] The appeal is dismissed. We have decided not to award costs to the respondent. His behaviour in allowing the occupation of house and the demolition of a shop not belonging to him, in our view, disentitles him to costs.

R v Guttenbeil

Court of Appeal, Nuku'alofa
Salmon, Moore, Blanchard, and Tupou JJ
AC 1/2015

25 March 2015; 31 March 2015

Sentencing – appeal by the Crown – no clear and compelling grounds shown to increase the sentence – appeal dismissed

Mrs Guttenbeil was charged with murder, and in the alternative manslaughter, arising from an incident in which she ran over her husband and his brother while trying to separate them in a fight involving a third man. The trial was before a judge alone. She was acquitted on the murder charge but found guilty of manslaughter. She was sentenced to 2 years 9 months imprisonment with the whole of the sentence suspended, subject to conditions which included attendance at an anger management course run by the Salvation Army and 160 hours community service. The Crown appealed against the suspension of the sentence.

Held:

1. The principle to be applied in appeals by the Crown against sentence was set out in *R v Misinale* "... For a sentence to be increased on a Crown appeal, the appellate court must be satisfied that the sentence is so inadequate or inappropriate that the sentencing judge erred in that he or she must have acted upon a wrong principle, wrongly assessed a relevant circumstance, took into account irrelevant factors, failed to take into account relevant factors, or has imposed a sentence that is inconsistent with sentences the court has imposed for like offending. In such a situation, the appellate court is left with no alternative but to impose a more severe or a different sentence. If the court is so satisfied, the sentence should be increased only to the lower end of the appropriate sentencing range."
2. The lower end of the appropriate sentencing range was 3 months imprisonment. The Crown did not satisfy the court that clear and compelling grounds existed for increasing the sentence by reducing the period of suspension. The sentence imposed by the Judge was at the lower end of the appropriate range but it could not be said in all the circumstances to be inadequate or inappropriate.
3. The appeal was dismissed.

Cases considered:
R v Holani [2001] Tonga LR 161
R v Misinale CA 13/99, 23 July 1999
R v Tofavaha [2003] Tonga LR 316

Counsel for the appellant	:	Mr Kefu Acting Attorney General
Counsel for the respondent	:	Mr Pouono

Judgment

[1] This is an appeal by the Crown, with leave granted, against the suspension of the sentence of imprisonment imposed in the Supreme Court on the respondent.

[2] Mrs Guttenbeil was charged with murder, and in the alternative manslaughter, arising from an incident in which she ran over her husband and his brother while trying to separate them in a fight involving a third man. The trial was before a judge alone. She was acquitted on the murder charge but found guilty of manslaughter. She was sentenced to 2 years 9 months imprisonment with the whole of the sentence suspended, subject to conditions which included attendance at an anger management course run by the Salvation Army and 160 hours community service.

[3] Mrs Guttenbeil has 7 children ranging in age from about 2 to 13. The children have obviously suffered trauma from this event but are supportive of their mother and wish to remain together as a family. The 2 eldest, who have been interviewed by counsel for the prosecution, have emphasised that their view is that their mother is the best person to take care of them.

[4] The Crown in its submissions to us contended that the aggravating features of this case outweigh mitigating factors and that the judge should not have suspended the whole of the sentence. The Crown submission is that the respondent should serve 3 to 9 months in prison. In support of the submission the Crown say that the starting point in consideration of a sentence is that a life has been taken unjustifiably and that there is a community need for punishment and deterrence which far outweighs the short term impact on the children of a period of incarceration for their mother. The Crown referred to the judgments of this Court in *R v Tofavaha* [2003] Tonga LR 316 and *R v Holani* [2001] Tonga LR 161 to support its submission that a full suspension of the term of imprisonment was inappropriate. The Crown did not challenge the term of imprisonment itself.

[5] Both the above cases concerned bad cases of drunken driving and extended periods of fast and reckless driving ending with collisions which in the first case caused the death of a passenger in the other vehicle and in the second case the death of a passenger in the vehicle driven by the offender. In both cases pleas of guilty to manslaughter were entered. In the case of *Tofavaha* this court replaced a sentence of 2 years imprisonment fully suspended with one of 2 years imprisonment without suspension. The offender was an unmarried prisoner officer. In the case of *Holani* this Court replaced a sentence of 18 months imprisonment fully suspended with one of 18

months with the final 12 months suspended. The offender was an unmarried primary school teacher.

[6] The principle to be applied in appeals by the Crown against sentence is set out in *R v Misinale* CA 13/99, 23 July 1999 where this Court said:

> "First, for such an appeal to succeed, clear and compelling grounds for increasing the sentence need to be established. It is not sufficient for the appellate court to consider that a more severe sentence could properly be imposed, or that the sentence imposed is inadequate or inappropriate. For a sentence to be increased on a Crown appeal, the appellate court must be satisfied that the sentence is so inadequate or inappropriate that the sentencing judge erred in that he or she must have acted upon a wrong principle, wrongly assessed a relevant circumstance, took into account irrelevant factors, failed to take into account relevant factors, or has imposed a sentence that is inconsistent with sentences the court has imposed for like offending. In such a situation, the appellate court is left with no alternative but to impose a more severe or a different sentence. If the court is so satisfied, the sentence should be increased only to the lower end of the appropriate sentencing range. Indeed, the appellate court, in fixing the proper range for this case, should take into account that it is an added penalty to have to face sentence a second time, and to have hope deferred, and perhaps dashed, in the result."

It can be seen that this is a stringent test. The Crown placed considerable weight on the 2 decisions referred to above but acknowledged that they were more serious cases because they involved drunken driving. The sentencing Judge was referred to these two decisions and also regarded them as more serious. The question is whether the full suspension was so inappropriate that the judge must have erred. It should be noted that the court in *Misinale* said that if the court was satisfied that the sentence was inappropriate it should be increased only to the lower end of the appropriate sentencing range. That means in this case 3 months in prison. In *Misinale* the added penalty of having to face sentence a second time was also noted. That factor has particular significance when the Court is being asked to impose actual imprisonment in place of a sentence appealed by the Crown that did not.

[7] The Crown has not satisfied us that clear and compelling grounds exist for increasing the sentence by reducing the period of suspension. Three months imprisonment is not a lengthy period of imprisonment but the effect on the family is likely to be well out of proportion to the perceived societal benefit. Similar considerations were referred to by the sentencing judge. There is no doubt that the sentence imposed by the Judge was at the lower end of the appropriate range but it cannot be said in all the circumstances of this case to be inadequate or inappropriate.

[8] For the above reasons the appeal is dismissed.

Mortimer anor v Fe'aomoeata anors

Court of Appeal, Nuku'alofa
Salmon, Moore, and Blanchard JJ
AC 2/2015 and AC 28/2014

25 March 2015; 31 March 2015

Land law – question of jurisdiction of Land Court – tenancy agreements and leaseholds – concerned dispute about land and interests in land – Land Court jurisdiction

On 18 December 2014, a Judge of the Land Court determined that the Land Court had no jurisdiction in proceedings involving tenancy agreements and leaseholds which had been commenced by the appellants. The appellants appealed that decision and also appealed against a particular costs order made by the trial Judge.

Held:

1. The proper construction of s149(1)(b) resulted in the Land Court having jurisdiction to hear and determine disputes affecting any land or any interest in land, claims affecting any land or any interest in land, or questions of title affecting any land or any interest in land. It was necessary that each of these classes must be "affecting any land or interest in land". If that nexus or link existed then jurisdiction was conferred.
2. Both the plaintiffs' claims and the defendants' defences together concerned a dispute about land and interests in land within the meaning of s 149(1)(b). Accordingly, the proceeding should be remitted to the Land Court for hearing and determination.
3. The appellants were entitled to their costs in the appeal and also the costs of the trial of the preliminary questions to be paid by the respondents to the appeal jointly and severally except the fifth respondent. It was appropriate that those costs be payable forthwith.

Cases considered:

Australian Solar Mesh Sales Pty Ltd v Anderson (2000) 101 FCR 1

Niu and ors v Tapealava AC 15 of 2012, 17 April 2013

Patrick Stevedores Operations No 2 Ply Ltd v Maritime Union of Australia (1998) 195 CLR 1

"Shin Kobe Maru", The Owners of the Ship v Empire Shipping Company Inc (1994) 181 CLR 404

Yuzhen Yang and another v Manoa (LA 11 of 2013, 6 June 2014)

Statutes considered:
Constitution of Tonga (Cap 2)
Land Act (Cap 132)

Rules considered:
Supreme Court Rules 2007

Counsel for the appellant : Mr Niu SC
Counsel for the first, second, third and ninth respondents: Mrs Vaihu
Counsel for the sixth and seventh respondents : Mr Kefu Acting AG

Judgment

[1] This is an appeal against a judgment of a Judge of the Land Court determining that the Land Court had no jurisdiction in proceedings which had been commenced by the appellants. The appellants also appeal against a particular costs order made by the trial Judge.

[2] The proceedings were commenced by a summons and statement of claim filed in the Land Court by the appellants. The statement of claim recited, in some detail, the appellants' account of the facts. The events leading to the litigation were also described by the trial judge in his reasons for judgment of 18 December 2014. What emerges from the appellants' pleadings and the judgment is the following.

[3] The appellants reside overseas. The first appellant, Mr Richard Mortimer, entered an agreement expressed to be a Tenancy Agreement on 16 February 2006. The other parties to the Agreement were Moleni Fonokalafi Fe'aomoeata, his wife Tupou Fe'aomoeata and their son Piea Fe'aomoeata. The son and the mother were the first and second defendants in the proceedings below and are the first and second respondents in the appeal.

[4] Moleni Fe'aomoeata, who died on 10 October 2007, owned a tax allotment on the island of Nuapapu, Vava'u. The Tenancy Agreement gave Mortimer, so the appellants alleged in the statement of claim, the right to construct buildings and structures over a 2 acre coastal part of the allotment which after construction would become the property of Moleni Fe'aomoeata who would rent the buildings to Mortimer for 60 years. The Agreement required the payment of US $28,965 to Moleni Fe'aomoeata less any deposit previously paid plus a monthly payment of US $70 rent. The trial Judge set out in his reasons for judgment two provisions of the Agreement. In one provision the landlord (we assume Moleni Fe'aomoeata), agreed he would not "in any way whatsoever interfere with the quiet enjoyment by the tenant, his spouse, family, guests, customers and invitees of the tenancy of the premises" if the tenant complied with the terms and conditions of the Agreement. The other provided that Mortimer "shall have the use of the grounds of the premises for personal gardening, cultivation or pleasure, and the landlord shall not interfere with the quiet use and enjoyment thereof by the tenant, his customers or guests".

[5] The second appellant, Mr Eric Stark, entered into an agreement, also expressed to be a Tenancy Agreement, with the same parties to the same effect in relation to a similar parcel of land of similar dimensions.

[6] On 29 June 2007 Piea Fe'aomoeata consented to the lease of the land the subject of the two Tenancy Agreements to the eighth defendant in the proceedings below, Escape Tonga Ltd, and the ninth defendant, Island Real Estate Limited. On that day, he signed two lease application forms. The applications were ultimately approved by Cabinet and leases were registered in April 2008 and in January 2009.

[7] After the appellants commenced the proceedings in the Land Court, the jurisdiction of the Court was put in issue which led to the judgment of the trial Judge determining that he did not have jurisdiction. Before discussing his Honour's reasons, it is convenient to set out the applicable legislative provisions.

The first is clause 90 of the Constitution which provides:

> The Supreme Court shall have jurisdiction in all cases in Law and Equity arising under the Constitution and Laws of the Kingdom (except cases concerning titles to land which shall be determined by a Land Court subject to an appeal to the Privy Council in matters relating to hereditary estates and titles or to the Court of Appeal in other land matters) and in all matters concerning Treaties with Foreign States and Ministers and Consuls and in all cases affecting Public Ministers and Consuls and Maritime Cases.

The second is s 149(1) of the Land Act which provides:

> (1) The Court shall have jurisdiction –
>
> (a) to define the area and boundaries of every parcel of land in the Kingdom;
>
> (b) to hear and determine all disputes, claims and questions of title affecting any land or any interest in land in the Kingdom and in particular all disputes, claims and questions of title affecting any tofia, tax or town allotment or any interest therein; excepting any disputes, claims and questions affecting any land or interest in land resumed by the Crown under Part IX of this Act;
>
> (c) to appoint one or more fit and proper persons with or without remuneration to act as trustees for any Tongan other than a noble or matapule who being entitled to any land is either under the age appointed by law for succeeding thereto or is by reason of mental infirmity incapable of managing his affairs for the purpose of protecting and managing such land and of applying in accordance with the directions of the Court for the maintenance and benefit of the person beneficially entitled to such land all monies received from the management

> thereof including monies arising from the sale or hire of livestock or the sale of copra or other products;
> (d) to take the accounts of all such trust estates and to dismiss any trustee guilty of mismanagement, breach of trust or fraud in connection with the trust estate and to appoint another trustee in his stead;
> (e) to hear and determine any question or amount of damages, loss, compensation, mesne profit, rent or claim in respect of any allotment, lease, sub-lease, permit or interests of any kind in any land.

[8] The procedure adopted by the trial judge to determine the question of jurisdiction was to try two preliminary issues under Order 24 Rule 4 of the Supreme Court Rules. One concerned the question of whether the Tenancy Agreements were illegal under s13 of the Land Act. His Honour concluded they were not, though the correctness of that conclusion does not arise for consideration in this appeal and this Court should not be taken to hold the view that it is necessarily correct. However his Honour also concluded that the Tenancy Agreements did not create any title or interest in land. This conclusion was foundational to his Honour's conclusion that the Land Court did not have jurisdiction to entertain the claims. His Honour did not, himself, undertake an analysis of the provisions of the Land Act to determine whether the Court had jurisdiction. Rather he felt obliged to follow a judgment of the Lord Chief Justice in *Yuzhen Yang and another v Manoa* (LA 11 of 2013, 6 June 2014). His Honour's approach appears to have been to ask what is the nature of the plaintiffs' claim and does it concern an interest in land. If the answer to that question is that it does not concern an interest in land, then the Land Court has no jurisdiction to deal with the claim.

[9] In our view, that process of reasoning does not, at least in a case such as the present, address the right question. The pleadings are important in the following consideration of the issue raised in this appeal and it is appropriate to describe, when discussing the pleadings, the status of the parties in the proceedings in the Land Court rather than in this appeal.

[10] The exclusion in clause 90 of the Constitution limiting the jurisdiction of the Supreme Court should not be taken to identify the boundaries of the jurisdiction of the Land Court. The Courts can have concurrent jurisdiction. That is clear from the judgment of the Court of Appeal in *Niu and ors v Tapealava* AC 15 of 2012, 17 April 2013. That the jurisdiction of the Land Court is wider than the limit on jurisdiction of the Supreme Court was recognised by the Lord Chief Justice in *Yuzhen Yang and another v Manoa* at [24]. We agree. That being so, it is necessary to consider the ambit of the jurisdiction of the Land Court conferred by s149(1).

[11] It is clear, in our opinion, that the proper construction of s149(1)(b) results in the Land Court having jurisdiction to hear and determine disputes affecting any land or any interest in land, claims affecting any land or any interest in land, or questions of title affecting any land or any interest in land. So much is clear from the language used together with the punctuation in the paragraph. The Crown argued in this appeal for a narrower construction of this paragraph effectively confining the jurisdiction it

confers to disputes about title. However the language used is clear and the expression "questions of title" is but one of three classes of matters identified in the opening part of s149(1)(b), the other two being disputes and claims. What is necessary is that each of these classes must be "affecting any land or interest in land". If that nexus or link exists then jurisdiction is conferred. If it is accepted, as it should be, that the Land Court and the Supreme Court can have concurrent jurisdiction then no violence is done to the system of administration of justice in the Kingdom or the system of land law to treat the Land Court as having a wide rather than narrow jurisdiction to the extent authorised by s149 of the Land Act and the Act more generally. As a matter of general principle statutes conferring jurisdiction on a Court should not be narrowly construed: see, for example, *The Owners of the Ship "Shin Kobe Maru" v Empire Shipping Company Inc* (1994) 181 CLR 404 at 420 – 421 and *Patrick Stevedores Operations No 2 Ply Ltd v Maritime Union of Australia* (1998) 195 CLR 1 at [112]

[12] Accordingly the question becomes, in the present case, is there a dispute affecting any land or any interest in land? The parties in the appeal accepted that this question may be answered by reference not only to the plaintiffs' claims but also the defences of the various defendants. A broadly analogous approach is adopted in the Australian Courts in determining whether federal jurisdiction has arisen. This is particularly relevant in the Federal Court of Australia. A case may have a federal element if a plaintiff relies on a federal statute but equally a case may have a federal element, not because of the nature of the plaintiff's claim which might not have a federal element, but by virtue of the defence which has relied on a federal statute: see, for example, the discussion of this issue by Burchett J in *Australian Solar Mesh Sales Pty Ltd v Anderson* (2000) 101 FCR 1.

[13] Even assuming a tenancy agreement of the type in issue in the present proceedings does not create an interest in land (and we express no view on that issue), the plaintiffs seek an order that the leases of the eighth and ninth defendants be cancelled and that they be evicted from the lands the subject of the cancelled leases. The third and ninth defendants raise, as a defence, that they had no knowledge of the Tenancy Agreements and that they secured clear title to the leasehold without impediments. What may emerge as an issue in the proceedings is the legal effect of the contractual rights of the plaintiffs (on the assumption that they are bare contractual rights and the Tenancy Agreements have not created an interest in land) on the rights of the leaseholders under the leases or even whether those leasehold interests should be extinguished. It is difficult to avoid the conclusion that both the plaintiffs' claims and the defendants' defences together concern a dispute about land and interests in land within the meaning of s 149(1)(b). We conclude that it does and, accordingly, the proceeding should be remitted to the Land Court for hearing and determination.

[14] One further matter needs to be addressed. The trial of the entire case was set down for hearing for 5 August 2014 in Vava'u. That date had been fixed on 5 June 2014. The first and second defendant did not appear. Shortly before the hearing, the trial Judge received notices from the first and second defendants seeking an adjournment. The first defendant said he had not had the opportunity to organise travel to Vava'u and, it appears, he was only notified of the hearing date on 28 July 2014. The second defendant sought the adjournment on health grounds. The plaintiffs

sought an order that the first and second defendants pay the costs thrown away by their non-appearance and the consequential adjournment of the trial and that those costs be paid forthwith. Those costs were said to include the costs of the plaintiffs attending the trial, the costs of witnesses who had been subpoenaed to attend and counsels' fees for the lost time and associated expenses. The trial Judge refused this application noting that it would be a significant award of costs against the defendants as lay people and that the plaintiffs, if successful, would be entitled to claim these costs in the cause. Accordingly his Honour took the view that those costs should be reserved in the cause. It was also the circumstances that led to his Honour, it appears, suggesting the trial of preliminary questions.

[15] The appellants accepted that in making the decision he did about costs, the trial Judge was exercising a discretion. However they argue that in the circumstances, the order they sought should have been made. They submit that it was an unreasonable exercise of the discretion to decline to make the order because the first and second defendants were lay people. Moreover they argue it can be inferred that the first and second defendants were quite content for the matter not to go to trial because they are, in substance, being accused of fraud and, under the Tenancy Agreements, were paid significant amounts of money. In addition, the late notice flowed from the failure of at least the first defendant to notify a change of address.

[16] These arguments would have sustained a decision to make costs order requested at the aborted trial. However it was open to the trial Judge, as a matter of discretion, to decline to make the order. There is no warrant for appellate intervention. That said, the appellants are entitled to their costs in the appeal and also, as they request, the costs of the trial of the preliminary questions to be paid by the respondents to the appeal jointly and severally except the fifth respondent. It is appropriate, in our view, that those costs be payable forthwith.

The Court orders:

1. The appeal be allowed.
2. The second preliminary question is answered that whether or not the tenancies created any title or interest in land, the Land Court does have jurisdiction to entertain the claims.
3. Any order which may have made dismissing the appellants' claim, be set aside.
4. The matter be remitted to the Land Court for hearing and determination.
5. The respondents (save for the fifth respondent) pay the appellants' costs of the appeal.
6. The respondents (save for the fifth respondent) pay the appellants' costs of the trial of the preliminary questions.
7. These costs be payable forthwith.

Cauchi v Judicial Appointments and Discipline Panel

Court of Appeal, Nuku'alofa
Salmon, Moore, and Blanchard JJ
AC 33/2014

25 March 2015; 31 March 2015

Civil procedure – leave for judicial review – refused as being premature – Court of Appeal set aside refusal

The Supreme Court determined that the appellant, Mr Cauchi, should not be granted leave to review a decision of the Judicial Appointments and Discipline Panel. The Panel had dismissed Mr Cauchi's complaints against Lord Chief Justice Scott relating to the trial of an action by Mr Cauchi against the Kingdom of Tonga. That action was for wrongful dismissal from the position of Attorney-General. The Supreme Court agreed with the Panel and took the view that the complaints were premature since Mr Cauchi should first have exercised a right of appeal to the Court of Appeal against the decision of the Chief Justice. The issue was whether the Supreme Court was correct in its determination.

Held:

1. The Panel was under a misapprehension of the position concerning appeal to the Court of Appeal and should not have dismissed Mr Cauchi's complaints as prematurely made. Even if there had been an extant appeal the Panel should simply have deferred its hearing and not dismissed the complaint.
2. The Supreme Court was similarly in error in refusing leave for judicial review of the Panel's decision.
3. The court set aside the Supreme Court's decision, granted leave for judicial review of the Panel's decision, and directed the Panel to proceed to consider Mr Cauchi's complaints. It also set aside the Supreme Court's costs decision and awarded Mr Cauchi costs of the judicial review application in the Supreme Court and costs in the Court of Appeal.

Cases considered:

Arbuthnot v Chief Executive of the Department of Work and Income [2008] 1 NZLR 13

Jenys v Public Curator (1953) 90 CLR 113

Statutes considered:
Constitution of Tonga (Cap 2)
Supreme Court Act (Cap 10)

Counsel for the appellant	:	Mr Niu SC
Counsel for the respondent	:	Mr Kefu A/AG

Judgment

[1] The issue on this appeal is whether the Supreme Court correctly determined that the appellant, Mr Cauchi, should not be granted leave to review a decision of the Judicial Appointments and Discipline Panel. The Panel had dismissed Mr Cauchi's complaints against Lord Chief Justice Scott relating to trial of an action by Mr Cauchi against the Kingdom of Tonga. That action, which is still ongoing, was for wrongful dismissal from the position of Attorney-General. In agreement with the Panel, the Hon. Justice Cato took the view that the complaints were premature since Mr Cauchi should first have exercised a right of appeal to this Court against the decision of the Chief Justice.

[2] The trial of Mr Cauchi's action for damages had been before the Lord Chief Justice and a jury commencing on 19 November 2013. On 26 November 2013 Mr Cauchi applied for the jury to be discharged. The Lord Chief Justice acceded to that application and on 13 January 2014 gave his written reasons for making the order discharging the jury.

[3] He said that on the morning of the trial counsel for the Government, the then Attorney-General Mr Adsett SC, had sought clarification of how the trial was to proceed, saying complicated questions of law and fact were involved. Mr Adsett asked whether it would be appropriate for questions to be framed for the jury. The Lord Chief Justice went on to record in his reasons (at [11]) that it had been agreed with Mr Adsett and with Mr Niu SC, who was counsel for Mr Cauchi;

> (i) that the issues of fact disclosed by the evidence would be framed as written questions for the jury to answer; and
> (ii) that all submissions of law would be made "at the close of the case".

[4] The trial then began. Three days had been allocated. However the evidence for both sides was not completed until late on the fifth day. Counsel then handed up proposed lists of questions for the jury. The next morning Mr Niu made an application asking for the jury to be discharged. Mr Adsett opposed the motion and disagreed with Mr Niu's suggestion that the "procedure adopted by consent (a reference to the "agreement" recorded in [3] above) was in any way in breach of the requirements either of the Constitution or of the Supreme Court Act. Later in his reasons (at [25]) the Lord Chief Justice said that he agreed with Mr Adsett:

> "[25] ... A procedure was agreed between counsel and the Court and was implemented. According to Mr Niu, his client instructed him to withdraw his consent to the procedure three days after it had been implemented and after he had

> returned to Australia. By then all the evidence had been heard. It is evident to me that the Plaintiff's belated unhappiness with the perceived consequences of the procedure agreed to is the real, but unacceptable reason for the motion to discharge being made.
>
> [26] I did not discharge the jury (as repeatedly but mistakenly reported in the media) because I accepted that I had misdirected the jury. In my opinion no "directions" in the sense of the term as usually understood, namely as part of a summing up, were ever given to the jury at all and therefore no question of misdirection arises.
>
> [27] I decided to discharge the jury because the decision by the Plaintiff to withdraw from the agreement reached taken together with the failure of all concerned sufficiently to prepare for the trial left the Court, and in particular the jury, in an impossible position …"

[5] The Lord Chief Justice gave his explanation of why this was the case by reference to the "difficult questions which the Plaintiff's decision to request trial by jury raises". He referred to cl.101 of the Constitution which required the Judge to "direct the jury upon the law bearing upon the case", saying that this requirement was repeated in s.13(3) of the Supreme Court Act:

> "After the evidence has been heard the judge shall sum up the evidence and explain to the jury the law that bears upon the case. The jury shall then consider the **evidence** and deliver their verdict".

The emphasis was added by the Lord Chief Justice who said that the final sentence of s.13(3) was "clearly a reflection of the basic principle that the facts are for the jury to consider and evaluate whereas the law is for the judge". The problem in the case, however, was that the questions of law raised "are particularly difficult to answer let alone explain to the jury especially when the explanations have to be interpreted from legal English into lay Tongan".

[6] The Lord Chief Justice went on:

> [31] In paragraphs 11 to 13 of his submissions (and in his opening remarks to the jury) Mr Niu appeared to be suggesting that the only procedure which conformed with the requirements of the Constitution was for all questions of law arising in the case to be explained to the jury which would then apply the law as understood by them to the facts in order to arrive at a general verdict. In my view that approach is neither sensible nor correct.
>
> [32] In my opinion the purpose of the Constitutional provisions referred to by Mr Niu is protective and especially so where the "large amounts" involved have the result that the action is only triable in the Supreme Court. As already pointed out, the function of the jury in a civil trial is to assist the judge to decide disputed questions of fact. Doubtless, these

> questions may themselves involve questions of law such as admissibility, corroborative effect, identification and so on which are routinely dealt with by warnings and explanations in criminal cases. But I do not accept that an attempt should be made to explain complicated questions of law to a jury as apparently envisaged by Mr Niu. Such a course does not protect against miscarriages of justice.

He then elaborated on the difficulty he saw but it is unnecessary for us to refer to that part of his reasons.

[7] The Lord Chief Justice concluded his reasons by saying that the "sudden decision mid-trial" by Mr Cauchi to "withdraw from the agreed procedure" and the filing of the motion to discharge the jury had left the Court in an impossible position. The several fundamental issues raised clearly required careful consideration before any further steps including rulings could be taken. It was not acceptable to stand the jury by for several weeks. The trial had already run to twice its allocated length. He pointed out the inconvenience this had caused. He adjourned the case for a directions hearing "after counsel have had an opportunity to consider what further steps need to be taken before the matter is again set down for trial".

[8] Mr Cauchi made his complaint to the Panel by letter dated 26 February 2014. The complaint was against both Lord Chief Justice Scott and Mr Adsett. He took issue with what was said in the Lord Chief Justice's account of what had occurred and, in particular that there had been any agreement about procedure. He said that he had instructed his counsel to appeal the matter following the release of those reasons. For present proposes it suffices to summarise the complaint against the Lord Chief Justice as alleging breach of his judicial oath in three respects:

(a) By depriving Mr Cauchi of his right under the Constitution of Tonga to a trial by jury;
(b) By acting with partiality against Mr Cauchi by wrongfully stating in his reasons for decision that Mr Cauchi or his counsel had agreed that the trial should be conducted on the basis that the role of the jury was to determine all issues of fact and that it was for the Judge to determine questions of legal liability arising from the jury's determinations. The Lord Chief Justice had also wrongfully allowed a claim for costs against Mr Cauchi for the aborted trial; and
(c) By acting with partiality in (i) refusing to allow Mr Cauchi to give or produce certain evidence (ii) the questions he had asked of witnesses at the trial and (iii) being discourteous to Mr Cauchi in front of the jury when Mr Cauchi was giving evidence.

[9] Mr Cauchi contended in his complaints to the Panel that it should recommend to his Majesty in Council that Lord Chief Justice Scott be dismissed from office because of his alleged misconduct.

[10] The Panel, however, in a decision dated 25 March 2014, noted that Mr Cauchi had said that he had instructed counsel to appeal against the Chief Justice's decision. In those circumstance, the Panel said it would be quite improper for it to consider the

matter further since that would risk interfering with the course of justice. The litigation, including any rights of appeal, must be pursued and determined before the Panel would entertain further consideration of the complaint. Plainly, the Panel was leaving it open to Mr Cauchi to come back to it after the contemplated appeal had been determined and the litigation was at an end.

[11] Mr Cauchi then sought judicial review of the Panel's decision. Cato J declined to give leave for that review. He pointed out that the complaint to the Panel was involved principally with the propriety of the Lord Chief Justice's ruling and his interpretation of provisions of the Constitution and of the Supreme Court Act. There was also the issue of whether Mr Cauchi through his counsel had agreed to the approach which the Lord Chief Justice had taken to the respective responsibilities of the jury and himself. In Cato J's view, such issues could only properly be decided authoritatively by this Court on an appeal. Other issues concerning the Lord Chief Justice's conduct, Cato J said, could only be properly evaluated on appeal. He concluded that the Panel had been right to consider that it was premature to entertain the complaints; the approach taken by the Panel could not be faulted. In the absence of rulings from this Court, the Panel could not properly determine whether the Lord Chief Justice's conduct of the trial had been in error, still less that he had not been impartial and that he was guilty of serious misconduct.

[12] Cato J said also that the first two complaints were essentially of error of law and should be dealt with in the normal way through an appeal to this Court. Further, he said (at para [14] of his judgment) that the complaints relating to procedure or the manner of questioning did not reach the threshold where a complaint of breach of discipline or misconduct was justified. Whether the Chief Justice's conduct was appropriate or manifested bias had to be considered in the whole context of the case and was also an appeal question, as was argument about the admissibility of evidence. Again, the complaints did not in context attain the threshold standard that Mr Cauchi needed to meet to demonstrate serious misconduct.

[13] Cato J declined to give leave to review the decision of the Panel and awarded costs to the respondent. The present appeal is against both those decisions of Cato J.

[14] At some time after the letter of complaint was sent to the Panel (the date is unknown to us) Mr Cauchi withdrew his instructions to counsel to bring an appeal against the order discharging the jury. That was understandable as it would have been an appeal against a decision which Mr Cauchi had himself applied for and which could not be reversed (by reinstating the first trial). His objection is not to the order itself but to the events which led to it and to the reasons given by the Judge. An appeal against an order in form wholly favourable to the appellant will rarely be entertained. As the New Zealand Supreme Court said in *Arbuthnot v Chief Executive of the Department of Work and Income* [2008] 1 NZLR 13 at [25]:

> [25] It is fundamental that an appeal must be against the result to which a decision maker has come, namely the order or declaration made or other relief given, not directly against the conclusions reached by the decision maker which led to that result, although of course any flaws in those conclusions may provide the means of impeaching the result. A litigant

> cannot therefore, save perhaps in very exceptional circumstances, bring an appeal when they have been entirely successful and do not wish to alter the result. The successful litigant cannot seek to have the appeal body overturn unfavourable factual or legal conclusions made on the journey to that result which have had no significant impact on where the decision maker ultimately arrived. In short, there is no right of appeal against the reasons for a judgment, only against the judgment itself.

[15] It is particularly unfortunate that the abandonment of any intention to bring an appeal was not advised either to the Panel or to Cato J, both of whom plainly proceeded on the basis that there would be an appeal against Lord Chief Justice Scott's order. Had they appreciated the true position we think it likely that their decisions would have been different.

[16] We say this because, although they would fully have recognised the awkwardness of the Panel's having to decide whether the Lord Chief Justice had erred in law in the approach that he took to the respective roles of Judge and Jury in a civil proceeding (with the potential for witnesses, including Lord Chief Justice Scott himself, expressing differing opinions on that legal question), they would also have realised that there was little prospect of having the issue authoritatively determined by this Court, at least in the context of this litigation. Mention was made to us of the opinion expressed by the Lord Chief Justice on the same question at the hearing which led to the "agreement" but there does not appear to have been any appealable ruling on that occasion.

[17] It is possible for Mr Cauchi to apply ahead of the prospective re-trial for a direction on how matters should be approached at that trial. But that is unlikely to give the Panel authoritative guidance since we understand from Mr Kefu that the Kingdom of Tonga takes the same position as Mr Cauchi on the issue and further, that Cato J has recently conducted a civil jury trial in that way which both counsel say has long been the orthodox approach in Tonga (and elsewhere in the common law world). That approach is that the Judge instructs the jury on the law and that the jury then decides all the issues in accordance with the law as explained to them by the Judge. The likelihood is therefore that any direction given by the Supreme Court upon such an application would result in a ruling favourable to Mr Cauchi and so the matter would not come to this Court. It is perhaps unfortunate that no mechanism exists in Tongan law enabling a proceeding to be moved directly into the Court of Appeal in such a case.

[18] The other matters of complaint by Mr Cauchi allege partiality (actual bias) on the part of Lord Chief Justice Scott. The investigation into those allegations would appear to involve factual questions only. A re-trial of the case in the Supreme Court will be before a different Judge. A hearing by the Panel will carry no risk of an interference with the case in the Supreme Court.

[19] We are conscious of the fact that this present appeal concerns judicial review (the issue is whether the Panel should have treated Mr Cauchi's complaint as premature) and that accordingly we are not concerned with the merits of Mr Cauchi's case before the Panel. Cato J in fact went too far in this respect in para [14] of his decision: see [12] above. His observations had the potential to inappropriately

influence the deliberations of the Panel. But it may assist the Panel if we venture to say that our impression is that Mr Niu and Mr Kefu are correct when they both say that the approach described in para [17] above is entirely orthodox and well settled in jurisdictions outside Tonga. It also seems that the matter has been regarded as sufficiently settled in Tonga that it has never previously been brought to this Court. Laws permitting or requiring juries must be observed even if the result is, as a practical matter, undesirable or even unacceptable: see *Jenys v Public Curator* (1953) 90 CLR 113 at 118.

260 [20] The conclusion we have reached is therefore that the Panel was under a misapprehension of the position concerning appeal to this Court and should not have dismissed Mr Cauchi's complaints as prematurely made. (Even if there had been an extant appeal the Panel should simply have deferred its hearing and not dismissed the complaint).

[21] Cato J was similarly in error in refusing leave for judicial review of the Panel's decision. We set aside Cato J's decision, grant leave for judicial review of that decision and direct the Panel to proceed to consider Mr Cauchi's complaints. We also set aside Cato J's costs decision and award Mr Cauchi costs of the judicial review application in the Supreme Court and costs in this Court.

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Taufa v Tahaafe anor

Court of Appeal, Nuku'alofa
Salmon, Moore, Blanchard, and Tupou JJ
AC 30/2014

26 March 2015; 31 March 2015

Land law – heir ceased to be Tongan subject – no right to tax allotment inheritance
Land law – point in time for determination of right of inheritance was time of death – Minister of Lands made error

The dispute between the appellant and the first respondent, brothers, was about the entitlement to a tax allotment. The tax allotment "Pava" was situated in Koloua, Tongatapu. The last holder was Finau Taufa, their mother, who held the allotment as widow. She died on 28 November 2002. In 1977 the appellant became a naturalized American and took up American citizenship. He therefore ceased to be a Tongan subject by virtue of the Nationality Act (Cap 59). After the death of their mother, her youngest son, 'Ofa Taufa, swore an affidavit on 7 April 2003 in the form required by the Ministry of Lands, that his brother, the first respondent, was the heir to the allotments held by Finau Taufa when she died. It was stated that the oldest son, the appellant, was naturalised as an American in 1977. This affidavit was lodged with the Ministry of Lands on 4 April 2003. The appellant applied to be registered as heir to the tax allotment on 17 October 2003. In 2007 the Nationality Act was amended and allowed under section 17 a Tongan who had lost his/her Tonga nationality to apply for re-admission as a Tongan subject. In 2011, the appellant applied to be re-admitted as a Tongan national and a certificate of his re-admission to Tongan nationality was issued on 25 August 2011. On 18 May 2012, the Minister of Lands wrote to the appellant, the first respondent, and their younger brother 'Ofa Taufa saying that the tax allotment that was held by Finau Taufa as the widow, should be changed to the heir Kisione 'Ofahemo'oni Taufa in accordance with his letter of 17 October 2003. The first respondent claimed that he was entitled to the tax allotment. The Lord President of the Land Court made an order on 29 August 2014 that declared that the first respondent and not the appellant was entitled to the tax allotment.

Held:

1. The point in time for the determination of the right of inheritance to the tax allotment in dispute was when the widow Finau Taufa died in November 2002. There were two elements required for the entitlement to the grant of a tax and town allotment: male, and Tongan subject by birth.

2. The appellant lost his right of inheritance when he became a foreigner. All foreigners and others in the position of the appellant would be treated the same and have the same rights guaranteed by clause 4.
3. The Minister of Lands (second respondent) conceded that the Minister had made an error in law when he made the decisions and directions in his letter of 18 May 2012 and, with reference to the allotment in dispute, his order that it should be registered in the name of the appellant.
4. The court held that the rightful heir to the tax allotment "Pava" was the first respondent 'Etuate Taufa Tahaafe. The appeal was dismissed with costs awarded to the first respondent only, given that the second respondent caused the mistake and error of law.

Statutes considered:
Constitution of Tonga (Cap 2)
Land Act (Cap 132)
Nationality Act (Cap 59)

Counsel for the appellant	:	Mr Fonua
Counsel for the first respondent	:	Mr 'O Pouono
Counsel for the second respondent	:	Mr Kefu A/AG

Judgment

[1] This is an appeal against the Judgment of the Lord President of the Land Court made on 29 August 2014 declaring that the first respondent and not the appellant was entitled to the tax allotment "Pava".

Background

[2] The dispute between the appellant and the first respondent, who are brothers, about the entitlement to the tax allotment arose in the following circumstances. The tax allotment "Pava" is situated in Koloua, Tongatapu. The last holder was Finau Taufa, who held the allotment as widow. She died on 28 November 2002.

[3] Finau Taufa and her husband 'Inoke Taufa (who died in 1990), had four children namely;

- Loloma Pepa (F) born 25/8/1941
- Kisione Taufa (M) born 20/9/1944 (Appellant)
- 'Etuate Tahaafe (M) born 18/10/1946 (First Respondent)
- 'Ofa Taufa (M) born 17/7/1949

[4] The appellant Kisione Taufa, went to school in Hawaii in 1965 at the Brigham Young University. He lived and worked in Hawaii, married a Tongan woman Patiola Tu'itamala Tauteoli and they had 7 children who were born in Hawaii between the years 1968 to 1985.

[5] In 1977 the appellant became a naturalized American and took up American citizenship. He therefore ceased to be a Tongan subject by virtue of section 4(1) of the Nationality Act (Cap 59) which stated (at that time) –

> A Tongan subject who when in any foreign State and not under any disability by obtaining a certificate of naturalization or by any other voluntary and formal act becomes naturalized therein shall henceforth be deemed to have ceased to be a Tongan subject.

[6] After the death of their mother Finau Taufa, in November 2002, her youngest son, 'Ofa Taufa, swore an affidavit on 7 April 2003 in the form required by the Ministry of Lands, that his brother, 'Etuate Tahaafe (the First Respondent) was the heir to the allotments held by Finau Taufa when she died. In this affidavit, it was stated that the oldest son Kisione Taufa (the Appellant) was naturalised as an American in 1977. This affidavit was lodged with the Ministry of Lands on 4 April 2003.

[7] It appears that the Appellant applied to be registered as heir to the Tax allotment on 17 October 2003. This is mentioned in the letter from the Minister of Lands dated 18 May 2012 to which we will shortly refer.

[8] For reasons unknown, the Minister of Lands and his successors from 2003 took no action with regard to the determination of the lawful heir to succeed to the allotment and the registration thereof, until the current Minister of Lands with his letter dated 18 May 2012.

[9] In 2007 the Nationality Act (Cap. 59) was amended, inter alia, repealing section 4 that took away Tongan nationality from a person who has become naturalised in a foreign country and enacting a new section that read as follows:

> "4. The following persons shall be deemed to be Tongan subjects –
> (a) any person born in Tonga to a Tongan parent;
> (b) any person born abroad of a Tongan father;
> (c) any person born abroad of a Tongan mother;
> (e) any person naturalised under this Act."

The 2007 Act also allowed under section 17 a Tongan who had lost his/her Tonga nationality to apply for re-admission as a Tongan subject.

[10] Sometime in 2011 the Appellant applied to be re-admitted as a Tongan national. A certificate of his re-admission to Tongan nationality was signed and issued by the Minister for Foreign Affairs on 25 August 2011.

[11] On 18 May 2012, the Minister of Lands wrote to the Appellant and the First Respondent and their younger brother 'Ofa Taufa saying that

> "the decision in this letter shall be final and I think it is the most reasonable in accordance with the law".

Of concern to the case before us is the Minister's decision –

> "1. To change the tax allotment that was held by Finau Taufa as the widow, to the heir Kisione 'Ofahemo'oni Taufa in accordance with his letter of 17/10/2003"

[12] The decision by the Minister of Lands in his letter of 18 May 2012 led to the claim made by the First Respondent to the Land Court which made the order on 29 August 2014 referred to in paragraph [1] of this Judgment in favour of the First Respondent and now the appeal before this Court.

Grounds for appeal

[13] The appeal is based on the ground that it was wrong and an error in law for the lower court to construe the Land Act so as to take away the right of the Appellant's inheritance under section 82 of the Act when he was naturalised and became a citizen of the United States of America in 1977. Section 82 of the Act states the rules of succession to allotments as follows:

> "Subject to the life estate of the widow the succession to a tax and town allotment shall be as follows;
>
> (a) Decent shall be traced from the last lawful male holder;
>
> (b) Only persons born in wedlock may inherit;
>
> (c) The inheritance shall descend 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 ....."

[14] Mr Fonua submitted that s 82 does not, in terms, limit devolution only to Tongan nationals. The only express criterion is that the person taking title under s 82 be in a familial relationship with the last lawful owner. The section is concerned only with blood lines. If it was the intent of the law to take away such an important right from a person who met the criteria then the Legislature should provide this in clear and unambiguous language in section 82.

[14] It was common ground during the appeal, though Mr Fonua eventually appeared to resile from this agreed position, that the point in time for the determination of the right of inheritance to the tax allotment in dispute was when the widow Finau Taufa died in November 2002. This, in our opinion is, correct.

[15] A convenient starting point in construing s 82 is the Constitution and the Land Act provisions which reserve the right to a tax and town allotment to male Tongan subjects by birth.

Clause 113 of the Constitution provides that –

> *"**Tongan male subjects by birth** of or over the age of 16 years may be granted town allotments and tax allotments ....."*

Section 7 of the Land Act provides that –

> *"**Every male Tongan subject by birth** upon making application in the prescribed form to the Minister of Lands shall be entitled to receive subject to the provision of this Act a grant of land ..... as a tax allotment."*

Section 43(1) of the Land Act provides that –

> *"**Every male Tongan subject by birth** of 16 years of age ..... shall be entitled to the grant of a tax or town allotment ....."*

[16] Therefore there are two elements required for the entitlement to the grant of a tax and town allotment:

- Male
- Tongan subject by birth

Both elements are clear but the requirement of "by birth" was necessary to distinguish this person from a foreigner who by naturalisation becomes a Tongan subject. Such a person is not a Tongan subject by birth.

Clause 29 of the Constitution states:

> "Any foreigner after he has resided in the Kingdom for a space of five years or more may with the consent of the King take the oath of allegiance and he may be granted Certificates of Naturalisation and all naturalised subjects shall have the same rights and privileges as native born subjects of Tonga with the exception that they shall not be entitled to the rights of hereditary tax allotments or town allotments."

Section 9 of the Nationality Act mirrors Clause 29 with regard to a naturalised Tongan and has a proviso saying:

> "Provided that he shall not be entitled to a grant of hereditary tax allotment or town allotment."

[17] Our attention was also drawn to the definition of a landholder or holder by Mr Kefu, in section 2 of the Land Act paragraphs (b) and (c).

Section 2 provides:

> "**landholder**" or "**holder**" means -
> (a) as regards Crown Land the Minister of Lands;
> (b) any Tongan subject holding an hereditary estate, tax allotment or town allotment;

> (c) any Tongan subject claiming to be interested in land which he is legally capable to hold;
> (d) any trustee duly appointed by the King, the Minister, or the Court on behalf of any person entitled to succeed to any land on reaching the lawful age of succession in respect of such land;
> (e) any person appointed as or acting as trustee or representative for any person beneficially entitled to any land or interest in land;
> (f) any person who claims to be entitled to any land or interest in land whether in actual possession or occupation or otherwise.

When s.82 is read with this definition in mind the following appears. Section 82, as we have said, deals with inheritance through blood lines from a "lawful male holder". A person whose claim to the succession is correctly registered will in turn became the lawful male holder. Paras (b) and (c) encompass only Tongan subjects as holders. That suggests that a foreigner cannot become a holder under the operation of s.82. The only other paragraph of possible relevance is para (f) but that part of the definition, which is a general one for the purposes of the whole of the Act, is not apt to describe a holder under s.82, for such a person is not a mere claimant.

[18] When the Appellant became a citizen of America in 1977 he lost his Tongan nationality by virtue of section 4(1) of the Nationality Act. Of interest is that section 6 of the Nationality Act gave to a "statutory alien", which the Appellant would be when he ceased to be a Tongan subject under section 4(1), the right to apply for a certificate of re-admission to Tongan nationality.

[19] With regard to the devolution of hereditary estates among nobles in Part III of the Land Act, we note section 42 which states:

> Nothing in this Part of this Act shall apply to any person who is not of Tongan nationality.

This applies only to noble estates and not to the town and tax allotments of commoners.

We agree that such a provision could have been put in Part IV of the Act to cover the devolution under section 82 to put beyond doubt that a foreigner (including a statutory alien) cannot inherit a tax or town allotment. But the provisions we have already discussed indicate otherwise.

[20] A further submission made by Mr. Fonua concerns the equality of all before the law guaranteed by Clause 4 of the Constitution which states:

> "There shall be but one law in Tonga for Chiefs and Commoners for non-Tongans and Tongans. No laws shall be enacted for one class and not for another class but the law shall be the same for all the people of this land."

The question is whether clause 4 requires a reading of section 82 in a way that does not exclude the Appellant from his right of inheritance. For the reasons stated above the Appellant had lost his right of inheritance when he became a foreigner. All foreigners and others in the position of the Appellant will be treated the same and have the same rights guaranteed by clause 4.

[21] There remains the claim of equitable estoppel by the Appellant. This was not raised in the lower court and no evidence was led. The issue cannot be raised on appeal.

[22] Mr Kefu, on behalf of the Minister of Lands (Second Respondent), has conceded that the Minister had made an error in law when he made the decisions and directions in his letter of 18 May 2012 and, with reference to the allotment in dispute, his order that it should be registered in the name of the Appellant.

Conclusion

[23] For reasons given, we hold that the rightful heir to the tax allotment "Pava" is the First Respondent 'Etuate Taufa Tahaafe.

[24] Based on our findings, we recommend that the Hon. Minister of Lands review his letter and decision of 18 May 2012 and seek advice on his decisions regarding other allotments referred to in that letter.

[25] The appeal is dismissed with costs awarded to the First Respondent only, given that the Second Respondent caused the mistake and error of law, to be taxed if not agreed.

Fau v Fau anor

Land Court, Nuku'alofa
Paulsen, President
LA 20/2014

15 April 2015; 16 April 2015

Civil procedure – application to strike out – claim was statute-barred – time ran from when right to bring action first accrued – struck out

The subject land was first registered to Sefo Puamau on 9 December 1927 and devolved to his heir Pataleone Fau on 19 May 1943. Pataleone Fau died on 5 October 1982. He had two surviving sons namely Peauafi Fau and Sosefo Fau. The plaintiff was the eldest son of Peauafi Fau. The first defendant was the eldest son of Sosefo Fau. After Pataleone Fau's death the land remained unregistered for 6 years – on 5 January 1988 it was registered to Sosefo Fau. Peauafi Fau died on 6 April 2001. Sosefo Fau died on 5 July 2012 and the land devolved to the first defendant. The plaintiff sought a declaration that the registration of the land to the first defendant was unlawful and for cancellation of the same. He also sought an order for the land to be granted to him and costs. The first defendant said that the plaintiff's cause of action was statute-barred and therefore applied to strike out the claim. The second defendant, the Minister of Lands, supported the application. The plaintiff opposed.

Held:

1. The alleged wrong upon which the claim was based was said to be the fraudulent registration of the land to Sosefo Fau in 1988. Any right Peauafi Fau had to challenge Sosefo Fau's registration accrued in 1988. The plaintiff did not have any claim independent of that which first accrued to Peauafi Fau. He made the same claim as was available to his father but through his father as heir. Time began to run from when the right to bring the action first accrued. It did not matter, in the case of a plaintiff who claimed through the person to whom the right to bring the action first accrued, that the plaintiff was not able to bring the action at that time or that time may have expired before he acquired a right to do so.
2. The right to bring an action based on the alleged fraudulent registration of the land to Sosefo Fau accrued in 1988 and expired in 1998 (applying section 170 of the Land Act).
3. The plaintiff's claim was dismissed.

Cases considered:
Cocker v Cocker [2002] Tonga L.R 252
Koloamatangi v Koloamatangi [2003] Tonga L.R. 131
Mokofisi v Minister of Lands and anor [LA 7 of 2014]
Motuliki v Namoa, Motuliki and Minister of Lands [1990] Tonga L.R. 61 (PC)
Jagroop v Soakai and the Kingdom of Tonga [2001] Tonga LR 234
Trustees Executors Ltd v Murray [2007] NZSC 27

Statute considered:
Land Act (Cap 132)

Rules considered:
Land Court Rules 2007
Supreme Court Rules 2007

Counsel for the plaintiff	:	Mr 'O Pouono
Counsel for the first defendant	:	Mr William Edwards
Counsel for the second defendant	:	Mr 'A Kefu SC

Ruling

[1] This is an application by the first defendant to strike out this claim relying on Order 8, Rule 8 of the Supreme Court Rules (applied by Order 2. Rule. 2 of the Land Court Rules). The application pleads that the plaintiff's cause of action is statute barred. The second defendant supports the application. The plaintiff opposes.

The facts

[2] The action concerns a property known as Fononga Hihifo at Ma'ufanga, Tongatapu.

[3] The land was first registered to Sefo Puamau on 9 December 1927 and devolved to his heir Pataleone Fau on 19 May 1943. Pataleone Fau died on 5 October 1982. He had two surviving sons namely Peauafi Fau and Sosefo Fau. The plaintiff is the eldest son of Peauafi Fau. The first defendant is the eldest son of Sosefo Fau.

[4] After Pataleone Fau's death Fononga Hihifo remained unregistered for 6 years. On 5 January 1988 it was registered to Sosefo Fau.

[5] Peauafi Fau died on 6 April 2001. Sosefo Fau died on 5 July 2012 and the land devolved to the first defendant.

[6] The plaintiff is seeking a declaration that the registration of the land to the first defendant was unlawful and for cancellation of the same. He also seeks an order for the land to be granted to him and costs.

[7] The kernel of the plaintiff's claim is contained in paragraphs 5 and 6 of the statement of claim as follows:

> '5 The land was registered by Pataleone Fau's younger son Sosefo Fau in 1988 in a process which was fraudulent based on a false submission made by him to the Second Defendant.
> 6 Sosefo Fau succeeded in registering the tax allotment after somehow convincing the Second Defendant that Peauafi (Mafi) Fau was not the eldest legitimate son and heir of Pataleone Fau.'

[8] Although for present purposes I proceed on the basis that these allegations are correct and will be proven at trial I should note for completeness that the position of the defendants is that there was no fraud committed.

[9] Also I record that Mr. Pouono has confirmed that it is not alleged that the first defendant was in any way involved in the alleged fraudulent behavior.

The argument in favor of the application.

[10] The guiding principle on an application to strike out was stated by the Court of Appeal in *Jagroop v Soakai and the Kingdom of Tonga* [2001] Tonga LR 234, 236 as:

> 'The principle upon which an application to strike out a claim may be entertained by the Court is clear. No party should have his claim denied without a hearing in the ordinary way, except where the claim is so hopeless that it cannot possibly succeed.'

[11] Clearly to strike out or dismiss a claim at this early stage is a matter of last resort.

[12] The following further principles apply to strike out applications:

a. Facts pleaded in the statement of claim, whether or not admitted, are assumed to be true.
b. Before striking out a claim the cause of action must be clearly untenable: the Court must be certain that it cannot succeed.
c. The jurisdiction is to be exercised sparingly, and only in clear cases.
d. The jurisdiction is not excluded by the need to decide difficult questions of law, requiring extensive argument.
e. The Court should be particularly slow to strike out a claim in a developing area of the law.

[13] I accept that the Court may strike out a claim that is clearly time-barred on the basis that such a claim is frivolous, vexatious or an abuse of process. It must be clear that a defendant intends to rely upon that defence. I am advised by Counsel that both defendants will rely on the limitation defence. Mr. Edwards referred me to a number of cases that contain these principles and to the commentary in the White Book. (See also *Trustees Executors Ltd v Murray* [2007] NZSC 27.)

[14] In concise submissions Mr. Edwards argues that the claim is founded upon the alleged fraudulent registration of the land to Sosefa Fau in 1988 and that the right to challenge the registration arose at that time. In reliance upon section 170 of the Land Act he says any claim, by the person so aggrieved (in this case Peauafi Fau) and any person claiming through him (in this case the plaintiff) had to be filed within 10 years of 5 January 1988 (by 5 January 1998) and as it was not the claim is time-barred. Section 170 of the Land Act 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.

[15] Mr. Edwards referred me to *Cocker v Cocker* [2002] Tonga L.R 252 at 253-254 and to the view expressed by the Court in that case that there is no scope for an exception to section 170 based on the nature of the cause of action in fraud.

[16] Mr. Kefu helpfully referred me to the Court of Appeal decision in *Mokofisi v Minister of Lands and anor* [LA 7 of 2014] which is on point and supports the defendants' position.

[17] Anticipating the plaintiff's arguments Mr Edwards also submitted that it could not be said that the cause of action only arose in 2012, upon the registration to the first defendant, as the land had devolved to him by operation of law under section 82 (c) of the Land Act. The first defendant did not obtain the land unlawfully in 2012.

[18] Mr. Pouono for the plaintiff submitted the claim was not time-barred. He argued that as Peauafi Fau had taken no steps to challenge the grant to Sosefo Fau in 1988 the plaintiff was unable to do so himself. He also argued that the plaintiff had to wait until both Pataleone Fau and Sosefo Fau had died and the land had been transferred to the first defendant before suing. On this basis time only began to run in 2012 and the plaintiff was therefore well within the 10 years to bring his claim. He referred me to *Motuliki v Namoa, Motuliki and Minister of Lands* [1990] Tonga L.R. 61 (PC). Resourceful as it is, I do not accept Mr Pouono's argument.

[19] The alleged wrong upon which this claim is based is said to be the fraudulent registration of the land to Sosefo Fau in 1988. Any right Peauafi Fau had to challenge Sosefo Fau's registration accrued in 1988. The plaintiff does not have any claim independent of that which first accrued to Peauafi Fau. He makes the same claim as was available to his father but through his father as heir. Time begins to run under section 170 from when the right to bring the action first accrues. It does not matter, in the case of a plaintiff who claims through the person to whom the right to bring the action first accrued, that the plaintiff was not able to bring the action at that time or that time may have expired before he acquires a right to do so.

[20] Applying section 170 to the facts of this case the right to bring an action based on the alleged fraudulent registration of the land to Sosefo Fau accrued in 1988 and expired in 1998.

[21] *Motuliki* does not assist the plaintiff. In that case the plaintiff's father had unlawfully surrendered land which the plaintiff sought to recover. The surrender had occurred more than 10 years before the claim was filed but within 10 years of the plaintiff attaining the age of majority. It was held that the plaintiff's claim was not time barred because in the "special circumstances" the plaintiff's father, having agreed to voluntarily surrender his rights to the allotment could not challenge what he had himself done. The plaintiff was therefore not claiming through his father but bringing the claim against his father and in his own name. Time only began to run from when the plaintiff attained his majority. The present case is quite different. It is not alleged that the plaintiff's father had unlawfully surrendered his rights; rather it is alleged he was a victim of his brother's fraud. The plaintiff therefore claims through his father not against him.[3]

The result

[22] I am satisfied that the plaintiff has no answer to this application and that the claim is statute barred. It has not been necessary therefore for me to consider the further submissions of Mr. Edwards relying on *Koloamatangi v Koloamatangi* [2003] Tonga L.R. 131.

[23] The plaintiff's claim is dismissed with costs to the defendants to be taxed if not agreed.

[3] It was not suggested either that the plaintiff was prevented from bringing this action earlier because he had not obtained his majority.

R v Siale anors

Supreme Court, Nuku'alofa
Cato J
CR 119-142/2014

16 April 2015

Sentencing – many defendants – rioters damaging a building – some faced more serious charges – all were young, first-time offenders – suspension of all or part of the sentence

The circumstances involved a dispute between students at Tupou College and Tonga College. There had been rivalry between the two schools for many years. In recent times some of the defendants stated they had been victims of violence perpetrated on them by students of Tonga College. One defendant said that he had reported this to the police but nothing had come of it. As a consequence, a large number of students from Tupou College gathered in the evening of the 18 July 2013 to effect retribution. There were about a hundred students, who embarked on this unlawful enterprise, many of whom had their cases disposed of in the Magistrates' court, and were discharged without conviction on payment of compensation of $200. The others are much more serious, and some will serve sentences of imprisonment and others will have suspended sentences imposed with conditions including lengthy sentences of community work. In almost all the cases, the offending followed a home invasion although only some defendants were charged with house breaking. The principal defendant, Sungalu Afuha'amango, who was one of the leaders, pleaded guilty to attempted serious arson as well as the offence of rioters damaging a building. There were two offenders, Siosifa Finau Sulunga and Sitivi Taliai, who pleaded guilty to causing Taniela Halahuni, one of the occupants of the residence, grievous bodily harm as well as charges of serious housebreaking and unlawful assembly. Three defendants 'Utu Fa'apoi, Viliami Siale and Haileni Taupaki pleaded guilty to causing serious body harm to Taniela Mahe, who was the son of the dweller of the house, Lu'isa Mahe, and other charges. Most of the accused fell into the category of rioters damaging a building. The damage was extensive both to the exterior and interior of the house, and was estimated as to be about $100,000. A small number of offenders, although committed for trial to the Supreme Court, ultimately had their charges reduced so that they faced only a charge of simple housebreaking. They were discharged without conviction on payment of $200 as compensation to the owner of the house.

Held:

1. Deterrent sentences must be imposed to emphasise not only to the offenders but to other students that such conduct would not be tolerated in Tonga. Competitive sporting and academic rivalry between schools was laudable, but such conduct, involving group violence, was not. Vigilante behaviour could not be tolerated in any civilised society. Should the court encounter further cases of serious violence and vigilantism arising out of inter-school rivalry sentences in the future the sentences imposed might well be more severe than those imposed.
2. All the offenders were young, first-time offenders. Tongan sentencing options were sufficiently broad that in all but the most serious cases, sentences of imprisonment were fully suspended, with substantial conditions as to community work, which was the retributive or punishment element of the sentences imposed. Conviction in itself may well adversely affect these students in various ways, in later life but that was an incident of their offending, for which they were all individually responsible.
3. There were aspects of each defendant's character or background that persuaded the court that a defendant should have in all but the most serious cases, the benefit of a suspension of a sentence of imprisonment. The guilty pleas which had been entered expeditiously, co-operation with the police, the fact all were first offenders and youthful justify the approach.
4. Each of the defendants was sentenced with the warning that all defendants who have received suspended sentences must abide strictly by the terms of their suspension including performing community work when and where requested to do so by probation officers, and life skill courses. A failure to do so would mean that warrants would be issued for their arrest and they may be recalled to carry out the sentences of imprisonment imposed.

Statute considered:

Criminal Offences Act (Cap 18)

Counsel for the Crown	:	Mr Lutui
Counsel for Mr Ma'asi	:	Mr Pouono
Counsel for the remaining defendants	:	Mr Fakahua and Mrs Tupou

Sentence

[1] The defendants appeared before me for sentencing commencing on the 10th April 2015. After hearing a day of submissions, I adjourned the sentence to the 16th April 2015 to enable me to consider their cases and impose sentences in a written judgment. I am indebted to Mr Lutui who provided a comprehensive memorandum of submissions for the Crown and Mr Fakahua and Mrs P Tupou who acted for all the defendants except Mr Pouono who acted for one defendant. This was a difficult assignment and I am grateful to all counsel for the practical way in which they approached their cases, both in arriving at agreements in relation to individual defendant's pleas with the Crown and in their approach to this sentencing. I am also appreciative of the work carried out by Probation officers in providing me with useful backgrounds on each defendant.

[2] In almost all the cases, the offending followed a home invasion although only some defendants were charged with house breaking. The principal defendant, Sungalu Afuha'amango, who I was also informed by Mr Lutui was one of the leaders, pleaded guilty to attempted serious arson as well as the offence of rioters damaging a building. There were two offenders, Siosifa Finau Sulunga and Sitivi Taliai, who pleaded guilty to causing Taniela Halahuni, one of the occupants of the residence, grievous bodily harm as well as charges of serious housebreaking and unlawful assembly. Three defendants 'Utu Fa'apoi, Viliami Siale and Haileni Taupaki pleaded guilty to causing serious body harm to Taniela Mahe, who was the son of the owner of the house, Lu'isa Mahe, and other charges. Most of the accused fell into the category of rioters damaging a building. This damage was extensive both to the exterior and interior of the house, and was estimated as to be about $100,000. A small number of offenders, although committed for trial to the Supreme Court, ultimately had their charges reduced so that they faced only a charge of simple housebreaking. They will be, as with the sentences imposed by Magistrates in the lower Court, discharged without conviction on payment of $200.00 as compensation to the owner of the house.

[3] The circumstances of this offending involve a dispute between students at Tupou College and Tonga College. There had been rivalry between the two schools for many years. In recent times, and indeed in probation reports presented in this case, certain of the defendants stated they had been victims of violence perpetrated on them by students of Tonga College. One defendant said that he had reported this to the police but nothing had come of it. As a consequence, a large number of students from Tupou College gathered in the evening of the 18th July, 2013, to effect retribution. There were about a hundred students, who embarked on this unlawful enterprise, many of whom had their cases disposed of in the Magistrates' court, and as I have said discharged without conviction on payment of compensation of $200.00. The others are much more serious, and sadly for all are first offenders, some will serve sentences of imprisonment and others will have suspended sentences imposed with conditions including lengthy sentences of community work.

[4] Hopefully, this judgment will assist to deter this kind of mindless violence in the future. I am aware that Magistrates have not infrequently encountered inter-school violence but this is the first time such extensive offending has featured in this Court to my knowledge. I consider that deterrent sentences must be imposed to emphasise not only to these offenders but to other students that conduct of this kind will not be tolerated in Tonga. Competitive sporting and academic rivalry between schools is laudable, but conduct of this kind, involving group violence, is not. Vigilante behaviour cannot be tolerated in any civilised society.

[5] Having said this, I am concerned here with young offenders who are first offenders. Fortunately for these defendants, Tongan sentencing options are sufficiently broad that in all but the most serious cases, sentences of imprisonment will be fully suspended, with substantial conditions as to community work, which is the retributive or punishment element of the sentences imposed. Conviction in itself may well adversely affect these students in various ways, in later life but that is an incident of their offending, for which they are all individually responsible.

[6] I record that, in each case, I am satisfied that there are aspects of each defendant's character or background that persuades me that consistently with *Mo'unga* principles, a defendant should have in all but the most serious cases, the benefit of a suspension of a sentence of imprisonment. I have also decided to fully suspend those sentences. I consider that the guilty pleas which had been entered expeditiously, co-operation with the police, the fact all are first offenders and youthful justify this approach. I record that my approach follows what was I regard as a careful submission by the Crown prosecutor, Mr Lutui. I have also arrived at this view after considering all the circumstances, independently of the Crown.

[7] I emphasise that were the defendants not to have pleaded guilty to the charges and been co-operative with the police, more could have been expected to have faced sentences of actual imprisonment. I also advance this warning. Should this Court encounter further cases of serious violence and vigilantism arising out of inter school rivalry sentences in the future the sentences imposed might well be more severe than those imposed today.

Agreed statement of facts

[8]

1. The Defendants were all students of Tupou College at the time of the offending.
2. On the night of 18 July 2013, after gathering for a meeting at the Tupou College campus, all of the Defendants and other students, totalling to over one hundred students, made their way from Tupou College to the village of Tofoa. Their destination in Tofoa was a house belonging to one Kepueli Ioane, but rented out to one Lu'isa Mahe, which was known to be frequented by students and ex-students of Tonga College, who were the intended target of the attack.
3. Lu'isa Mahe was a school teacher at Tonga High School, and on some nights she would tutor students and ex-students of Tonga College.
4. Around 11:30pm that night, all the Defendants, together with other Tupou College students arrived at the Tofoa rugby field. They then all proceeded to remove their shirts and used them to cover their faces as a means of protecting their identities, and to identify themselves to the rest of the Tupou College students.
5. All of the Defendants together with the other Tupou College students then walked to the dwelling house of Kepueli 'Ioane, which was occupied by Lu'isa Mahe and her two sons, and eleven other occupants all of whom were either current or ex-students of Tonga College. When the Tupou College group arrived they surrounded the house, then they all proceeded to throw rocks and sticks at the house causing it significant damage. All of the Defendants then entered the house.
6. When the Defendants entered the house, some of the occupants who were in the living room including Luisa Mahe's two children,

retreated to the rooms in the house to hide and avoid being struck by the objects being thrown into the house, and to avoid being assaulted by the Defendants.

7. Luisa Mahe however sat in the living room whilst the Defendants continued to smash and damage everything in the house. Luisa Mahe was eventually led out of the house by several of the Tupou College students, who knew her as their teacher in another school.

8. Then one unidentified Tupou College student threw a burning blanket into one of the rooms where some of the occupants of the house were hiding. The burning blanket was quickly thrown out by the occupants but the blanket was thrown back in. The Defendant, Sungalu Afuha'amango, then got hold of a propane gas cylinder, opened it, then threw it into the room.

9. Fortunately, the gas cylinder did not catch fire or explode, but it caused the occupants of the room to run out of the room and try to enter and hide in other rooms in the house. Whilst attempting to take refuge in one of the other rooms, one of the occupants, Taniela Halahuni, was struck in the head with a rock which was thrown by the Defendant, Siosifa Finau Sulunga, which caused him to fall to the floor. The Defendant, Sitivi Taliai, then used a stick to hit the head of Taniela Halahuni whilst he was on the ground. Taniela Halahuni lost consciousness.

10. One of the occupants of the house who was the son of Lu'isa Mahe, Taniela Mahe, tried to escape the house by running out. He was punched by 'Utu Fa'apoi which caused him to fall down, he was then repeatedly punched in the head by Viliami Siale and Haileni Taupaki, which caused him to lose consciousness.

11. Both Taniela Halahuni and Taniela Mahe were taken to Vaiola Hospital after the attack. Taniela Mahe suffered multiple scalp lacerations as a result of the assault. There was also an occipital scalp laceration down to the skull however the skull, was not fractured.

12. Taniela Halahuni upon arriving at hospital was unconscious breathing spontaneously with an obvious injury to his head. X-rays of his head and chest were carried out and it was obvious that immediate surgery was required.

13. The surgery showed that Halahuni suffered a 6cm laceration to his head. This laceration showed a clear fracture of Halahuni's skull. A medical report described the injuries sustained by Mr Halahuni as a "severe head injury". Taniela Halahuni was in a coma for two weeks before regaining consciousness. He was discharged from hospital on 30 August 2013.

14. The estimated cost of the damage to Kepueli Ioane's house that was caused by the Defendants is around TOP $100,000. The house has not been occupied since the attack due to the extensive damage.

15. At the time of this incident Viliami Siale was 20 years old and was in Form 6. Sungalu 'Afuha'amango was 20 years old and was

a Technical student at Tupou College. Sitivi Taliai was 18 years old and was in form 5. Haileni Taupaki was 18 years old and was a Technical student at Tupou College. 'Utu Fa'apoi was 18 years old and was a Technical student at Tupou College. Siosifa Finau Sulunga was 20 years old and was in form 5.

16. Sungalu Afuha'amango admitted that he was the leader of the group of Tupou College students that went to Tofoa that night.
17. All of the accused have no previous convictions, and they all cooperated and admitted their offending to the Police.
18. All of the accused have no previous convictions, and they all cooperated and admitted their offending to the Police.

Dated this 20th day of March 2015.

I now proceed to sentence each defendant.

Attempted serious arson

1. SUNGALU AFUHA'AMANG0 (CR120/2014)

[9] This defendant, who was the leader, pleaded guilty to one count of attempted serious arson which carries a maximum sentence of seven and a half years and rioters damaging a building which carries a maximum sentence of seven years. I view the attempted serious arson charges in his case as extremely serious. After a blanket that had been set alight had been thrown into the room of the house by one of the group, the defendant opened and threw into the room a propane gas cylinder. This could have had disastrous consequences. Mercifully, it did not ; but in my view this plainly premeditated act was in the upper level of serious attempted arson and I adopt a starting point of six and a half years.

[10] I have considered the defendant's circumstances. He is now aged 22. He is single, attended Tonga High School for three years then Tupou College. He went on to complete a four year course at the school as an electrician. He is panel beating, now. He is a member of the Mormon Church. The factors which defence counsel urge upon me in mitigation are his early guilty plea, his co-operation with the police and it seems his remorse. He is a first offender. I consider taking into account these subjective factors he should receive two years mitigation making his sentence on the arson charge four and half years. He is duly convicted and sentenced to imprisonment for four and half years on that count.

[11] I consider, however, that under *Mo'unga* he is deserving of some period of his sentence being suspended for his guilty plea, co-operation, youth, being a first offender and remorse. I accordingly order that the final 18 months of his sentence be suspended on the following conditions;

i. He is not to commit any offence punishable by imprisonment for two years;
ii. He is on his release subject to probation for 12 months to live where directed;

iii. He is to undergo a life skills course under the direction of the Probation office and the Salvation Army.

[12] On the charge of rioters damaging a building, he is sentenced to two years imprisonment. There was extensive damage caused to the house and he must bear responsibility for that. This sentence will be served concurrently with the attempted serious arson count and both sentences will be backdated to the date he was remanded in custody namely the 10th April, 2015.

Causing grievous bodily harm

2. SIOSIFA FINAU SULUNGA (CR139/2014)

[13] His offending is also in the very serious category. After the canister had been thrown into the room, one of the occupants of the room Mr Halahuni attempted to escape and was hit by the defendant who threw a rock at him. He fell to the ground and was then hit about the head with a stick by the co-offender to the charge of causing grievous bodily harm, Sitivai Taliai. The victim was unconscious, taken to hospital and operated upon. He sustained a fracture to the skull. He was in hospital for a month. Mercifully, he seems to have fully recovered. The starting point for this offending, which carried a maximum sentence of 10 years, I fix also at 6 and half years reflecting the use of a weapon causing a skull fracture. Had the consequences caused permanent injury, the starting point would have been higher.

[14] I have read the probation report. The defendant is aged 20 and comes from a large but stable family. He has been working in a plantation assisting his father. He is attending Tupou College's technical class as a plumber. He represents the school at sports. He is active in the church and the youth choir conductor. He received favourable referee reports. He expressed remorse. That said he appeared to resile both in the report and at the hearing from his plea. He maintained he did not hit the victim with a rock. I note, however, that his plea was entered with counsel present, and I was told by Mr Lutui that he had admitted this act to the police in a written record of interview. I did not see any reason not to proceed with sentence. I view his apparent change of heart as one that could be taken to affect the quality of his assertion of remorse although I do not propose to do this. I reduce his sentence also by two years for his early guilty plea, cooperation, youthfulness, his being a first offender and apparent remorse. He is accordingly convicted and sentenced on the grievous bodily harm charge to four and half years imprisonment.

[15] I suspend however the final 21 months of his sentence because of the fact that he plainly qualifies within *Mo'unga* principles. I have allowed him a greater period than Mr Afa'amango because there is no suggestion he was a leader and because there was no permanent injury to the victim. I do so 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 his release subject to probation for 12 months and to live where directed;

iii. He is to, on his release, undergo a life skills course under the direction of the Probation office and the Salvation Army.

[16] He also pleaded guilty to serious housebreaking which carries a maximum sentence of 10 years and riotous assembly. On the housebreaking charge, he is convicted and sentenced to two years imprisonment – this being a planned home invasion, this sentence to be served concurrently with the grievous bodily harm charge. On the riotous assembly charge, he is convicted and discharged. All sentences are backdated to the date of remand in custody namely the 10th April, 2015.

3. SITIVI TALIAI (CR121/2014)

[17] He pleaded guilty to the same charges as his co-offender, Mr Sulunga. He used a weapon, namely a stick to the head, after the victim had fallen to the ground. He is aged 20. He comes from large family and has a good Church background. He had recently moved to Tupou College and would appear to have been affected by the school violence. He is now undertaking a cookery course at another technical institute. He also said he was remorseful, and I have read references concerning his undertaking of church activities and a more guarded reference from the technical institute. I see no reason to distinguish him from Mr Sulunga.

[18] Accordingly, he is convicted of causing grievous bodily harm and sentenced to 4 years and 6 months imprisonment the final 21 months of the sentence to be suspended 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 his release subject to probation for 12 months and to live where directed;
iii. He is to on his release undergo a life skills course under the direction of the Probation office and the Salvation Army.

[19] On the housebreaking charge, he is convicted and sentenced to two years imprisonment – this being a planned home invasion, this sentence to be served concurrently with the grievous bodily harm charge. On the riotous assembly charge, he is convicted and discharged. All sentences are backdated to the date of remand in custody namely the 10th April, 2015.

Causing serious bodily harm

4. 'UTU FA'APOI (CR129/2014)

[20] The defendant pleaded guilty to riotous assembly, serious housebreaking and causing serious bodily harm. Shortly after, Mr Halahuni had been assaulted, the victim of this assault, Taniela Mahe, was also assaulted by the defendant, Halieni Taupaki, and Viliam Siale. Taniela Mahe suffered multiple scalp lacerations as a result of the assault. There was also an occipital scalp laceration down to the skull; however the skull was not fractured. He had been trying to escape from the room where the propane gas cylinder had been thrown. His mother was the owner of the

residence. I adopt the count of causing serious bodily harm which carries a maximum sentence of 5 years as the charge on which I will impose the head sentence. Although this offending did not involve weapons, it was brutish group violence and followed a house invasion at night. The violence was clearly premeditated. The maximum sentence for this offence is five years. I consider that a four year starting point is appropriate, in this case.

[21] I have read the probation report. The offender is aged 20. He comes from a large family. He was a talented sportsman and represented the College in athletics. He had been described as a well behaved boy. He had, in 2013, enrolled at the college having been schooled elsewhere. He was enrolled in the second year of a technical course. He is a first offender, said to be remorseful, was cooperative with the authorities and pleaded guilty at the first opportunity. References were also advanced from his town officer and from the Deputy Principal of his college attesting to his former good character. Like so many of these young men, he has let himself down as well as his supportive family and his school. However, I mitigate the starting point of 4 years by 18 months and I sentence him on the count of causing bodily harm to two and one half years imprisonment.

[22] Having considered whether I should partially or fully suspend his sentence and but, not without some reservation, I have decided taking into account he is a first offender and for all the other reasons supported by *Mo'unga,* to fully suspend his sentence. I have, however, decided to impose as part of his sentence 120 hours of community work, which is a very significant number of hours.

[23] The sentences I impose for the offence of causing serious bodily harm is two and one half years imprisonment fully suspended on the following conditions;

i. He commits no further offences punishable by imprisonment during the period of his suspension;
ii. He is to be placed on probation for 12 months to live where directed by his probation officer;
iii. He is to carry out 120 hours community work under the supervision of Probation and probably performing work on cleaning up the Vuna Road from Popua to Sopu.
iv. He is to undertake a life skills course under the direction of Probation.

On the housebreaking, he is sentenced to two years imprisonment also fully suspended on the same terms to be served concurrently with the offence of causing serious bodily harm.

On the offence of riotous assembly, he is convicted and discharged

5. VILIAME SIALE (CR119/2014)

[24] He was a co-offender with Mr Fa'apoi. He is aged 22. His father is dead and he lives with his mother, who is seriously ill, and a member of his family who is married. The probation report indicates that he also assisted to shield Mrs Mahe from flying rocks. The Crown did not dispute this, and I give him credit by imposing a

lesser number of hours of community work. He is studying as a plumber in the Technical Division of the school but in 2015, became a student in the Tourism and Hospitality Program. He was a very good athlete representing Tonga and winning the gold medal in the decathlon in 2014 at the Oceania Athletics Championship. He also excelled in rugby. A reference was written for him by the President of Tonga Athletics Association, and the Deputy Principal of Tupou College. He is also a member of a Church youth group.

[25] Accordingly, the sentences passed upon him are;

causing serious bodily harm, two and one half years imprisonment fully suspended on the following conditions;

i. He commits no further offences punishable by imprisonment during the period of his suspension;
ii. He is to be placed on probation for 12 months to live where directed by his probation officer;
iii. He is to carry out 90 hours community work under the supervision of Probation and probably performing work on cleaning up the Vuna Road from Popua to Sopu;
iv. He is to undergo a life skills course under the direction of Probation

On the housebreaking, two years imprisonment also fully suspended on the same terms to be served concurrently with the offence of actual bodily harm.

On the offence of riotous assembly, I convict and discharge him.

6. HAILENI TAUPAKI (CR127/14)

[26] This defendant also pleaded guilty, co-operated with the authorities and appears remorseful. He is aged 20 comes from a large family. His father died and his mother remarried. He also enrolled in the technical division for 2 years and took carpentry. He also later enrolled in a separate technical school and was pursuing carpentry and is a member of a church. Like others of the offenders, he complains of violence at the hands of Tonga College boys. Whilst that may be so, self-help is not a reason for vigilante action. He also pleaded guilty to rioters damaging a building contrary to section 77(2) of the Criminal Offences Act. As such he was part of a group who caused or contributed to extensive damage in the sum of about a $100,000.

[27] The sentences I pass upon him are;

Causing serious bodily harm, two and one half years fully suspended on the following conditions;

i. He commits no further offences punishable by imprisonment during the period of his suspension;
ii. He is to be placed on probation for 12 months to live where directed by his probation officer;

iii. He is to carry out 120 hours community work under the supervision of Probation and probably performing work on cleaning up the Vuna Road from Popua to Sopu;
iv. He is to undergo a life skills course under the direction of Probation.

On the rioters damaging a building offence, he is sentenced to 2 years imprisonment also fully suspended and concurrent with the serious bodily harm offending.

Rioters damaging building

[28] In relation to other defendants who were charged with the offence of rioters damaging building of which the maximum sentence is seven years, I consider that because the damage was extensive ($100,000) premeditated, both internal and external to a private dwelling a starting point of three and half years imprisonment must be imposed to reflect the seriousness of this offending. Other factors which cause me to impose a reasonably substantial starting point is that the offending involved concerted activity by a large group of young men, and at night. Such conduct must receive a response which sends a deterrent message that this cannot be tolerated and must be protective of society. The offending must have been very frightening for the occupants involving both external and internal damage, the throwing of rocks to break windows and to destroy property.

[29] However, again I have examined the circumstances of each offender, and having entered guilty pleas, been co-operative with the police, been remorseful, having attended as with others counselling courses, and being first offenders, I have determined to mitigate the starting point by 18 months imprisonment. The end result for each offender is a sentence of two years imprisonment.

[30] I have, however, decided to fully suspend these sentences. This was consistent with the approach of the Crown and I have decided independently that this approach is appropriate. Each defendant will have to perform a substantial amount of community work as a punitive element of the sentence.

[31] I now proceed to consider the individual circumstances and impose sentence on these defendants.

7. KULISITOFA FIFITA (CR122/2014)

[32] He is aged 19 and still attends Tupou College. He lives at home with his parents. He like most of these young men freely admitted involvement as a reprisal. He likes sport and physical activity. He is remorseful, pleaded guilty, he is a first offender, and was co-operative with police. Like others, he spent a short period in custody in the initial stages of the inquiry. He used a stick to inflict internal damage to the building.

[33] The sentence imposed upon him for rioters damaging a building is two years imprisonment fully suspended on the following conditions;

i. He commits no further offences punishable by imprisonment during the period of his suspension;

ii. He is to be placed on probation for 12 months to live where directed by his probation officer;
iii. He is to carry out 85 hours community work under the direction of Probation (probably performing work on cleaning up the Vuna Road from Popua to Sopu).
iv. He is to undergo a life skills course under the direction of Probation.

8. NAULIVOU TUPOU (CR123/2014)

[34] He is aged 21. He lives with relatives in Tonga. His parents have migrated to the United States. He belongs to a Church. He has had an unstable upbringing and has had to change homes frequently. Like others, he blames peer pressure for his actions. He participates in church youth and in community activities according to his Town Clerk. His church speaks highly of him. His educational attainment is unremarkable. He is remorseful, pleaded guilty, is a first offender, and was co-operative with police. He used a stick to cause damage to windows. He tried to stop some of the damage and this is accepted by the Crown. He also will have part of his sentence of community hours reduced, as a consequence.

[35] The sentence I impose upon him for rioters damaging a building is two years imprisonment fully suspended on the following conditions;

i. He commits no further offences punishable by imprisonment during the period of his suspension;
ii. He is to be placed on probation for 12 months to live where directed by his probation officer;
iii. He is to carry out 65 hours community work under the direction of Probation (probably performing work on cleaning up the Vuna Road from Popua to Sopu).
iv. He is to undergo a life skills course under the direction of Probation.

9. SAMIU MANU (CR124/2014)

[36] He is aged 18 and his mother says is a well- behaved son. He is helpful in the plantation. He is in his second year at Tupou College and is studying electrical appliances. He boards at the school. Positive references were supplied by the Town Clerk and his Minister. Peer pressure he gave as his explanation. He smashed items in the building and by his actions aided and abetted others. He is remorseful, pleaded guilty, is a first offender, and was co-operative with police.

[37] The sentence I impose upon him for rioters damaging a building is two years imprisonment fully suspended on the following conditions;

i. He commits no further offences punishable by imprisonment during the period of his suspension;
ii. He is to be placed on probation for 12 months to live where directed by his probation officer;

iii. He is to carry out 85 hours community work under the direction of Probation (probably performing work on cleaning up the Vuna Road from Popua to Sopu).
iv. He is to undergo a life skills course under the direction of Probation.

10. MAIKOLO MANU (CR125/2014)

[38] He is aged 18. His parents were overseas and he was staying with other relatives at the time. He now lives with his father who has returned to Tonga. He is studying fitting and machine work at the Fokololo Institute, and has potential. He is actively involved in church activities, and references were supplied for him. He was involved in damaging the building internally. He is remorseful, pleaded guilty, is a first offender, and was co-operative with police.

[39] The sentence I impose upon him for rioters damaging a building is two years imprisonment fully suspended on the following conditions;

i. He commits no further offences punishable by imprisonment during the period of his suspension;
ii. He is to be placed on probation for 12 months to live where directed by his probation officer;
iii. He is to carry out 85 hours community work under the direction of Probation (probably performing work on cleaning up the Vuna Road from Popua to Sopu);
iv. He is to undergo a life skills course under the direction of Probation.

11. VILIAMI TAI (CR128/2014)

[40] The defendant is aged 22. He is a US citizen and hopes to enter Army training shortly overseas, and has delayed this as a consequence of these proceedings. He was brought up by his maternal aunt, who described him as getting into trouble at Tupou College. He had, it seems, been assaulted previously by a group from Tonga College, and had reported this to police. Nothing came of it. He became involved it seems as a consequence in this activity. He is remorseful. He admitted to smashing and damaging the building. References were advanced on his behalf concerning his rugby involvement, youth development, both in his village and religious community. He is remorseful, pleaded guilty, is a first offender, and was co-operative with police.

[41] The sentence I pass upon him for rioters damaging a building is two years imprisonment fully suspended on the following conditions;

i. He commits no further offences punishable by imprisonment during the period of his suspension;
ii. He is to carry out 85 hours community work under the direction of Probation (probably performing work on cleaning up the Vuna Road from Popua to Sopu). In his case, I recommend that every effort be made by Probation to allow him to complete his

community work prior to July, 2015 to enable him to apply to enter the US army.

12. PEISIMANI FINAU (CR130/2014)

[42] This defendant is aged 22. His parents have died. He attended Tupou College in 2011, having gone to Tupou High School until then. He was taking an electrical course at Tupou College. He was living with his eldest sister. He belonged to a Church. He entered the house and caused damage. He is remorseful, pleaded guilty, is a first offender, and was co-operative with police.

[43] The sentence I pass upon him for rioters damaging a building is two years imprisonment fully suspended on the following conditions;

i. He commits no further offences punishable by imprisonment during the period of his suspension;
ii. He is to be placed on probation for 12 months to live where directed by his probation officer;
iii. He is to carry out 85 hours community work under the direction of Probation (probably performing work on cleaning up the Vuna Road from Popua to Sopu);
iv. He is to undergo a life skills course under the direction of the Probation office.

13. SIOFILISI VAIANGINA (CR131/2014)

[44] He comes from large family. He was living with his uncle at the time of these offences. He now lives in Eua with his father. He was in technical carpentry classes at Tupou College. He is described as very helpful at home and in carpentry. He was involved in rioting and damage of the building. Probation has indicated they are willing to make arrangements for him to perform his community work in Eua. Promising references were filed on his behalf.

[45] The sentence I impose upon him for rioters damaging a building is two years imprisonment fully suspended on the following conditions;

i. He commit no further offences punishable by imprisonment during the period of his suspension;
ii. He is to be placed on probation for 12 months to live where directed by his probation officer;
iii. He is to carry out 85 hours community work under the direction of Probation (probably performing suitable work at Eua)

14. PENISILA HOPONOA (CR132/2014)

[46] He is aged 22. He comes from a very large family he is married but separated. He did electrical training at Tupou College technical School in 2013. He is unemployed but helps his father in plantation work. He was one of the older students involved. He was involved also in entering and damaging the building. References were filed on his behalf indicating that he is actively involved in community work

from his town officer. His father, a Minister, wrote of his involvement in the Church as a choir conductor. Like the others, he is remorseful, pleaded guilty, is a first offender, and was co-operative with police.

[47] The sentence I pass upon him for rioters damaging a building is two years imprisonment fully suspended on the following conditions;

i. He commits no further offences punishable by imprisonment during the period of his suspension;
ii. He is to be placed on probation for 12 months to live where directed by his probation officer;
iii. He is to carry out 85 hours community work under the direction of Probation (probably performing work on cleaning up the Vuna Road from Popua to Sopu)
iv. He is to undergo a life skills course under the direction of Probation.

[48] He is also convicted upon a charge of serious housebreaking and I sentence him on this to 2 years imprisonment to be served concurrently with the rioters damaging a building offending and suspended on the same terms.

15. HALOTI MAHE (CR134/2014)

[49] The defendant is aged 21. He comes from a large family. He was taking a three year course in electrical studies in the Technical Division of the College. He finished school in 2013 and works for a bakery. He lives with his parents. He belongs to a church. He likes sport. He admitted to throwing stones at the building damaging windows and doors, and furniture. The defendant is remorseful, pleaded guilty, is a first offender, and was co-operative with police.

[50] The defendant is sentenced for rioters damaging a building to two years imprisonment fully suspended on the following conditions;

i. He commits no further offences punishable by imprisonment during the period of his suspension;
ii. He is to be placed on probation for 12 months to live where directed by his probation officer;
iii. He is to carry out 85 hours community work under the direction of Probation (probably performing work on cleaning up the Vuna Road from Popua to Sopu);
iv. He is to undergo a life skills course under the direction of the Probation office

16. SIONE KAITU'U (CR135/2014)

[51] This defendant did not appear for a probation report. He is aged 18 and was in the 6th Form at Tupou College. Further, he was employed during vacation, by the Ministry of Agriculture in frozen exports. He has on holiday in Ha'apai assisted at a Youth Congress and after the hurricane in distribution projects. He was involved in

smashing windows before entering the house. The defendant is remorseful, pleaded guilty, is a first offender, and was co-operative with police.

[52] The defendant is sentenced for a rioter damaging a building to two years imprisonment fully suspended on the following conditions;

i. He commits no further offences punishable by imprisonment during the period of his suspension;
ii. He is to be placed on probation for 12 months to live where directed by his probation officer;
iii. He is to carry out 85 hours community work under the direction of Probation (probably performing work on cleaning up the Vuna Road from Popua to Sopu);
iv. He is also to undergo a life skills course under the direction of the Probation office.

17. TU'IFUA NGALUAFE (CR137/2014)

[53] He was aged 20. He comes from a family of four. His father has died. His mother looks after him and the offending comes as a surprise. He struggled at school and continued with technical classes. He attends church activities. He is helpful at home with domestic duties. He also received a good reference from his town officer and his Minister. The defendant is remorseful, pleaded guilty, is a first offender, and was co-operative with police.

[54] I sentence him for the offence of rioters damaging a building to two years imprisonment fully suspended on the following conditions;

i. He commits no further offences punishable by imprisonment during the period of his suspension;
ii. He is to be placed on probation for 12 months to live where directed by his probation officer;
iii. He is to carry out 85 hours community work under the direction of Probation (probably performing work on cleaning up the Vuna Road from Popua to Sopu)
iv. He is also to undergo a life skills course under the direction of the Probation office.

18. 'ATUNAISA TANGATAEVAHA (CR138/2014)

[55] The defendant is aged 23. He comes from large family. His father is a Minister. He is a part time student at Tonga Tertiary Institute studying computer and music. He left Tupou College after this incident. He reports fighting with boys from Tonga College. He is unemployed. He relies on his parents. He said he was influenced by peer relations to become involved in this offending. This is a common theme. He threw stones at the house. The defendant is remorseful, pleaded guilty, is a first offender, and was co-operative with police.

[56] I sentence him for the offence of rioters damaging a building to two years imprisonment fully suspended on the following conditions;

i. He commits no further offences punishable by imprisonment during the period of his suspension;
ii. He is to be placed on probation for 12 months to live where directed by his probation officer;
iii. He is to carry out 85 hours community work under the direction of Probation (probably performing work on cleaning up the Vuna Road from Popua to Sopu);
iv. He is also to undergo a life skills course under the direction of the Probation office.

19. VILI FANGAUPO (CR140/2014)

[57] He is aged 19. He was brought up on Eua. He lives with his mother. His mother was surprised at his offending. The defendant moved from 'Eua to Tupou College but did not succeed academically and joined the technical class. His mother has taken him back to Eua. He looks after the family plantation whilst his father and brother go fruit picking in Australia and attends to domestic duties. The defendant is remorseful, pleaded guilty, is a first offender, and was co-operative with police. He also has good references from the town officer, and a church leader.

[58] I sentence him on the offence of rioters damaging a building to two years imprisonment fully suspended on the following conditions;

i. He commits no further offences punishable by imprisonment during the period of his suspension;
ii. He is to be placed on probation for 12 months to live where directed by his probation officer;
iii. He is to carry out 85 hours community work under the direction of Probation to be carried out in 'Ohonua 'Eua.

Like another offender from Eua, I do not require him to undergo a life skills course.

20. SIOTAME TOKI (CR141/2014)

[59] He is aged 22. He comes from a very large family. He was married in 2014 and had a child recently. He was regarded as a well behaved boy and comes from a good church background. He did not achieve at Tupou College and went on to Form 7 before becoming involved in this activity. He is unemployed and assists in plantation work. The defendant is remorseful, pleaded guilty, is a first offender, and was co-operative with police. He also has good references from a church leader indicating he is in the first stages of being a preacher. He is secretary of the Youth choir.

[60] I sentence him for the offence of rioters damaging a building to two years imprisonment fully suspended on the following conditions;

i. He commits no further offences punishable by imprisonment during the period of his suspension;

ii. He is to be placed on probation for 12 months to live where directed by his probation officer;
iii. He is to carry out 85 hours community work under the direction of Probation (probably performing work on cleaning up the Vuna Road from Popua to Sopu);
iv. He carry out a life skills course under the direction of the Probation office.

21. SAMUELA FINAU (CR142/2014)

[61] He did not attend for a probation report but his counsel was able to provide information on his background. He had entered training as a welder and had entered the Ministry of Works having been at Tupou College in 2013. His father was a police officer. He was the youngest of three children. He had assisted to set up scholarships since the offending. He used sticks to damage parts of the internal building. He is remorseful, and was co-operative with police, he is a first offender, and pleaded guilty to this charge.

[62] The sentence I impose upon him for rioters damaging a building is two years imprisonment fully suspended on the following conditions;

i. He commits no further offences punishable by imprisonment during the period of his suspension;
ii. He is to be placed on probation for 12 months to live where directed by his probation officer;
iii. He is to carry out 85 hours community work under the direction of Probation (probably performing work on cleaning up the Vuna Road from Popua to Sopu).
iv. He is to undergo a life skills course under the direction of probation.

Simple housebreaking

22. SIONE MOLISI TIMANI (CR126/2014)

[63] He is aged 18 (16 at the time of the offending). He comes from a large family. His father is a Minister. He went into the house with I am told a piece of wood, and withdrew when he saw Mrs Mahe. He had been at Tonga High School. He went to Tupou College in form 5. He is remorseful, pleaded guilty, is a first offender, and was co-operative with police. He was also supplied with references from his church and school.

[64] He went out of peer pressure to the house. He was charged only with simple housebreaking which carries a maximum of three years imprisonment. I order that he be discharged without conviction upon payment of $200 compensation to the owner of the house, Kepueli Ioane.

23. SIOSAI MA'ASI (CR133/2014)

[65] The accused in this case aged 19 now, was charged with simple housebreaking. He was not involved in any of the violence. This has a maximum of three years imprisonment. He was born in New Zealand and came to Tonga at Form 7 level as a cultural matter. He boarded at Tupou College. He is currently studying at Unitech in Auckland. He said it was challenging for him and he was influenced by peers at his new school. Mr Pouono appeared for him and submitted he should be discharged without conviction as were others in similar circumstances in the lower court on payment of compensation to the owner of the house. Mr Lutui did not oppose the application in this case. The defendant is remorseful, pleaded guilty, is a first offender, and was co-operative with police.

[66] The sentence I impose on the simple housebreaking is that the defendant is discharged without conviction and is to pay compensation of $200.00 forthwith which on receipt is to be paid forthwith to the owner of the house, Kepueli Ioane.

24. SIOSAIA TAE (CR136/2014)

[67] He was charged with simple housebreaking. He is aged 20. He was fostered by paternal relatives. He belongs to a church. He is involved in youth and Church activities. He left the technical division in 2013 and wants to join the Army. He did not participate in any of the activities involving damage. The defendant is remorseful, pleaded guilty, is a first offender, and was co-operative with police. I have also been supplied with references from the Town Clerk and his church relating to his good character and his support of the Mo'unga 'Olive School and his music talents.

[68] I propose to sentence him, as I have with others involved in simple housebreaking, by a discharge without conviction on the condition he pay $200.00 to Court immediately to be paid to the owner of the house, Kepueli Ioane.

[69] I give the following warning. All defendants who have received suspended sentences must abide strictly by the terms of their suspension including performing community work when and where requested to do so by probation officers, and life skill courses. A failure to do so will mean that warrants will be issued for their arrest and they may well be recalled to carry out the sentences of imprisonment imposed.

[70] Community work must be performed when and where directed to do so by probation and completed as soon as possible. Community work has a priority over any other personal, social, sporting or cultural commitment.

Manu v 'Aholelei

Land Court, Nuku'alofa
Paulsen, President
LA 13/2014

3 and 4 March 2015; 17 April 2015

Land law – meaning of "landholder" and "holder" of land – effect of registration – Minister must observe natural justice – lease was declared invalid

The plaintiff, Manapo'uli Manu (Manapo'uli), was the holder of a registered lease dated 15 November 2013 for a term of 50 years over an allotment. The allotment was part of the Crown estate. The defendant, Feangai 'Aholelei (Feangai), her children and her husband (until his death) occupied the allotment since 2001. In reliance upon her lease Manapo'uli sought an order evicting Feangai and her family from the allotment. Feangai refused to vacate and claimed that Manapo'uli's lease was not validly granted. Feangai filed a defence and a counterclaim and sought an order declaring that the lease was invalid and directing the third party, the Minister of Lands, to cancel the registration of the lease. Feangai argued that her father-in-law, Nafetalai, was the lawful and registered holder of the allotment and had granted Fine (her deceased husband) and Feangai (and their children) the right to occupy the land. The plaintiff argued that Nafetalai was never the registered landholder of the allotment and therefore did not have the authority to grant a license to Fine and Feangai to occupy it. Alternatively, it was submitted that Feangai's right to occupy the land must have come to an end upon Nafetalai's death.

Held:

1. The Land Act did not make registration the test of ownership and the intention of the Act was that registration was a method of proof of ownership and nothing more. The factual findings lead to the conclusion that the defendant's father-in-law, Nafetalai, qualified as a holder of the allotment under the definition of 'landholder' and 'holder' in section 2 of the Land Act and was also the owner, although not registered as such.
2. A holder was entitled to allow relatives and others to occupy the land. Historically the ability to do so was an essential aspect of social organization and land tenure in Tonga. Nafetalai had authority to and did grant a license to Fine and Feangai to occupy the allotment and make it their own during his lifetime. Notwithstanding that the license to occupy the land conferred by Nafetalai upon Feangai and Fine expired upon his

death they remained in lawful occupation of the land. The fact of their exclusive possession gave them the right to be protected from disturbance; a right that would be recognized and enforced by the Court. Their occupation would not become unlawful unless and until the Crown asserted its rights of ownership by taking steps to evict them. The evidence established that no such steps were taken between Nafetalia's death in 2007 and the granting of the lease in November 2013.

3. The evidence established that reasonable steps were not taken by the Minister to acquaint himself with the information that was relevant to the exercise of his power to make a grant of the lease to Manapo'uli. Where the making of a grant had the potential to adversely affect some identifiable person by dispossessing her from her home of longstanding the Minister could reasonably be expected to seek her views and given her an opportunity to adduce probative material before making a decision. This was not an onerous obligation. The Minister failed to do so and the granting of the lease was accordingly unlawful.

4. The plaintiff's claim for possession of the land was dismissed. The grant of the lease to the plaintiff was invalid and the court ordered the cancellation of the registration of the lease. The matter was referred back to the Honorable Minister of Lands for further consideration.

Cases considered:

Cocker v Palavi anor [1997] Tonga LR 203
Finau v Minister of Lands anor [2012] Tonga LR 127 (CA)
Folau Tokotaha v Deputy Minister of Lands anor [1923-1962] Tonga LR 159
Hakeai v Minister of Lands anors [1996] Tonga LR 142
Hampton v BHP Billiton Minerals Pty Ltd NZ [No 2] [2012] WASC 285
Hausia v Vaka'uta anor [1974–1980] Tonga LR 58
Hey v Moorhouse (1839) 6 Bing N.C. 52
Lisiate anor v 'Eli anors [2012] Tonga LR 30 (CA)
Ma'ake v Lataimu'a [2007] Tonga LR 15
Nui and ors v Takelava and anor [2013] TOCA 2
Ongolea v Finau [2003] Tonga LR 147
Schaumkel v 'Aholelei [2013] TOCA 1
Tafa v Viau anors [2006] Tonga LR 125 (LC)
Tafa v Viau anors [2006] Tonga LR 287 (CA)
To'a v Taumoepeau anor [2015] Tonga LR 62
Vai v 'Uliafu [1989] Tonga LR 56
Vainikolo v Kaihea and another [2009] Tonga LR 201

Statute considered:

Land Act (Cap 132)

Counsel for the plaintiff	:	Mr Pouono
Counsel for the defendant	:	Mr Liu SC
Counsel for the third party, Minister of Lands:		Mr Kefu SC and Ms Aleamotu'a

Ruling

Introduction

[1] The plaintiff, Manapo'uli Manu (Manapo'uli), is the holder of a registered lease No 8451 dated 15 November 2013 for a term of 50 years over an allotment with an area of 30.3 perches at Alaivaha'amama'o By-Pass Road. The allotment is part of the Crown estate.

[2] The defendant, Feangai 'Aholelei (Feangai), her children and her husband (until his death) have occupied the allotment since 2001; that is for 14 years.

[3] In reliance upon her lease Manapo'uli is seeking an order evicting Feangai and her family from the allotment. Feangai refuses to vacate and says that Manapo'uli's lease was not validly granted. Feangai has filed a defense and a counterclaim and seeks an order declaring that the lease is invalid and directing the third party, the Minister of Lands, to cancel the registration of the lease.

The facts

[4] Nafetalai 'Aholelei (Nafetalai) was born on 26 August 1928. He married Lavi Emily Paea (Emily). Together they had ten children. There were seven boys and three girls. Tevita 'Aholelei (Tevita) was their eldest child, born on 15 August 1948. Fine 'Aholelei (Fine) was the seventh child and the fourth of the seven boys. Tevita is still alive but Fine died in 2010.

[5] Manapo'uli is one of Tevita's daughters. Feangai was Fine's wife. The main protagonists are therefore niece and aunt by marriage.

[6] In the 1960's Nafetalai had a court case over a property on Railway Road, Kolofo'ou. He lost the case. It appears that the then Minister of Lands decided to give Nafetalai an allotment at Alaivaha'amama'o By-Pass Road in substitution for the one he lost. This became known as Lot 3 on Plan 2058 and is the subject of this proceeding. Throughout the hearing the allotment was referred to as being at Pahu, Kolofo'ou.

[7] The allotment was swampy but Nafetalai built a shelter and his family moved onto the allotment in around 1964/65. I understand that seven of his 10 children were born there.

[8] Tevita married in 1972. After his marriage he lived at Halaleva and then Ma'ufanga but spent long periods away from home working at sea.

[9] Nafetalai made an application to the Minister for the grant of the allotment in 1974. The allotment had been surveyed in the early 1970s. Nafetalai's application satisfied all the requirements of the Land Act. The application was in the prescribed form. He had produced his birth certificate and a poll tax receipt and paid the survey fee. He also provided a letter from the town officer stating that he had built and was living on the allotment.

[10] The Minister did not ever sign a deed of grant of the allotment to Nafetalai but there is compelling evidence that the Minister did allocate the allotment to him. I do not accept the submission for the Minister that the evidence on this aspect was scant. The name Nafetalai 'Aholelei has been written indelibly on Lot 3 on Plan 2058. The names of other persons to whom allotments had been allocated appear on their respective allotments. An unsigned deed of grant in the name of Nafetalai was prepared. 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 a 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 be written on the Plan and the deed of grant prepared after a decision to allocate the allotment was made by the Minister.

[11] Nafetalai and Emily moved to Niue and then later to New Zealand. Nafetalai spent about eight years in Niue, returned to Tonga briefly in 1982 and then spent 25 years in New Zealand before his death in 2007.

[12] Fine and Feangai married on 6 January 1982. Before the marriage Fine was living on the allotment with Nafetalai's third son, Sione, and Sione's wife and children. After their marriage Fine and Feangai lived on adjoining land. After about two months they shifted to live at Ha'ateiho.

[13] In about May 1982 Nafetalai and Emily returned to Tonga and lived on the allotment with Sione and his wife. Fine and Feangai also moved back to the allotment at that time. Sione and his family then moved to Sione's own allotment at Tofoa and Nafetalai and Emily moved to New Zealand. Fine and Feangai nailed up the shelter and went back to Ha'ateiho. The shelter was removed by some unknown persons in around 1983. There is no evidence that anyone lived on the allotment again until 2001.

[14] In about 2001 Fine and Feangai moved back to live on the allotment. The impetus for this was that Nafetalai telephoned Fine and directed him to make the allotment his own. It must be the case that Nafetalai intended that Fine use the land for a home for himself and his family. With the exception of Fine and Sione all of Nafetalai's sons, including Tevita, had moved to New Zealand and did not intend to return to Tonga. Sione had his own allotment at Tofoa. Fine had no allotment of his own.

[15] The allotment was very overgrown and it was still swampy. Fine and Feangai set about clearing the allotment, filled it to make it dry and built an iron shed which they occupied initially. They later built a substantial two storey house which was completed in around 2005. They converted the shed into a workshop for Fine to work in.

[16] Feangai said that the cost to fill the land was about T$10,000 and the cost to build the house was about T$90,000. The exact figures do not matter. A lot of time, effort and money were expended by Fine and Feangai as a result of Nafetalai's direction that they make the allotment their own.

[17] Manapo'uli saw that Fine and Feangai had filled the allotment, had erected a small engineering workshop and were running a business from it. Later she saw that a

two storey house had been built. She said that this was during 'Nafetalai's time' which must mean prior to his death in 2007. She wondered how it was possible for a younger son to build on land that belonged to the eldest; referring it appears to Tevita's status as Nafetalai's heir. She said she could not recall if she spoke to Tevita about this.

[18] Following Nafetalai's death in New Zealand on 28 November 2007 neither Emily nor Tevita (as part of her widow's estate or as Nafetalai's heir respectively) made any claim to the land. There was no evidence that Emily is still alive or, if not, when she died. When asked why he did not claim the allotment after Nafetalai's death, Tevita said that he had health problems that prevented him from coming to Tonga. However, Manapo'uli said that Tevita asked her to go to the Land Office and check the status of the allotment. She said that she did this and reported back to Tevita. Manapo'uli said this occurred some years before Tevita came to Tonga which was in September 2013. In his evidence, Tevita said he did not know that the allotment had never been registered in Nafetalai's name until he came to Tonga in September 2013. That seems unlikely if Manapo'uli did investigate the status of the land on his instruction. She also discussed the allotment with Tevita before he came back to Tonga. Tevita was, in my view, aware that the allotment was not formally registered to Nafetalai before September 2013.

[19] Fine died in 2010. After Fine's death Feangai remained living on the allotment with her children. No one challenged her right to live on the allotment. She continued to live there totally undisturbed as she had since 2001.

[20] Despite doing nothing to claim the allotment following Nafetalia's death Tevita clearly regarded himself as having some entitlement to it. At some stage Tevita and Manapo'uli reached an agreement with respect to the allotment. Manapo'uli's understanding of the agreement was that Tevita would apply for the allotment and then surrender it to her. Manapo'uli spoke to Tevita about the fact that Feangai and her children lived on the allotment and their intention was that Fine and her family could remain there and Manapo'uli would develop the front part of the allotment. In his evidence, Tevita added that Manapo'uli intended to build a house on the allotment in front of Feangai's house. This is something Manaop'uli had not mentioned in her evidence. All of this was discussed and agreed between Tevita and Manapo'uli with no input from Feangai. Manapo'uli then travelled with Tevita to Tonga in around September 2013 with the intention of claiming the allotment.

[21] As things developed Tevita did not apply for a grant of the allotment as Nafetalai's heir. Why he did not do so was not explored in the evidence. On 11 September 2013 Manapo'uli applied to the Minister for a lease of the allotment. The application was accompanied by a letter signed by Tevita but prepared by Manapo'uli's husband, Melielau Manu. The letter stated that as no claim had been made by Nafetalai's widow or Tevita as his heir, the allotment had reverted to the Crown under section 87 of the Land Act. It went on to say as follows:

> "I am the heir (Tevita 'Ofa Ki Falefakauo 'Aholelei – Heir) and I have two brothers and no son. But the reason I am bothering you, is to show and to

> ask that I genuinely consent to my daughter, Manapo'uli 'Aholelei leasing this piece of land."

[22] There were a number of aspects of the application and letter which were examined at the hearing. In her application Manapo'uli used her birth name 'Aholelei and not her married name of Manu (being the name under which she commenced these proceedings). She gave her address as being at Hola By Pass Road, Pahu when she lived at Ma'ufanga. In his letter in support of the application, Tevita also gave his address as being at Pahu when he did not live there. There was no mention made in the letter that the allotment was occupied by Feangai and her family, or that she and Fine had filled the allotment and had built a two storey house on it. Mr. Niu submitted that this was all deliberate and intended to mislead the Lands Office to avoid the possibility of any inspection and the identification of competing claims. I do not consider that I am required to decide if that was so on the issues raised in the pleadings.

[23] On 28 October 2013 a brief to the Minister of Lands was prepared with the recommendation that a decision be made to approve the grant of the lease and submit it to Cabinet. The brief was misleading. It indicated that a site inspection had been carried out when that was not the case. Importantly also, due to the positions the parties have taken, in the comments section of the brief it was noted that the allotment had been granted to Nafetalai as follows:

> "The subject land was granted for Nafetalai 'Aholelei but not yet register (D/G 110/98). He passed away on 28.11.2007."

[24] Things then moved swiftly. The lease application was approved by Cabinet on 1 November 2013. On 11 November 2013 the Minister approved the lease application. On the same day the Minister issued a direction for a survey of the allotment to be completed. The lease was granted to Manapo'uli on 15 November 2013.

[25] There is a dispute between the parties as to when Feangai was told of Manapo'uli's and Tevita's intentions to make a claim on the allotment. There was a meeting on the allotment between Tevita, Melielau and Feangai but there was no agreement as to when this occurred and what was said. I hesitate to delve deeply into this because in my view it cannot alter the result of the case. What is clear to me is that Feangai was told at this meeting that there was a 'Chinese' who wanted to run a business at the front of the allotment. She objected to that and said that Tevita should pay her for all her expenses for filling the land and building the house and she would leave and go back to Ha'ateiho. Tevita told her no one would move her from the land but did not tell her that Manapo'uli had or intended to apply for a lease. Feangai only discovered this in April 2014 when a container was delivered to the allotment.

[26] The arrival of the container is explained by the fact that having been granted the lease Manapo'uli had negotiated with one Semisi Pomale to grant him a sublease of an area at the front of the allotment. He then took steps to occupy that part of the allotment. On 23 April 2014 an application was made to the Minister of Lands by Semisi Pomale for the grant of a sub-lease. When Feangai objected these proceedings were filed against her to evict her from the land.

[27] Feangai's daughter, Mavaetangi Matakaiongo, then went and spoke to Mr. Moala at the Lands Office. She said that upon his advice an application was made by Feangai's son, also called Fine, for a lease of the allotment. That application was made on 26 May 2014. Both the application for sublease by Mr. Pomale and the application for lease by Fine have not been processed awaiting the outcome of this litigation.

The submissions and issues

[28] Manapo'uli and the Minister of Lands adopted similar positions. They argue that Nafetalai was never the registered landholder of the allotment and therefore did not have the authority to grant a license to Fine and Feangai to occupy it. Alternatively, they submit that Feangai's right to occupy the land must have come to an end upon Nafetalai's death. On that basis it was argued that at the time the lease was granted Feangai was unlawfully occupying the land and was no more than a squatter so that the Minister did not need to consider her development and occupation of the land when granting Manapo'uli the lease. They submit that the lease was validly granted in these circumstances.

[29] There is a very late submission for the Minister that Nafetalai did not have authority to allow Fine and Feangai to occupy the allotment as he had abandoned the allotment when he moved to Niue and New Zealand in 1982.

[30] It was accepted for the Minister that if Fine was found to have been occupying the land lawfully then the Minister was obliged to consider her occupation and development of the land and the lease "can be cancelled".

[31] Feangai argued that Nafetalai was the lawful and registered holder of the allotment and had granted Fine and Feangai (and their children) the right to occupy the land. It was submitted that the right to occupy did not terminate upon the death of Nafetalai but continued until the Crown terminated that right expressly or by necessary implication by granting the allotment to another person. It was further submitted that the decision of the Minister to grant Manapo'uli a lease was invalid as being in breach of the rules of natural justice and in circumstances where there was an impediment to the grant of the lease, namely the work of filling the allotment by Feangai and Fine and the presence of the two storey house and the fact and duration of Feangai's occupation of the land.

[32] The matters in dispute between the parties can be resolved by a consideration of the following issues:

[32.1] Was Nafetalai the lawful holder of the allotment able to grant Fine and Feangai the right to occupy the land?

[32.2] Did Nafetalai abandon the allotment in 1982?

[32.3] Was Feangai occupying the allotment lawfully after Nafetalai's death?

[32.4] What is the nature of the Minister's functions and duties when making a decision to grant a lease?

[32.5] Was the decision of the Minister to grant the lease to Manapo'uli made lawfully?

[32.6] If the Minister's decision to grant the lease was unlawful what relief (if any) should the Court order on the parties' respective claims?

Was Nafetalai a lawful holder of the allotment?

[33] The relevant provisions of the Land Act are the definition of 'landholder' or 'holder' in section 2 and sections 3 and 4 which provide as follows:

> "landholder" or "holder" means –
>
> "(a) as regards Crown Land the Minister of Lands;
> (b) any Tongan subject holding an hereditary estate (tofia), a tax allotment (api tukuhau) or town allotment (api kolo);
> (c) any Tongan subject claiming to be interested in land which he is legally capable to hold;
> (d) any trustee duly appointed by the King, the Minister, or the Court on behalf of any person entitled to succeed to any land on reaching the lawful age of succession in respect of such land;
> (e) any person appointed as or acting as trustee or representative for any person beneficially entitled to any land or interest in land;
> (f) any person who claims to be entitled to any land or interest in land whether in actual possession or occupation or otherwise."
>
> Section 3:
> "All the land of the Kingdom is the property of the Crown."
>
> Section 4:
> "The interest of a holder in any hereditary estate, tax allotment or town allotment is a life interest subject to the prescribed conditions."

[34] The Minister relies on *Folau Tokotaha v Deputy Minister of Lands and anor* [1923-1962] Tonga L.R. 159 as authority that a deed of grant confirms ownership and legal title to land. It is argued that while Nafetalai was granted and allocated the allotment he never perfected his title by registration and could not have authority to grant a license to Fine and Feangai to occupy the land. I do not accept that submission. The Land Act does not make registration the test of ownership and the intention of the Act is that registration is a method of proof of ownership and nothing more. *(Lisiate and anor v 'Eli and ors* [AC 23 of 2011, 27 April 2012] distinguishing *Folau Tokotaha* and quoting with approval from the decision of Hunter. J in *Fifita Manakotou v Vaha'i (Noble)* Volume II Tonga L.R. 121, 123.) Relevantly, because of the parallels with this case, in *Lisiate* the Court at paragraph [31] said as follows:

> "It is true that the Minister must grant an application. It may in our view be properly inferred that the Minister did so in around 1963. The evidence that supports this conclusion is the detail included in the register of tax

> allotments which is a register kept by the Minister's department. In fact the very existence of the record in this register along with the inclusion of the uncompleted deed in the Register of deeds suggests strongly that a deed may have been issued at that time and subsequently lost. Whether or not that was the case we are satisfied that Siuaki was the lawful holder within any of the three meanings set out in [*subparagraphs (b), (c) and (f) of the definition of landholder or holder in section 2 of the Land Act*] at the time of the death of his mother in 1984."

[35] I also do not accept the submission for the Minister that *Lisiate* is distinguishable as being concerned with 'possession' under section 84 of the Land Act and not the "more important issue" of legal title. The Court identified the issue that it was concerned with as whether one Siuaki was a holder and owner of land. It followed from the fact of his ownership that he also 'possessed' the land in terms of section 84 (see paragraphs [30] and [31] of the judgment in *Lisiate*).

[36] It follows from my factual findings in paragraphs 6, 7, 9 and 10 that Nafetalai qualified as a holder of the allotment under subparagraphs (b), (c) and (f) of the definition of 'landholder' and 'holder' in section 2 of the Land Act and was also the owner, although not registered as such.

Did Nafetalai abandon the allotment?

[37] This was raised by the Minister for the first time in the written submissions and then in a very brief manner. The submission is one sentence. I do not consider it would be proper to allow the Minister to raise this issue now. The submission is contrary to the Minister's principle pleading that Nafetalai was never the lawful landholder of the allotment. Had this been pleaded Feangai could have called evidence on the matter. In any event, I agree with the submissions of Mr. Niu that to establish abandonment the Minister must take forfeiture proceedings under section 44(2) of the Land Act and prove that to the satisfaction of the Court. There is no such application made.

Were Fine and Feangai occupying the allotment lawfully?

[38] Section 4 of the Land Act defines a holder's interest as "a life interest subject to the prescribed conditions". A holder is entitled to allow relatives and others to occupy the land *(To'a v Taumoepeau and Minister of Lands* (Unreported LA 10/2012, 13 March 2015 Scott J); *Schaumkel v 'Aholelei* [2013] TOCA 1 at paragraph [10], *Vainikolo v Kaihea and another* [2009] Tonga LR 201.) Historically the ability to do so is an essential aspect of social organization and land tenure in Tonga. I find that Nafetalai had authority to and did grant a license to Fine and Feangai to occupy the allotment and make it their own during his lifetime.

[39] Both Manapo'uli and the Minister argue in the alternative that from 2007, when Nafetalai died, Fine and Feangai were no more than squatters. The Minister relied upon *Schaumkel* at paragraphs [33] & [38] and *Finau v Minister of Lands and anor* (Unreported Court of Appeal AC 9 of 2012, 12 October 2012). I do not consider either case supports the argument advanced by Manapo'uli and the Minister.

[40] *Schaumkel* was concerned with the application of the rules of succession to a property which had not reverted or been surrendered under section 54 of the Land Act and where the Minister "did not have to exercise the discretion required in making a fresh grant". That was not the case here where the Minister was exercising a discretion to grant the lease.

[41] Certainly in *Schaumkel* at paragraphs [33] to [35] the Court of Appeal held that a person who has been simply given permission to occupy land by the land owner does not acquire a legal interest in the land, rather he is a holder of a license to occupy which may be terminated upon reasonable notice and the license to occupy must come to an end at the latest upon the death of the land owner. It does not follow, for the reasons I come to, that upon the death of the land owner the continued occupation of the land is necessarily unlawful.

[42] The assistance that the Minister seeks to obtain from *Finau* is unclear to me. The issue in *Finau* was whether the power to grant an allotment, which had reverted to the Crown, could be exercised if the allotment was in the lawful occupation of someone other than the grantee. The Court of Appeal held that there was no warrant to imply a requirement that the "lawful occupation by someone other than the potential grantee, renders land unavailable". The decision does not undermine the principle, that I discuss later in this ruling, that the exercise of a discretion by the Minister to make a grant must be exercised reasonably and fairly in accordance with the principles of natural justice. I note in this regard that at paragraph [2] the Court of Appeal recorded that before making the grant "the Minister heard from interested parties including the appellant about what should be done in relation to the allotment".

[43] In *To'a* at paragraph [53] Scott J found that the reversion of the land in question to the Crown did not render the continued use of the land by a license holder unlawful and he did not become a trespasser. The Judge said:

> "While I accept that his license to reside there came to an end with Matei's death there is nothing to suggest that the Crown which was prima facie entitled to possession took any steps to evict him. Accordingly, he was in possession nec vi, nec clam, nec precario ... Secondly, it is notorious that applications for grant and registration typically take months to process. It would be absurd, for example, to suggest that the lawful occupant of land subject to a section 83 reversion occupied the land unlawfully while his section 43 application was being processed (and see *Tafa v Viau* – above, paragraphs 36 – 39)."

[44] The common law of trespass to land protects the right of possession and not title as such. (*Nui and ors v Takelava and anor* [2013] TOCA 2.) As a general rule, only a person in possession of land is able to sue for trespass. Exclusive defacto possession of land (requiring both an intention to possess the land and the exercise of exclusive control over it) carries with it the right to retain possession and undisturbed enjoyment of the land as against all wrongdoers and also against the owner at least until such time as the owner has lawfully affected re-entry. I note that in *Schaumkel* at paragraph [26] the Court of Appeal noted that ample notice to regain possession had been given following the expiry of a license to occupy.

[45] A person who is given lawful and exclusive possession of land but omits to give it up at the termination of his interest is not a trespasser in the absence of some step taken by the owner to evict him. (*Hey v Moorhouse* (1839) 6 Bing N.C. 52.) The issue was discussed in *Hampton v BHP Billiton Minerals Pty Ltd NZ* [No 2] [2012] WASC 285 at paragraphs 300, 301 and 303 as follows:

> "300. The counterclaimants submitted that it is sufficient for a claim for trespass that they had a mere *intention* to regain possession at some time in the future. There is centuries of authority, from at least the time of Blackstone, to the contrary. Physical occupation over the land, immediately prior to the trespass, is a pre-requisite for an action for trespass to land.
>
> 301. Consistent with the requirement of physical occupation, in a line of cases dating from at least 1827, it has been iterated and reiterated that a landlord, without re-entry, cannot maintain an action of trespass against a tenant holding over after tenancy. In the High Court of Australia in *Radaich v Smith*, Windeyer J said that '[a] right of exclusive possession is secured by the right of a lessee to maintain ejectment and, *after his entry*, trespass' (emphasis added). The same point was subsequently made by McHugh J saying that '[t]he legal right to possession before entry gave rise to an *interesse termini* that enabled the lessee to bring an action of ejectment and, *after entry*, an action for trespass to the land' (emphasis added). It has been quoted with approval in the Western Australian Court of Appeal. As Kirby P has said, the answer to the question of '[w]ho may sue for trespass to land' requires generally 'the occupation or physical control of land' .....
>
> 303. In relation to trespass to land, the requirement for physical occupation or control was based on the law of seisin which required a formal entry to the land, ie livery of seisin. That formal entry was required to perfect title before the owner could bring a claim for trespass. A person occupying the owner's land without permission had a 'real though wrongful seisin'. It may be that the pre-requisite of physical occupation or control at the time of trespass arose from the origins of trespass as a writ *vi et armis* (with force and arms) and *contra pacem regis* (against the king's peace). For instance, Bullen and Leake's pleading of trespass to land in 1868 provided that 'the defendant broke and entered certain land'. An alleged trespasser who was in peaceful and consensual occupation prior to the alleged trespass could not comfortably be described as a trespasser."

[46] In a Tongan context it has been held that a person may lawfully occupy and reside upon land that he has not been granted by way of town or tax allotment, lease, sublease or permit and that the only requirement is that the applicant must be lawfully residing in the Noble's or Crown's estate. (*Tafa v Viau and ors* [2006] Tonga L.R. 287 at paragraphs [35] to [39] and *Ma'ake v Lataimu'a* [2007] Tonga L.R. 15 at paragraph [49].)

[47] In *Finau* at paragraph 22 the Court of Appeal said:

> "The rights under the law of Tonga of those in lawful possession of an allotment without a documentary title were recognized in *Tafa v Viau* [2006] Tonga L.R 125 (LC) and 287 (CA). At [2] the Court of Appeal said:
>
> > 'At the time of an application made by the appellant for the grant of an allotment ... the … respondents ... were in lawful occupation of the land'".

[48] It follows from this that notwithstanding that the license to occupy the land conferred by Nafetalai upon Feangai and Fine expired upon his death they remained in lawful occupation of the land. The fact of their exclusive possession gave them the right to be protected from disturbance; a right that would be recognized and enforced by the Court. Their occupation would not become unlawful unless and until the Crown asserted its rights of ownership by taking steps to evict them. The evidence establishes that no such steps were taken between Nafetalia's death in 2007 and the granting of the lease in November 2013.

The Minister's functions and duties

[49] Sections 89 and 92 of the Land Act provide as follows:

> "89. No lease shall be granted except with the consent of the Cabinet, but consent shall not be granted to a lease by a widow of the land of her deceased husband.
>
> "92. A lease granted under sections 90 or 91 shall be in the form prescribed in Schedule IX. The term shall not exceed 50 years, and shall be renewable upon such conditions as to rent and methods of cultivation as may be ordered by regulations made under this Act."

[50] The lease application is form no 1 of Schedule IX to the Land Act and it is directed by section 124 (1) that the form is to be used with such variations as may be necessary. There is a requirement that the estate or allotment holder declares that there is no impediment to prejudice the lease. When signing the form the Minister does so as the representative of the Crown. (*Tafa* at page 293).

[51] For Feangai, Mr. Nui made a submission that the grant of the lease to Manapo'uli was invalid because there was an impediment to the grant "namely, the work of filling the allotment by the defendant and her husband and the presence thereon of their substantial two storey dwellinghouse and their occupation and residing thereon...". In previous cases the Courts have expressed a view that there will be an impediment to the making of a grant if land is not 'available' because, save in the case of trespassers, the land was in fact occupied. *(Ongolea v Finau* [2003] Tonga L.R 147 and *Vai v 'Uliafu* [1989] Tonga L.R 56.) Whether the approach taken in those cases can be supported must now be in doubt in light of the comment of the Court of Appeal in *Finau* at paragraph [16] that the Court was leaving it for determination in another case:

> "….whether the Act entrusts to the Minister the determination of the question of whether land is "available" as a matter of fact …. or whether "available" has a legal meaning to be determined by a 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."

[52] However, as Scott J observed in *Toa* at paragraph [61]:

> "While the responsibility for determining availability may not be clear what is beyond doubt is the responsibility of the Ministry to make proper enquiries to comply with the rules of natural justice and to avoid obvious mistakes *before* a decision is reached"

[53] The Courts have recognised the application of traditional legal grounds of judicial review to the administrative decision of the Minister to make grants under the Land Act. A repository of administrative power has an obligation to adopt a reasonable and fair process before he exercises that power. This includes the duty to take reasonable steps to ascertain the facts relevant to the exercise of the power. In *Tafa* the Court of Appeal at paragraph [12] said:

> "Two aspects of the Minister's functions and duties, in a case such as this, 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. In the first place, he cannot properly sign the 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 enquiry 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 enquiries 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."

[54] The Court also noted 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. At paragraph [13] the Court said:

> "Where the 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"

[55] In *Finau* the Court of Appeal considered (at paragraph [15]) 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 L.R. 58; *Hakeai v Minister of Lands and ors* [1996] Tonga. L.R 142; *Cocker v Palavi and anor* [1997] Tonga LR 203 and *Tafa).*

[56] The requirements of natural justice will vary from case to case and are dependent upon the nature of the inquiry that is being conducted and the decision making power that is being exercised. However, in a case such as this, where the making of a grant has the potential to adversely affect some identifiable person by dispossessing her from her home of longstanding the Minister can reasonably be expected to seek her views and given her an opportunity to adduce probative material before making a decision. This is not an onerous obligation. As was noted in the Land Court in *Tafa* at pages 141-142:

> "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, in quite untenable and is a recipe for lawlessness. I cannot accept that such a consequence could ever have been intended by the legislature"

Was the decision of the Minister to grant the lease to Manapo'uli lawful?

[57] The evidence established that reasonable steps were not taken by the Minister to acquaint himself with the information that was relevant to the exercise of his power to make a grant of the lease to Manapo'uli.

[58] The principle evidence that has a bearing on this point was given by Mr. Semisi Moala for the Minister. Mr. Moala was the officer responsible for the handling of Manapo'uli' application for lease on behalf of the Ministry of Lands albeit he delegated his duties to Mr. Lousa. He said that before the lease was granted to Manapo'uli the land should have been inspected but it was not. Mr. Moala considered that the only time an inspection will not be required before a lease was granted was in respect of recently sub-divided land (which this was not). He said that the decision to grant the lease may well have been different had an inspection been done in this case Mr. Moala also confirmed that on the briefing form to the Minister someone had confirmed the site inspection was "OK" indicating that an inspection had been completed. He said that when making his decision to grant the lease the Minister would have understood that an inspection had been carried out.

[59] Based on this evidence I reject as a matter of fact the submission for the Minister that even had the Minister heard from Feangai he would have found that she had no legal claim to the land.

[60] In the circumstances described by Mr. Moala the Minister proceeded to make the grant in ignorance of the factors that the allotment was occupied by Feangai and her family, had been so occupied at that stage for 12 years, that Feangai and Fine had undertaken at their own cost substantial improvement work and had built a two storey dwelling and workshop upon the land.

[61] Furthermore, Feangai was never consulted and was not given any opportunity to be heard before the Minister exercised his discretion to grant the lease to Manapo'uli. Knowledge of the matters referred to above would have required the Minister to accord natural justice to Feangai and consider her interests before making a grant of the lease to Manapo'uli.

[62] Even if I had been of the view that Feangai was in unlawful occupation of the allotment it would not in my view follow that the Minister was not required to consider her interests before making a grant to another. The argument that the Minister is not required to consider the interest of 'squatters' or 'trespassers' is derived from cases such as *Ongolea* and *Vai* and for the reasons I have already stated the approach taken in those cases may not now be supportable. In my view, the Minister, having made reasonable enquiries, should have regard to the rights, interests or legitimate expectations of any person that are imperiled by the Minister's consideration of the application for the grant. In *Hakeai* at page 3 the Court said:

> "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. Here, although the officials of the Ministry of Lands knew the surrender had been arranged to enable him to apply for a grant of the allotments, he was not given any opportunity to argue that he should have priority before the purported grant was made to the appellant. That was legally wrong. If he had been given the right to comment, this whole matter might well have ended then. It is to enable both sides of a case to be considered that the principle of natural justice exists."

Summary of my findings

[63] Nafetalai was lawful holder and owner of the allotment from at least 1980 albeit not formally registered as such. He granted Fine and Feangai a license to lawfully occupy the land and make it their own. Whilst that license expired upon his death Fine and Feangai remained in lawful occupation of the land. Before granting the lease the Minister was obliged to inspect the land and to give consideration to the interests of Fine and to give her an opportunity to be heard in accordance with the principles of natural justice. The Minister failed to do so and the granting of the lease was accordingly unlawful.

The relief

[64] For the foregoing reasons I dismiss Manapo'uli's claim for possession of the land. I give judgment for Feangai both on Manapo'uli's claim and on her counterclaim.

[65] I declare that the grant of the lease to Manapo'uli to be invalid and I order the cancellation of the registration of the lease.

[66] The matter is referred back to the Honorable Minister of Lands for further consideration but I note that such consideration must now include the competing claims for a lease of the property as well as any claims that Feangai may wish to make once she is consulted.

[67] I will receive any written submissions on costs by Feangai within 21 days and by
630 Manapo'uli and the Minister 21 days thereafter.

Veamatahau v Tulikifanga anor

Supreme Court, Nuku'alofa
Paulsen CJ
CV 7/15

17 April 2015; 28 April 2015

Civil law – order sought for vacant possession of house – defence of estoppel failed – order granted

The plaintiff owned a house at Houmakelikao but for many years he was living overseas. He was the second defendant's brother and the first defendant's uncle. The defendants lived in the house but the plaintiff asked them to move out so that he can live there with his family. The defendants did not dispute the plaintiff's ownership of the house but say that whilst he was overseas he gave them permission to live in the house and said he would not be returning to Tonga. The plaintiff sought an order that the defendants vacate and return the house and pay compensation for their unlawful occupation of it. The defendants contend that the plaintiff was estopped from denying that he would not return to Tonga (not raised in the statement of defence). The defendants have also counterclaimed for $40,000 for 'services rendered' in maintaining the house (and the surrounding allotment upon which it was built) during their period of occupation.

Held:

1. The defence of estoppel failed because when the plaintiff told the second defendant that he was not intending to return to Tonga, it was not a representation of fact nor was it a promise. It was no more than a statement of future intention. The words contained no element of assurance that the defendants would be allowed to remain in the house for any period of time, let alone indefinitely. The court held that the plaintiff's words were never relied upon by the defendants. Having provided the defendants with a place to live on a rent-free basis for 14 years there was nothing unconscionable in the plaintiff asserting his right of ownership and requiring them to move out of the house however unwelcome that may be from the defendants' perspective.
2. Generally speaking a house was personal property and did not form part of the land. The plaintiff asked the defendants to move out in June 2013, and gave them until February 2015 to do so. On any view of the facts they have had reasonable notice. By continuing to occupy the house the defendants were intentionally retaining possession of the house in defiance

of the rights of the plaintiff. The plaintiff sought an order for the return of the house and whilst granting such a remedy (as opposed to damages representing the value of the house) was discretionary no injustice would arise the court do so. The plaintiff was entitled to judgment for the return of the house.

3. The defendant's occupation of the house from February 2015 was unlawful. The plaintiff would ordinarily be entitled to damages for the period of unlawful detention and use of his house. The usual measure would be represented by a reasonable remuneration for the defendants' use of the house. However, the plaintiff called no evidence as to what was a reasonable rental and in any event the amount involved would most likely be no more than a few hundred pa'anga. The court made no award on the basis that no loss was proved.
4. With respect to the counterclaim, the court found there was no basis in law or fact for the defendants' counterclaim for payment of $40,000 or any other sum from the plaintiff. The counterclaim was dismissed.
5. The court made the following orders: the defendants were to vacate and return possession of the house to the plaintiff within 21 days; the defendants' counterclaim was dismissed; and the plaintiff was entitled to his costs of the action which were to be taxed if not agreed.

Cases considered:

Commonwealth of Australia v Verwayen (1990) 170 CLR 394

Cowley v Tourist Services Ha'apai Ltd and Fund Management Ltd [2001] Tonga LR 183 (CA)

Esera v Westbrook [2002] WSCA 5 (CA of Samoa)

General and Finance Facilities Ltd v Cooks Cars (Romford) Ltd [1963] 1 WLR 644 (CA)

Goldstar Insurance Co Ltd v Gaunt [1998] 3 NZLR 80 (CA)

Lumbers v W Cook Builders Pty Ltd [2008] HCA 27

Mafile'o v Muhupeatau and others [2001] TOLC 4

Nash v Barnes [1922] NZLR 303

O.G Sanft & Sons v Tonga Tourist and Development Co Ltd [1981-1988] Tonga LR 26

Pavey & Matthews Pty Ltd v Paul (1987) 162 CLR 221

Strand Electric and Engineering Co Ltd v Brisford Entertainments Ltd [1952] 2 QB 246

Veikune v To'a [1981-1988] Tonga LR 138

Waltons Stores (Interstate) Ltd v Maher [1988] HCA 7; (1988) 164 CLR 387

Wilson Parking New Zealand Limited v Fanshawe 136 Limited [2014] NZCA 407

Statute considered:

Evidence Act (Cap 15)

Counsel for the plaintiff : Mr Pouono

Counsel for the defendants : Mr Fakahua

Ruling

The claim and counterclaim

[1] The plaintiff is the owner of a house at Houmakelikao but for many years he has been living overseas. He is the second defendant's brother and the first defendant's uncle. The defendants are living in the house but the plaintiff has asked them to move out so that he can live there with his family. The defendants do not dispute the plaintiff's ownership of the house but say that whilst he was overseas he gave them permission to live in the house and said he would not be returning to Tonga.

[2] In this action the plaintiff is seeking an order that the defendants vacate and return the house and pay compensation for their unlawful occupation of it. The defendants contend that the plaintiff is estopped from denying that he would not return to Tonga. The defendants have also counterclaimed for T$40,000 for 'services rendered' in maintaining the house (and the surrounding allotment upon which it is built) during their period of occupation. The issues that arise are:

[2.1] Does an estoppel arise which prevents the plaintiff from obtaining an order requiring the defendants to vacate the house.

[2.2] If not, is the plaintiff entitled to an order that the defendants vacate the house.

[2.3] Is the plaintiff entitled to damages in the event that the defendants are in unlawful occupation of the house and, if so, in what sum.

[2.4] Are the defendants entitled to payment for services rendered in the maintenance of the house and, if so, in what sum.

The facts

[3] The plaintiff built the house in around 1984 on the allotment of Talau Fakatava in the expectation that he would at some time in the future be granted the land as his own. I understand that he still does not own the land. The cost of the house was about T$20,000. He lived there for 4 or 5 years before going overseas and he left his father and, upon his father's death in around 1994, his elder brother to look after the house. Between 1990 and 2001 the house was occupied by a non-Tongan, then by the plaintiff's first cousin and husband and then by a man called Selisi Mataele. Some rent was received by the plaintiff over this period.

[4] How the defendants came to occupy the house was the focus of much of the evidence. The plaintiff's evidence was that in around 2004 his sister, Moana Finau, asked him if he would allow the defendants to live in the house so that they could look after her adopted children. He said that Moana Finau agreed to pay rent of T$100 per month which she did until 2007 when she stopped paying after a disagreement with the defendants. Moana Finau's evidence was that she had initially allowed the defendants to live in the house in around 2001 without telling the plaintiff and it was a few years later that she made an arrangement with the plaintiff to pay rent. Moana Finau confirmed that she had a disagreement with the defendants and stopped paying the rent in around 2007/2008.

[5] The second defendant's recollection was quite different. She said that the defendants had been living with a clergyman in crowded conditions. In around 2001 the plaintiff's house became vacant and she asked him if she (and her daughter) could live there. The second defendant said that the plaintiff told her that he did not intend to return to Tonga and that she should go and live in the house and that she should take care of it, an obligation she must have assumed when she moved in with her daughter. There was no evidence of any discussion about the period that the defendants would live in the house and the defendants never paid rent.

[6] Whilst I believe that both the plaintiff and Moana Finau to be honest their recollection of events was poor and changed in the telling. It seems unlikely that Moana Finau, who is very close to her brother, would give permission to the defendants to live in his house without telling him, or that the defendants would occupy the house without having some contact with the plaintiff. There was also no corroborating evidence of the payment of rent by Moana Finau. I therefore accept the second defendant's evidence about how the defendants came to live in the house.

[7] When the defendants moved into the house in 2001 there was no furniture in it and the water had been disconnected. The second defendant said that they did work and incurred expenses to maintain the house in the following ways:

[7.1] They mowed the lawns and kept the house clean.

[7.2] They painted the interior of the house. The paint cost T$135. No invoices or receipts were produced.

[7.3] They put in carpet at a cost of $T142. No invoices or receipts were produced.

[7.4] A water meter, electricity meter and telephone line were installed although the water and electricity supply remained in the plaintiff's name. The cost of this was not disclosed and no invoices or receipts were produced.

[7.5] In his written submissions Mr. Fakahua states that the defendants had also renovated the bathroom but I heard no evidence about that.

[8] What is apparent is that that taken at its highest the work done and expenses incurred by the defendants in the maintenance of the house are modest, particularly when one considers the period of their occupation and also that they benefitted directly from all that they did or spent.

[9] According to the plaintiff, when the rent stopped being paid in around 2007/2008 he phoned the second defendant and asked her to move out of the house but the second defendant hung up on him. The second defendant denied this. There was nothing to suggest that the plaintiff took any steps to remove the defendants from the house in 2008 as one would expect if had been rebuffed in the manner he described. Also the plaintiff acknowledged that in 2011 the second defendant travelled to Australia and there met with the plaintiff and Moana Finau but nothing was said to her about moving out of the house. For these reasons I again accept the evidence of the second defendant that no demand was made that the defendants leave the house in 2008.

[10] In June 2013 the plaintiff travelled to Tonga and it is acknowledged by the second defendant (although denied in both the statement of defence and in an affidavit sworn by her in the action) that on that visit the plaintiff asked the defendants to move out of the house. The plaintiff says he gave the defendants until January 2015 to be out but the second defendant says no date was mentioned.

[11] The plaintiff returned to Tonga in February 2015 and the defendants were still living in the house. The plaintiff was eager for them to leave. He gave them three further days to move out of the house which resulted in the first defendant calling the Police. The defendants also sought legal advice and on 12 February 2015 their lawyer, Mr. Fakahua, sent the plaintiff a letter which reads as follows:

> I hereby respectfully state that I am acting for Finau Tulikafanga. Finau has complained about you coming for them to vacate and moved away from the house and the land that they are currently occupying.
>
> It is now 15 years of their occupation and her child Lavinia Tulikifanga and you have no appreciation of their state of affairs of living like orphaned and I know the connection between your sister and niece and I submit to you to give them 6 months so that they can look for a place to move there. Sorry but the three days that you have given them is unreasonable.
>
> I believe that a lawyer should have advised you for they have been staying on the land for more than 15 years by keeping and taking care of the allotment without any contribution from you to the keeping and maintaining the house and I believe that you are happy when you look at the house that it is in good condition as kept by Finau and Lavinia.
>
> I believe this letter will be of assistance to you.

[12] The plaintiff then filed these proceedings. The claim was accompanied by an application for an urgent eviction order which I dismissed after a defended hearing for reasons set out in a written ruling dated 20 March 2015.

Does an estoppel arise against the plaintiff

[13] The defence of estoppel was not raised in the statement of defence and Mr Pouono urged that I do not consider it. As there was no suggestion of prejudice I have decided to consider the defence but this is not to be taken as a precedent in other cases.

[14] The submission for the defendants on estoppel was as follows:

> Refer paragraph 9 of Finau's brief of evidence she stated that she thought that the plaintiff would honour his words as previously that he would not come again to Tonga and he is estopped from denying his promise as on the telephone conversation in 2000/2001.

[15] Paragraph 9 of the second defendant's brief of evidence was similarly pithy and read:

> In 2013 when the plaintiff came to Tonga and asked me to vacate the land and I was surprised and not only that but I thought that he would honoured his words previously that he would not come again to Tonga and he is estopped from denying his promise

[16] Estoppel arises in a variety of guises and I am left guessing what form the defendants are relying upon. As best as I can determine it is promissory estoppel. The equitable defence of estoppel has been recognised in Tonga. *O.G Sanft & Sons v Tonga Tourist and Development Co Ltd* [1981-1988] Tonga LR 26; *Veikune v To'a* [1981-1988] Tonga LR 138. The elements necessary to establish promissory estoppel are:

> [16.1] A belief or expectation which was created or encouraged through a clear and unequivocal representation of fact or promise by the party against whom the estoppel is alleged. *Goldstar Insurance Co Ltd v Gaunt* [1998] 3 NZLR 80 (CA). *Mafile'o v Muhupeatau and others* [2001] TOLC 4 at [30].
>
> [16.2] The belief or expectation has been reasonably relied on by the claimant.
>
> [16.3] Detriment would be suffered if the belief or expectation is departed from.
>
> [16.4] It would be unconscionable for the party against whom the estoppel is alleged to depart from the promise or representation.

[17] Promissory estoppel was traditionally applied where a promise was made to refrain from exercising pre-existing contractual rights but it has wider application today. *Waltons Stores (Interstate) Ltd v Maher* [1988] HCA 7; (1988) 164 CLR 387; *The Commonwealth of Australia v Verwayen* (1990) 170 CLR 394. The broad rationale of all types of estoppel is to prevent a party from going back on his word (whether express or implied) when it would be unconscionable to do so. Unconscionability has been described as the element which both attracts the jurisdiction of a court of equity and moulds the appropriate remedy. But importantly the departure from a voluntary promise is not unconscionable in itself, even if detriment results. What equity responds to is one party creating or encouraging an assumption in the other party, and its knowledge that the other party will rely on the assumption to its detriment. The aim of the court in granting a remedy is not to satisfy the claimant's expectation (although that may be done in appropriate cases) but to satisfy the equity that has arisen in the claimant's favour. *Wilson Parking New Zealand Limited v Fanshawe 136 Limited* [2014] NZCA 407. Applying these principles I find that no estoppel arises in this case.

[18] The plaintiff told the second defendant that he was not intending to return to Tonga. That is not a representation of fact nor is it a promise. It is no more than a statement of future intention. The words contain no element of assurance that the defendants would be allowed to remain in the house for any period of time, let alone

indefinitely, as they now contend. Furthermore, even if regarded as a promise (which I do not accept) the words could not reasonably be understood to mean that the defendants would not be asked to vacate the house at some stage. The defence of estoppel fails on this ground alone but I will go on and consider the other elements.

[19] The plaintiff's words were never relied upon by the defendants. They are not mentioned in the statement of defence. In Mr Fakahua's letter of 12 February 2015 they are not referred to at all. In that letter the defendants acknowledge (at least implicitly) that they had to leave the house but wanted six months to do so. I also note, and have recorded in my ruling of 20 March 2015 at [12], that Mr Fakahua previously accepted that the plaintiff was entitled to possession of the house, subject only to the payment of a sum for maintenance and the giving of a reasonable period of notice. This is all quite inconsistent with the position the defendants now adopt. It is telling too that in her evidence the second defendant raised a number of justifications for her stance that are unrelated to what the plaintiff told her about his intentions. She was upset that the plaintiff did not show her sufficient respect when asking her to move out of the house. She thought that he should have thanked her for looking after the house. She also said she was the only one of her siblings who resided in Tonga and took care of their late father. She then asserted that her father had asked the plaintiff to leave the house to a younger brother. All of this leads me to the firm view that the defendants' reasons for refusing to leave the house have nothing to do with their reliance upon the plaintiff's words.

[20] In considering whether it would be reasonable for the defendants to have placed any reliance upon the plaintiff's words they must be considered in the context in which they were spoken. The second defendant did not have a suitable place to live or a home of her own. She called upon her brother for assistance. Out of his natural love and affection for the defendants he agreed to let them live in his house. In those circumstances the defendants cannot legitimately contend that they would not have moved into the house (or would not have done any of the maintenance work) if they had known the plaintiff might one day return to Tonga.

[21] Having provided the defendants with a place to live on a rent free basis for 14 years there is nothing unconscionable in the plaintiff now asserting his right of ownership and requiring them to move out of the house however unwelcome that may be from the defendants' perspective.

[22] Although I was not referred to it by Counsel, I have had regard to section 103 of the Evidence Act. Section 103(2) states as follows:

> If a person, either in express terms or by conduct, makes a representation to another of the existence of a certain state of facts which he intends to be acted upon in a certain way, and it is acted upon in that way in the belief of the existence of such a state of facts to the damage of him who so believes and acts, the first is estopped from denying the existence of such a state of facts.

[23] Section 103(2) does not assist the defendants. The plaintiff's words were not a representation of an existing fact. In the circumstances under which they were spoken

the plaintiff did not intended that the defendants would act on his words and they did not do so. In any event they have suffered no damage.

[24] For the foregoing reason the defence of estoppel fails.

Is the plaintiff entitled to an order that the defendants vacate the house.

[25] It is an idiosyncrasy of Tongan law that generally speaking a house is personal property and does not form part of the land. Buildings are treated as chattels detachable from the land upon which they stand. *Cowley v Tourist Services Ha'apai Ltd and Fund Management Limited* [2001] Tonga LR 183 (CA). Possession, but not ownership of the house, was given to the defendants in 2001 for no fixed term and on the understanding that they would look after the house. In those circumstances a bailment arose and the defendants possessed the house at the will of the plaintiff and subject to his revocation on reasonable notice. (Palmer '*Bailment*' The Law Book Company, 1979 at 348) The plaintiff was, upon giving reasonable notice, to have the house returned to him. He asked the defendants to move out in June 2013, giving them until February 2015 to do so. On any view of the facts they have had reasonable notice. By continuing to occupy the house the defendants are intentionally retaining possession of the house in defiance of the rights of the plaintiff.

[26] The plaintiff seeks an order for the return of the house and whilst granting such a remedy (as opposed to damages representing the value of the house) is discretionary no injustice will arise in this case should I do so. *Nash v Barnes* [1922] NZLR 303, *General and Finance Facilities Ltd v Cooks Cars (Romford) Ltd* [1963] 1 WLR 644 (CA). The plaintiff is entitled to judgment for the return of the house.

Is the plaintiff entitled to damages

[27] The defendant's occupation of the house from February 2015 was unlawful. The plaintiff would ordinarily be entitled to damages for the period of unlawful detention and use of his house. The usual measure would be represented by a reasonable remuneration for the defendants' use of the house. *Strand Electric and Engineering Co Ltd v Brisford Entertainments Ltd* [1952] 2 QB 246; *Esera v Westbrook* [2002] WSCA 5 (CA of Samoa). The plaintiff called no evidence as to what is a reasonable rental and I am unwilling to speculate about that. In any event the amount involved would most likely be no more than a few hundred pa'anga. I make no award on the basis that no loss was proved.

Are the defendants entitled to payment for services rendered

[28] The defendants seek T$40,000 by way of counterclaim. This is how the claim is pleaded in the statement of defence:

> The defendants submit that they maintained the town allotment since 2000-2015 which is 15 years and all services rendered such as mowing, cleaning, renovation, painting, new installation of water meter and other in the sum of $40,000.

[29] Mr. Fakahua's written submissions gave me no more information. I was not told on what the basis this claim is made. It cannot be based on contract as it was never suggested that the plaintiff agreed to pay the defendants to maintain the property. For reasons I have given it cannot be estoppel (used as a sword rather than a shield). There can be no possible claim in restitution either when the second defendant agreed to look after the house as the basis upon which the plaintiff allowed them to move in. *Pavey & Matthews Pty Ltd v Paul* (1987) 162 CLR 221, 256; *Lumbers v W Cook Builders Pty Ltd* [2008] HCA 27.

[30] The defendants have obtained the full benefit of their work and expense by enjoying the house on a rent free basis for 14 years. Whilst the defendants' paradigm is that the plaintiff derived benefit from having his house maintained the correct view is that if he had been able to rent the house he could have expected it to have been maintained and earned 14 years of rent.

[31] Furthermore, the T$40,000 claimed bears no relationship to the value of the work done or costs actually incurred by the defendants. In her evidence the second defendant said that the amount claimed was what she thought was required to buy land and a house. The plaintiff is not obliged to put her in funds to buy a house.

[32] I can see no basis in law or fact for the defendants counterclaim for payment of T$40,000 or any other sum from the plaintiff. The counterclaim is dismissed.

The result

[33] I make the following orders:

[33.1] The defendants are to vacate and return possession of the house to the plaintiff within 21 days.

[33.2] The defendants' counterclaim is dismissed.

[33.3] The plaintiff is entitled to his costs of the action which are to be taxed if not agreed.

R v Pale anors

Supreme Court, Nuku'alofa
Cato J
CR 150-154 and 156/2014

28 April 2015

Sentencing – home invasion – leader of the group sentenced to the head sentence of six years – all had varying suspension on conditions

The six accused all appeared before the court for sentencing on a serious case of a home invasion at night followed by theft and robbery. A large amount of property was taken valued at about $11,000, about half of which was recovered.

Held:

1. Deterrence and the protection of society, aside from retributive considerations, were very important sentencing rationales in cases involving home invasions, at night, by several offenders, followed by violence. Robbery carried a maximum sentence of 10 years in Tonga. The starting point of seven and a half years took into account the fact that the offender was the instigator and the leader that night and was much older than the others.
2. The accused, Mr Pale, pleaded guilty to charges of conspiracy to serious housebreaking, conspiracy to theft, serious housebreaking and robbery. The starting point was reduced by 18 months to take into account the accused's early guilty plea, his remorse, and the fact the he was a first-time offender and was responsible for a large family. The final 18 months were suspended on conditions.
3. The other five accused were all sentenced with varying degrees of suspension and all subject to conditions.

Statute considered:

Criminal Offences Act (Cap 18)

Counsel for Pale : Mr Niu SC
Counsel for 'Amanaki and 'Atunaisa Tupou'ata : Mr Corbett
Counsel for Tu'uhoko : Mr Tu'utafaiva
Peni and Petelo Mo'unga were unrepresented

Sentence

[1] The accused come before me on a serious case of a home invasion at night followed by theft and robbery. A large amount of property was taken valued at about $11,000, about half of which was recovered. The agreed facts are as follows.

Summary of facts

1. On or about the night of 10th June 2014, Sisi Pale, Petelo Mo'unga, 'Amanaki Tupou'ata, Peni Tomasi Mo'unga and Siosaia Tu'uhoko were on a white 3 tonne truck belonging to Sisi Pale. They were en route to Nuku'alofa from Lapaha.
2. On or about 11:00pm, Pale and Petelo Mo'unga dropped off 'Amanaki Tupou'ata, Peni Tomasi Mo'unga and Tu'uhoko at Vuna Road at Sopu. Pale and Petelo Mo'unga then went to the residence of 'Anitoni Hurrell to pick up 'Atunaisa Tupou'ata.
3. After picking up 'Atunaisa Tupou'ata, they came back and picked up the rest of the boys ('Amanaki Tupou'ata, Peni Tomasi Mo'unga and Tu'uhoko) on Vuna road and drove west to the end of Sopu.
4. 'Atunaisa Tupou'ata showed Pale, Petelo Mo'unga, 'Amanaki Tupou'ata, Peni Tomasi Mo'unga and Tu'uhoko where the house of the complainant (Vika Carafa) is located. 'Atunaisa Tupou'ata told them that he is sure there should be goods in the house and that the residence owners are elderly.
5. They then dropped off 'Atunaisa Tupou'ata at around 1:00am and returned to Sopu on Vuna road. They stopped in front of an abandoned house at Sopu and proceeded to plot on how the crime would be committed.
6. At about 3:00am, they drove to the end of Sopu where they parked the white 3 tonne truck. They all got off and walked to the residence of the complainant (Vika Carafa). The accused persons entered the residential area and tried to break into the house occupied by the victim.
7. Pale climbed up a pipe and broke into the house through a window on the first floor. He entered the house and went downstairs opened the entrance letting the other accused inside.
8. Pale, Petelo Mo'unga and 'Amanaki Tupou'ata then went upstairs. At this time the victim was still asleep in her room. There was no one else in the house except the accused. The accused persons entered with shirts tied on their faces.
9. Two of the accused persons held her head and her feet, and a third tied her up. Pale threatened the victim that if she screamed, they would kill her. They left her tied up on the bed while they proceeded to rob the house.
10. While the accused persons were robbing the house, 'Amanaki Tupouata, went to get the white 3 tonne truck they had parked at the end of Sopu in order to transport the stolen goods.

11. After leaving the complainant's residence, the accused persons aside from 'Atunaisa Tupou'ata all returned to Lapaha to Sisi Pale's residence and unloaded the goods. The goods were divided between and pawned by the accused persons.
12. Some of the goods were later pawned on or about 11 June 2014.

Sisi Pale (CR150/2014)

[2] Mr Pale pleaded guilty to charges of conspiracy to serious housebreaking, conspiracy to theft, serious housebreaking and robbery. He was aged 34, the leader of the offenders who were all much younger, and the instigator of this offending. His probation report indicates he is a first offender, and a husband and father of a large number of children. He is their sole means of support. He was in gainful employment, at the time of this offending.

[3] I adopt the robbery as the head sentence. The complainant and occupier of the residence was threatened and bound in her residence in an upstairs bedroom where she had been sleeping by three of the offenders including Mr Pale who had adopted disguises. Objectively, the offending is very serious. It involved, an entry into a residence in the early hours of the morning, serious threats made to the complaint and her being tied up, and subsequently a large amount of property was taken from the premises.

[4] Mr Niu SC submitted that the offending was not in the upper range of robbery. He submitted that the offending was more spur of the moment rather than premeditated. The offenders led by his client drove around and sourced a target, his client scaled a drain pipe and opened the door to allow the others inside, and those that entered disguised themselves. It may be that the robbery was conceived when the offenders discovered the occupier was present and not before, however, the Agreed Facts evidence that the offenders had been told that people were in the house and in such circumstances they chose to enter the house. There is a real risk in cases of housebreaking that resistance will be encountered. They must have anticipated having to confront an occupier otherwise they would not have adopted disguises. The threat to the occupant by Pale, and tying her up in her own bedroom was callous. It must have been an extremely frightening experience for this woman who was, it seems, on her own in the house at the time and asleep before the group entered. Mr Pale seems likely to have committed these acts after consuming a large amount of whiskey earlier that evening. Mr Niu informed me that his wife had grown concerned about his drinking about that time.

[5] Mr Lutui amongst other cases cited to me CR 226-229/2005 Kafalava, Masima and Taufo'ou where the sentencing Judge had to deal with a number of offenders who had entered a residence of the owner of a popular cafe in Nuku'alofa to await the return after he had locked up the café for the night. A violent attack was carried out on him with a rock knocking him unconscious. I am informed the head sentence, in this case, was the robbery, although there were other charges such as housebreaking and causing grievous bodily harm, as well. Two of the offenders were first offenders and one had previous convictions for house breaking and theft. The Judge sentenced all the offenders on robbery to seven years imprisonment. Given that the offenders

pleaded guilty a starting point would likely to have been 8 years or higher. That case may be distinguished, however, from this case in that there was a measure of more serious violence and greater planning.

[6] The starting point in my view is less than Kalava, but nonetheless the offending is very serious. Deterrence and the protection of society, aside from retributive considerations, are very important sentencing rationales in cases like these involving home invasions, at night, by several offenders, followed by violence. Robbery carries a maximum sentence of 10 years in Tonga. The starting point taking into account also that the offender was the instigator and the leader that night and much older than the others, I consider to be seven and a half years.

[7] Mr Niu rightly referred to his early guilty plea, his co-operation, the fact he expressed remorse and the fact he is a first offender as being relevant factors for mitigation. I accept this and the starting point is reduced by 18 months making the sentence for robbery for which he is convicted, six years imprisonment.

[8] I consider, bearing in mind his early guilty plea and co-operation, remorse and the fact he is a first offender in particular, who has a large family that he should be allowed some suspension of his sentence. Taking into account the very serious nature of the offending, I order that the final 18 months of his sentence be suspended on the following conditions;

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

[9] On the charge of conspiracy to housebreak, I convict him and sentence him to 2 years imprisonment to be served concurrently with the robbery sentence.

[10] On the charge of serious housebreaking, which carries a maximum sentence also of 10 years, I convict and sentence him to 3 and a half years imprisonment concurrent with the robbery sentence.

[11] On the charge of conspiracy to theft, I convict and sentence him also to two years imprisonment to be served concurrently with the robbery sentence.

[12] All sentences are to be backdated to the period he was remanded in custody on this offending.

Peni Tomasi Mo'unga *(CR151/2014)*

[13] This prisoner also pleaded guilty also to conspiracy to serious housebreaking, conspiracy to theft, serious housebreaking and robbery. He is aged 18. He has one previous offence for theft for which he received 3 months imprisonment suspended for three years on the 25th January 2010. He came from a dysfunctional family and, as with his brother, left home for periods. His father is serving a sentence of imprisonment for drugs. He is married with a child but the relationship is unstable. He was on the night in question with a co-offender Mr Tu'uhoko when he was given a lift

by Mr Pale, in his motor vehicle. He was not told about Mr Pale's intention to commit housebreaking until later. He entered the residence but he did not go upstairs. However, knowing the occupant had been disabled, he proceeded to assist others to steal a significant amount of property. His involvement in the robbery was less serious but he also took advantage of the complainant being disabled and proceeded to assist in the stealing of a significant amount of property from the residence. I commence with a starting point of five years for his involvement. He is allowed 18 months reduction for his early guilty plea, his youth, remorse, and with also a background of limited offending.

[14] He is convicted and sentenced to three and a half years imprisonment. Despite his earlier conviction, I consider he falls within Mo'unga and I suspend the final 18 months of his sentence on the following conditions;

a. He is not to commit any offence punishable by imprisonment for a period of 2 years;
b. He is placed on probation to reside where directed by his probation officer for a period of 12 months;
c. He is to undergo a Life skills program at the direction of his probation officer.

[15] On the charge of conspiracy to effect serious housebreaking, he is convicted and sentenced to 18 months imprisonment concurrent with the robbery offending.

[16] On the offence of conspiracy to theft he is convicted and sentenced to 18 months imprisonment concurrent with the robbery sentence.

[17] On the serious housebreaking, he is convicted and sentenced to two years imprisonment concurrent with the robbery sentence.

[18] All sentences are to be backdated to the period he was remanded in custody on this offending.

Siosaia Tu'uhoko *(CR152/2014)*

[19] This prisoner falls into a different category. He was with Peni Mo'unga when they were picked up and given a lift in his vehicle by chance by Mr Pale. It was only later that he learned about Mr Pale's intention to housebreak. His counsel Mr Tu'utafaiva informed me he was too afraid to enter the house. He was given very little of the proceeds. He pleaded guilty to conspiracy to serious housebreaking and conspiracy to theft.

[20] I am informed by his counsel that he is aged 21. He has recently married and his wife was in Court. He has a labouring job with his father in law's construction company. I was informed he has previous convictions. He was sentenced in the Magistrates Court to 12 months' probation on the 18th February 2014. On the 12th December 2014, I sentenced him to housebreaking and indecent assault to 15 months imprisonment (6 months for the assault) and fully suspended this on conditions that he commit no offences punishable by imprisonment for a period for two years, that he be placed on probation for a period of 12 months, and that he was not to drink alcohol whilst on probation, that he attend a Salvation Army Alcohol and drug awareness

course, and that he carry out 40 hours community work with the recommendation he clean the Vuna Road.

[21] The present offending occurred prior to the offending for which he was sentenced. As such he is not in breach of my orders. Had he faced sentence today on the earlier charges, I may not have fully suspended his sentence. However, I am instructed that he has not committed any further offending since this offending, that he has attended and completed a course on alcohol abuse and has not consumed alcohol for a very long time now (confirmed by his wife now in court). He also completed his community work. At the time of this offending, I am informed he was residing with Peni Mo'unga. He is now in a stable relationship. I bear this in mind when it comes to sentence. I view him as a person who appears since this offending to be well on the way to rehabilitating himself.

[22] On the charges of conspiracy to serious housebreaking and conspiracy to theft, he is convicted. On each charge, he is sentenced to 12 months imprisonment both fully suspended on the following conditions;

a. He is placed on probation for a further 12 months to live where directed;
b. He is further to undergo a Life skills course;
c. He is also to undergo a further 40 hours community work as directed by his probation officer.

'Amanaki Tupou'ata *(CR153/2014)*

[23] He is aged 18 years. He was represented at this hearing by Mr Corbett. He pleaded guilty to conspiracy to serious housebreaking, conspiracy to theft, serious housebreaking, and robbery. He was unrepresented at the arraignment but prior to arraignment, he had been warned as had his brother, 'Atunaisa, that he should attempt to secure legal representation, the procedure on arraignment and the principles relating to discount on sentence. He pleaded guilty to charges as did his brother to conspiracy to serious housebreaking. I have no doubt they both understood what they were doing and the particulars were understood by them and confirmed by them at arraignment. They appeared at the first sentencing hearing of this matter again unrepresented, and both confirmed the summary of facts, and expressed remorse for their actions. After this hearing had been adjourned to enable further inquiries to be made, by the Crown, and the prisoners remanded in custody, the defendants engaged Mr Corbett who is acting for another defendant who is not before the Court today. Mr Corbett sought to have their pleas set aside. His case was that the brothers had entered pleas without the assistance of counsel who had been engaged by them. He also said in the case of this defendant that he had been subject to duress.

[24] I adjourned the application to have the Crown obtain an affidavit from the counsel who they said should have appeared to represent them. An affidavit was obtained from counsel, and I am satisfied there is no substance in the complaints at all. Rather than their counsel abandoning them, I am satisfied that they abandoned the services of counsel who had appeared for them in the early stages after arrest, but not at the committal, or since. Further I am satisfied they well knew the nature of their pleas, and the particulars of their offending. I was informed when I requested of Mr

Lutui whether Amanaki had, in his record of interview, suggested duress he confirmed he had not. I declined the applications. Further, I indicated to counsel Mr Corbett, prior to sentencing resuming in the afternoon, he might take instructions as to whether the defendants still expressed remorse because that might affect my approach to their sentence. He informed me in the afternoon that they both expressed remorse for their actions.

[25] In relation to Amanaki, although he has one previous conviction, there is some doubt about this. In any event, it was not of great moment so I regard him as a first offender. Objectively his role included disabling the complainant in her bedroom. He was not the instigator and compared with Mr Pale he was very young. The prisoner was only about 18 at the time of the offending. I am prepared to accept there was some pressure placed on him by Mr Pale although I observe he is not a very big man in stature. I consider objectively his involvement, though less than Mr Pale, in assisting to disable the complainant who had been asleep in her bedroom was very serious and I commence with a starting point of six years in his case for his role in the robbery. I reduce this sentence by 18 months for his guilty pleas, apparent co-operation, remorse, being a first offender, and his youth. The sentence I impose upon him for robbery is 4 years and a half years imprisonment.

[26] I suspend the final 18 months of this sentence on the basis, he satisfies Mo'unga principles. I do this on the following conditions.

a. He is not to commit any further offences punishable by imprisonment for two years;
b. He is placed on probation for 12 months to live where directed;
c. He is to attend a Life skills course under the direction of his probation officer.

[27] On the charge of conspiracy to theft, he is sentenced to 18 months imprisonment to be served concurrently with the sentence on the robbery count.

[28] On the charge of conspiracy to serious housebreaking he is sentenced to 2 years imprisonment to be served concurrently with the sentence on the robbery count.

[29] On the charge of serious housebreaking, he is convicted and sentenced to three years imprisonment concurrent with the sentence on the count of robbery.

[30] His sentences are also backdated to the period he was placed on remand in custody.

Petelo Mo'unga *(CR154/2014)*

[31] Petelo was the youngest of the offenders. He was 15 at the time of the offending. He had an unstable family upbringing and little education. He worked occasionally in the bush and for Mr Pale, and some of his friends. The probation report revealed that he was very influenced by Mr Pale to carry out the offending and under his influence during the offending. He has previous offences for housebreaking and theft. His role in the offending included being involved in disabling the occupant by tying her up in her bedroom. I fix the same starting point as Amanaki Toupu'ata, namely six years. I

allow him 2 years for his guilty plea, co-operation, remorse, and additionally, the fact he was only 15 at the time of the offending.

[32] I convict and sentence him on robbery, to four years imprisonment. Because of his age at the time of the offending, I allow a greater period of suspension in his case. I suspend the final two years of his sentence on the following conditions;

a. He commit no further offences punishable by imprisonment during the period of suspension;
b. He is placed on probation for a period of 12 months;
c. He is to live where directed by his probation officer;
d. He is to undergo a Life skills course under the direction of probation.

[33] On the charge of conspiracy to theft, he is sentenced to 18 months imprisonment to be served concurrently with the sentence on the robbery count.

[34] On the charge of conspiracy to serious housebreaking he is sentenced to 18 months imprisonment to be served concurrently with the sentence on the robbery count.

[35] On the charge of serious housebreaking, he is convicted and sentenced to 18 months imprisonment concurrent with the sentence on the count of robbery.

[36] His sentences are also backdated to the period he was placed in remand in custody.

'Atunaisa Tupou'ata *(CR156/2014)*

[37] He did not proceed beyond giving Mr Pale information and directions on which house the group should break into as the Summary of fact records. At the time, he was living in the area, and he was visited by Mr Pale that night first in connection with some musical equipment, and after being dropped back at his house by Mr Pale before the housebreaking took place, he took no further part in the offending. He pleaded guilty to conspiracy to serious housebreaking, conspiracy to theft, and abetment to serious housebreaking.

[38] He is aged 22. He comes from a large family. He attended a panel beating course some years ago. He is married and has a family. He works as a labourer and does some mechanical work when able. He will get credit for his early plea, his reported expression of his remorse, his co-operation. I also sentence him as a first offender.

[39] Even though he did not go into the house or take any further part in the activity, or it seems profit from the nights events, he supplied material information knowing Mr Pale's intention and that it would be used for the purpose of housebreaking, and that the house was likely occupied by people who would not provide much resistance. A starting point for his involvement in the house breaking by providing material information I assess as 18 months imprisonment, which I mitigate for his guilty plea, his co-operation, remorse and his absence of any other convictions by 6 months. I accordingly, convict him of abetting a serious housebreaking and sentence him to 12

months imprisonment. However, I fully suspend his sentence on the following conditions;

a. He is not to commit any offences punishable by imprisonment for a period of two years;
b. He is to be placed on probation for 12 months;
c. He is to live where directed by his probation officer.
d. He is to attend a Life skill's course.

[40] Because he has been remanded in custody for sentence since the 6th March, 2015, I will not impose any additional requirement of community work. He is eligible for immediate release from custody under the conditions of this sentence.

[41] On the charges of conspiracy to serious housebreaking and the conspiracy to theft charges, he is convicted and sentenced to six months imprisonment concurrent with the charge of abetting a serious housebreaking.

R v Masalu and Taufa

Supreme Court, Nuku'alofa
Cato J
CR 143 and 144/ 2013

28 April 2015

Criminal law – manslaughter – police officers – joint unlawful enterprise – elements not proved – acquitted

On 16 November 2013 Masalu punched 'Inoke Pepa and caused him to fall on the road and hit his head. Then Taufa and Masalu kicked his head and body repeatedly, resulting in severe injuries to his head that caused Pepa's death. Both accused, Masalu and Taufa, were police officers. They were charged with manslaughter arising out of joint unlawful enterprise. In the alternative they were charged with causing grievous bodily harm and also, alternatively common assault.

Held:

1. To constitute a joint enterprise, the assailants must share a common purpose to cause harm to the victim and make it clear by their actions to the other that was their common intention. Accessorial liability may only be imputed for a crime that was subjectively foreseen or contemplated beyond reasonable doubt by a secondary party or confederate as a possible incident falling within the scope of the common unlawful enterprise.
2. The court examined the evidence and found that the Crown did not discharge the onus to prove the elements of the charges. The accused were acting in the execution of their duty.
3. Both accused were acquitted of all charges they faced and were both discharged.

Cases considered:

Chan Wing Siu v R (1985) 80 CR App Rep 117
Hunter v Sara [1999] 105 A Crim R 241
Powell v Daniels [1999] AC 1
R v Anderson and Morris [1966] 2 QB 110
R v Fakatava [2001] Tonga LR 76
R v Peters and Parfitt [1955] Crim LR 501

Statutes considered:
Criminal Offences Act (Cap 18)
Police Act 2010

Counsel for the Crown	:	Mr Kefu, Acting Attorney-General
Counsel for the accused	:	Mr Tu'utafaiva and Mr Taione

Verdicts

[1] The accused, Sosefu Masalu, CR 143/2013 stood trial in the Supreme Court of Tonga at Nuku'alofa on a charge of manslaughter under sections 85, 86(1) (a) and 91 and 93 of the Criminal Code. In the alternative, he was charged with grievous bodily harm contrary to section s 106(1) and 2(a) of the Criminal Code. Alternatively, he was charged with common assault, contrary to section 112 of the Criminal Offences Act. He stood trial together with Samisoni Taufa (CR 144/2013) who faced the same counts in his indictment manslaughter, in the alternative causing grievous bodily harm and also, alternatively common assault.

[2] The accused were charged each with one count of manslaughter arising out of joint unlawful enterprise. The particulars of the joint enterprise were that they caused the death of 'Inoke Pepa when Masalu on the 16th November 2013, unlawfully punched him causing him to fall on Taufa'ahau Road, his head hitting the road surface, causing a fracture to his skull, and then Samisoni Taufa together with Sosefo Masalu unlawfully kicked his head and body repeatedly, resulting in severe injuries to his head that caused his death.

[3] Both accused had individual manslaughter charges laid in the alterative that no joint unlawful enterprise was established. In the case of Masalu, the allegation again was that he had caused the death of Mr Pepa by unlawfully punching him causing him to fall on Taufa'ahau Road, hitting his head on the road surface causing a fracture to his skull, resulting in serious injuries to his head that caused his death. In the case of Taufa, the particulars of manslaughter were that he caused this by repeatedly kicking the deceased on the head, causing severe injuries to his head that caused his death.

[4] The charge of causing grievous bodily harm involved particulars in relation to Masalu that he had wilfully and without lawful justification punched the deceased in the head causing him to fall on Taufa'ahau Road, his head to hit the surface resulting in a fracture to his head and severe injuries to his head. In the case of Taufa, the particulars were that wilfully and without justification kicked the head of Mr Pepa resulting in severe injuries.

[5] A further alternative count of common assault was based on the allegation in relation to Masalu that he had wilfully and without legal justification punched the deceased and in the case of Taufa that he had wilfully and without legal justification kicked Mr Pepa whilst he was lying in Taufa'ahau road.

The essential elements of the offences charged

[6] Before proceeding to consider the evidence, I direct myself on the essential elements of the crimes of manslaughter, causing grievous bodily harm and common assault.

Manslaughter

[7] In order for an accused to be convicted individually of manslaughter I must be satisfied beyond any reasonable doubt on the evidence considered separately;

a) That the accused did an act on or about the 18th August 2012 that caused harm to Mr Pepa;
b) That such act was a deliberate act; and
c) That act was an unlawful and dangerous act; and
d) That act caused Mr Pepa's death;

[8] I direct myself also in this regard that;

(a) The act does have to be a material cause of death. The prosecution does not, however, have to prove beyond a reasonable doubt that it was the sole cause of death or even a major cause of death. It is sufficient if it is a material cause and not one that is insignificant or inconsequential.
(b) Deliberate is used in the sense of an intentional act and not one that arose by accident. The Crown's case is and it must be proven beyond a reasonable doubt, that the accused's deliberate act caused the death of the deceased. Whether the act was a deliberate one requires a determination as to the accused's state of mind when the accused did that act. That state of mind may be demonstrated by the circumstances in which the act was done, including the conduct of the accused and the statements made the accused before at the time of or after the accused did the act bearing upon this question.
(c) An act is unlawful if it involves a deliberate application of force to another person without that person's consent.
(d) Where, as, in this case, an assault takes place in the context of the use of a police power under section 100(1) of the Police Act, 2010, a police officer is entitled when attempting to exercise a power under the Act or another enactment, in this case a power of arrest, to use reasonable and proportionate force to exercise that power.
(e) However, under section 100(2) of that Act a police officer may not use force that is likely to cause death or grievous bodily harm to a person unless it is necessary to prevent death or serious injury to that police officer or another person.
(f) An act is dangerous if it is such that a reasonable person in the position of the accused would have realized that, by that act, the

deceased was being exposed to an appreciable or significant risk of harm.

Causing grievous bodily harm

[9] Likewise, in the event I do not convict an accused of manslaughter I have to consider the alternative count of causing grievous bodily harm in regard to that accused, the evidence being considered in relation to each separately. In this regard, I direct myself that the essential elements the Crown must establish beyond a reasonable doubt are;

1. The accused on or about the 18th August, 2014 did wilfully;
2. And without lawful excuse, (namely that he did not use reasonable or proportionate force to exercise a power of arrest under section 100 Police Act, 2010).
3. Cause grievous bodily harm to Mr Pepa.

[10] In this regard, I direct myself that grievous bodily harm means in this context harm that endangers life.

Wilfully means the accused intentionally did the act or acts causing grievous bodily harm.

[11] The act does have to be established beyond a reasonable doubt to be a material cause of grievous bodily harm. The prosecution does not, however, have to prove beyond a reasonable doubt that it was the sole cause of death, or even a major or substantial cause of death. It is sufficient if is a material cause and not one that is de minimis or inconsequential.

[12] In relation to lawful excuse, I direct myself again that under section 100 (1) of the Police Act, 2010 provides that a police officer is entitled when attempting to exercise a power under the Act or another enactment, in this case a power of arrest, to use reasonable and proportionate force to exercise that power. However, under section 100(2) of that Act a police officer may not use force that is likely to cause death or grievous bodily harm to a person unless it is necessary to prevent death or serious injury to that police officer or another person.

Assault

[13] An assault means the wilful and unlawful application of force to the person of another without that other's consent.

Again, I refer to the provisions of section 100 of the Police Act, 2010

Common purpose

[14] I also direct myself on what I have to find beyond a reasonable doubt to satisfy myself that there was established in fact a joint unlawful enterprise or a common unlawful purpose to which the accused was a knowing party. The law is set out for Tonga by Ford J in *R v Fakatava* [2001] Tonga LR 76 when he said;

> "it is not necessary that there should be any kind of elaborate pre-arrangement to constitute a joint enterprise - *Hunter v Sara* [1999] 105 A Crim R 241, but the assailants must share a common purpose to cause harm to the victim and make it clear by their actions to the other that was their common intention *R v Peters and Parfitt* [1955] Crim LR 501. The common intention or agreement is gauged from their conduct."

The Crown case on manslaughter here was that the accused formed a common unlawful intention or joint enterprise to unlawfully assault the deceased, and that as a consequence of the deceased incurring serious head injuries he died.

[15] If I am satisfied beyond a reasonable doubt that there was such a common purpose, I must approach the case on the basis of those generally well known cases cited to me by the Crown on accessorial liability, in Tonga namely *R v Anderson and Morris* [1966] 2 QB 110; followed by Ford J in *R v Fakatava* [2001] Tonga LR 76 that at common law each party to a common unlawful enterprise is liable for acts done in pursuance of the joint enterprise [and] this includes liability for unusual consequences if they arise from the common purpose. In recent, years, however, the *Anderson v Morris* formula has been revised so that at common law, accessorial liability may only be imputed for a crime that is subjectively foreseen or contemplated beyond reasonable doubt by a secondary party or confederate as a possible incident falling within the scope of the common unlawful enterprise. I refer to the passage cited by Smith and Hogan , 10th ed, 2003, Criminal Law 162 said to be the approach advanced by the Privy Council in *Chan Wing Siu v R* (1985) 80 CR App Rep 117, and approved by the House of Lords in *Powell v Daniels* [1999] AC 1.

> "The principle turns on contemplation ...it meets the case of a crime foreseen as a possible incident of the common unlawful enterprise. The criminal culpability lies in participating in the venture with that foresight.

I direct myself, accordingly

The evidence

[16] The incident occurred in the early hours of the 16th November 2012 at Vaini. The evidence establishes, to my satisfaction, that the deceased Mr Pepa had been drinking heavily during the day and in the evening at a kava club in Vaini with friends since the early afternoon the day before. Later that evening, or in the early hours of the 16th November, the deceased and two friends were passing the residence of Malia Pule'anga who was the wife of a police officer named Hala. He served at the Vaini police station where the accused were also stationed. That evening, Malia had held a celebration which had commenced about 10pm after completing academic studies. Her husband was present and others. During the evening, concerns arose about the occupants of a car which had approached the residence requesting information concerning a person who was not present. Malia was sufficiently concerned that, knowing Taufa was on duty, to text him. He arrived at the residence wearing official police uniform about half an hour later. He was accompanied by the co-accused Masalu, who was not on duty having completed an earlier shift. Masalu had been at the police station because he had expected to be met by friends to go out

with socially. Taufa and he, however, spent some time together before Taufa responded to the text and he and Masalu went to Malia's residence about 11.30 which was not far from the police station at Vaini, also on the Taufa'ahau road. Sometime after he arrived, the deceased Mr Pepa and his two friends arrived. One of them, a witness, Annisbaymoney Taufa was allowed to attend the party but the others Mr Pepa and a friend, Solomone Vaka, for cultural reasons were asked to leave. Mr Inoke was annoyed about this. Some verbal abuse was directed at the police officers. I am satisfied that later in the evening Inoke returned about 2pm with a group of young men who created a disturbance which included throwing a rock in the vicinity of the residence. I am satisfied also that Hala and the accused left the residence and went out and attempted to quell the disturbance which had included an invitation to a fight. I am satisfied that some abuse was directed at the police officers by the group. I have heard both police officers give evidence concerning their motivation for chasing the men.

[17] There was evidence that, although commencing behind the others, Masalu moved more quickly, running in a western direction along Taufa'ahau Road. I accept that Taufa had put down his torch and that he and Hala had run more along the right hand side of the road to the intersection near the Vaini Mormon church, but that they could not catch any of the group, some of whom had run past the Church along a road which is to the right of the Mormon Church and the residence of one, Niua Taueli. A sketch plan was produced of the area which included measurements, as well as photographs. Meanwhile, Masalu, who moved more quickly than the others had attempted to grab one of the men who had no shirt. He was unsuccessful because the man was able to break away. Masalu then crossed over the road to chase and attempt to arrest the deceased who was running in the road about the area of the residence of 'Inoke Tesi and Paea 'Iloa. The evidence is disputed about what Masalu did then, and I will refer to that evidence later. The Crown alleges that Masalu punched the deceased in the face and he fell backwards to the ground hitting the rear left hand side of his head on the edge of the road which caused his skull to be fractured. He seems to have become unconscious and motionless immediately. There is some evidence also that Masalu kicked Mr Pepa in the stomach. The defence contended that Masalu did not punch Inoke but merely attempted to grab him from behind and that Inoke during this movement slipped and fell backwards. Masalu also fell forward to the ground near to but probably to the side of Inoke. The defence also contended he did not kick Inoke, either.

[18] Before I do so, however, I return briefly to Taufa. Having been unable to effect an arrest, he and Hala returned from the area near the intersection by the Vaini Mormon Church. The area is lit by an electric light on a lamp post which is situated at the corner of Taufa'ahau Road and the residence of Niua Taueli that is on the opposite side of the intersection from the Church. The distance from the corner of Niua Taueli's residence to the site where Inoke fell to the ground that is on the edge of the sealed roadway is not given on the sketch pan but considering the distance from C- G on the plan is probably a little over 23.5 metres. Taufa, in his evidence, asserts that he saw Masalu grab at Inoke and the pair fall to the ground before he and Hala ran towards the Church. Shortly after he said they came back. He said Annisbaymoney ,who had followed the others from Malia' residence, was already present and attending Inoke when he and Hala returned which, he said, was a very short time after

they had proceeded on to the intersection. The Crown alleged that when he returned he kicked Inoke twice, which he denied.

[19] Shortly after it seems Inoke fell to the ground assistance was provided by his uncle and with others he was taken to hospital. Medical evidence was given by a doctor Mafi that he died a reasonably short time later. Later an x-ray revealed that he had a fractured skull and a laceration to the back of the head was also apparent. I am satisfied from the evidence of Dr Mafi and also the pathologist Dr Buadromo that the cause of death was the head trauma associated with Inoke falling on the back of his head possibly where a ridge in the side of the road shown in the photos may well have caused the laceration to the back of the head. The force of the fall left indentations in the scalp around the laceration consistent with road metal Dr Buadromo opined. I accept beyond any reasonable doubt that his fall was caused at least in part by the actions of Masalu in grabbing him, causing him to be spun around and, lose his footing. He fell backwards with the rear of his head hitting the road with a high level of force resulting in trauma and fracture to his skull that caused complications and his death.

Evidence concerning Masalu's involvement in the death of 'Inoke

[20] Malia Pule'anga said 'Inoke and two others Annisbaymoney Taufa and Solomone Vaka came back about 2 am – standing and cursing at police officers. They backed away when Taufa and Masalu approached them. They commenced to run who that were running. She saw Taufa was holding a torch. He placed it on the ground. He put it down on the frontage of our residence. She also started to walk down the road. Hala picked up the torch. Masalu accelerated in speed. Masalu grabbed a young man without upper body clothing and could not hold him. That occurred when he had just passed the white car. He was in the middle of the road. One of the group ran from the left hand side to the right hand side and she noticed Masalu grabbing hold of that person from the back. She said he used his whole arms to grab him. They both fell to the ground. That person was Mr Pepa. She said when they fell to the ground, the young man was on his back and Masalu was on his stomach. Masalu fell on the tar road. She said there were lights in the area; streetlights opposite the Mormon Church. There were no other lights. She was about 60-70 metres from the person she saw to fall to the ground.

Hala was still chasing the remainder of the men. Hala and Taufa ran to the left to the turn at the Mormon Church. She saw Masalu stand up. Inoke was still lying on the ground where they had fallen down. She saw Taufa coming back from the turn. She noticed he walked towards the deceased. The deceased was lying still. His head was on the edge of the road and his feet were towards the frontage of that place. She did not see anything done to the deceased when he was lying there by Taufa. By this time she had come much closer to where Mr Pepa was lying towards the area of the police vehicle. (Seen in photo exhibit 1).

She said Hala walked up and bent over and shouted for someone to take Inoke to hospital. She saw the deceased, Taufa, Masalu, and Hala present. Other young men started to come back. Some of them were carrying sticks and rocks. A fight broke out between Hala, Masalu, Taufa and the young men. The fight was broken up. They

returned to her residence. The young men walked towards her residence and shouted out they wanted Hala. They left eventually and came back the next day and attacked her home.

Under cross-examination, by Mr Tu'utafaiva she said she was standing at the frontage of Halatokoua's residence (shown on the sketch map) when she saw Masalu grab the deceased. That would according to the sketch plan be about 60 metres from the area where Mr Pepa fell. She said he was holding on to him from the back. Their heads came together as they fell.

Nai Tonga

[21] He lived opposite the Mormon Church on the corner residence across the road from where Mr Pepa fell to the ground. He resided at Niu Finau's residence which is shown on the map. He woke at 3am in the morning. He went to the side of the road. He looked easterly at youths walking towards him. There were about 5-6. They went around an area where there is a street light. He heard them challenging someone to a fight. He saw two young men start running. He knew the deceased and saw him running. He focused his attention on the deceased. Two of the men ran past him towards Mormon Church. Masalu, he observed, turned and went to Mr Pepa. Masalu punched him and he fell to the ground. He said he hit him on the chest proceeding upwards. He indicated a swinging punch. It landed and went up to the mouth. It landed on the right shoulder, and proceeded to the lower chin area. He said it came into contact with the side of the jaw. He said he saw someone running up from behind and then his focus returned to the deceased and he saw his head hit the road, in the area of marker 3 in the photographs. He was parallel with the road, and his feet were towards the cones. Masalu threw his wrist watch down which had apparently been damaged in Masalu's fall.

Tava or Taufa, he said, then arrived. He kicked the deceased. He said he kicked him in the lower jaw area, with his right foot. Hala came with a torch and grabbed Masalu, and Tava because there were a lot of young men prepared to attack them. He noticed Paula Inoke run up when the deceased fell. Malia was running from the rear. He said he did not know Tava's name at the time - only afterwards. He had however, seen him in police uniform. He had an early night before waking up.

Under cross-examination from Mr Tu'utafaiva he said that when Masalu crossed he ran right up to Inoke who was running on the right side. He said he had a side view. He agreed with the proposition put to him by Mr Tu'utafaiva;

> "isn't what really happened, Mr Tonga, Masalu came up and tried to hold Inoke shirt of the right shoulder, whereby Inoke struggled to break loose and they fell together to the ground.
>
> Answer Yes may be if he was trying to grab him, but then I change my focus to the people who were running up behind, then I turn to see them slamming down on the ground."

He further said he believed that may be Sefo was trying to hold Inoke because they both fell together at the same time.

He said Annisbaymoney came over and held Inoke's head up. Persons by the name of Rambo and Sukanaivalu arrived. He said to Mr Tu'utafaiva that Tava ran up and kicked Inoke in the head. He said, however, it was not a hard kick but rather a small kick just to slide off the cheek with his shoes. It had taken place after Masalu had got up. He explained the action as kicking or moving him with his feet. He said he was not sure whether he kicked Inoke's head of just moved it with his foot. He says he saw Hala running up with a torch and the torch was on and he dragged them away. Hala, he saw immediately after he saw Tava kicking. He nudged a shoebox used as a demonstration. He said "to my mind, may be Tava was using his foot to check the status of Inoke but Inoke was still moaning at the time."

Paula Iloa

[22] He was aged 19. He and his friends were in a hut at the back of his house and heard noises of a fight. He ran to an area inside a fence at his father's residence. He saw Inoke falling down. He fell facing up and head first. He said Hala, Tava and Masalu were around Inoke facing him. He did not know Hala or Tava before the incident. They were facing him as he was standing at the fence nearby. Hala was holding the torch, the next was Tava and he was the one he said he saw doing the kicking. He saw him kick him on the left side of the head. He said he had no firm recollection where. He approximated it as two kicks. He was wearing black working shoes. The head moved. He did not hear the sound of the kick. He said it was a kick and not just a foot to move the head. He said at first that he could not think he could demonstrate the kick. Then he was asked was it with a similar force as kicking a rugby ball and he demonstrated. Annisbaymoney, he said, arrived and stopped the kicking.

Under cross-examination from Mr Tu'utafaiva, he said he arrived there when the deceased hit the ground. Almost immediately these three were present. He said other youths disappeared into the turn. He explained to Mr Tu'utafaiva that he had initially said he could not demonstrate the kick because he was somewhat shy. He maintained the kick hit the left side of the head. He admitted, however, that he could not see clearly because of the shadow (from the street light across the road). The shadow he said would cover the deceased head. He said that it was his interpretation that there was a kick because the head moved. He said that he only saw the foot raised and the head move. He admitted he did not see the foot hit the head. He inferred a kick. He said "yes but the foot was raised for the kick and the head moved, the head would not move for no reason." He said the foot did hit the head but he admitted that he did not see whereabouts on the head the kick landed. He said at another point in his evidence, that from where they were standing and the kick was made, he could not see where it landed but the kick was made. On the issue of his evidence that as an approximation, there were two kicks, to defence counsel he said he could not say whether more than two but he only saw two. He said Annisbaymoney came up and crouched between Inoke and the officers.

Annisbaymoney Taufa

[23] He said he had commenced drinking kava with the deceased about 5pm. He, Inoke, Solomone walked to Hala's and saw there was a "drink up". Solomone was drunk. He knew a relative of Hala's wife and it was against Tongan custom for him to be present at a "drink up". He was a neighbour. He was allowed in. The others were told to leave. The deceased had asked why he was being treated that way. He was drunk from beer. He drank spirits also. He said Hala, Masalu and Tava were chasing 'Inoke, Fine, and Lotu who were running.

He was about 40-50 metres away when Masalu struck 'Inoke from the side with his right arm. The elbow area of right swinging arm hit him on right shoulder. They were both facing town in a westerly direction. He was behind the deceased, who fell backwards. He said Masalu made a short kick on the side of his stomach. He did not see anything else. He said he saw Hala and Tava coming from the area of the intersection. He does not know what happened when Hala and Tava arrived. He then reached down and touched Inoke.

Under cross-examination, he said Masalu remained standing. He did not see Masalu fall to the ground. He was 40-50 metres away He was, he said in front of the police car when Tava came back (located in photo exhibit 1) He says about 4-5 metres away from Inoke when he was on the ground.

Suka Koluse

[24] Since about 2-4 in the afternoon he had been drinking alcohol and beer. He admitted to being drunk. He left the club house after Inoke and Annisbaymoney. He said he was drunk. He ran over and saw the man on the road. He had been standing eating beyond the Church about 108 metres away when he saw Masalu he said punched or use his arms against the deceased. He said they were kicking him so he tried to stop them. Sefo and Tava, he said, were kicking and punching the victim. He said then he did not know who kicked Inoke. He also later said he had not seen Inoke kicked. The uncle of the deceased, Mr Tevita Pepa, confirmed that when he took the deceased to hospital, Suka Koluse was present and had told him that the deceased had been hit by a torch and had fallen down. I did not find this witness to be credible in his evidence.

Lisala Lavaka

[25] He was one of those who attended the celebration for what was the end of an examination. He described himself as being very drunk. He said the group challenged the occupants to a fight and they were throwing an object in the direction of the house that hit a tree. He said there were standoffs before the police chased the group. He said he saw Masalu made a hook swing on Inoke and they both fell to the ground. He said his lower right arm was swinging and made contact with right shoulder. He was at the frontage of Leimoni Teisina's residence shown on the sketch map. Under cross-examination, he said that the arm of Masalu was bent a little and it would have been on the chest of Inoke. He said other youths came back and commenced to fight.

[26] Evidence was given by Doctors Mafi and Buadromo that the deceased, as I have said, suffered a serious head injury, a fractured skull from which complications including bleeding from the head to the lungs and died before any treatment could be administered.. As I have said Doctor Buadromo also said the laceration to the back of the head was consistent with his fall to the road, and she mentioned abrasions to the head around the chin and forehead areas which in her view were consistent with the use of a blunt object possibly with a punch or a kick. Significant force was required to cause the injury.

[27] Officer Sailusi Taukei'aho gave evidence of a record of interview he carried out with Masalu. In that record of interview, Masalu talked of verbal abuse from the youths who had challenged them to a fight. He said Taufa told him to chase them and catch one to question them about the other drunks. He said he had chased them and he caught one who was shirtless and he had struggled and got lose and run. He caught another boy he said and they had fallen onto the road. He said that when he got up Taufa was already standing there with Pule'anga. He talked of others turning up with sticks and stones, and going to arrest someone who prevented them from doing so because he threw a stone at them. Another person held them the youths back and they moved back to Pule'anga's residence. The youths continued also on to Pule'anga's residence where the youths asked for them. He was told not to deal with them anymore because it would make matters worse. He said there wasn't that much lighting where he caught the deceased but there was light. Later, when he returned to the police station, he learned that Mr Pepa had died. He declined to answer questions about his actions in relation to the deceased after caution, saying he would give his explanation in court.

Taufa's evidence

[28] The accused, Taufa, gave evidence. He did not make a statement. He gave evidence of being on duty from about 4.30 and meeting Masalu at about 9.30. He said he had responded to a text from Malia because she was afraid of some drunks who had come to her place. He said he and Masalu got there about 1.30pm. He gave evidence of three people appearing and only one being allowed in. He told the others to leave. 'Inoke was not happy about this. Inoke had said nobody was going to make him leave. He had been challenged by Inoke to a fight. They returned after about 10 minutes. There were 6-8 youths. They were calling out and throwing stuff. He wanted to arrest them because they were drunk in a public area and they were disturbing the peace. They called him over for a fight. He walked over to them with Masalu and Hala behind them. They did not stop and he decided to chase them to apprehend them. He said he did not have any understanding with Masalu. He said Masalu went past he and Hala and he tried to grab with his right arm. He was not successful. Masalu then ran after another man to the right, and his right arm went around and he grabbed him around the chest. They fell down. Masalu was about 45 degrees when he grabbed the deceased. Inoke fell on his left knee whist the rest of his body was thrown on the road. He demonstrated the actions of Masalu recorded by me in these terms, this not being disputed by counsel'

> "As I understand, he said Masalu came across on a diagonal position with right arm making contact along the right upper chest and then somewhere pulled Inoke so that Inoke was facing back down the street and then he carried through and pass to the left hand side of 'Inoke's body as Inoke fell to the ground with his back to the ground."

He said he and Hala ran on and he stopped Hala at the corner because he could not see anything. He returned to where 'Inoke was and Annisbaymoney was there stroking his hair. He intended to arrest the deceased. The youths returned with sticks and throwing rocks. He was hit by a stick. They walked backwards to Hala's residence. It was about 4 o'clock. He denied kicking the deceased saying such suggestions were untrue. He denied that either he or Masalu had been drinking. He was not able to identify any of the youths. He denied that he chased them to assault them. He said he was not angered by their words or conduct. He maintained that he perceived a possible threat from the youths returning and that his intention was to effect an arrest to Mr Kefu. He wanted to arrest them for what they had been doing. He said he had told the others Masalu and Hala to catch one of them as they were running. He did not discuss this at the beginning. He maintained that Masalu had not struck Inoke. His swinging arm was to grab him. He maintained he had not kicked the deceased out of anger.

Masalu's evidence

[29] Masalu's evidence was to similar effect as Taufa's and consistent with his own record of interview. He said he was with Taufa at about 1 o'clock. He said he was not on duty but the responsibility of an officer is 24 hours. He said at first he had walked over to the young men and told them to go to sleep and they left. Shortly after, they had come back and they were swearing, and shouting out for a fight. Taufa told he and Hala to chase and catch at least one of them to be caught for the charging purpose that is to inquire of him who the rest of the drunks were so they could be charged later. He said that he had run after the deceased as he had crossed the road after being unable to hold the other man. He said he ran after the deceased who was running down the other side of the road. He approached him on the angle and grabbed his tee shirt or singlet. He said we were still in the course of running. He was trying to get his hand off my singlet and that is when he slipped and he slipped then as well. He said Inoke fell facing down but he was unable to see what part of his body came into contact with the road.

He said he landed on his elbows. He said his face did not hit the ground. He said when he got up Taufa was present and the youths with sticks arrived. He said he was on the ground for about 2 minutes before he got up. He fell on the road about 2-3 metres from Inoke. He backed away after that to Hala's residence. He denied kicking anybody. Under cross-examination, he said his purpose was to arrest Inoke. He denied hitting Inoke. He denied to Mr Kefu that he had responded out of anger. He said he had reached out for Inoke and denied a swinging motion. He said afterwards he had fallen to the right. Mr Kefu suggested his version of how Inoke fell was not accurate, and he denied this.

The submissions of counsel

[30] Mr Kefu submitted that the police officers had acted out of anger as part of a joint unlawful enterprise, or individually has done so, and were not at the material time acting within the provisions of section 100 (1) of the Police Act, 2010. They were, he submitted, acting in retribution for the group's conduct and not with a view to lawfully effecting an arrest. He further said of Masalu that the method he used to apprehend Inoke was likely to cause death or grievous bodily harm and consequently fell outside section 100(1). He suggested a tackle may have been more appropriate. He submitted that the evidence did reveal a punch and that this was supported by the pathologist's evidence of abrasions particularly to the chin, and the evidence of Nai Tonga particularly supported this, also. He submitted that Masalu's actions were a material cause of Inoke falling to the ground with fatal consequences, or, in the alternative, if I were to find Masalu did punch Inoke, the offence of causing grievous bodily harm or assault. He argued that Masalu's evidence that Inoke had slipped was a belated or contrived explanation and that there were certain inconsistencies between Taufa's account of the fall and Masalu's account as to where Masalu came to rest on the ground in relation to Inoke.

As to Taufa, he placed particular weight on the evidence of the witnesses Nai Tonga and Paula 'Iloa. He submitted both witnesses were well placed to see what had happened and the lighting was reasonably good also. Neither had any motive to give untrue evidence. Neither had been drinking. He submitted that I should accept their evidence. He submitted that I should find Taufa guilty in that he had contributed materially to serious injury by exacerbating the effect of the injury as part of a joint unlawful enterprise, or individually. Further, if not manslaughter, then alternative verdicts were available.

Mr Tu'utafaiva conversely submitted that I should find both accused not guilty. He said that both were attempting to perform a lawful arrest, and that their actions were not unlawful either individually or as part of a joint enterprise and that the death of Mr Pepa was no more than an unfortunate accident. The group of youths had been creating a disturbance and breach of the peace, and that they were acting lawfully in attempting to effect an arrest. Masalu's actions were not unreasonable, and he fell within the provisions of sections 100 (1) of the Police Act. He submitted the evidence did not reveal a punch, and was consistent with a grabbing round arm motion that unsettled the deceased and that during this encounter; he slipped over backwards as Masalu had said with tragic consequences. He should be acquitted on all charges.

As for Taufa, he submitted the evidence of Nai Tonga did not support kicking as Mr Kefu submitted, and that Paea 'Iloa's evidence was unreliable, also pointing to his answers under cross-examination. He submitted that taking all the evidence into account I should have a reasonable doubt about the Crown cases, and acquit both accused on all of the charges.

Findings

[31] On the evidence, I find the following;

a. The deceased, Inoke Pepa, had been drinking with others including Annisbaymoney for a very lengthy period prior to their arrival at the home of Malia Pule'anga at Vaini, and was probably very intoxicated. They arrived after the accused had arrived. I accept that Taufa, who was on duty, responded to a text from Malia to attend because she was concerned about the presence of some men in a car who had made inquiries of her as to the presence of a certain person.

b. Malia and others were involved in a "drink up" as a celebration of the completion of academic studies. I find that Taufa and Masalu, who had completed his duty that afternoon but had visited the police station, both attended Malia's residence in response to her text. To that extent, they were at the time carrying out their police duties.

c. The deceased, Annisbaymoney and Solomone Vaka, all of whom I am satisfied were intoxicated, having spent a long time drinking kava and alcohol, at a club in the area walked past the residence of Malia Pule'anga and her husband Hala. Annisbaymoney, who was a neighbour, was allowed to remain but the other two were asked to leave, and did so after the Police officers had told them to leave. I find that 'Inoke was very annoyed at being asked to leave and questioned why. The reason was apparently a Tongan custom involving Solomone's presence as a relative of the occupants where a "drink up" was occurring.

d. 'Inoke returned not long after without Solomone, but with a number of other youths. Taufa and Masalu and Malia's husband, Hala, who was also a police officer at Vaini but off duty at the time, and others were present. There was a commotion and a rock was thrown in the vicinity of the house. The police officers, Taufa, Masalu and Hala confronted the young men outside who I find had been aggressive. The young men, including 'Inoke, commenced to run away and the police officers chased them. I am satisfied, having heard the accused, that this was with a view to effecting an arrest for which by then had to my mind plainly reached the level of a drunken disturbance and breaches of the peace, and preventing any further breaches. I accept the evidence of both accused on their motivation for giving chase. They were both I find at the relevant time in giving chase to affect an arrest acting in the course of duty. Masalu told the police, in his written record of interview, that he did this because he intended to arrest one and make inquiries of him as to the others so they could be charged, and I accept his evidence. Taufa also had proceeded with this motive. I reject the Crown submission that the accused were

out for revenge or retribution, or were spoiling for a fight. I also accept what Mr Taufa said was that if he did not take action there was the possibility that the group would come back again with additional numbers and he wanted to avoid this. I observe that there was evidence that certain of the young men did, after Inoke had been injured, return with weapons, later attack the police officers and that this carried on back to Malia's home afterwards creating more disturbance until they left. In these circumstances, I consider the accused could not be criticised for taking the action they did.

f. Section 100 (1) of the Police Act 2010 allows Police to use reasonable force to perform their duties. I do not agree with Mr Kefu that Masalu should have employed a tackle on Inoke rather than, as I find he did, attempt to apprehend or arrest him by grabbing him from behind and to the right side. Masalu had already attempted to grab one of the group, who was without a shirt who had broken free shortly before he proceeded to attempt to arrest Inoke. I find that he attempted to grab 'Inoke forcibly from behind and to his right side as Taufa stated and Masalu said coming across on the angle, with what may to others, viewed from different perspectives, to have seemed like a round arm swing across the body of Inoke from behind. I find, having considered all the evidence, that he probably thrust out his right arm and grabbed Inoke around the upper chest area, in an effort to grab him by the singlet he was wearing, and probably also in an upwards movement. There was some evidence that suggested his lower arm below the elbow made contact around the shoulder of Inoke. That may appear to have been what happened from the vantage of the witness accepting this was a very quick movement, and it is inevitable in such circumstances that witnesses will have differing observations of what occurred. I accept, however, that Masalu did try to grab Inoke's singlet, lunging out and grabbing his singlet around the upper chest. I observe he had failed with the other member of the group seconds before because he had no shirt and was able to break free, and no doubt was determined that this should not happen again. He was still running at pace, and his grasp of Inoke's singlet is likely to have turned Inoke around. Being intoxicated he was likely swung off balance so that he fell or slipped over backwards and his head forcefully impacted with an indentation possibly at the edge of the road. Masalu was also brought down or followed in the same movement falling also to the ground. I do not think it matters whether he fell to the left as Taufa recalled or to the right as Masalu recalled. The evidence as to the dynamics as to how Inoke came to fall is rather uncertain. I accept however, as I have said Masalu had tried to grab him, did so and that both fell shortly after to the ground. I find also that Masalu, when apprehending the deceased was acting reasonably within his power of arrest and his actions fell within section

100(1) of the Police Act 2010, and were not excessive. Accordingly, whilst the actions of Masalu were I find a material contributing factor in causing an inebriated Inoke to lose his footing and fall to the ground incurring a fatal head injury, because I have found his actions fell within section 100(1) of the Police Act and were not unreasonable, or excessive his assault on the deceased was not unlawful. I add that I did not consider that Masalu's explanation as to Inoke falling suffered because it was belated as Mr Kefu suggested. I consider it quite likely that in the circumstances, Inoke did lose his footing and slip over, tragically hitting the rear of his head on the roadway.

g. I also find, it follows, that I reject the Crown's contention that was fundamental to its case, that Masalu punched Inoke in the head. The only witness who stated this in chief was Nai Tonga who resiled very far from this allegation under cross-examination from Mr Tu'utafaiva. Others spoke of a rounded or swinging arm action as I have said but not a punch. Nor did I consider that the pathologist's evidence that there were certain abrasions consistent with blunt force trauma about the face assisted. That was no more than a possibility, the pathologist stated. There was nothing in the nature of a signature about the abrasions to my mind to suggest they must have been caused by a kick or a punch, assuming they arose at the time of this incident.

h. Nor do I accept beyond reasonable doubt that, as Annisbaymoney had said in evidence, Masalu kicked Inoke in the stomach. No other witness suggests that this took place, and in these circumstances, I am not satisfied beyond any reasonable doubt that this occurred. It is to be noted that kicking did not form part of the particulars against Masalu in the charges of individual manslaughter, causing grievous bodily harm or assault,

i. I now consider the assaults alleged to be attributable to Taufa's kicking. I have already found that Taufa was not a party to any joint unlawful enterprise. I do not find that either officer acted other than in the course of duty. I reject any suggestion that their actions were a reprisal or in retribution. Mr Kefu submitted that there was still a Crown case that individually Taufa was guilty of manslaughter, if he was found to have kicked Inoke in the head after he had fallen to the ground, and sustained a serious head injury. He urged upon me that I should do this because two witnesses, Nai Tonga and Paula Iloa had said so. He also correctly pointed out that both were well positioned to see what had happened. There was street lighting from the corner where Nai Tonga was living, and across the road virtually from where Inoke fell. He had not been drinking and it was not established that he was anything other than an independent witness without motive to give false evidence implicating Taufa. Likewise with Paula Iloa, who, he said, was observing from an even shorter distance inside

his father's property, adjacent to where Inoke had fallen. He was also independent, was not intoxicated, and was aged 19.

j. I accept the strength of Mr Kefu's submissions, but having heard their evidence under rather penetrating cross-examination from Mr Tu'utafaiva, I have been left in real doubt about the reliability of their evidence and observations. First, as I have recited above, at para 21 Nai Tonga's observations moved from kicking to simply moving Inoke's head with his foot. Paula Iloa, under cross-examination, (see para 23) when asked where the kick had landed, was, he said unable to say because his view had been obstructed by shadow from Annisbaymoney falling in the area of Inoke's head. It would seem he had inferred a kick took place because he saw the foot raised and shortly after Inoke's head moved. Masalu said, in his record of interview, there was not much lighting but there was light. In chief, Paula had first said he could not demonstrate the kick but later volunteered to do so. When it was suggested by defence counsel that he could not do so because it had not taken place, he said he did not want to demonstrate because he was shy. I did not find this answer convincing, but rather convenient. Further, later under cross-examination, when asked again about where the kick had landed he said he was not able to see because he could not see the side where it had landed. When asked why he had said two kicks approximately, he said because that was the least number, which I also was concerned about, in terms of his accuracy. It is I think also important to bear in mind that actions moved quickly at the scene with Hala and Taufa returning from the corner in a very short time, and soon after other members of 'Inoke's group came on the scene. Annisbaymoney must have been on the scene quickly also (indeed Taufa suggests he was there tending to Inoke before they returned) because he said he was about the police car when Taufa arrived near Inoke, about 4-5 metres from Inoke. He did not, when asked, say that he saw Taufa kick Inoke. Nor did Malia, who had also followed on, like Annisbaymoney, in the rear see Taufa kick the deceased. She said she was near the police car, where Taufa and her husband were present near 'Inoke. When asked by the prosecution, she said she saw Taufa approach 'Inoke but she did not see him do anything. I also heard the accused give evidence and record that there was nothing in the way he gave his evidence or in the content of his evidence that gave me reason to disbelieve him when he denied he had kicked 'Inoke. The uncertain state of the evidence on this issue means I have a reasonable doubt as to whether Taufa kicked Inoke as alleged by the Crown and, accordingly, the Crown has not discharged the onus it bears to establish this essential element common to all counts that Mr Taufa faces.

Verdicts

730 For the reasons I have given, I acquit both Mr Masalu and Mr Taufa of all charges they face in their respective indictments; namely manslaughter, causing grievous bodily harm or assault. They are both discharged.

R v Potemani

Supreme Court, Nuku'alofa
Paulsen CJ
CR 166/2014

11-13 May 2015; 18 May 2015

Criminal law – receiving and money laundering charges – receiving proved – money laundering not proved – no offence to transfer a credit balance in a bank account

Mrs Potemani was a Facebook user. On 28 March 2014 she accepted a friend request from one Jet Larry Iketau, a person she had never met. She started to chat with Mr Iketau on Facebook. There followed over the course of the next six days hundreds of chat exchanges between Mrs Potemani and Mr Iketau over Facebook. The chats very quickly became intimate with expressions of love being made by both parties. There seemed no doubt that Mr Iketau was from the very beginning grooming Mrs Potemani to act as a money mule for a phishing scam. Mrs Potemani did not know that on 31 March 2014 Mr Iketau, or someone associated with him, had through computer hacking obtained the bank account details of Paula and Timothy Holt, who run a resort business in Tonga, and had used them to successfully request electronic transfers of amounts of $T21,000 and $T4,000 from Mr and Mrs Holts' account into Mrs Potemani's account. On instructions from Mr Iketau, Mrs Potemani withdrew the money from the bank and she made unsuccessful attempts to send the money as directed by Mr Iketau through Fexco. On 1 April Mr Iketau gave Mrs Potemani instructions that she was to use the money to buy electronic equipment and forward that equipment to him using DHL. She said that she would do that for him and on 2 April she went to retail outlets in Nuku'alofa where she bought a laptop, notepad and mobile phones worth $T7,576.76. Fexco filed a suspicious transaction report under the Money Laundering and Proceeds of Crime Act. Mrs Potemani was spoken to by the Police and charged. On 4 April 2014 she voluntarily made a statement to the Police and assisted them by downloading all of her chats with Mr Iketau from Facebook which were admitted into evidence. Mrs Potemani was charged with receiving and money laundering. She claimed that she lacked the mens rea for the offences.

Held:

1. The issue in relation to the receiving charge was whether the Crown satisfied the onus upon it to establish beyond a reasonable doubt that Mrs Potemani had an actual belief that the money that she withdrew from the

bank was stolen or obtained under circumstances which amounted to a criminal offence.

2. All of the elements of the receiving charge were proved. The court was satisfied that was proven beyond reasonable doubt that Mrs Potemani had an actual belief at the time she withdrew the money from the ANZ that it was obtained under circumstances that amounted to a criminal offence. She lied to the ANZ bank as to the purpose to which she was going to put the money when she withdrew the $19,000 from her account. Secondly, she lied to Western Union as to the reasons the money was being sent overseas on both occasions she tried to send the money. There was no reason for her to lie unless she believed she was involved in some criminal activity. Thirdly, her chats at the time indicated that she was very nervous and concerned about being questioned as to the source of the money. Fourthly, Mrs Potemani admitted to the Police in her statement that she thought the money was the product of the sale of marijuana.

3. Money laundering was a process by which criminals disguised the original source, ownership and control of the proceeds of criminal activity. They did this by taking the proceeds of a crime, called a predicate offence, and laundering the money in various ways to make it appear to have been obtained legitimately. A predicate offence then was the crime that produced the property (usually cash) that was to be laundered. A credit balance in a bank account was merely a thing in action and was not something tangible capable of being stolen under Tongan law. Whilst in everyday life such a transfer might be regarded as the payment of money from one person's account to that of another, the money was in fact represented electronically by an entry in the bank's accounts and as a debt owed by the bank to its customer. The debiting of one customer's account and the crediting of the account of another did not involve any transfer or taking of property from one to another.

4. When Mr Iketau caused the ANZ bank to debit Mr and Mrs Holts' bank account and credit the bank account of Mrs Potemani he did not commit the offence of theft. The court was unable to find any other serious offence that he might have committed. That being the case, the Crown failed to prove an essential element of the offence of money laundering: it failed to prove that the money Mrs Potemani used to acquire the electronic equipment was derived directly or indirectly from a serious offence. The charges of money laundering were not proved.

5. Mrs Potemani was convicted on the charge of receiving. On the second and third counts of the indictment, Mrs Potemani was not guilty of money laundering and she was acquitted of those charges.

6. The acquittal of Mrs Potemani on money laundering charges may be regarded as unsatisfactory. There was a need for reform of the law involving dishonesty. In a modern age where increasingly both private and commercial transactions were conducted electronically more cases would occur until there was reform.

Cases considered:
Machent v Quinn [1970] 2 All ER 25
R v Crooks [1981] 2 NZLR 53
R v Funaki anors [2005] TLR 239
R v Makahununiu [2005] TOSC 20
R v Preddy [1996] AC 815
R v Sefesi [2013] TOSC 14

Statutes considered:
Crimes Act 1961 (NZ)
Criminal Offences Act (Cap 18)
Larcency Act 1916 (UK)
Money Laundering and Proceeds of Crime Act 2000

Counsel for the Crown : Mr 'Aho
Counsel for the accused : Mr Pouono

Ruling

The charges

[1] Mrs. Potemani faces one count of Receiving, contrary to section 148 (1) and (5) of the Criminal Offences Act and two counts of Money Laundering, contrary to section 17 (1)(a) and (b)(i) of the Money Laundering and Proceeds of Crime Act 2000.

The facts

[2] Mrs. Potemani is a Facebook user. On 28 March 2014 she accepted a friend request from one Jet Larry Iketau, a person she had never met. She started to chat with Mr. Iketau on Facebook. There followed over the course of the next six days hundreds of chat exchanges between Mrs. Potemani and Mr. Iketau over Facebook. The content of some chats would suggest that there were also texts and telephone calls made but this was not explored in the evidence. Mr. Iketau told Mrs. Potemani that he lived in South Africa and he quickly found common ground with her by claiming that he was of Tongan ethnicity and a Christian. On learning that she was a woman alone he suggested he might be the right man for her. The chats very quickly became intimate with expressions of love being made by both parties and the possibility of Mr. Iketau coming to Tonga and travelling with Mrs. Potemani was discussed.

[3] There seems no doubt that Mr. Iketau was from the very beginning grooming Mrs. Potemani to act as a money mule for a phishing scam. In a chat at 11:13am on 31 March 2014 Mr. Iketau asked Mrs. Potemani if she could open a bank account for him. He said that he had "product" that he wanted to advertise on line in Tonga and needed an account into which anybody who had an interest in his product could make payment. Ms Potemani immediately agreed. There followed more chats where Mr. Iketau said that the account should be in Mrs. Potemani's name. He then asked whether two accounts could be opened at different banks and, later, if Mr. Potemani

had a friend who might also allow her account to be used. I do not need to go into further detail of all that. As it turned out Mrs. Potemani had an existing account with the ANZ and agreed that her account could be used. The account only had T$4 in it at the time.

[4] In a chat at 11.21am on 31 March 2014 Mrs. Potemani asked Mr. Iketau what sort of product he had but he did not respond to that question and she did not press him. In a later chat at 12.24pm Mr. Iketau said he had a customer who wanted a sample of "the product" and that he was going to have the customer send the money to Mrs. Potemani's account. She was given instructions to collect the money from the account and send it to Mr. Iketau by money transfer through Western Union. In later chats Mr. Iketau was insistent that the money be sent immediately, that is that Mrs. Potemani was to go straight from the ANZ bank to Western Union and send the money. At 1.24pm on 31 March 2014 Mrs. Potemani provided Mr. Iketau with her bank account details.

[5] What Mrs. Potemani did not know was that on 31 March 2014 Mr. Iketau, or someone associated with him, had through computer hacking obtained the bank account details of Paula and Timothy Holt, who run a resort business in Tonga, and had used them to successfully request electronic transfers of amounts of $T21,000 and $T4,000 from Mr. and Mrs. Holts' account into Mrs. Potemani's account. Mr. and Mrs. Holt did not know and had no connection to Mrs. Potemani and had no reason to make any payment to her.

[6] On the instructions of Mr. Iketau Mrs. Potemani checked her account balance and at 2.56pm on 31 March 2014 advised Mr. Iketau that she had received the $T21,000 payment. At that stage the smaller $T4,000 payment did not show in Mrs. Potemani's account. It appears that Mrs. Potemani was not aware of the $T4,000 amount going into her account until much later. Mrs Potemani then withdrew $T1,000 from her account at the ATM machine and as instructed by Mr. Iketau withdrew a further $T19,000 from inside the ANZ bank at Nuku'alofa. When she withdrew the money she lied to the bank officer and said it was to be used to buy a vehicle.

[7] On the next two days, that is 1 April and 2 April, Mrs. Potemani made unsuccessful attempts to send the money as directed by Mr. Iketau through Fexco (which I understand is associated with Western Union). On 1 April she tried to send $10,000 to a recipient in Singapore and told Fexco that this was a cash reimbursement to a friend. On 2 April she tried to send $T5,000 each to Mr. Iketau and someone he claimed was his sister in South Africa. On that occasion she said the intended recipients were relatives and the money was for travel expenses. It was because there was no supporting documentation and because Fexco was suspicious of Mrs. Potemani that she could not send the money.

[8] At 5.53pm on 1 April Mr. Iketau gave Mrs. Potemani instructions that she was to use the money to buy electronic equipment and forward that equipment to him using DHL. She said that she would do that for him and on 2 April she went to retail outlets in Nuku'alofa where she bought a laptop, notepad and mobile phones worth $T7,576.76. She was getting encouragement from Mr. Iketau to use more money and buy more equipment but the chats show that she was reluctant because she was concerned that she would be asked where she got so much money from.

[9] Later that day she went to DHL with a friend and arranged for the goods to be sent to Mr. Iketau under her friend's name. In a chat at 1.54pm she told Mr. Iketau that the value of the goods as listed on the invoice issued by DHL was "a make up" to reduce the cost of the freight and, in a later chat at 2.04pm, that she had used her friend because she was worried about gossip and about something happening to her. In her evidence Mrs. Potemani said that it was DHL that decided what value to place on the goods for the invoice but even if that was so she was aware that the information was incorrect and went along with it.

[10] Fexco filed a suspicious transaction report under the Money Laundering and Proceeds of Crime Act. For its part the ANZ quickly suspected that a fraud had been committed. There was evidence of the ANZ emailing Mr. and Mrs. Holt about the payments because they had insufficient funds to cover them and replies coming back which were sent, not by Mr. and Mrs. Holt, but by Mr. Iketau or his associates aimed at buying time while Mrs. Potemani sent the money or goods. Mrs. Potemani was spoken to by the Police and charged. On 4 April 2014 she voluntarily made a statement to Detective Paseka which was taken from her over three days with lengthy breaks. Mrs. Potemani assisted the Police by downloading all of her chats with Mr. Iketau from Facebook which were admitted into evidence.

[11] There are two points about Mrs. Potemani's statement that I should mention. First, Mrs. Potemani gave answers to two questions in which she said that she had thought that Mr. Iketau must have been involved in selling marijuana and for that reason did not want the money sent directly to him. In her answer to Q17 she said that she thought this because she had asked Mr. Iketau what his product was and he had not told her. The second point is that Mrs. Potemani said that she spent about $T600 of the money upon herself for fuel, food, clothes and other items.

[12] I understand that the ANZ credited Mr. and Mrs. Holts' bank account with the full amount debited so that they suffered no loss. The ANZ suffered no loss either and has recovered the full $T24,000 from Mrs. Potemani or from recovery of the electronic goods that were collected from DHL before they were sent to Mr. Iketau.

The defendant's case

[13] Mrs. Potemani gave evidence in which she confirmed most of what I have said above. Mrs. Potemani's Counsel, Mr. Pouono, said in his submissions that Mrs. Potemani did not dispute that $T21,000 had been deposited into her ANZ account at Nuku'alofa on the 31 March 2014 and that she had withdrawn $T20,000 and attempted to immediately transfer the money to Singapore and then later the next day attempted to transfer the money to South Africa all under Mr. Iketau's instructions. Mrs. Potemani also did not dispute that the transfers did not go through because of Western Union's requirements. She admits also that she then bought electronic items to be sent to South Africa. Mr. Pouono said that the issue raised by the defence in relation to both the Receiving and the Money Laundering charges was whether Mrs. Potemani had the required *mens rea* for the offences. He submitted that she did not.

[14] In respect of the Receiving charge, Mr. Pouono said that Mrs. Potemani thought the money was the sale proceeds of legitimate product sold in Tonga. He points out that Mrs. Potemani knew nothing about the computer hacking and the debiting of Mr.

and Mrs. Holts' bank account and in the absence of such knowledge she was free to use the money that was put into her account as she wished.

[15] In respect of the Money Laundering charges Mr. Pouono said Mrs. Potemani had no reason to believe the money came from the commission of a serious offence. He referred again to her lack of knowledge of anything about the actual source of the money and says that she was taken advantage of by Mr. Iketau who used emotive language with her and asked her to go out so that she was trying to prove herself to him

The receiving charge

[16] Section 148 (1) and (5) Criminal Offences Act provides

> (1) Any person who receives any property knowing or believing it to have been stolen or obtained in any way whatsoever under circumstances which amount to a criminal offence is guilty of an offence and is liable to the same punishment as if he had committed theft.
> (5) For the purposes of this section…..a person shall be treated as receiving property if he dishonestly undertakes or assists in its retention, removal, disposal or realization, or if he arranges to do so

[17] Mr. 'Aho referred me also to section 40 of the Evidence Act but I do not rely on that provision.

The elements to be proved

[18] The indictment charges that Mrs. Potemani received on or about 31 March 2014 at Nuku'alofa $T25,000 which she believed to be obtained in anyway whatsoever in circumstances which amounted to a criminal offence.

[19] The $T25,000 is the sum of the two amounts credited to Mrs. Potemani's account on 31 March 2014. As I have noted earlier, Mrs. Potemani withdrew only $T20,000 from her account and she did not know of the $T4,000 paid into her account until later. The Crown relies on *Machent v Quinn* [1970] 2 All ER 25 applied in Tonga in *R v Funaki anors* [2005] TLR 239 and other cases as authority that it is not necessary to prove the total value in the indictment; it will suffice if it is proven that a sum was received. I accept that is correct as a matter of law and there were no submissions made for the defense to the contrary.

[20] The essential elements of the charge of Receiving that must be proved beyond reasonable doubt are:

> [20.1] That Mrs. Potemani;
> [20.2] Received property;
> [20.3] That she knew or believed to have been stolen or obtained under circumstances which amount to a criminal offence.

[21] Items 20.1 and 20.2 were not contested but I record that they were proved in the evidence. Mrs. Potemani gave evidence of the events I have described and her involvement in them and the cash she withdrew from the ATM. The cash Mrs. Potemani withdrew from the bank is clearly property within the meaning of the section.

[22] The issue in relation to this charge is whether the Crown has satisfied the onus upon it to establish beyond a reasonable doubt that Mrs. Potemani had an actual belief that the money that she withdrew from the bank was stolen or obtained under circumstances which amount to a criminal offence. I note that in contrast to what is required in other jurisdictions (compare for instance section 246 Crimes Act 1961 (NZ)) there is no requirement in section 148(1) that the Crown prove that the property received by an accused was in fact stolen or obtained as a result of a criminal offence. *R v Makahununiu* [2005] TOSC 20 and section 148(3) of the Criminal Offences Act.

[23] Mr. 'Aho referred me to the leading New Zealand Court of Appeal decision in *R v Crooks* [1981] 2 NZLR 53, which dealt with the meaning of the word "knowing" as it appeared in section 258 Crimes Act 1961 (NZ) and whether an accused will be taken to have known that property has been dishonestly obtained when he has a suspicion that that is the case and fails to make any inquiry. I do not need to resort to the analysis in *Crooks*. I am satisfied that it has been proven beyond reasonable doubt that Mrs. Potemani had an actual belief at the time she withdrew the money from the ANZ that it was obtained under circumstances that amounted to a criminal offence. I come to this view for the following reasons.

[24] There were a number of circumstances that should have put Mrs. Potemani on notice that Mr. Iketau may have been involved in criminal activity. When he asked her to open a bank account for him she had been his friend on Facebook for only three days. If Mr. Iketau was selling legitimate goods in Tonga one would expect him to have his own bank account. Even if there were valid reasons that he did not have a bank account Mr. Iketau asked Mrs. Potemani to open an account for him in her name and not in his name. The reason he gave for that in a chat at 11.15am on 31 March 2014 was that if she opened the account in his name questions would be asked. The chats also disclose that the amount that Mr. Iketau informed Mrs. Potemani would be paid by the customer for the product changed according to what he considered could be sent out of Tonga through Western Union. Although he initially said $T20,000 would be deposited into Mrs. Potemani's account he later said that the full payment was in fact $T30,000 and asked if Mrs. Potemani could have a friend make her account available so that T$15,000 could be put into each account. If that was not enough Mr. Iketau was insistent that the money be withdrawn from ANZ immediately and that Mrs. Potemani must go straight to Western Union and send it to him.

[25] All of that would not be sufficient to show that Mrs. Potemani had an actual belief that the money she withdrew from the ANZ was stolen or obtained under circumstances amounting to a criminal offence if Mrs. Potemani, in her desire to prove herself to Mr. Iketau, merely suspected that the money may have been stolen or obtained through criminal activity or had a genuine but misguided belief that the money was from the sale of legitimate goods. What satisfies me that this was not the case are the following four further pieces of evidence. First, Mrs. Potemani lied to the

ANZ bank as to the purpose to which she was going to put the money when she withdrew the T$19,000 from her account. Secondly, she lied to Western Union as to the reasons the money was being sent overseas on both occasions she tried to send the money. There was no reason for her to lie unless she believed she was involved in some criminal activity. Thirdly, as I have mentioned her chats at the time indicate that she was very nervous and concerned about being questioned as to the source of the money. Fourthly, and in my view decisively, Mrs. Potemani admitted to the Police in her statement that she thought the money was the product of the sale of marijuana. It is quite clear from the context of the interview that Mrs. Potemani was stating what she believed at the time she withdrew the money. I reject as wholly implausible her evidence that she only thought of the possibility that the money was from the sale of marijuana when she was in Police custody.

[26] For those reasons I find all of the elements of the Receiving charge are proved.

Money laundering

[27] There are two counts of Money Laundering. I will deal with each separately.

First count of money laundering

[28] Count two of the indictment charges that Mrs. Potemani, on or about 2 April 2014 at Nuku'alofa, did use $T7,576.76, having reasonable grounds to suspect that it was derived directly from the commission of a serious offence, by converting those funds to purchase electronic equipment with the aim of aiding another in the commission of an offence.

[29] Section 17(1)(a) and (b)(i) of the Money Laundering and Proceeds Crime Act relevantly reads:

> A person commits the offence of money laundering if the person:
>
> (a) acquires, possesses or uses property knowing or having reasonable grounds to believe or suspect that it is derived directly or indirectly from the commission of a serious offence;
> (b) by:
> (i) the conversion or transfer of property derived directly or indirectly by the commission of a serious offence, with the aim of concealing or disguising the illicit origin of that property or of aiding any person in the commission of the offence;

The elements to be proved

[30] Section 17 is not easy to interpret or understand but broken down into its elements what the Crown must prove beyond a reasonable doubt against Mrs. Potemani in this case is as follows:

[30.1] That Mrs. Potemani;
[30.2] Used $7,576.76;
[30.3] Knowing or having reasonable grounds to believe or suspect that it was derived directly or indirectly from the commission of a serious offence;
[30.4] By the conversion of the $7,576.76 into electronic equipment;
[30.5] That the $7,576.76 was derived directly or indirectly from the commission of a serious offence;
[30.6] That she acted with the aim of aiding any person in the commission of the serious offence.

[31] The defence was focused on the *mens rea* requirement of the offence but I consider that Mrs. Potemani clearly had the required *mens rea.* The findings of fact that I have made in relation to the Receiving charge are applicable here. The circumstances under which Mrs. Potemani acquired and used the money were so clearly suspicious that she had reasonable grounds to believe, and did in fact believe, that the money was derived from serious criminal offending. I consider this charge was not proven for other reasons which I shall now set out.

[32] Money laundering is a process by which criminals disguise the original source, ownership and control of the proceeds of criminal activity. They do this by taking the proceeds of a crime, called a predicate offence, and laundering the money in various ways to make it appear to have been obtained legitimately. A predicate offence then in this context is the crime that produces the property (usually cash) that is to be laundered. In section 17(1)(b)(i) the term "a serious offence" refers to the predicate offence. What constitutes a "serious offence" is defined in section 2 of the Money Laundering and Proceeds of Crime Act 2000 but for present purposes I do not need to concern myself with that definition.

[33] When I asked Mr. 'Aho to identify the serious offence for the purposes of section 17(1)(b)(i) (that is, what was the predicate offence) he said it was the theft of $T25,000 from Mr. and Mrs. Holt by the fraudulently transfer of that sum from their bank account to the bank account of Mrs Potemani. I do not think that can be correct. A credit balance in a bank account is merely a thing in action and is not something tangible capable of being stolen under Tongan law. Whilst in everyday life we might regard such a transfer as the payment of money from one person's account to that of another the money is in fact represented electronically by an entry in the bank's accounts and as a debt owed by the bank to its customer. The debiting of one customer's account and the crediting of the account of another does not involve any transfer or taking of property from one to another.

[34] In *R v Sefesi* [2013] TOSC 14 the accused was an employee of a bank who had been charged with five counts of fraudulent misappropriation under section 162 (b) of the Criminal Offences Act. It was alleged that he had fraudulently acted by debiting one customer's account in favour of another. The accused was acquitted on a directed verdict (although convicted on an alternative count) and Cato J issued a written judgment in which he quoted from the House of Lords in *R v Preddy* [1996] AC 815 as follows:

[10] Preddy concerned electronic transfers from a lending institution to the bank account of a fraudulent borrower. Lord Goff observed;

> Let it be assumed that the lending institution bank account is in credit, and there is therefore no difficulty in identifying a credit balance standing in the account as representing property, i.e. a chose in action, belonging to the lending institution. The question remains, however, whether the debiting of the lending institution's bank account and the corresponding crediting of the bank account of the defendant and or his solicitor constitutes obtaining of the property. The difficulty in the way of that conclusion is simply that, when the bank account of the defendant (or his solicitor) is credited, he does not obtain the lending institutions "chose in action".

[11] Lord Goff further explained;

> "...I do not see for myself how this can be properly be described as obtaining property belonging to another. In truth the property which the defendant has obtained is the new chose in action constituted by the debt now owed by the bank, and represented by the credit entry in his own bank. This did not come into existence until the debt so created was owed to him by his bank, and so never belonged to anybody else. True, it corresponded to the debit entered into lending institution's bank account; but it does not follow that the property which the defendant acquired can be identified with the property which the lending institution lost when the account was debited. In truth, section 15 (1) is here being invoked for the purpose for which it was never designed, and for which it does not legislate."

[35] Relevantly Cato J noted also:

> "[8] I was advised that the Tongan provisions contained in section 162 of the Act followed the English Larcency Act 1916, and were enacted about a hundred years ago, although the English definition of property seemed wider than the Tongan being described as anything that has value and is the property of any person. Banking with its system of electronic debits and credits has, however, moved well beyond coin and banknotes passing hands and tangible property in that sense.
>
> and
>
> [19] In my view, this prosecution illustrates an urgent need for Tonga to effect reform of the existing Criminal Offences Act to avoid the problems the Crown encountered in this case. Offences involving dishonesty such

> as embezzlement, theft and misappropriation generally require to be revisited because they are so important for the maintenance of probity in business and commercial dealings. Consideration is also required to be given to the concept of property itself and electronic transfers so important in banking and commerce today. Penal legislation should be fashioned to plainly meet the demands of the modern age.

[36] In this case when Mr. Iketau caused the ANZ bank to debit Mr. and Mrs. Holts' bank account and credit the bank account of Mrs. Potemani he was not committing the offence of theft as that offence is defined under Tonga law. I was unable to find any other serious offence that he might have committed and I was not referred to any by Counsel for the Crown. That being the case the Crown has failed to prove an essential element of the offence of Money Laundering; that is it has failed to prove that the money Mrs. Potemani used to acquire the electronic equipment was derived directly or indirectly from a serious offence.

[37] The Crown cannot, in my view, call in aid section 17(2) of the Money Laundering and Proceeds of Crime (Amendment) Act 2010 which provides that for the purposes of a money laundering offence under section 17(1) it is not necessary to prove which serious crime has been committed. That does not mean that there is no requirement for the Crown to provide proof of a predicate offence only that it does not have to prove that any particular offence was committed. This is made clear by the use of the determiner "which" in section 17(2). But what the Crown must do, in my view, is produce sufficient evidence from which an inference can be drawn to the required criminal standard that the property in question is derived, directly or indirectly from criminal activity that amounts to a serious offence. In this case it has not done so.

[38] For these reasons I find this count of the indictment is not proven.

Second count of money laundering

[39] Count three of the indictment charges that Mrs. Potemani, on or about 2 April 2014 at Nuku'alofa, did use $T1,723.24, having reasonable grounds to suspect that it was derived directly from the commission of a serious offence, by converting those funds to purchase goods with the aim of aiding another in the commission of an offence.

[40] It was never explained to me where the figure of $T1,723.24 came from. Mr. 'Aho said in his submissions that what the Crown relied on to prove this charge was that in her statement to the Police Mrs Potemani admitted to spending $T600 of the money she withdrew from the ANZ on goods for herself.

[41] I consider that this charge is not proven for two reasons. First, what I have said above in relation to the first count of Money Laundering applies equally to this charge. Secondly, even if I was wrong in my conclusion that the Crown has failed to prove that the money that Mrs Potemani used to buy goods was not derived from a serious offence, the $600 was spent for her own consumption and not to aid the commission of the offence as required by section 17(1)(b)(ii).

[42] For these reasons I find that this count of the indictment is not proven either.

The result

[43] On the first count of the indictment Mrs. Potemani is guilty of the offence of Receiving under section 148(1) and (5) Criminal Offences Act and she is convicted of that charge.

[44] On the second and third counts of the indictment Mrs. Potemani is not guilty of Money Laundering under section 17(1)(a) and (b)(i) Money Laundering and Proceeds of Crime Act and she is acquitted of those charges.

[45] Finally the result of this case, and in particular the acquittal of Mrs. Potemani on Money Laundering charges, may be regarded as unsatisfactory. I lend my support to the comments that Cato. J made in *R v Sefesi* about the need for reform of the law involving dishonesty. In a modern age where increasingly both private and commercial transactions are conducted electronically more cases like this will occur until there is reform.

Friendly Islands Satellite Communications (Tongasat) Ltd anor v Pohiva anors

Supreme Court, Nuku'alofa
Paulson CJ
Number

31 March and 1 April 2015; 19 May 2015

Civil procedure – various interlocutory applications made – considered on the limited facts before the court – orders made

On 1 February 2013, the Deputy CEO at the Commissioner of Revenue's office wrote to the Tax Agent for Tongasat advising that an objection by Tongasat to a 2010/2011 income tax assessment had been disallowed. The result was that Tongasat owed $12,135,941.31 in income tax. On a date prior to 11 August 2014 the letter of 1 February 2013 was delivered to the offices of a Tongan newspaper, the Kele'a, by a person unknown who slipped an envelope containing it under the Kele'a's office door. On 11 August 2014 a copy of the letter, together with other documents relating to Tongasat and its tax affairs, was separately delivered to the Tonga PSA in the same manner. The person or persons who delivered the documents to the Kele'a and the Tonga PSA was unknown to the plaintiffs and to the first to sixth defendants. There was no sharing of the documents received between the Kele'a and the Tonga PSA. There were a number of interlocutory applications made. The plaintiffs applied for orders that the first to fifth defendants be required to attend Court and be cross-examined as to the identity or description of John Doe and also for preliminary discovery of documents. The defendants applied to strike out the plaintiffs' amended statement of claim dated 6 February 2015 in whole or in part, for particulars of the amended statement of claim, to discharge or vary interim restraining orders that have been made against them, and to discharge a direction that they file a statement of defence.

Held:

1. It was inappropriate to make the order sought by the plaintiffs that the defendants be cross-examined because it was not necessary to do so. The underlying purpose of the exercise of the power was the disclosure of the identity of a wrongdoer when that was not known to the person who had been wronged. Disclosure had already been made of all the information that the defendants had relevant to the identity of John Doe. The plaintiffs' application to compel the defendants to attend for cross-examination was dismissed.

2. The plaintiffs' application for preliminary discovery of documents was dismissed. The plaintiffs have already had the disclosure from the defendants that they were seeking. In the absence of evidence that the defendants have, or have had, in their control relevant documents other than those disclosed (the onus being on the plaintiffs to satisfy the Court of this) the making of an order was unnecessary.
3. The defendants sought to strike out all of the causes of action on the grounds that the amended statement of claim was unclear or could otherwise prejudice or delay a fair trial. The court found that the claim was particularly maladroit for a number of reasons. However, it did not consider that it should strike out the claim on this ground but found that it could not be advanced unless a further statement of claim was filed. The court therefore granted leave for a further amended statement of claim to be filed addressing the points the court made.
4. At common law a company could obtain damages for defamation but only in respect of financial loss either shown to have been suffered or shown to have been probable. Exemplary damages were recoverable in defamation in exceptional cases. The pleadings in the statement of claim were not satisfactory but the deficiencies could be corrected by amendment. Tongasat's claim in defamation should not be struck out.
5. A plaintiff must prove a publication of defamatory material of and concerning him. Unless he could satisfy that burden, there was no cause of action. The second and third plaintiffs were not named in the first, second, third or fourth matters complained of. The four matters complained of say nothing at all about their involvement in the operations of Tongasat or in the activities described. There was no pleading either that the second and third plaintiffs were the alter ego of Tongasat or vice versa. The court therefore considered their claims in defamation untenable and they were struck out.
6. The defendant applied for the restraining order to be rescinded or varied. In order to secure an injunction a plaintiff must show that there was a serious question to be tried (in the sense that the plaintiff made out a prima facie case) and that the balance of convenience favoured the granting of the injunction. The court was satisfied that there was a serious issue to be tried on the breach of confidentiality claim based on equitable principles notwithstanding the defendants intended reliance upon an iniquity defence. As to the balance of convenience question, as a general proposition, when an injunction was sought to prevent a breach of confidentiality in a private or purely commercial context, one might expect that the balance of convenience would usually favour the plaintiff. Also, as a general principle, the court should only restrain rights of free expression where there were clear and compelling reasons to do so. Having taken all the arguments into account the matter that tipped the balance in favour of discharging the restraining orders was that there was almost no evidence before the Court that Tongasat would suffer any harm by the disclosure of the documents in question or that the payment of damages would not be sufficient remedy if it did. The balance of convenience favoured discharging the restraining orders.

Cases considered:

American Cyanamid Co v Ethicon Ltd [1975] AC 396

Ashworth Hospital v MGN Ltd [2002] 4 All ER 193

Attorney-General v Guardian Newspapers (No 2) [1990]1 AC 1

Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd [2001] 208 CLR 199

Ayers v Elementary Solutions Ltd and Anor [2014] NZHC 2998

B Howard Smith v Truth Weekender Ltd and others (HC, Auckland, CIV 2010-404-843, 12 July 2010)

Ballina Shire Council v Ringland [1999] NSWSC 11

Banker Trust Co v Shapira [1980] 3 All ER 353

Bargold Pty Ltd v Mirror Newspapers Ltd [1981] 1 NZWLR 9

Bateman v Fairfax Media Publications Pty Ltd [2014] NSWSC 400

Bonnard v Perryman [1891] 2 Ch 269

British Steel v Granada Television [1981] AC 1096

Commissioner of Taxation v Sydney Refractive Surgery Centre Pty Ltd [2008] FCAFC

Euro Banking Corp v Fourth Estate [1993] 1 NZLR 559

Fahey v TV 3 Network Services [1999] 2 NZLR 129

Hubback v Wilkinson [1899] 1 QB 94

Jameel v Wall Street Journal Europe Sprl (No 2) [2005] QB 914 (CA)

John Fairfax & Sons Ltd v Cojuangco [1988] HCA 54

Jones v Skelton [1963] 1 WLR 1362

Joyce v Sengupta [1993] 1 WLR 337

Klissers Farmhouse Bakeries Ltd v Harvest Bakeries Ltd [1985] 2 NZLR 140 (CA)

Knupffer v London Express Newspaper Ltd [1944] AC 116

Lewis v Daily Telegraph Ltd [1963] 1 QB 340

Lewis v Daily Telegraph Ltd [1963] 2 WLR 1063

Liu v The Age Company Ltd [2012] NZWSC 12; [2013] NSWCA 26; [2015] NSWSC 276

McSweeney v Berryman [1980] 2 NZLR 168

Morgan v Odhams Press Ltd [1971] 2 All ER 1156

Mount Cook Group Ltd v Johnstone Motors Ltd [1990] 2 NZLR 48

News Media v Finlay [1970] NZLR 1089 (CA)

Niven v Poverty Bay Farmers Meat Co [1917] GLR 118

Norwich Pharmacal Co and ors v Customs and Excise Commissioners [1974] AC 133

P v T Ltd [1997] 4 All ER 200

Palace Films Pty Limited v Fairfax Media Publications Pty Ltd [2012] NSWSC 1136

Taylor v Beere [1982] 1 NZLR 81

The Rugby Football Union v Consolidated Information Services Limited [2012] UKSC 55

Thomson v Westpac Banking Corporation (No 2) (1986) 2 PRNZ 505 (HC)

Statutes considered:
Constitution of Tonga (Cap 2)
Defamation Act (Cap 33)
Revenue Services Administration Act 2002
Supreme Court (Amendment) Act 2012

Rules considered:
Supreme Court Rules 2007

Counsel for the plaintiffs : Mr SJ Stanton SC and Mr William C Edwards

Counsel for the defendants (apart from seventh def) : Dr RE Harrison QC, SC

Ruling

[1] The first plaintiff (Tongasat) was the exclusive agent for the Kingdom of Tonga in the management of its orbital slot positions. The second and third plaintiffs were at all material times the Managing Director and Marketing and Finance Directors respectively of Tongasat.

[2] The plaintiffs have commenced this action against seven defendants. They pursue causes of action in defamation, malicious falsehood, conversion and breach of confidentiality.

[3] The first four defendants are involved in one capacity or other with the Tongan newspaper the Kele'a.

[4] The fifth and sixth defendants are the Tonga Public Service Association and its Secretary-General.

[5] The seventh defendant, John Doe, is a person or persons unknown, named in the proceeding in the expectation that his (or their) identity will in due course become known.

[6] There are a number of interlocutory applications before the Court. The plaintiffs have applied for orders that the first to fifth defendants be required to attend Court and be cross-examined as to the identity or description of John Doe and also for preliminary discovery of documents. The defendants have applied to strike out the plaintiffs' amended statement of claim dated 6 February 2015 in whole or in part, for particulars of the amended statement of claim, to discharge or vary interim restraining orders that have been made against them, and to discharge a direction that they file a statement of defense.

[7] To understand these applications it is necessary for me to set out the facts bearing in mind that at this interlocutory stage I do so on the basis of limited material and only to the extent that it is necessary to resolve the applications that are before me. I consider the relevant facts are substantially as follows.

The facts

[8] On 1 February 2013, the Deputy CEO at the Commissioner of Revenue's office wrote to the Tax Agent for Tongasat advising that an objection by Tongasat to a 2010/2011 income tax assessment had been disallowed. The result was that Tongasat owed $12,135,941.31 in income tax.

[9] On a date prior to 11 August 2014 the letter of 1 February 2013 was delivered to the offices of the Kele'a by a person unknown who slipped an envelope containing it under the Kele'a's office door.

[10] On 11 August 2014 a copy of the letter, together with other documents relating to Tongasat and its tax affairs, was separately delivered to the Tonga PSA in the same manner.

[11] The person or persons who delivered the documents to the Kele'a and the Tonga PSA is unknown to the plaintiffs and to the first to sixth defendants.

[12] There was no sharing of the documents received between the Kele'a and the Tonga PSA.

The first matter complained of

[13] On 11 August 2014 there were articles published in the Kele'a on pages 4 and 13 under the headline "Previous Sale of Satellite Slot in exchange of letters with Tax Department". It is alleged that on the same day Kele'a published on its website a similar article under the same headline. In their amended statement of claim the plaintiffs label these as the "first matter complained of".

[14] The focus of the article on page 4 of the Kele'a is past Government decisions and actions and in particular whether it had leased or sold orbital slots. The Commissioner of Revenue's letter of 1 February 2013 was referred to in the article as well as being reproduced in full. Its relevance to the subject matter of the article was as showing that a satellite slot had been sold. There was mention of the fact that the Tonga PSA and Mr. 'Akilisi Pohiva had taken Court action to challenge that transaction.

[15] The second article in the Kele'a that day, on page 13, discusses in more detail the content of the letter of 1 February 2013. It notes that Tongasat had unsuccessfully sought a tax exemption on money received from the sale of orbital slots and that "the outstanding tax due for Tongasat remains unchanged at $12,135,941.31". The article also discussed whether orbital slots were sold or leased and concludes by asking whether Tongasat's tax remained unpaid.

The second matter complained of

[16] On 18 August 2014, the PSA issued a press release No 14/14 titled "Concerns on Tax Arrears of Tongasat and its Employees". The press release is the plaintiffs' "second matter complained of".

[17] The second matter complained of expressed concerns that the Tonga PSA had about the tax arrears of Tongasat with a recommendation for the Ministry of Revenue

to conduct an internal compliance audit of "Tongasat's income for confirmation of tax due to Government for leasing out the orbital slots that belonged to Tonga". It asserted that it was not fair that small businesses pay their taxes in a timely manner while Tongasat had tax arrears from 2010/2011 in the millions of dollars.

[18] With reference to the letter of 1 February 2013 the press release stated that Tongasat's tax arrears were around $12 million and that "Tongasat had sued Government for this income tax charged to them and lost". It was asserted also that not included in the $12 million was PAYE tax as well as tax payable on revenue that it was estimated Tongasat had earned from leasing satellite slots under existing commercial contracts since 2009 totaling approximately $19.5 and that it was not known whether Tongasat had declared this income to the Ministry of Revenue.

[19] The press release also focused on an agreement for the sale of two orbital slots at 134°E and 138°E said to have been negotiated by the Minister of Finance, Mr 'Aisake Eke, which it was said would produce taxable income to Tongasat. The press release opined that the agreement should be submitted to Parliament for approval.

[20] The press release contained a prominent picture of Her Royal Highness Princess Pilolevu, and identifies her as the "Chairlady of Tongasat" who had "directed for the sale price of the two orbital slots" and also a picture of Mr 'Aisake Eke the Minister of Finance.

The third matter complained of

[21] On 25 August 2014 there appeared in the Kele'a an article authored by the PSA headed "Pay all your taxes appropriately". This is the plaintiffs' "third matter complained of".

[22] The third matter complained of might on one view be regarded as a public spirited attempt to have "rich companies" pay their taxes but its focus is on Tongasat. Tongasat is mentioned five times and no other companies are named. The article also references the letter of 1 February 2013 "from the Department to Tongasat requesting that they pay their tax due 2010/2011 which was T$12m odd tax due" and goes on to make the point that more money may be owed for PAYE and Tongasat's "dues on 2011/20012 & 2012/2013?". Tongasat is said to have used the assets of the nation but not "meet their payment" and "That is why PSA suggested to the department that an audit should be done to Tongasat".

The fourth matter complained of

[23] On around 22 January 2015 the PSA was invited by the new Prime Minister, Mr. 'Akilisi Pohiva, to speak to Cabinet. Its presentation was on upholding the rule of law as the key to the sustainable socio-economic development for Tonga.

[24] On 23 January 2015 the PSA issued a further press release No 01/15 describing its presentation to Cabinet which was published both in hard copy and in electronic form on the Tonga PSA's Facebook page. This press release is the plaintiffs' "fourth matter complained of".

[25] The fourth matter complained of dealt with the broader controversies over Tongasat's administration of satellite slots, non-payment of license fees and appropriation of funds received from the People's Republic of China. It referred to millions of dollars in lost revenue to the Government of Tonga. It also questions the legality of outright sales of orbital slots. It called for an investigation and the transfer of the Minister of Finance to another portfolio.

The terms of the restraining orders

[26] Before this proceeding was commenced Tongasat (but not the other plaintiffs) filed for a restraining order against the first to fifth defendants. The basis for the application was that the documents published in the Kele'a on 11 August 2014, which could only refer to the letter of 1 February 2013, was part of Tongasat's tax file and the publication of it was said to be a breach of the confidentiality regime which section 57 of the Revenue Services Administration Act (RSA) affords taxation correspondence.[4] On 26 August 2014 Tongasat's application for a restraining order was dealt with by Cato. J on an ex parte basis and he issued an order:

> …restraining the [first to fifth defendants] from further publishing disseminating and/or referring to or parting with possession of the documents (being confidential tax documentation and information of … [Tongasat]) including their destruction.
>
> [Tongasat] is to file a Statement of claim within 7 days thereof.
>
> Leave is granted to the [first to fifth defendants] to apply to the Court to rescind amend or vary this order on Notice to the Applicant.

[27] After this proceeding was commenced the plaintiffs sought further urgent injunctive relief. On 12 November 2014 that application came before the Court. It was not fully argued but Cato. J ordered that the fifth defendant, Ms 'Amanaki, on behalf of the PSA was to provide written undertakings to this effect:

> (i) She on behalf of the PSA Association has no further documents emanating from the tax file relating to Tongasat that are confidential.
> (ii) That no further publication or use of those documents in any further publication will be made by her, her servants or agents on behalf of the Association.
> (iii) That those documents and indeed the affidavit she has filed in this proceeding will be treated as confidential to this litigation and are not to be given or allowed to be read by any person other than a party including counsel to this litigation. All documents are confidential to the court until further order.

[4] Paragraph 5 of the further affidavit of Lucy Anna Ilaiu dated 22 August 2014.

> These orders are interim orders and may be the subject of recission or variation after further hearing on a date yet to be set by the Court.
>
> These orders are made pursuant to section 57 of the Revenue Services and Administration Act 2002.

[28] The undertakings were provided but not within the time the Judge required. For present purposes nothing turns on that.

The amended claim

[29] The plaintiffs' amended statement of claim was filed on 9 February 2015. It contains the following:

> [29.1] Defamation claims that have been lumped into one by all plaintiffs against the first and fifth defendants in respect of the first matter complained of (although the claim against the fifth defendant may well be a typographical error), the fifth and sixth defendants in respect of the second matter complained of, the first, fifth and sixth defendants in respect of the third matter complained of and the fifth and sixth defendants in respect of the fourth matter complained of.
>
> [29.2] A claim by all the plaintiffs against all the defendants that they have committed a malicious falsehood in relation to the first, second and third matters complained of.
>
> [29.3] A claim apparently by Tongasat alone (but it is not altogether clear) against the first, fifth and sixth defendants alleging conversion of Tongasat's confidential tax records.
>
> [29.4] A claim by all plaintiffs against all defendants alleging breach of confidentiality through the disclosure of Tongasat's tax records.

The plaintiffs' applications

Application that the defendants be cross-examined

[30] The relevant part of the plaintiffs' application, seeks orders:

> …that the First through Fifth Respondents attend the Court on such date as the Court may determine to be examined as to the following matters:
>
> (a) the identity and further description of the person or persons who provided them or any one or more of them or to any person on behalf of the Proposed First Defendant [the proprietor of the Kele'a Newspaper] the documents referred to in the affidavit of Lucy Anna 'Ilaiu sworn on 21 August 2014;
>
> (b) the manner and circumstances in which the First through to Fifth Respondents or any other person on behalf of the Proposed First

Defendant/First Respondent obtained the documents including person or persons from whom the documents were obtained.

[31] The Supreme Court of Tonga has all the powers for the time being exercised by the High Court of Justice in England and Wales.[5] This Court therefore undoubtedly has the power to order disclosure under what has become known in England as the *Norwich Pharmacal* jurisdiction.[6] *Norwich Pharmacal* is authority for the principle that where a person becomes involved in the wrongful act of another that person becomes under a duty to assist the person injured by those acts by giving him any information which he is able to give by way of discovery that discloses the identity of the wrongdoer.[7]

[32] The Court's power is discretionary and exceptional and an order will never lightly be made and only where the Court is satisfied that it is necessary to do so.[8] The importance of the underlying purpose of rendering assistance by identifying the wrongdoer must always be recognised.[9]

[33] The exercise of this power does not require that the person against whom an order of disclosure is made should be compelled to submit to cross-examination. Although undoubtedly that could be ordered, usually it will suffice that they provide written disclosure of the details of the identity of the alleged wrongdoer[10] or produce relevant documents for inspection.[11]

[34] I was not referred to any case where, in reliance upon *Norwich Pharmacal*, cross-examination has been ordered. I was referred to case law where cross-examination has been ordered ancillary to the making of an injunction freezing assets but that is a different sort of case. Even in those cases the courts will not make an order requiring a party to be subjected to cross-examination when there are alternative means of achieving the same ends which are less burdensome.

[35] In my view it would be inappropriate to make the order the plaintiffs are seeking because it is not necessary to do so. As I have said, the underlying purpose of the exercise of the power is the disclosure of the identity of a wrongdoer when that is not known to the person who has been wronged. In this case disclosure has already been made of all the information that the defendants have relevant to the identity of John Doe.

[36] In an affidavit of 31 October 2014 the fifth defendant, Mrs. Mele 'Amanaki, attaches copies of all of the documents received by the Tonga PSA on around 11 August 2014. She describes the circumstances under which they were delivered to the

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[5] Section 2, Supreme Court (Amendment) Act 2012.
[6] *Norwich Pharmacal Co and ors v Customs and Excise Commissioners* [1974] A.C. 133.
[7] *Ashworth Hospital v MGN Ltd* [2002] 4 All ER 193, 199-200 per Lord Woolf CJ.
[8] Lord Cross in *Norwich Pharmacal* at page 199; Woolf C.J in *Ashworth Hospital* at page 209 and *Euro Banking Corp v Fourth Estate* [1993] 1 NZLR 559, 566-567.
[9] *Euro Banking Corp v Fourth Estate* (ibid) at 566.
[10] *British Steel v Granada Television* [1981] A.C. 1096; *P v T Ltd* [1997] 4 All ER 200; *The Rugby Football Union v Consolidated Information Services Limited* [2012] UKSC 55.
[11] *Norwich Pharmacal; Ashworth Hospital; Banker Trust Co v Shapira* [1980] 3 All ER 353.

PSA. She deposes that there was no indication of the identity of the person who delivered the documents and that neither she nor the PSA will be able to shed any light on the origins of the documents.

[37] In an affidavit of 4 November 2014 the second defendant, Mr. Mateni Tapueluelu, deposes on behalf of himself and the first, third and fourth defendants, that the Kele'a had received only the letter of 1 February 2013 and that neither he nor any of the Kele'a defendants is aware of the identity of the person who delivered the letter and are not able to provide any further information as to the origins of the anonymously delivered envelope.

[38] The plaintiffs argued that cross-examination of the defendants is necessary because the 'Amanaki and Tapueluelu affidavits are convenient and self serving. I do not accept that submission. It was also implied in the plaintiffs' Counsel's submissions that the affidavits were untrue.[12] I feel that particular submission went too far. I have no reason, on what is before me at this time, to disbelieve the evidence of Mrs. 'Amanaki and Mr. Tapueluelu or to regard their evidence as implausible.

[39] The plaintiffs have also relied upon a body of case law that has arisen in response to what is known as the 'newspaper rule' which deals with the circumstances under which the Court will compel the disclosure of the identity of a confidential news media source.[13] I do not need to go into that. The defendants are not relying on the newspaper rule. They have filed affidavits to say that they do not know the identity of John Doe. It is unnecessary to compel them to attend for cross-examination to confirm that which is already in their affidavits.

[40] I have not found it necessary to consider the arguments of the defendants that the plaintiffs are advancing this application for the improper collateral purpose of broad based information gathering or their assertion of personal privilege against self-incrimination.

[41] For the reasons given the plaintiffs' application to compel the defendants to attend for cross-examination is dismissed.

Preliminary discovery of documents

[42] The plaintiffs also seek preliminary discovery of documents from the defendants. The discovery sought is limited to documents that identify or describe John Doe. The defendants do not take the position that this Court lacks jurisdiction to make the order sought but say it should be refused on its merits.

[43] I see no justification for making such an order at this stage of the proceeding as there is clearly no need for it. The plaintiffs have already had the disclosure from the defendants that they are seeking. The disclosure is contained in the 'Amanaki and Tapueluelu affidavits and the exhibits attached to them. In the absence of evidence

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[12] Page 29 paragraph 95 of the plaintiffs' submissions of 24 March 2015.

[13] *John Fairfax & Sons Ltd v Cojuangco* [1988] HCA 54; *Liu v The Age Company Ltd* [2012] NZWSC 12; [2013] NSWCA 26; [2015] NSWSC 276 and *Bateman v Fairfax Media Publications Pty Ltd* [2014] NSWSC 400.

that the defendants have, or have had, in their control relevant documents other than those disclosed (the onus being on the plaintiffs to satisfy the Court of this) the making of an order is unnecessary. There is no such evidence before me.

[44] The plaintiffs' application for preliminary discovery of documents is dismissed.

The defendants' applications

Application to strike out the amended statement of claim.

[45] The defendants seek to strike out all of the causes of action and rely specifically upon O.8 R.8(1)(a) and (c) Supreme Court Rules 2007 which provide:

> (1) The Court may at any time order that any pleading or part thereof be struck out if:
>
> (a) it discloses no reasonable cause of action or defence, as the case may be; or...
>
> (c) it is unclear, or may otherwise prejudice or delay the fair trial of the action;...
>
> and may order the action to be stayed or dismissed, or judgment to be entered accordingly.
>
> (2) No evidence shall be heard on an application under paragraph (1) (a).

[46] The principles upon which the Court will act are well settled. No party should have his claim denied without a hearing in the ordinary way, except where the claim is so hopeless that it cannot possibly succeed. The Court will exercise its jurisdiction to strike out sparingly and will generally only do so when there is no reason to suppose the plaintiff will be able to remedy deficiencies in its pleading by amendment.[14] The application proceeds on the assumption that the facts pleaded in the statement of claim are true and where the application relies upon O.8 R.8(1)(a) no evidence is to be heard.

The amended statement of claim

[47] The defendants argue that the amended statement of claim as a whole is unclear or may otherwise prejudice or delay a fair trial and apply to strike it out on those grounds. It is an exceptional case where a court would strike out a claim on this ground without giving a plaintiff the opportunity to amend their pleading. That said, it is the case that the plaintiffs' amended statement of claim is particularly maladroit for at least all of the following reasons.

[48] I have mentioned the lumping together of causes of action. There are successive publications relied upon by the plaintiffs and not all defendants were involved in all

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[14] *Hubback v Wilkinson* [1899] 1 Q.B. 94 per Lindley M.R.

publications. The fifth and sixth defendants were not involved in the first matter complained of. The first, second, third and fourth defendants were not involved in the fourth matter complained of. In defamation, and also in malicious falsehood, each publication is a separate cause of action and must be pleaded as such. It is not satisfactory that all claims are simply lumped into one, followed by a single prayer for relief, as the plaintiffs have done in this case.

[49] In relation to the defamation and malicious falsehood causes of action the words that are complained about are material facts. They should be set out in the amended statement of claim. In some cases it might be enough to describe the words' substance or effect but the plaintiffs do not do that. With few exceptions the relevant passages in the first, second, third or fourth matters complained of are not set out or referred to at all in the amended statement of claim. The four publications are simply attached to the amended statement of claim as schedules, which is an unsatisfactory practice that is to be discouraged. It leaves it to the defendants and the Court to search through the publications and guess what words are said to be false or carry the pleaded defamatory meanings. The defendants and the Court are entitled to know, by way of a proper pleading, what particular words or passages are being complained of as being false or having defamatory meanings so that subsequent processes and the trial "can be conducted against a recognizable boundary"[15] I should emphasis that this is not a case where it is possible to read the publications and conveniently find the foundation of the plaintiffs' pleadings.[16]

[50] Again with particular reference to the defamation cause of action, where words are not defamatory in their natural and ordinary meaning but by innuendo because of extrinsic facts, the plaintiff must give particulars of those extrinsic facts. The plaintiffs should assert knowledge of those facts to persons to whom the words were published. In this case there are pleadings of true innuendo in paragraphs 17, 20, 21, 24, 25 and 26C of the amended statement of claim but I do not consider that they are true innuendos at all because they do not allege facts extraneous to the publications which if known would impart a particular defamatory meaning to the words as published. They appear to me to be in part alternative defamatory meanings and in part irrelevant material (at least to the existence of a true innuendo).

[51] The alleged defamatory meanings relied upon by the plaintiffs are contained in paragraphs 16, 19, 23 and 26B. They are in some cases convoluted. As an example, in paragraph 19(c) the words "which in substance and in fact was a confidential tax record properly classified as confidential pursuant to section 57 of the Act as pleaded aforesaid and relied upon by the Fifth and Sixth Defendants" are entirely superfluous. In some instances multiple defamatory meanings are contained within a single allegation[17] but on other occasions there is no apparent defamatory meaning that I can discern at all. Meanings relied upon in respect of the second matter complained of, in paragraph 19, and the third matter complained of, in paragraph 23, are identical

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[15] Smith A.J in *Ayers v Elementary Solutions Ltd and Anor* [2014] NZHC 2998 at [29].
[16] *B Howard Smith v Truth Weekender Ltd and others* (HC, Auckland, CIV 2010-404-843, 12 July 2010).
[17] Paragraph 23(d) and 26C as examples.

despite the fact that the two publications they relate to are significantly different. There are other examples of inappropriate use of the "cut and paste" function throughout the pleading.[18]

[52] There is throughout the pleading also a failure to identify what kinds of damages are recoverable under the different heads of claim and to particularise the damages that are being sought. There is also a failure to distinguish between categories of damage that are conceptually quite different such as aggravated and exemplary damages. In this regard, see for instance the particulars at paragraph 27. The cause of action in conversion has no prayer for relief at all.

[53] I am keenly aware that there are differences in style and approach between Counsel when it comes to pleadings but taking full account of that the amended statement of claim is unnecessarily prolix. The facts, if not the law, are very straightforward and yet the narrative presented is diffuse. Furthermore, there is much material pleaded that is irrelevant. By way of example, in a pleading for conversion I can see no place for paragraphs 37 to 41 and paragraph 42 makes the same allegation against the fifth defendant twice.

[54] All of this makes the pleading so difficult to understand that I consider the defendants cannot be expected to, and would not presently be able to, provide a targeted response to it. As Eichelbaum J said in *Thomson v Westpac Banking Corporation (No 2)*:[19]

> ... The object of obtaining crisp admissions or denials, and thus defining the points at issue, is entirely defeated by a lengthy diffuse narrative, which is likely to elicit only a generalised response.

[55] As to the appropriate response to this, I do not consider that I should strike out the claim on this ground but on the other hand it cannot be advanced unless a further statement of claim is filed, which I envisage will be significantly different from what is presently before the Court. I will therefore grant leave for a further amended statement of claim to be filed addressing the points I have made above and also others as will appear later in this ruling.

Defamation

The damages recoverable by a corporation

[56] The defendants argue that Tongasat, being a corporation, cannot sue in defamation for general damages because it has no feelings that can be injured and whether or not it could recover special damages by way of proved financial loss "that is not the claim it brings at any rate in defamation".

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[18] Paragraphs 20(i) and 24(i) are examples.

19 (1986) 2 PRNZ 505 (HC) at 508.

[57] At common law a company can obtain damages for defamation but only in respect of financial loss either shown to have been suffered or shown to have been probable. [20] As the plaintiffs correctly submit in my view, damages to a company's trading or business reputation may be suffered not as a loss of income but as a loss of a capital asset.[21] I was also referred to section 16 of the Defamation Act which it was submitted means that in Tonga once defamation is proved the cause of action is complete and proof of special damage is not required, be the plaintiff a natural person or a corporation. The defendants argued to the contrary and submit that section 16 was intended to alter the common law but only to the limited extent that it removed a requirement to prove special damage in an action for slander and then only in the four categories of case set out in section 16(1)(a) to (d). I do not think this submission correctly states the position at common law where it is my understanding that in some instances there was no requirement to prove special damage in slander.

[58] I do not need to venture any further view on section 16 as it is not clear to me that Tongasat is not suing for actual pecuniary loss. The prayer for relief in the amended statement of claims reads "The plaintiff claims damages, including aggravated and exemplary damages, and interest and costs…." I cannot take it from this that Tongasat is only claiming general damages as the defendants contend. Exemplary damages are recoverable in defamation in exceptional cases and there is certainly a claim for those.[22] That is not to say that I consider the pleading is satisfactory as for the reasons I have given already I clearly do not, but its deficiencies in this particular regard can be corrected by amendment and by Tongasat providing proper particulars of the damages that are being sought.[23] Tongasat's claim in defamation should not be struck out on this basis.

The pleaded imputations

[59] The defendants also invite me to strike out the defamation cause of action on the basis that the words used in the first, second, third and fourth matters complained of were not capable of bearing any of the defamatory meanings pleaded. For reasons that I have already given, and will develop further, the pleadings will need to be substantially amended which will necessarily include a review of the pleaded defamatory meanings rendering any ruling by me on this aspect of the defendants' application moot. It is also a fact that on the state of the pleadings this would be an extremely time consuming exercise that would not reward the effort. I therefore have decided that it would not be appropriate to consider this application at this time.

The second and third plaintiffs

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[20] *News Media v. Finlay* [1970] N.Z.L.R. 1089 (CA) per Haslam, J at p.1103; *Mount Cook Group Ltd v Johnstone Motors Ltd* [1990] 2 NZLR 48 and *Palace Films Pty Limited v Fairfax Media Publications Pty Ltd* [2012] NSWSC 1136.
[21] *Commissioner of Taxation v Sydney Refractive Surgery Centre Pty Ltd* [2008] FCAFC and *Jameel v Wall Street Journal Europe Sprl (No 2)* [2005] QB 914 (CA).
[22] *Taylor v Beere* [1982] 1 NZLR 81.
[23] *Lewis v Daily Telegraph Ltd* [1963] 1 QB 340, 376 and *Niven v Poverty Bay Farmers Meat Co* [1917] GLR 118.

[60] I now turn to consider the position of the second plaintiff and third plaintiff. The second and third plaintiffs are not referred to in any of the four matters complained of. The only officer of Tongasat that is identified in any of the publications is the Chairlady HRH Princess Pilolevu and only in the second matter complained of. The defendants submit that it is completely far-fetched and implausible to allege that the second and third plaintiffs have been defamed. They argue that the critical question is whether it could be deduced by a reasonable reader that the second plaintiff and third plaintiff were not only mentioned by implication in the publications but actually implicated as being involved in the activities under discussion, being principally evasion of tax liabilities of Tongasat. They say the second and third plaintiffs were neither mentioned nor implicated and have no claim.

[61] The plaintiffs contend that the defamatory imputations in the publications include the diversion of money, misappropriation of funds and the failure to pay tax which are all matters of which Tongasat's directors are necessarily implicated as they are responsible for Tongasat's affairs; the company needing its directors to be able to act. It was also submitted that the directors are effectively the alter ego of the corporation.

[62] A plaintiff must prove a publication of defamatory material of and concerning him. Unless he can satisfy this burden there is no cause of action. Usually this will not be in issue because the plaintiff will be named or described directly by the material in question.[24] If the plaintiff is not identified directly it is permissible for the plaintiff to call in aid the concept of innuendo and point to material outside the words in issue so as to show that while on their face the words do not identify him/her, those hearing or reading them would understand that the plaintiff was being referred to. There is no pleading that the second and third plaintiff's rely on innuendo in that sense.[25]

[63] I do not accept the plaintiffs' submission that imputations against a company of the diversion of money, misappropriation of funds and the failure to pay tax necessarily implicates its directors in those activities. If the directors, then why not the company's shareholders or, in this case, its tax agents? I have found in my research no case, and was not referred to any, which supports the plaintiffs' argument.

[64] Whether an imputation against a company reflects on an officer or director of the company will be dependent upon the part that the director or officer is alleged to have played in the operations of the company and the extent to which he or she is identified with the activities that are the subject of the action.[26]

[65] In this case the second and third plaintiffs are not named in the first, second, third or fourth matters complained of. The four matters complained of say nothing at all about their involvement in the operations of Tongasat or in the activities described. There is no pleading either that the second and third plaintiffs are the alter ego of

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[24] *Lewis v Daily Telegraph Ltd* [1963] 2 W.L.R. 1063 and *Jones v Skelton* [1963] 1 W.L.R 1362.
[25] *Morgan v. Odhams Press Ltd* [1971] 2 All E.R.1156 and Simon. L.C. in *Knupffer v. London Express Newspaper Ltd* [1944] A.C. 116 at 119.
[26] *Bargold Pty Ltd v Mirror Newspapers Ltd* [1981] 1 NZWLR 9.

Tongasat or vice versa. I therefore consider their claims in defamation are untenable and they are struck out.

Malicious falsehood

[66] The plaintiffs plead malicious falsehood against all defendants arising out of the first, second and third matters complained of. The kernel of the cause of action is that the defendants falsely and maliciously published in the first, second and third matters complained of that Tongasat owed $12,000,000 in tax arrears. There is no pleading as to what Tongasat's actual tax position was other than that it "was not as disclosed." The plaintiffs also allege that the words "'were calculated to cause pecuniary damage to the plaintiffs in their said business". The plaintiffs claim damages for injury to the business standing of Tongasat and reputational injury sustained by the second and third plaintiffs.

The need for pecuniary loss

[67] The defendants seek to strike out Tongasat's claim on the ground that it misunderstands the nature of the tort which is concerned with the malicious infliction of pecuniary loss and not loss of reputation. They say the plaintiffs must prove pecuniary loss and it is not sufficient that they plead that the words used "were calculated to cause pecuniary loss". The defendants contend that this is not just a pleading point as the possibility of Tongasat incurring any such loss is implausible when its agency to manage the orbital slots expired in 2009 and there is no allegation that it now carries on any business.

[68] The plaintiffs respond that any deficiencies in the pleading do not warrant striking out what is a claim that is "sound and conventional". I was also referred to an extract from the text in *Gatley* as authority that a plaintiff need only allege that the false words were calculated to cause pecuniary damage.

[69] I agree with the defendants that the pleading is inadequate and that pecuniary loss must be pleaded. I do not accept the plaintiffs' submission that it is sufficient to plead that the words used were calculated to cause loss. The common law is that special damage has to be proved and is the gist of the action.[27] The extract from *Gatley* that I was referred to for the contrary view relies upon a statutory relaxation of the common law that does not apply to Tonga.

[70] I am not however able to accept the defendants' submission that it is implausible that Tongasat has suffered any damage to its business. Whilst there is no specific pleading that Tongasat now carries on any business this is not something that the plaintiffs have conceded and it was submitted to me that "To assert that Tongasat has no business is clearly misconceived". I take Counsel's submission in this context at face value. On that basis, whilst again an amendment to the pleading is necessary, it would not be right to strike out the claim of Tongasat on this ground.

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[27] Todd and Others "The Law of Torts in New Zealand" (6th Ed 203) at 15.3.03.

The second and third plaintiffs

[71] To establish a cause of action in malicious falsehood a plaintiff must prove a false statement about himself or his or her business or property, that was made maliciously and that caused damage.[28] In this case the statement that is alleged to have been false concerns Tongasat's tax position. The publications say nothing about the second and third plaintiffs. Furthermore, there is no allegation that the second and third plaintiffs have suffered loss as a result of the malicious falsehood other than to their reputations. Injurious falsehood is an economic tort concerned with the malicious infliction of pecuniary loss.[29] It does not protect reputations as such. Damage to reputation is peculiarly within the province of defamation.[30] For these reasons the second and third plaintiffs' claim for malicious falsehood is untenable and is struck out.

Conversion

Tongasat's possessory right or title

[72] The next cause of action alleges that the first, fifth and sixth defendants converted confidential tax records. Conversion involves the intentional assertion of rights or dominion over goods which is inconsistent with the possessory interest or title in the goods of the plaintiff. Accepting, as I must, that the facts pleaded in the amended statement of claim are true I find that Tongasat has an arguable cause of action. It is pleaded that Tongasat has ownership rights over the confidential tax records, that they were removed from the offices of the Ministry of Revenue and passed into the possession of the first and fifth defendants without its consent, that it has requested their return and the first and fifth defendants have refused to return them. I therefore do not strike out the claim of Tongasat in conversion.

The second and third plaintiffs

[73] There is no pleading that the second and third plaintiff have a right to possession of or title to the tax records. To the contrary, it is pleaded that it is Tongasat that has ownership and rights co-extensive with rights of the Ministry of Revenue and Customs...".[31] In the plaintiffs' written submissions it was submitted that it was Tongasat that was entitled to possession of the documents in issue as it constituted its tax file but there was no such submission in support of the second and third plaintiffs' claim. I note also that paragraphs 36 and 42 of the amended statement of claim allege that Tongasat has suffered damage. There is no such pleading in respect of the second and third plaintiffs. It follows that in so far as the claim in conversion is brought on behalf of the second and third plaintiffs it is untenable and is struck out.

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[28] Ibid.
[29] *Ballina Shire Council v Ringland* [1999] NSWSC 11 and *Joyce v Sengupta* [1993] 1 W.L.R. 337, 347.
[30] Todd at 15.3.04.
[31] Paragraph 35(c) of the Amended Statement of Claim.

Breach of confidentiality

Equitable grounds

[74] The defendants' application to strike out this cause of action proceeded on the understanding that only a statutory basis for claiming confidentiality to the tax documents under section 57 RSA was being asserted. This is not the case as the plaintiffs submit that this cause of action is based on traditional equitable principles and section 57[32]. I understand on that basis the defendants accept that as far as Tongasat is concerned this cause of action cannot be struck out on this application.

The second and third plaintiffs

[75] It is trite that a plaintiff can only sue in respect of a right that he may have to prevent the unauthorised use of confidential information to his detriment. In this case, on the state of the pleading the only party who is entitled to asset any right to confidentiality in the tax documents is Tongasat (or possibly the Ministry of Revenue) and not the second and third plaintiffs. Their claim is untenable in this instance also and is struck out.

Request for particulars and statement of defence

[76] The defendants have sought further particulars of the amended statement of claim which they say are required to ensure compliance with Order 8 Rule 2 and to fully inform them of the case they have to meet. In light of my other findings it is inevitable that an amended statement of claim will be filed and any request for particulars would at this stage serve no purpose. It also follows from what I have said that the direction that I previously made that the defendants file a statement of defence is discharged.

Application to rescind or vary the ex parte restraining order

[77] The breach of confidentiality cause of action grounded the applications for the restraining orders. I have set out earlier the restraining orders that were made by Cato. J on 26 August 2014 and 12 November 2014. As those orders were made, in one case, on an ex parte basis and, in the other, under urgency Counsel are agreed that I can consider the matter afresh with the benefits that Cato. J did not have of further evidence and Counsels' arguments.

The principles to be applied

[78] The principles that the Court will apply in deciding whether to issue or refuse an interim injunction are well known and I adopt the approach in *Klissers Farmhouse*

[32] *Attorney-General v Guardian Newspapers (No. 2)* [1990]1 A.C. 1, 268.

Bakeries Ltd v Harvest Bakeries Ltd.[33] The purpose of an interlocutory injunction is to maintain the status quo until the rights of the parties can be determined at the hearing of the suit. In order to secure an injunction a plaintiff must show that there is a serious question to be tried (in the sense that the plaintiff has made out a prima facie case) and that the balance of convenience favours the granting of the injunction. This enquiry requires the Court to look at the impact on the parties of a granting or the refusal of an order. Finally, an assessment of the overall justice of the case is
690 required. If it can be shown that a plaintiff will be adequately compensated in damages and will suffer no irreparable injury if the injunction is not granted that is an important factor against the making of an order. However, the grant of an interim injunction involves the exercise of a discretion and the approach that I have outlined cannot be taken as suggesting a rigid or mechanical approach.

[79] I also note what Lord Diplock said in *American Cyanamid Co v Ethicon Ltd* [1975] AC 396 at 406-407:

> "…where the legal rights of the parties depend upon facts that are in dispute between them, the evidence available to the court at the hearing for an application for an interlocutory injunction is incomplete…
>
> 700 It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations".

The threshold

[80] I turn to the threshold question of whether Tongasat has established that there is a serious question to be tried. Tongasat bases its breach of confidentiality claim on section 57 RSA and on equitable principles. The defendants argue that the overriding public interest dictates that the law not protect the confidential information. The extent to which it is necessary for a Court at this stage to examine the legal merits of
710 the arguments will vary from case to case.[34] Whilst I make no final findings, of course, at this interlocutory stage I do not find the plaintiffs' reliance upon section 57 compelling. The plaintiffs' submissions did not articulate a preferred interpretation of section 57 but it appears that the plaintiffs regard it as a very broad secrecy provision binding tax officers and the public alike and protecting all correspondence and documents provided to any taxation officer or emanating from any taxation officer in connection with the performance of his duties. I do not find support for that in the wording of the section. I read and considered the large number of authorities that the plaintiffs' Counsel referred me to on secrecy provisions in taxation and other legislation in other jurisdictions but derived very little assistance from them. What I

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[33] [1985] 2 NZLR 140 (CA). Compare that to *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* [2001] 208 CLR 199 which would appear to impose a higher threshold requirement on a plaintiff.

[34] *ABC v Lenah Game Meats Pty Limited* at 219 per Gleeson CJ.

can say is that the plaintiffs have satisfied me to the extent that I consider there is a serious issue to be tried on the breach of confidentiality claim based on equitable principles notwithstanding the defendants intended reliance upon an iniquity defence.

[81] The more difficult question is where does the balance of convenience lie? I now turn to consider the competing considerations on that issue.

[82] Tongasat relies upon the fact that the restraining orders have persisted for some time and that there was a delay in attempting to discharge them. I do not accept this submission. Given the complexity of the pleadings and the difficulties they raised, combined with the fact that overseas Counsel was engaged I do not think the defendants are guilty of excessive delay.

[83] I consider that I must take into account that it appears, on what is before me, that Tongasat's tax documents were removed unlawfully from the offices of the Ministry of Revenue before being passed to the defendants. Such behavior should not be condoned and it might be said that the Court was doing so if the restraining orders are lifted. This is a factor that I take into account but not an important one as there is no suggestion that the defendants were involved in the removal of the documents and the plaintiffs' Counsel expressly disavowed any suggestion that the defendants were involved in or guilty of criminal behavior.

[84] As a general proposition, when an injunction is sought to prevent a breach of confidentiality in a private or purely commercial context one might expect that the balance of convenience will usually favor the plaintiff. This is because the harm to the plaintiff caused by disclosure might (subject to there being some evidence on the point) be irreparable or damages difficult to assess. It is also the case that the refusal of an injunction in such cases may deprive a plaintiff for all time of the primary remedy that it is seeking. Although I consider this litigation has a distinctively public flavor to it I accept that these are very important considerations to which I have given full weight in the balancing exercise I am undertaking.

[85] For the defendants, it was argued that this proceeding is a classic "gagging writ" to stifle legitimate public debate of Tongasat's taxation affairs and, more broadly, its conduct as an agent of the government of the Kingdom of Tonga in respect of orbital slot management. The defendants submit that the plaintiffs' reliance on section 57 RSA as a basis for the breach of confidentiality claim was very weak, if not untenable, and yet it was the basis on which the restraining orders had been made. It was also submitted that as the defendants intend to plead justification in relation to the defamation and malicious falsehood claims, and the defence of iniquity in relation to the breach of confidentiality claim, freedom of speech considerations are engaged which generally require the refusal of injunctive relief restraining defendants from publishing or continuing to publish material concerning the subject matter in question. I was referred to a number of authorities[35] as well as section 7 of the Act of Constitution which enshrines the principle of freedom of the speech and of the press.

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[35] *Bonnard v Perryman* [1891] 2 Ch 269; *McSweeney v Berryman* [1980] 2 NZLR 168 and *Fahey v TV 3 Network Services* [1999] 2 NZLR 129.

I am satisfied that as a general principle this Court should only restrain rights of free expression where there are clear and compelling reasons to do so.

[86] The defendants also argue that it is an extraordinary feature of this case that the plaintiffs do not plead that the Commissioner's letter did not reflect the true position regarding Tongasat's tax position but I do not accept that is correct as there is such a pleading at paragraph 30 of the amended statement of claim. The defendants are on firmer ground with the submission that none of the plaintiffs' deponents assert that the published statements derived from the Commissioner's letter are untrue.

[87] So far as the Commissioner's letter of 1 February 2013 is concerned, the defendants argue that it has already been published in full and it is now a matter of public record. For that reason it is said that there is no sufficient benefit to the plaintiffs to justify a continuing order restraining the defendants from further publishing, disseminating or referring to that particular document regardless of the position the Court takes in relation to the other documents. I do not consider that this is a strong point in the defendants favor for the reason that the publications in question have all been by the defendants. If, as Tongasat alleges, the publications were in breach of its rights the Court should be hesitant of allowing a repetition of the publication simply because of the effect of the earlier breach.[36]

[88] Whilst Tongasat is, I understand, a private corporation it was the exclusive agent of the Government of Tonga in relation to the management of its orbital slots which are clearly very valuable assets of the nation. There is real and genuine public interest in knowing how those assets have been managed and how revenue generated from them has been used. The question, as I see it, is whether this public interest overrides the competing need that Tongasat says it has to protect its confidential tax records. Having taken all the arguments advanced by both sides into account the matter that in my view is decisive in tipping the balance in favor of discharging the restraining orders is that there is almost no evidence before the Court that Tongasat will suffer any harm by the disclosure of the documents in question or that the payment of damages would not be sufficient remedy if it does.

[89] I have studied closely the affidavits of Mrs. Lucy 'Ilaiu, Mrs. Helena Tu'iono and Mr William Edwards. They have very little to say on the issue of the harm that Tongasat will suffer by disclosure. In her affidavit of 21 August 2014 Mrs. Ilaiu deposes that unless the defendants are restrained from using the confidential information Tongasat will suffer "irreparable harm to its commercial reputation and business". That is the high watermark of Tongasat's evidence. Mrs. Ilaiu does not say how that harm will occur or what if any business Tongasat now has to protect. Tongasat has failed to satisfy me that it will suffer any significant harm if the restraining orders are lifted that cannot be compensated in damages should it be successful on any of its claims.

[90] Taking all the matters I have mentioned above into consideration I have formed the clear view that the balance of convenience favors discharging the restraining orders. Standing back and looking at the overall justice of the case my view is

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[36] *Euro Banking Corp v Fourth Estate* [1993] 1 NZLR 559.

confirmed by the fact that there will now be considerable delays in having this case determined as a result of the manner in which the plaintiffs' claims have been presented. There is no opportunity that the case can be fast tracked. It is unjust in those circumstances that the restraining orders should remain in place on an open ended basis.

[91] For these reasons the interim orders of 26 August 2014 and 12 November 2014 are discharged.

The result

[92] The orders that I make arising out of this decision are as follows:

[92.1] The plaintiffs' applications that the defendants be compelled to attend for cross examination and preliminary discovery are dismissed.

[92.2] The claims of the second and third plaintiffs against all defendants are struck out.

[92.3] In relation to Tongasat, I do not strike out any of its claims but direct that it is to file a further amended statement of claim with 42 days of the date of this ruling addressing the issues that have been identified.

[92.4] The direction that the defendants file a statement of defense is discharged. In its stead I direct that the defendants shall file a statement of defense to the plaintiffs' further amended statement of claim within 28 days of receipt.

[92.5] I make no orders on the defendants' application for particulars at this time.

[92.6] The restraining orders of 26 August 2014 and 12 November 2014 are discharged.

[92.7] I will convene a directions conference immediately upon receipt of the defendants' statement of defense or earlier upon application of either party

Costs

[93] If the parties cannot agree on costs I will receive submissions within 21 days by memoranda.

Police v Tapueluelu

Supreme Court, Nuku'alofa
Paulsen CJ
AM 27/14

14 May 2015; 21 May 2015

Sentencing appeal – appeal against discharge without conviction – Magistrate erred – particularly serious offending – appeal allowed

The respondent pleaded guilty to two offences in that he caused grievous bodily harm to Penisimani Pasese and Tomasi Talanoa Taufa on 24 April 2014 at Vava'u. On 28 August 2014 he was discharged without conviction by the Police Magistrate. The Crown appealed against the discharge.

Held:

1. Before deciding to exercise its discretion and make an order discharging an accused without conviction the Court must undertake a process of analysis and reasoning as follows:
   a. First, the Court has to consider all the circumstances of the case including the nature of the offence and character of the offender; and
   b. Having done so, the Court must form the view that by reason of those circumstances it is inexpedient to inflict punishment upon the accused; and
   c. That the making of a probation order is not appropriate.

   The Magistrate's sentencing remarks show that he gave inadequate consideration to the matters in paragraphs a and b and no consideration at all to the matter in paragraph c. Accordingly, he acted on wrong principle.
2. The court found that the offending was particularly serious. The court considered the degree of violence used, the fact that the offending was premeditated, and there was in fact no provocation for the assaults. In any event, the respondent's belief that the victims had taken the cellphone could never justify what he did. Further the respondent used his position as a Police Officer to facilitate the offending and that was a grave breach of the community's trust.
3. The court balanced the gravity of the offending with the possible consequences of a conviction upon the respondent and could not come to a view for the purposes of section 204 that it was inexpedient to inflict punishment on him. To the contrary, the Court was bound to convict him and impose a penalty that reflected the seriousness of the offence.

4. The appeal was allowed. The order made in the Magistrate's Court that the respondent be discharged without conviction was quashed. It was not appropriate for the case to be referred back to the Magistrate's Court and the court would hear from counsel on sentence.

Cases considered:

Fisheries Inspector v Turner [1978] 2 NZLR 233 (CA)
R v Mafi (CR32/2013)
R v Niulala (CR73 of 2011)
R v Taufa (CR97/13)
R v Tu'iha'ateiho (CR 116 of 2013)

Statute considered:

Criminal Offences Act (Cap 18)

Counsel for the appellant : Mrs Langi
Counsel for the respondent : Mr Pouono

Ruling

[1] Mr. Tapueluelu was charged with two offences under Section 107 of the Criminal Offences Act that he did cause grievous bodily harm to Penisimani Pasese and Tomasi Talanoa Taufa on 24 April 2014 at Vava'u.

[2] Mr. Tapueluelu pleaded guilty to both charges before a Police Magistrate at Nuku'alofa and on 28 August 2014 he was discharged without conviction under Section 204 of the Criminal Offences Act. The Crown has appealed from the Magistrate's decision and this ruling deals with that appeal.

The facts

[3] Mr. Tapueluelu is according to his Counsel, about 55 years old. He is a senior Police Officer with over 30 years experience and has no previous convictions.

[4] On 24 April 2014 Mr. Tapueluelu was at Vava'u where I understand he and his wife have a store. His wife's cellphone went missing and Mr. Tapueluelu decided that it must have been taken by Penisimani Pasese and Tomasi Talanoa Taufa who had recently been to the store. I understand that they were aged 14 and 16 years old respectively at the time.

[5] Mr. Tapueluelu and another person (who I understand may have been his son) went out and searched for the two youths. They first came across Tomasi Taufa and drove him to the parking lot of the local Police Station. He was questioned about the cellphone and when he denied knowledge of what had happened to it Mr. Tapueluelu assaulted him by slapping him around the head and then punching him in the right eye. There is a medical report which describes injuries consistent with such an attack.

[6] The three then drove and located Penisimani Pasese and he too was driven to the parking lot of the Police Station. Penisimani Pasese also denied any knowledge of

what had happened to the cellphone and Mr. Tapueluelu then administered a more serious beating to him which involved repeated punching and kicking him while he was on the ground. In his statement Penisimani' said he blacked out and that his head was hit with a pole. It was fortunate that another senior Police Officer arrived on the scene at this time and put an end to the assault.

[7] I should add at this point two important points. First, it was not suggested to me that either victim had taken the cellphone and it seems Mr. Tapueluelu jumped to a most tragic and incorrect conclusion. Secondly, both victims suffered injuries but not of a permanent nature.

[8] Before the Magistrate Mr. Tapueluelu elected to have the charges dealt with under the enhanced jurisdiction of that Court and gave early notice of his intention to plead guilty and seek a discharge without conviction. There were a number of adjournments before the hearing on 28 August 2014. At that hearing Mr. Tapueluelu was represented by Mr. Pouono and Crown Counsel was also present. I have seen a record of the sentencing by the Magistrate with which no issue has been taken by either side. His sentencing remarks are very brief. The record shows that the Magistrate stated that he had received a call from "the victims" advising that a settlement had been reached with Mr. Tapueluelu and asking for the case be cancelled because "they are related and living as a family with the defendant". The Magistrate said:

> "Therefore, I sentence this case:
>
> The accused is therefore discharged without conviction under Section 204. The victims had contacted me that they are satisfied and there is some help from the defendants to them."

[9] The Magistrate should not, of course, have been speaking with the victims outside of a Court hearing with all parties present. The Magistrate did have before him a letter dated 18 August 2014 signed by the two victims and Tomasi Taufa's mother which sought leniency for Mr. Tapueluelu as follows:

> "It is true, there was some sorrow but now there has been a settlement and apologies were made and some money was given to one of the victims, Tomasi Talanoa Taufa ($200). We're grateful for we are related but I sincerely hope this problem has taught Taniela to be more careful in carrying out his duties as a Police officer of Tonga.
>
> I plead for your mercy and to give him another chance for his work based on making a living for his family. And I sincerely hope his methods would be better in carrying out his duties to the people and the country of Tupou."

The statutory provision

[10] Section 204 provides:

> 204 Discharge without conviction
>
> (1) Where a court is of the opinion, having regard to the circumstances including the nature of the offence and character of the offender, that it is inexpedient to inflict punishment and that a probation order is not appropriate, it may make an order discharging him absolutely or alternatively discharging him subject to the condition that he commits no offence during such period, not exceeding 3 years from the date of the order, as may be specified therein.
>
> (2) A discharge under this section is deemed to be an acquittal.
>
> (3) A court discharging an offender under this section may-
>
> (a) make an order for payment of costs or the restitution of any property; or
>
> (b) make any order for the payment of any sum that the court thinks fair and reasonable to compensate any person who, through, or by means of, the offence, has suffered—
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> (i) loss of, or damage to, property;
>
> (ii) emotional harm; or
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> (iii) loss or damage consequential on any emotional or physical harm or loss of, or damage to, property.

[11] Before deciding to exercise its discretion and make an order discharging an accused without conviction the Court must undertake a process of analysis and reasoning as follows:

> [11.1] First, the Court has to consider all the circumstances of the case including the nature of the offence and character of the offender; and
>
> [11.2] Having done so, the Court must form the view that by reason of those circumstances it is inexpedient to inflict punishment upon the accused; and
>
> [11.3] That the making of a probation order is not appropriate.

[12] It is quite clear from the Magistrate's sentencing remarks that he gave inadequate consideration to the matters in paragraphs [11.1] and [11.2] (without any reference to the terms of the Act or relevant principles) and no consideration at all to the matter in paragraph [11.3]. Accordingly, he acted on wrong principle.

The Court's approach

[13] As to the approach that the Court should take to the question of whether it is inexpedient to inflict punishment, this involves a balancing of the gravity of the offending by reference to the character and circumstances of the offender and the

facts of the particular case against the direct and indirect consequences of a conviction. The Court must determine if the indirect and direct consequences of a conviction would be out of all proportion to the gravity of the offending. In arriving at a view the facts of past cases are of assistance but no two cases are likely to be exactly the same.

[14] *R v Tu'iha'ateiho* (CR 116 of 2013) was a case where the accused was facing firearm charges and where a discharge without conviction was sought on the grounds that the accused was a Noble with responsibilities to the Realm and the community and a conviction might have impaired his ability to travel. Cato. J referred with approval to a decision of Richardson J in *Fisheries Inspector v Turner* [1978] 2 NZLR 233 where the learned judge observed:

> In considering the exercise of discretion under section 42 the Court is required to balance all the relevant public interest considerations as they apply in the particular case.
>
> and
>
> It must have regard to the seriousness of the offence and to the gravity with which it is viewed by Parliament, to the seriousness of the particular offending; to the circumstances of the particular offender in terms of the effect on his career, his pocket, his reputation and any civil disabilities consequential on his conviction; and indirect consequences. And if the direct and indirect consequences of a conviction are, in the Court's judgment, out of all proportion to the gravity of the offence, it is proper for a discharge…to be given.
>
> and
>
> The jurisdiction to discharge under section 42 is one that must be exercised sparingly."

[14] In *R v Tu'iha'ateiho*, Cato J refused a discharge without conviction because he considered that the licensing and security of firearms was a matter of great concern and that Parliament had made its intent plain by providing for imprisonment as the appropriate penalty. He considered it would send the wrong message to the Tongan community if persons could avoid conviction for possession of firearms by an appeal to the avoidance of possible travel restrictions. It followed that the public interest factors and the need to impose a conviction outweighed the inconvenience and hardship that would be suffered by the accused.

The Crown's position

[16] The position of the Crown is that the discharge without conviction granted to Mr. Tapueluelu was a manifestly inadequate response to his offending. The Crown said that the Magistrate was wrong because he gave inadequate weight to the aggravating

features of the case, too much weight to mitigating factors and failed to recognise the seriousness of the charges and the circumstances of the offending.

[17] The Crown submitted that the particular aggravating features included that Mr. Tapueluelu is an experienced senior Police Officer, that he assaulted two members of the public and they sustained serious injuries, that he used his position as a Police Officer to facilitate the assault and that there was a serious breach of the trust the community puts in him as a Police Officer. The Crown also expressed the need for deterrence. It was acknowledged that Mr. Tapueluelu was entitled to credit for his early guilty plea, the payment of compensation, the fact that he was a first time offender and for his genuine remorse but, it was submitted, none of that justified discharging him.

[18] I was referred to *R v Mafi* (CR32/2013) which was a case of causing grievous bodily harm with a machete where no permanent injury was inflicted on the victim. In that case Cato. J considered that the starting point for sentencing purposes was six and a half years imprisonment but he reduced that to three years due to significant mitigating factors. He also fully suspended the sentence of imprisonment because of exceptional circumstances including the offender's serious ill-health. Whilst accepting that *R v Mafi* involved the use of a weapon, and therefore might for that reason be considered a more serious case, the Crown submitted that it indicated that a period of imprisonment was required here.

The defence's position

[19] Mr. Pouono confirmed that Mr. Tapueluelu was a Police Officer with a long record of good service of about 30 years and no prior convictions. The assaults had occurred, he said, because Mr. Tapueluelu had believed that the cellphone had been taken by the victims and that they were lying to him.

[20] Mr. Pouono emphasised that Mr. Tapueluelu's intention to seek a discharge without conviction was made at an early stage in the Magistrate's Court and there were a number of hearings before the Magistrate satisfied himself that it was appropriate to make the order. He pointed out also that Crown Counsel was present at the hearing and took a neutral position. In my view, it certainly would have been appropriate in the circumstances if Crown Counsel had addressed the Magistrate on the applicable law but of course that does not in any way alter the Magistrate's obligation to impose an appropriate sentence as required by law.

[21] Mr. Pouono also referred me to two cases. The first was *R v Niulala* (CR73 of 2011) which was a case where a civil servant of long standing of a similar age to Mr. Tapueluelu had been charged with both indecent assault and assault. Lord Chief Justice Scott granted the accused a discharge with a condition to be on good behavior for two years. Mr. Pouono submitted that *R v Niulala* was authority to support the Magistrate's approach in this case. I do not get a great deal of assistance from this case. Both the indecent assault and assault were at the very low end of the scale of offending and there were not the aggravating features that are present in this case.

[22] The second case Mr. Pouono referred me to was *R v Taufa* (CR97/13) which Mr. Pouono said was a domestic assault where the charges were withdrawn because the

victim had said she had forgiven the defendant and did not want her complaint to proceed. This case does not assist me as there was no ruling of the Court granting a discharge. I certainly would not accept as a matter of principle that the Court should grant a discharge in every case that a victim requests it.

[23] I asked Mr. Pouono to address me on the likelihood that a conviction would result in the termination of Mr. Tapueluelu's employment and loss of benefits. He referred me to clause 23 of the Constitution (as amended in 2013). I was not specifically addressed on whether Mr. Tapueluelu is a person to whom that provision applies. In any event, clause 23 only operates when the person convicted is sentenced to imprisonment for two years or more. There is no certainty this will be the case if Mr. Tapueluelu is convicted of these offences. It appears to me also that clause 23 is more relevantly a consideration to be taken into account by the Court following conviction when deciding whether to impose a period of imprisonment (as opposed to other sentencing options) and for how long.

Is it inexpedient to inflict punishment?

[24] As I have said, to determine whether it is inexpedient to inflict punishment, broadly the Court's obligation is to balance the gravity of the offence against the consequences of a conviction.

[25] Taking into account everything that can be said in support of Mr. Tapueluelu and his character, this offending was particularly serious. As I expressed to Counsel, I take this view because of the degree of violence, that the offending was premeditated (in that Mr. Tapueluelu went in search of the two victims and upon collecting them at different times drove them to a Police parking lot where he assaulted them) and there was in fact no provocation for the assaults. In any event, Mr. Tapueluelu's belief that the victims had taken the cellphone could never justify what he did. There is also much force in the Crown's submissions that Mr. Tapueluelu used his position as a Police Officer to facilitate the offending and that is a grave breach of the community's trust.

[26] When I balance the gravity of the offending with the possible consequences of a conviction upon Mr. Tapueluelu I simply cannot come to a view for the purposes of section 204 that it is inexpedient to inflict punishment on him. To the contrary, the Court is bound to convict him and impose a penalty that reflects the seriousness of the offence.

The result

[27] The appeal is allowed. The order made in the Magistrate's Court that Mr. Tapueluelu be discharged without conviction is quashed. It is not appropriate for the case to be referred back to the Magistrate's Court and I will hear from Counsel on sentence.

Fakafanua v Faua Development Ltd (in receivership) anors

Land Court, Nuku'alofa
Paulsen, President
LA 9/2014

6 May 2015; 1 June 2015

Civil procedure – strike out application – issues already decided in earlier proceeding – claim struck out

The plaintiff, Mr Fakafanua was a business man and was a director and shareholder of the first defendant company, Faua. Faua had been placed into receivership. The second defendant, the Bank, advanced T$650,000 to Faua on various securities and was not repaid. The third defendant (the Minister) was the representative of the Crown in all matters relating to land. Mr Fakafanua owned an allotment that was subject to a lease in favour of Faua. Faua obtained an advance from the Bank on the security of a mortgage over its leasehold land, an equitable mortgage of all the assets and undertaking of Faua (including the buildings and improvements owned by it on the land) and Mr Fakafanua's personal guarantee. Mr Fakafanua challenged the validity of the lease and the Bank's securities. All defendants apply to strike out the claim. The principal issues were whether the proceeding was an abuse of process as being an attempt to re-litigate issues finally determined in earlier proceedings and whether Mr Fakafanua had standing to challenge the Bank's securities.

Held:

1. The principles upon which the Court would strike out an application were well-settled. No party should have his claim denied without a hearing in the ordinary way, except where the claim is so hopeless that it could not possibly succeed. The Court would exercise its jurisdiction to strike out sparingly and would generally only do so when there was no reason to suppose the plaintiff would be able to remedy deficiencies in its pleading by amendment.
2. The issues Mr Fakafanua sought to raise against Faua were decided in the earlier proceeding. The finding that the lease was valid and enforceable was the foundation for, and fundamental to, the Orders that the Chief Justice made that Faua was entitled, as against Mr Fakafanua, to possession of the land. Faua had no right to possession of the land except under the lease. As between Mr Fakafanau and Faua the validity of the lease and equitable mortgage were beyond challenge. The claim against Faua was struck out in its entirety.

3. Mr Fakafanua could challenge the validity and enforceability of his personal guarantee, but not in the Land Court. There were already civil proceedings between Mr Fakafanua and the Bank in relation to the guarantee. Those proceedings were before the Supreme Court and that was the proper forum to determine what, if any, liability Mr Fakafanua had under his guarantee. The claim against the Bank was struck out in its entirety.
4. As the claims against both Faua and the Bank have been struck out, and there was no independent relief sought from the Minister, the claim against him must be struck out also.

Cases considered:
Blair v Curran [1939] 62 CLR 464
Cowley v Tourist Services Ha'apai Ltd and Fund Management Ltd [2001] Tonga LR 183 (CA)
Kolo v Bank of Tonga [1997] Tonga L.R. 181
Lees v Lee's Air Farming Ltd [1960] UKPC 33
Mangisi v Koloamatangi (Unreported Appeal No 11/98, 23 July, 1999)
Salomon v A Salomon Co Ltd [1896] UKHL 1
Tu'uvai v Kingdom of Tonga [2007] Tonga LR 277
Yat Tung Investment Co Ltd v Dao Heng Bank Ltd [1975] A.C. 581

Statute considered:
Land Act (Cap 132)

Rules considered:
Land Court Rules 2007
Supreme Court Rules 2007

Counsel for the plaintiff	:	Mr K Barron-Afeaki SC
Counsel for the first and second defendants	:	Mrs D Stephenson
Counsel for the third defendant	:	Mr S Sisifa

Ruling

The applications before the Court

[1] The plaintiff (Mr. Fakafanua) is the owner of an allotment that is subject to a lease in favour of the first defendant (Faua). He was at all material times a shareholder and director of Faua. Faua obtained an advance from the second defendant (the Bank) on the security of a mortgage over its leasehold land, an equitable mortgage of all the assets and undertaking of Faua (including the buildings and improvements owned by it on the land) and Mr. Fakafanua's personal guarantee. Mr. Fakafanua now seeks to challenge the validity of the lease and all the Bank's securities.

[2] All defendants apply to strike out this claim relying on O.8 R.8 Supreme Court Rules (as applied by O.2 R.2 Land Court Rules). The principal issues are whether this

proceeding is an abuse of process as being an attempt to re-litigate issues finally determined in earlier proceedings and whether Mr. Fakafanua has standing to challenge the Bank's securities. This ruling deals with those strike out applications. Before turning to consider the merits of the applications I shall set out the background facts.

The facts

The parties

[3] Mr. Fakafanua is a business man. Faua is a company of which he was at all material times a director and shareholder. Faua is now in receivership. The Bank advanced T$650,000 to Faua on various securities and has not as yet been repaid. The third defendant (the Minister) is the representative of the Crown in all matters relating to land.

Vuna Developments

[4] Mr. Fakafanua has a town allotment on Vuna Road, Ma'ufanga. There is a bar and restaurant on a portion of that land. Around 2006 Mr. Fakafanua and a company controlled by one Sosaia Moehau, called Epic International Limited, agreed on a joint enterprise to complete the bar and restaurant and carry on business. Vuna was subsequently incorporated and arranged financed from the Bank. Disagreements arose between Mr. Moehau and Mr. Fakafanua. The disputes were settled in around January 2009. The object of the settlement was to separate the business affairs of Mr. Fakafanua and Mr. Moehau. Mr. Fakafanua incorporated Faua to act as a vehicle to raise a loan from the Bank to acquire the assets and business of Vuna. Vuna in turn used the sale proceeds to settle its indebtedness to the Bank at a substantial discount. At the same time Mr. Moehau transferred his shares in Vuna to Mr. Fakafanua and resigned as a director of Vuna.

[5] In April 2009 the Bank made an advance of T$650,000 to Faua which was used by Faua to acquire the assets of Vuna. The Bank required security for the advance by way of a mortgage of a 50 year lease to be granted by Mr. Fakafanua to Faua over the land upon which the bar and restaurant was constructed, an equitable mortgage over all of the assets and undertaking of Faua (the equitable mortgage) as well as Mr. Fakafanua's personal guarantee which was limited as to amount.

The lease

[6] A 50 year lease from Mr. Fakafanua to Faua was issued on 26 August 2010 as registered Lease No 7888 (the lease). By August 2010, Faua was already in default of its obligations to the Bank and a Receiver had been appointed. As a consequence, when the lease was issued it was signed on behalf of Faua by the Receiver.

The earlier proceeding

[7] It appears that in January 2011 the Receiver considered that Mr. Fakafanua was preventing her from having access to the land, buildings and improvements. On 24 January 2011 proceedings were filed by Faua against Mr. Fakafanua in the Land Court under LA 1 of 2011 (the earlier proceeding). The orders sought required Mr. Fakafanua to vacate the land and restraining him or his agents from interfering with Faua's right to possession of the land, the buildings and improvements during the term of the lease. Mr. Fakafanua defended the claim. He put in issue, inter alia, the validity of the equitable mortgage under Tongan law. Chief Justice Scott directed that the challenge to the equitable mortgage be determined as a preliminary issue. He issued a ruling on 29 July 2011 (the first ruling) in which he concluded that there was no objection in Tongan law to the creation of an equitable mortgage over leasehold land.

[8] Mr. Fakafanua filed an appeal to the Court of Appeal from the first ruling but it was "dismissed as withdrawn" on 27 April 2012.

[9] Chief Justice Scott determined the earlier proceeding by a second ruling on 3 September 2011 (the second ruling) in which he rejected further defences raised by Mr. Fakafanua and found that Faua was entitled to the relief it sought in the statement of claim.

The civil proceeding

[10] In April 2014 the Bank commenced proceedings against Mr. Fakafanua under his personal guarantee. Mr. Fakafanua filed a defence, following which the Bank applied for summary judgment. That proceeding is yet to be heard.

This proceeding

[11] In April 2014 Mr. Fakafanua commenced this proceeding. The statement of claim openly challenged the first ruling. At paragraph 20 it alleged that "The creation of an equitable mortgage or charge over leasehold land, as held in the [first ruling] circumvent the strict land requirements in Part VI of the Land Act". At paragraph 23 it was alleged that "the equitable mortgage agreement between [Mr. Fakafanua] and the [Bank] dated 3 April 2013 has no application over lease No. 7888" and then in paragraph 24 that Faua and the Receiver have no legal, enforceable or recognised rights at law which entitle them to occupy and control the lease and it should remain unencumbered.

[12] All defendants applied to strike out the statement of claim. Following the filing of those applications, Mr. Fakafanua filed an amended statement of claim which is the relevant pleading now before the Court.

The amended statement of claim

[13] The amended statement of claim is a most unsatisfactory pleading. It is not in Form 2 as required by O.8 R.2 Supreme Court Rules. It does not contain a concise statement of the nature of the claim and the relief sought (although the first statement

of claim did). That would have been very useful. O.8 R.2(b) requires that the statement of claim state "the material facts upon which the plaintiff relies" but large parts of the amended statement of claim are in the nature of legal submission. It is trite that a statement of claim should plead facts not law. The statement of claim must also sufficiently inform the Court and the parties against whom relief is sought of the plaintiff's cause of action. There is nothing pleaded that one can recognises as a cause of action in the usual sense. It is not satisfactory, as has been done in this case, to lump all allegations of fact and law against all defendants together into one, leaving it to the defendants to extract from those allegations the cause or causes of action that they may have to respond to at trial. Because there has been no attempt to distinguish the causes of action against each defendant there is but one prayer for relief and it is not clear what relief is sought from which defendant. Furthermore, there is no obvious connection between any particular relief sought and the allegations in the body of the document. There is also a most unsatisfactory attempt to incorporate 23 paragraphs from the statement of claim originally filed by no more than a single reference (paragraph 19). The Court's task in dealing with the strike out applications has been made much more difficult by the state of the amended statement of claim.

[14] In his submissions for Mr. Fakafanua, Mr Barron-Afeaki argued that there was "fraud, forgery and misrepresentation" that led to the granting of the lease and the creation of the securities. The specific matters underpinning this allegation appear to be as follows:

[14.1] That Mr. Fakafanua had never intended to grant a new lease to Faua, rather his intention was to assign the lease in favour of Vuna to Faua.

[14.2] That the land area leased by Faua was materially different from the area shown on the lease application form.

[14.3] That Mr. Fakafanua he did not sign the lease and it appeared to have been signed by a third party on behalf of Faua without lawful authority.[37]

[14.4] That Faua never completed any shareholders resolutions, directors resolutions or directors certificates authorising Faua to take a lease of the land or to obtain the advance or grant security to the Bank and that the Bank knew or ought to have known of all of these deficiencies and irregularities and deceitfully and fraudulently ignored them.

[14.5] That the equitable mortgage of Tongan leasehold land is invalid and unlawful.

[14.6] That the buildings fittings and fixtures on the land were real property under Tongan law and the Bank had no rights to authorise anyone to enter onto the land and remove them.

[14.7] That Mr. Fakafanua received bad advice from his lawyer who acted when conflicted, did not follow his instructions and misled him as to the nature of the documents he was signing.

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[37] It appeared that at the hearing Mr Barron-Afeaki accepted that the signature on the lease was the Receivers so this allegation falls away but it is no consequence to my decision.

[15] Mr. Fakafanua seeks declarations that the lease along with the loan agreement between Faua and the Bank and all securities taken by the Bank for its advance are null and void *ab initio*. He also seeks a declaration that the buildings, fittings and fixtures on the land subject to the lease are real property.

The approach to strike out applications

[16] The principles upon which the Court will act under O.8 Rule 8 are well settled. No party should have his claim denied without a hearing in the ordinary way, except where the claim is so hopeless that it cannot possibly succeed. The Court will exercise its jurisdiction to strike out sparingly and will generally only do so when there is no reason to suppose the plaintiff will be able to remedy deficiencies in its pleading by amendment.

The claim against Faua

[17] Against Faua Mr. Fakafanua asserts that the lease and equitable mortgage are invalid and unenforceable. He seeks to prevent interference with what he regards as his "rights to the quiet enjoyment and possession of the land described in ...[the lease], building and improvements thereon"[38].

[18] Faua argues that it is an abuse of the process of the Court (O.8 R.8(1)(d)) for Mr. Fakafanua to raise these issues as they have been previously decided in the earlier proceeding. I accept that it is an abuse of the process of the Court, and a valid basis to strike out a claim, to raise in subsequent proceedings matters that have been litigated and finally determined in earlier proceedings.[39]

[19] Mr. Barron-Afeaki rejected the argument that Mr. Fakafanua was attempting to re-litigate issues decided in the earlier proceeding. He submitted that there is no Court of Appeal decision in Tonga to support the ruling of Scott C.J that an equitable mortgage of a leasehold interest is recognised by Tongan law and that in any event this is an important constitutional issue which was not fully and properly argued in the earlier proceeding. He said that Scott. C.J's ruling was in respect to an "incidental application: not in respect of a substantive issue pled in the Statement of Claim and supported by a Prayer for Declaratory relief: and accordingly does not amount to Res Judicata". Mr. Barron-Afeaki was critical of Mr. Fakafanua's Counsel in the earlier proceeding and submitted that the issues raised as to the validity of an equitable mortgage and the status of buildings and improvements under Tongan law (as real or personal property) are of such great importance that they need to be "thrashed out" properly in this proceeding. He also submitted that the matters of "fraud, forgery and misrepresentation" that Mr. Fakafanua now raises are all new and were not the subject of any rulings in the earlier proceeding.

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[38] Paragraph 1 of the statement of claim.
[39] Yat Tung Investment Co Ltd v Dao Heng Bank Ltd [1975] A.C. 581 and Tu'uvai v Kingdom of Tonga [2007] Tonga LR 277.

[20] Section 99 of the Evidence Act provides:

> Every judgment is conclusive proof in all subsequent proceedings between the same parties or their privies of facts directly in issue in the case actually decided by the Court, but not of facts which were only collaterally or incidentally in issue even though the decision of such facts was necessary in order to enable the Court to decide the case.

[21] As with the doctrine of *res judicata* at common law, section 99 reflects the interests of the community in the determination of disputes through the finality and conclusiveness of judicial decisions as well as the interests of individuals to be protected from repeated suits for the same cause.

[22] Section 99 applies only to facts "directly in issue in the case actually decided by the Court" and not to facts that are "collaterally or incidentally in issue". I was not assisted with any authorities on what is meant by the words "collaterally or incidentally in issue" but their meaning is clear from the context and a strict construction is required. A judgment will be conclusive proof of those facts which the judgment necessarily established as the foundation or justification of its conclusions; that is the ingredients of the cause of action or the title to the right established.[40]

[23] There is no suggestion that the Court lacked jurisdiction in the earlier proceeding or that the earlier proceeding involved different parties. I need only therefore consider the following:

> [23.1] Is Mr. Fakafanua raising the same issues as were decided in the earlier proceeding?
>
> [23.2] If so, were those findings directly (or merely collaterally or incidentally) in issue in the earlier proceeding?

[24] The statement of claim in the earlier proceeding put in issue Faua's right to possession of the land under the lease at paragraphs 10 and 13. Paragraph 13 pleaded "... [Mr. Fakafanua] has no lawful right to occupy the Land and Premises during the term of registered lease 7888." It also put in issue the Receiver's rights to possession of the buildings and improvements and to conduct the affairs of Faua under the equitable mortgage at paragraphs 11 and 12 which stated "Pursuant to the terms of the Equitable Mortgage [the Receiver] is the agent of ... [Faua] with the power to conduct the affairs of ... [Faua] on its behalf" and that "[Mr. Fakafanua] denied ... [Faua's] receiver ... to access and enter the Land and the Premises".

[25] Mr. Fakafanua defended the earlier proceeding challenging the validity of the equitable mortgage under Tongan law. That challenge was the subject of the first ruling. In paragraph 10, Scott C.J noted that the argument for Mr. Fakafanua was that under Tongan law equitable mortgages may not be created or enforced over or in respect of land because of the provisions of clause 104 of the Act of Constitution and sections 96 and 97 of the Land Act. The very same arguments are raised by Mr. Fakafanua in this proceeding. He also states in the first ruling that the issue raised by Mr. Fakafanua was "that the mortgage was invalid for want of registration"

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[40] Blair v Curran [1939] 62 CLR 464, 531-533.

(paragraph 7) and "that such mortgages may not be "created or enforced over or in respect of land". The Chief Justice determined the issue at paragraph 17 when he concluded that there was no objection in Tongan law to the creation of an equitable mortgage over leasehold land. He also recorded that Mr. Fakafanua had not argued that there was an objection to the creation of an equitable mortgage over Faua's other assets namely "the buildings standing on the land and their contents".

[26] As far as the lease is concerned, the Chief Justice recorded as accepted by Mr. Fakafanua that he had no right to occupy the land or premises during the term of the lease (paragraph 9 of the first ruling and paragraph 13 of the second ruling) thereby acknowledging the validity and enforceability of the lease. In paragraph 13 the Chief Justice stated "the validity of the lease 7888 is not questioned". I note also that at paragraph 13 of the second ruling the Chief Justice noted that there was a possible dispute as to the precise area of the allotment that was to be subject to the lease but that Mr. Fakafanua did not challenge the validity of the lease itself. Mr. Fakafanua raises that same matter in this proceeding. The Chief Justice rejected this defence on the basis that no particulars of the alleged inconsistency were provided nor was there any suggestion that such inconsistency prevented Faua from operating without breaching Mr. Fakafanua's rights. Importantly for present purposes, the Chief Justice noted at paragraph 8 of the second ruling that Mr. Fakafanua admitted that he "has no lawful right to occupy the land and premises during the term of registered lease number 7888".

[27] It is clear therefore that the issues Mr. Fakafanua seeks to now raise against Faua were decided in the earlier proceeding.

[28] I reject the argument for Mr. Fakafanua that the findings were "incidental" and "not in respect of a substantive issue pled in the statement of claim in the earlier proceedings". To the contrary, there were specific pleadings in relation to both matters.

[29] With respect to the Chief Justice's finding that the equitable mortgage was valid under Tongan law it is obtuse to suggest that this was decided only incidentally when it was a stand-alone preliminary issue and the subject matter of the first ruling. Chief Justice Scott described the issue in paragraph 2 of the second ruling as "central to the defence" and "this central point of the defence". That finding was amenable to appeal and Mr. Fakafanua exercised his right of appeal. Having abandoned his appeal he cannot raise the issue again.

[30] The finding that the lease was valid and enforceable was the foundation for, and fundamental to, the Orders that the Chief Justice made that Faua was entitled, as against Mr Fakafanua, to possession of the land. Faua had no right to possession of the land except under the lease.

[31] It does not matter that Mr. Fakafanua now wants to challenge those findings by raising matters that he could but did not raise in the earlier proceeding. Furthermore, (and without intending any disrespect to the thoughtful arguments advanced by Mr Barron-Afeaki) if there are important constitutional issues that need to be resolved, that must await later cases between other parties. As between Mr. Fakafanau and Faua the validity of the lease and equitable mortgage are beyond challenge.

[32] There was no suggestion that Mr. Fakafanua is able to pursue other claims that are not presently pleaded. I therefore strike out his claim against Faua in its entirety.

The claim against the Bank

[33] As far as the Bank is concerned Mr. Barron-Afeaki argued that as the owner of the land subject to the lease Mr. Fakafanua must have standing to challenge security taken over the lease and the improvements on the land. It was not explained why this should be so.

[34] There is no pleading that Mr. Fakafanau was a party to the loan agreement or the agreements creating the Bank's securities (other than the guarantee). Mr. Fakafanua's pleading is that the advance was made by the Bank to Faua and the securities taken by the Bank from Faua. The security documents are before the Court in an affidavit of Mr. Ralph Stephenson. Except for his guarantee, Mr. Fakafanua is not a party to them, at least not in his personal capacity. Where Mr. Fakafanua has signed the documents he has done so in the capacity as a director of Faua. Mr. Fakafanua does not claim that he owns the buildings and improvements on the land either.

[35] Mr. Fakafanua has no standing to challenge the contractual arrangements between Faua and the Bank to which he was not a party. As I have said, it was not explained to me why his status as the landowner would entitle him to do so. I was not referred to anything in the Land Act or the general law that supports the argument. His status as a shareholder and director of Faua certainly does not entitle him to do so either. If authority is required for that proposition one need go no further than *Salomon v A Salomon Co Ltd*[41] and *Lees v Lee's Air Farming Ltd.*[42]

[36] If the arrangements between Faua and the Bank were entered into as a result of "fraud, forgery and misrepresentation" as alleged then it is Faua that has title to the right to bring an action against the Bank not Mr. Fakafanua.

[37] In so far as Mr. Fakafanua challenges the validity and enforceability of his personal guarantee that is a matter that he can pursue, but not in the Land Court (section 149 of the Land Act). There are already civil proceedings between Mr. Fakafanua and the Bank in relation to the guarantee. Those proceedings are before the Supreme Court and that is the proper forum to determine what, if any, liability Mr. Fakafanua has under his guarantee.

[38] I note that as against the Bank Mr. Fakafanua also seeks a declaration that the buildings and improvements on the leased land are real property not subject to the equitable mortgage. I consider the argument that Mr. Fakafanua seeks to advance is quite untenable as a matter of law (O.8. R.8(1)(a)). Despite Mr. Barron-Afeaki's resourceful argument that there is statutory recognition that buildings and improvements are real property in the Memorandum of Mortgage Form 2 of Schedule

[41] [1896] UKHL 1.
[42] [1960] UKPC 33.

VIII to the Land Act, the overwhelming weight of authority is to the contrary. *Cowley v Tourist Services Ha'apai Ltd*[43], *Mangisi v Koloamatangi*[44], *Kolo v Bank of Tonga*[45]

[39] In the absence of any suggestion that there are other claims Mr. Fakafanua could pursue against the Bank his claim is struck out in its entirety.

The Minister

360 [40] Mr Barron-Afeaki argued that the Minister needs to be party to this proceeding to respond to the important legal and constitutional issues that are raised. As I have struck out the claims against both Faua and the Bank and there is no independent relief sought from the Minister it follows that the claim against him must be struck out also.

The result

[41] The claims by Mr. Fakafanua against all defendants are struck out.

[42] The defendants are all entitled to their costs which if not agreed are to be taxed by the Registrar.

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[43] [2001] Tonga LR 183.
[44] (Unreported Appeal No 11/98, 23 July, 1999).
[45] [1997] Tonga L.R. 181.

Fili v Afei

Supreme Court, Family Divorce Jurisdiction, Nuku'alofa
Paulsen CJ
FD 33/2015

21 May 2015; 3 June 2015

Divorce law – petition under section 3(1)(g) – no acts of a party that destroyed marriage – petition dismissed

The parties were married on 5 January 2012 and the respondent has refused to live with the petitioner since November 2013 when he returned to Tonga from Australia where he was on a seasonal workers scheme. The petitioner has petitioned for divorce on the ground set out in section 3(1)(g) of the Divorce Act, that the respondent has behaved in such a way that the petitioner could not reasonably be expected to live with the respondent.

Held:

1. What the petitioner described in his evidence was common following the failure of a marriage. Section 3(1)(g) was concerned with acts of a party to the marriage that destroyed the fabric of the relationship and resulted in the failure of the marriage; acts such as domestic violence, aggression or physical and mental abuse. Those acts were not present.
2. The court's obligation was to apply the law and, whilst there was no doubt that the marriage between the parties was over that did not entitle the petitioner to a divorce. The petitioner would be entitled, upon the expiration of two years from separation, (November 2015) to apply for a divorce on the grounds in section 3(1)(f) of the Act.
3. The petition for a divorce was dismissed.

Case considered:
Tonga v Falepapalangi [2009] Tonga LR 33

Statute considered:
Divorce Act (Cap 29)

Counsel for the petitioner : Mr Fili
No appearance for the respondent

Ruling

[1] This is a petition for divorce on the ground set out in Section 3(1)(g) of the Divorce Act that the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent.

[2] The parties were married on 5 January 2012 at 'Eua. The evidence of the petitioner was that the respondent has refused to live with him since November 2013 when he returned to Tonga from Australia where he was on a seasonal workers scheme. The respondent said that she hated the petitioner and did not want to see him again, that she does not care about him and her family does not like him either. The petitioner said the respondent sent their daughter away to be cared for by her parents at this time and he has had no chance to see her. Since all this occurred the petitioner has had no contact with the respondent except in relation to getting a divorce.

[3] At the conclusion of the petitioner's evidence I advised his counsel, Mr. Fili, that in my view the ground relied upon for divorce had not been made out. I gave him an opportunity to provide me with submissions on any relevant case law that may have a bearing on the petition before I made my ruling. I have now received a letter from Mr. Fili in which he sets out three matters which he submits justify the granting of a divorce in this case. In respect of these matters they are either a repetition of the petitioner's evidence or are the usual incidents of the separation of any married couple, namely the cessation of both sexual relations and the performance of domestic duties.

Discussion

[4] Whilst the petitioner will have been deeply hurt by his wife what he has described in his evidence is common following the failure of a marriage. Section 3(1)(g) is not concerned with such matters but with acts of a party to the marriage that destroy the fabric of the relationship and result in the failure of the marriage. Those are acts such as domestic violence, aggression or physical and mental abuse. *Tonga v Falepapalangi* [2009] Tonga LR 33.

[5] Any other interpretation would effectively mean that parties to a marriage would be entitled to a divorce upon separation and would deprive the grounds of divorce set out in section 3(1)(a) to (f) of the Divorce Act of any meaning. That is clearly not the law in Tonga.

[6] The Court's obligation is to apply the law and whilst there is no doubt that the marriage between these parties is over that does not entitle the petitioner to a divorce; at least not yet. On the information before the Court the petitioner will be entitled upon the expiration of two years from separation (November 2015) to apply for a divorce on the grounds in section 3(1)(f) of the Act.

[7] I dismiss the petition for a divorce.

Hingano v Hingano anor

Land Court, Nuku'alofa
Paulsen, President
LA 25/2014

28 May 2015; 3 June 2015

Civil procedure – interim injunction sought for eviction – subjects were not parties to the proceeding – application dismissed

There are three related Court proceedings underway. In this proceeding Hetueni Hingano (Hetueni) challenged the grant of an allotment named Kavelangi to Mr Nepote Hingano (Nepote), the child of Salesi and Sesilia. Hetueni asserted that the grant was, inter alia, obtained by fraud and that he was the legitimate son and heir of Salesi and entitled to the land. This was denied by Nepote and also by Salesi (although he was not a party). Counsel agreed that the fundamental issue in all three proceedings was whether Hetueni was the child of Salesi or the issue of an extra-marital relationship of Salesi's former wife. It was alleged that on the morning of 25 May 2015 Salesi and Sesilia broke into the house and announced that they were going to live there and then ordered the occupants out. Hetueni made an application for an interim injunction seeking to evict Salesi and Sesilia respectively from Kavelangi. Salesi and Sesilia opposed and denied breaking into the house – they said they entered peacefully. They said that they were in failing health, that they built the house whilst the land belonged to Salesi and that the property was not being maintained. Also, they did not accept that Hetueni had any right to the land.

Held:

1. Injunctions were granted to maintain the status quo pending the hearing of an action between the parties. Salesi and Sesilia were not parties to this proceeding or indeed any proceeding in which possession of the land was claimed from them. It was open to Hetueni to commence a proceeding against Salesi and Sesilia but until he did so an injunction could not be made against them except in the case of "extreme urgency". There was no extreme urgency here. Therefore the court did not have the power to make the injunction sought.
2. Whilst the court did not condone the actions of Salesi and Sesilia in occupying the land unannounced, there was nothing to suggest that damages would not be an adequate remedy should it be found that their occupation was unlawful and loss was suffered.
3. The application for an injunction was dismissed.

Cases considered:

American Cyanamid Co v Ethicon Ltd [1975] AC 396

Klissers Farmhouse Bakeries Ltd v Harvest Bakeries Ltd [1985] 2 NZLR 140 (CA)

Saxmere v New Zealand Wool Board Disestablishment Co Ltd (No 1) [2009] NZSC 72

Rules considered:

Supreme Court Rules 2007

Counsel for the plaintiff	:	Mr T Fakahua
Counsel for the first defendant and Salesi and Sesilia Hingano	:	Mrs F Vaihu
No appearance for the second defendant		

Ruling

[1] There is before the Court an application for an interim injunction made on behalf of Hetueni Hingano (Hetueni) seeking to evict Mr. Salesi Hingano and Mrs. Sesilia Hingano (Salesi and Sesilia respectively) from an allotment named Kavelangi.

[2] Before ruling on this application I need to set out some background information for the benefit of Counsel and the parties. I heard this application on Thursday, 28 May 2015 and reserved my decision. On Sunday, 31 May 2015 my wife and I were invited guests at a Church service. Following the service I was approached by Salesi and Sesilia who I did not recognise until they mentioned that they had attended a hearing in front of me the previous Thursday. I did not speak to them except to exchange the briefest of pleasantries and did not discuss the case with them. I subsequently learned that they may have been in photographs taken of my wife and me and members of the Church.

[3] I disclosed what had happened to Counsel and asked for their views on Monday, 1 June 2015. Mr. Fakahua expressed a preference that the application be dealt with by Justice Cato. I referred the application to Justice Cato but he has advised me that because of heavy trial commitments, including a murder trial involving Mr. Fakahua, he would not be able to rule on the application for many weeks. There are no other resident Judges.

[4] It is a fact of life in such a small nation that Judges will from time to time come into contact with litigants. In the circumstances that present themselves I have asked myself whether any fair minded, impartial and properly informed observer could reasonably believe on the facts as I have disclosed them that I may have been unconsciously biased by the contact that I have had with Salesi and Sesilia.[46] In the circumstances I have no doubt that they could not. I consider therefore the best course for the parties is for me to rule on the application myself.

[46] Saxmere v New Zealand Wool Board Disestablishment Co Ltd (No 1) [2009] NZSC 72.

The related proceedings

[5] There are three related Court proceedings underway. In this proceeding Hetueni is challenging the grant of Kavelangi to Mr. Nepote Hingano (Nepote), the child of Salesi and Sesilia. Hetueni asserts that the grant was, inter alia, obtained by fraud and that he is the legitimate son and heir of Salesi and entitled to the land. This is denied by Nepote and also by Salesi (although he is not a party to this proceeding).

[6] There is another land case under LA 27 of 2014 in which Nepote seeks possession of the land from 'Alisi and Ma'ake Kaufusi who occupied the land on the authority of Hetueni. Although Nepote is the registered owner of the land 'Alisi and Ma'ake Kaufusi have until recently been living there and defended this claim on the basis that Hetueni is the "proper person to hold the land".

[7] Finally in CV 74 of 2014 Salesi seeks the cancellation of the registration of Hetueni as his son.

[8] It is accepted by Counsel that the fundamental issue in all these proceedings is whether Hetueni is the child of Salesi or the issue of an extra-marital relationship of Salesi's former wife.

The events of 25 May

[9] On 25 May 2015 'Alisi and Ma'ake Kaufusi were in New Zealand and the land was being occupied by a number of other people with the authority of Ms Silioti Vaea (Silioti). She is the sister of Hetueni (and daughter of Salesi) and she has agreed to look after the land on Hetueni's behalf. The occupants I was told were Lesieli 'Aholelei, Hauhau 'Olive and some restaurant workers. I understand that the daughter and son in law of 'Alisi Kaufusi and Ma'ake Kaufusi had been living in the house but had moved temporarily to Tofoa.

[10] It is alleged that on the morning of 25 May 2015 Salesi and Sesilia broke into the house and announced that they were going to live there and then ordered the occupants out. It was also said that the occupants left to avoid "domestic violence". That same day this application for an injunction was filed.

[11] I required that the application be served on Salesi and Sesilia. They filed an affidavit on 27 May 2015 in opposition to the application in which they denied breaking into the house. They say they entered peacefully. They had recently returned to Tonga and had been living with Sesilia's brother, which for cultural reasons they have found uncomfortable. They say that after they entered the property Silioti was called and she ordered them to leave which they did not do. The occupants, apart from Hauhau Olive (who lives in another building on the land) then removed the louvres from the windows and other items as well as their personal belongings and left the property. They say that they are in failing health, that they built the house whilst the land belonged to Salesi and that the property was not being maintained. In addition to this, of course, they do not accept that Hetueni has any right to the land.

Injunction principles

[12] The principles that the Court will apply in deciding whether to issue or refuse an interim injunction are well known and are set out in *Klissers Farmhouse Bakeries Ltd v Harvest Bakeries Ltd*.[47] The applicant must show that there is a serious question to be tried (in the sense that it has made out a *prima facie* case) and that the balance of convenience favours the granting of the injunction. Having made these assessments the Court must stand back and look at where the overall justice of the case lies. If it can be shown that an applicant will be adequately compensated in damages and will suffer no irreparable injury if the injunction is not granted that is an important factor against the making of an order.

[13] I note that in this case there are before the Court in the affidavits filed very different versions of the events that occurred on 25 May 2015. I am in no position to resolve those differences[48] but in any event I do not consider I must do so for the reasons that follow.

Discussion

[14] Mr. Fakahua submitted that the balance of convenience favoured granting an injunction but it appears to me that he overlooks a fundamental hurdle. Injunctions are granted to maintain the status quo pending the hearing of an action between the parties. Salesi and Sesilia are not parties to this proceeding or indeed any proceeding in which possession of the land is claimed from them. It is open to Hetueni to commence a proceeding against Salesi and Sesilia but until he does so an injunction cannot be made against them except in the case of "extreme urgency". There is no extreme urgency here. (Order 22. Rule (6) and (7) Supreme Court Rules). I therefore consider the Court does not have the power in this proceeding to make the injunction sought.

[15] In any event, whilst I do not condone the actions of Salesi and Sesilia in occupying the land unannounced there is nothing to suggest that damages would not be an adequate remedy should it be found that their occupation is unlawful and loss has been suffered. There is also no suggestion that the prior occupants do not have alternative accommodation. Mr. Fakahua did suggest that there are concerns about the care of the property particularly as renovations have been undertaken to it but there is nothing to suggest that Salesi and Sesilia would damage the property in anyway.

[16] Also of significance is that as a result of this application, and the events that led to it, I have set CV 74 of 2014 down for hearing on 15 and 16 July 2015. Counsel advise me that they believe a ruling in that case will resolve all differences between the parties. That is only a little over a month away and I consider as a matter of discretion that it is better deal with the substantive issue between the parties than grant an injunction.

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[47] [1985] 2 NZLR 140 (CA).
[48] American Cyanamid Co v Ethicon Ltd [1975] AC 396 at 406-407

Result

[17] For the reasons given the application for injunction is dismissed.

[18] Costs will lie where they fall.

R v Nisa

Supreme Court, Nuku'alofa
Cato J
CR 182/2014

5 June 2015

Sentencing – manslaughter – young offender – high degree of provocation – sentence suspended with conditions

The defendant was charged with causing the death of Matangi Fakava when, on 20 October 2014, he unlawfully stabbed him with a knife and caused severe injuries to his arm and left lung which led to his death. He was 16 at the time of the offence. On 5 March 2015 he pleaded guilty to one count of manslaughter. It was agreed that there was a high degree of provocation given that the deceased had attacked the accused and had continued assaulting the accused whilst he was on the ground. The defendant was sentenced.

Held:

1. A high starting point was called for where knives and other weapons were used during the commission of an offence and death resulted. Deterrence and the protection of society were important sentencing principles. A starting point where a mature offender was involved and a knife was carried with the possibility of violence being anticipated, it being used when violence materialised to inflict lethal injuries, was 9 years imprisonment.
2. Because there was a high level of provocation and the offender was young and immature or unsophisticated, the starting point was reduced to six years imprisonment. The accused had no previous convictions and pleaded guilty at a very early stage. He was said to have good prospects at school and intends to proceed on at school. The probation report spoke well of him and he was highly regarded at school and in the wider community. For these mitigating factors, his early plea and his good character he was allowed a further two years by way of mitigation.
3. Further, the defendant and his family in a formal ceremony offered apologies to the deceased's family and a cow and other items were given. The deceased's family said that the defendant had remorse and forgave him his actions. Because an apology was an important aspect of Tonga culture, the court allowed a further six months by way of mitigation.

4. The defendant was entitled to have the final three years of his sentence suspended because he was so obviously likely to be rehabilitated, was a first offender, and was only 16. Conditions were imposed. Therefore, he was eligible for immediate release.

Cases considered:
R v Fakauho [2000] TLR 50
R v Kaho [2005] CR136/09
Tu'itavake v R [2005] Tonga LR 348

Counsel for the Crown : Mr 'Aho
Counsel for the defendant : Ms Tonga

Sentence

[1] The prisoner Kasivaki Nisa, aged 16 at the time of the offending, pleaded guilty on the 5th March 2015 to one count of manslaughter arising out of an incident that took place on the 20th October 2014, at Hamula. The particulars of the charge were that he did cause the death of Matangi Fakava when he unlawfully stabbed him with a knife causing severe injuries to his arm and left lung and thus leading to his death. The Crown accepted this plea in discharge of the indictment for murder.

[2] The prisoner has been remanded in custody for a little over 7 months on two occasions and including after he had pleaded guilty to manslaughter. He appeared for sentence originally on the 27th April 2015, but on that date the sentence was adjourned for further inquiry until the 29th May 2015. At the conclusion of submissions, I further adjourned the matter overnight to today's date because I wished to give further consideration to the matter before passing sentence.

[3] The agreed facts were;

1. The accused is 17 years old and is from the village of Hamula. He is a form 4 student at Beulah College.
2. On the evening of the 20th October, 2014, the deceased Matangi Fakava, was drinking alcohol with two friends named Sosefo Kaloni and Senoni Kaloni at Sosefo Kaloni's home.
3. The deceased became intoxicated and wanted to go for a walk so he and his two friends left Sosefo's house and went for a walk.
4. At approximately 8.00pm, they walked past the accused's residence. The deceased went inside the accused's house whilst his two friends continued walking to a third person's residence.
5. The accused was inside his house sleeping when he heard the deceased calling out his (the accused's) sister's name.
6. The accused went to his sister's room and saw the deceased rummaging through a suitcase of clothes that was inside the room.
7. The accused chased out of the house and the deceased left. The accused also walked to the road and met with the deceased's two friends.

8. Sosefo Kaloni invited the accused to join them in drinking alcohol. The accused went back to his house and put a kitchen knife in the back pocket of his trousers.
9. The accused then followed the deceased and his friends.
10. The deceased eventually noticed that the accused was following them and so he walked up to the accused and began assaulting him.
11. During the assault, the accused took his knife and stabbed the deceased on his left arm and shoulder. The knife cut into the body of the deceased severing a vein in the arm, and punctured his left lung.
12. The deceased threw the accused to the ground and continued to assault him, causing the accused to call the deceased's two friends to help him.
13. The two friends stepped in and tried to stop the deceased. The accused managed then to break free and run off.
14. The deceased was taken to hospital but was declared dead on arrival due to substantial loss of blood from the injuries he suffered from being stabbed by the accused.
15. The accused was later arrested and made a voluntary confession to police.
16. The accused is a first time offender.

[4] On hearing counsel, it was further accepted by the Crown that prior to taking up the knife; the accused had been subject to violence at the hands of the deceased, who was a strongly built young man of 19, and that, prior to the accused stabbing the accused, that the deceased again had commenced an assault on him. Having seen the prisoner, I formed the view that he was a rather unsophisticated 16 year old and that the provocation he received could be described as significant, a view which the Crown shared.

[5] It is necessary when pleas are entered for counsel to arrive if possible at an agreed summary of fact, as here or if not indicate the basis upon which there is disagreement so that a disputed facts hearing, if necessary, can be held. A failure to agree on the facts may lead to a sentence being adjourned. In this case, the Crown (Mr. Kefu) who did on appear at this hearing, in his memorandum of submission on sentence accepted that there was a high degree of provocation given that the deceased had attacked the accused and had continued assaulting the accused whilst he was on the ground. I proceed to sentence on this basis.

[6] The Crown, on this occasion, represented by Mr 'Aho usefully advanced certain authorities relating to stabbings where death followed and manslaughter convictions had been entered. *Tu'itavake v R* [2005] Tonga LR 348, 382, para 200; *R v Kaho* [2005] CR136/09; *R v Fakauho* [2000] TLR 50. The maximum sentence for manslaughter in Tonga is 25 years imprisonment. Whilst the categories in *Tu'itavake* are of some assistance, every case varies on its facts and this is no exception. From these cases, however, I accept that a high starting point is called for where knives and other weapons are used during the commission of an offence and death results. Deterrence and the protection of society are important sentence principles in cases of

this kind. A starting point, in my view, where a mature offender is involved and a knife was carried with the possibility of violence being anticipated, it being used when violence materialised to inflict lethal injuries in the case of an adult offender is 9 years imprisonment, and in some cases possibly higher.

[7] However, there are very strong mitigating factors, as the Crown accepted, in its sentencing memorandum, in this case. At the time of the offending, the prisoner had been at home. He was aged 16 and in the fourth form and about to go back to boarding school. The deceased who, with friends, had been drinking chose to enter the prisoner's house uninvited when he was asleep, and had rummaged around in his sister's belongings. He had been told to leave the house by the prisoner who awoke, and had been subsequently assaulted by the deceased. The deceased left the property and the prisoner was invited to join friends of the deceased drinking elsewhere. It was then that he foolishly went with them to drink, having placed a kitchen knife in his back pocket. Violence did ensue and it was initiated again by the deceased. It was during this skirmish that the prisoner produced the knife and with two firm downwards thrusts, it seems, penetrated the arm and shoulder and the lung causing the deceased to bleed extensively. He was dead shortly after on arrival at hospital.

[8] I consider, consistently, with the Crown's assertion that there was a high level of provocation in this case, and that the offender was young and in my view rather immature or unsophisticated that the starting point can be reduced to six years imprisonment, being the starting point for this case.

[9] I take into account further that the accused has no previous convictions and has pleaded guilty at a very early stage. He is said to have good prospects at school and obviously this year his education has been restricted. He intends to proceed on at school. It is said he misses his father who now resides in the United States. It seems his mother, who was in Court, shoulders responsibility for bringing up his large family of siblings with some assistance from relatives. The probation report spoke well of him and he is highly regarded at school and in the wider community. For these mitigating factors, his early plea and his good character I allow him a further two years by way of mitigation.

[10] Finally, it is of importance that not only at the request of the deceased's family, did he attend the deceased's body but he and his family in a formal ceremony offered apologies to the deceased's family and a cow and other items were given. I was informed that the deceased family asked that the prisoner has remorse and I am informed the family of the deceased has forgiven him his actions. In these circumstances, and also because an apology is an important aspect of Tonga culture, I allow a further six months by way of mitigation.

[11] The sentence I impose is one of three and half years imprisonment. This sentence is backdated to take into account the dates on which he was remanded in custody, which I am informed involved two periods from the 24th October 2014 – to the 30th January 2015, and then from the 5th March 2015 to the present, (a period of 7 months and 11 days to todays' date). I consider that the prisoner is entitled to have the final three years of his sentence suspended because he is so obviously likely to be rehabilitated, is a first offender, only 16 and so as to pursue his education, on the following conditions;

(1) He is not to commit any offences punishable by imprisonment for the period of his suspension;

(2) He is placed on probation for 12 months to live where directed by his probation officer;

(3) He is to undergo a Life Skills course and a course against violence, under the direction of Probation.

[12] The effect of my sentence today is that he is eligible for immediate release. The Crown is to facilitate this together with his defence counsel, Ms Tonga, with the prison authorities forthwith.

[13] Finally, I record that Mr Kefu, in his original memorandum, asserted that a starting point of three years or less given the mitigating factors was appropriate. I take Mr Kefu to mean an end or final sentence after mitigating factors, which is not greatly dissimilar from that which I have imposed. I pause simply to add that, in certain cases, particularly those which are unusual, I find it helpful that the Crown does indicate a period that it considers is appropriate, although this does not bind me to accept the level of sentence suggested.

R v Lui Lomu

Supreme Court, Nuku'alofa
Cato J
CR 92/2014

5 June 2015

Criminal law – indecent assault and rape charges – found the complainants credible – accused was convicted of all charges

For the sentencing decision, see page 266 of this volume.

The accused was charged with indecent assault of complainant A in 2012 and three counts of rape against complainant B in 2012, 2013, and 2014. Both complainants were sisters and the accused was the husband of their mother's cousin. The accused was 36, was married in 2007 and had one adopted child. He admitted A had come and stayed with them in 2012. A was the daughter of his wife's first cousin. He denied touching her. He admitted B had come and stayed with them in 2011, 2012, and 2013. He said he had had sexual intercourse with B and it was consensual.

Held:

1. An assault was an intentional touching or deliberate physical contact of the complainant without her consent. An indecent assault was one that right-minded persons would consider so offensive to contemporary standards of modesty and privacy as to be indecent. Where an assault was indecent itself, it was unnecessary to establish a specific intent.
2. The court considered the evidence of complainant A was credible and accepted beyond reasonable doubt that the accused had threatened her to preserve her silence, and had used the threat of a knife. Even though there was no corroboration of her evidence, the court was satisfied beyond any reasonable doubt that she told the truth concerning the indecent assault by touching of her breasts and that it was without her consent.
3. To convict of rape, the court must be satisfied beyond a reasonable doubt that at the time of the sexual intercourse the accused knew that she did not consent to the intercourse, or he was reckless as to whether she consented to it. Submission, even in the absence of threats of or acts of force to the complainant, was not consent. Consent must be a true consent by a woman who was able to understand the significance of what was to happen and who was able to make an informed and rational decision as to whether she

would consent or not. Consent must be freely given to the act of intercourse by the accused.

4. The court found the evidence of complainant B credible beyond a reasonable doubt as to the offending. She was aged about 15 when the offending commenced and with her limited intellect (a person described as slow), she would have essentially submitted to the accused's approaches with little resistance. She said she tried to push him away and the court accepted that.
5. As to complainant A the charge of indecent assault was proved beyond a reasonable doubt. As to complainant B, the court found the defendant guilty of four counts of rape and he was convicted accordingly. He was remanded in custody for sentence.

Cases considered:

Boardman [1974] 3 All ER 887
P [1991] 2 AC 447
R v C [1992] Crim LR 642 (CA)
R v Court [1988] 2 All ER 221 (HL)
R v Fonua [2002] Tonga LR 4
R v Lasike [2006] Tonga LR 18
R v Lasike [2006] Tonga LR 161
Teisina v R [1999] Tonga LR 145

Statutes considered:

Criminal Justice and Public Order Act 1994 (UK)
Evidence Act (Cap 15)

Counsel for the prosecution : Ms Moa and Ms Fineanganofo
Counsel for the defendant : Mrs Vaihu

Verdicts and reasons

[1] The accused was charged with;

a. Indecent assault of complainant A in 2012 at Kolomotu'a in that he committed a serious indecent assault namely fondled her breasts and her vagina against her will contrary to section 124(3) of the Criminal Offences Act;
b. In 2012 at Kolomotu'a he committed rape against complainant B when he inserted his penis into her vagina against her will contrary to section 118(1) (a) of the Criminal Offences Act;
c. In 2013 at Kolomotu'a he committed rape against complainant B when he inserted his penis into her vagina against her will contrary to section 118(1) (a) of the Criminal Offences Act;
d. In 2014, at Kolomotu'a he committed rape against complainant B when he inserted his penis into her vagina against her will contrary to section 118(1) (a) of the Criminal Offences Act.

[2] The indictment originally included two further counts;

> e. That in 2013, at Kolomotu'a, he carnally knew complainant C who is a girl under the age of 15 contrary to section 121(2) of the Criminal Offences Act;
> f. That in 2014, at Kolomotu'a, he committed a serious indecent assault on complainant C contrary to section 124 (3) of the Criminal Offences Act in that he fondled her breasts and her vagina against her will.

[3] On the 3rd October 2014, he had pleaded guilty to counts five and six. He, on the same day, had pleaded not guilty to the other charges against complainants A and B, and had elected trial by Judge alone.

[4] His trial commenced on the 25th May 2015. There was a lengthy adjournment from the 28th May 2015, caused in part by the illness of complainant B who was taken to hospital after an epileptic attack after her evidence in chief had been completed. An adjournment was requested and granted after other evidence was granted until the 1st June, when the trial proceeded.

[5] After the evidence had concluded, on the 2nd June, I was concerned that the indictment did not adequately allow me to return sensible verdicts on the various acts alleged there being more than one of rape in years 2012 and 2013. I did not see any prejudice in the Crown being able to amend the indictment to reflect the evidence, as it was given at trial. The defence had not sought the indictment be clarified by further particulars, before the trial commenced and it became clear to me that the single counts were not representative or specimen counts, and so the incidents or acts alleged should be the subject of individual counts to meet the evidence for which individual verdicts could be sensibly given. The further amended indictment read.

> 1. Indecent assault contrary to section 124(1)(3) of the Criminal Offences Act.
> Particulars in the year 2012, at Kolomotu'a, in the bedroom of HH's residence the accused committed a serious indecent assault on A when he fondled her breasts against her will.
> 2. Rape contrary to section 118(a) of the Criminal Offences Act.
> Particulars that in 2012 during night time, in the bedroom of HH's residence at Kolomotu'a did carnally know B when he inserted his penis into her vagina against her will.
> 3. Rape contrary to section 118(a) of the Criminal Offences Act.
> Particulars that in 2012 during night time, in the living room of HH's residence at Kolomou'a did carnally know B when he inserted his penis into her vagina against her will.
> 4. Rape contrary to section 118(a) of the Criminal Offences Act.
> Particulars that in 2013 during night time, in the living room of HH's residence at Kolomotu'a did carnally know

B when he inserted his penis into her vagina against her will.

5. Rape contrary to section 118(a) of the Criminal Offences Act. Particulars that in 2013 during day time, in the at HH's hurricane house at Kolomotu'a did carnally know B when he inserted his penis into her vagina against her will.
6. Rape contrary to section 118(a) of the Criminal Offences Act. Particulars that in 2014 during day time, in the bathroom of HH's residence at Kolomotu'a did carnally know B when he inserted his penis into her vagina against her will.

At the conclusion of submissions on the 3nd June, 2015 I reserved my verdicts until today.

1. The law

g. Indecent assault – the essential elements

[6] In order for the accused to be convicted of indecent assault I must be satisfied that the evidence establishes beyond a reasonable doubt;

1. That he assaulted complainant A in circumstances;
2. that were indecent.

[7] An assault is an intentional touching or deliberate physical contact of the complainant without her consent.

[8] An indecent assault is one that right-minded persons would consider so offensive to contemporary standards of modesty and privacy as to be indecent.

[9] In *R v Court* [1988] 2 All ER 221 (HL) considered in *R v C* [1992] Crim LR 642 (CA) it was held that where an assault was indecent itself, it was unnecessary to establish a specific intent. Both cases were referred to in *R v Lasike* [2006] Tonga LR 161.

h. Rape – the essential elements

[10] In order to convict the accused of rape, the Crown must prove beyond reasonable doubt in relation to each count considered individually that the accused;

1. carnally knew complainant B, that is had intercourse with her by his penis entering her vagina;
2. and that it was against her will.

[11] For the purpose of considering whether the accused carnally knew the complainant B against her will I must be further satisfied beyond a reasonable doubt under section 118 (2) that at the time of the sexual intercourse;

3. the accused knew that she did not consent to the intercourse;
4. or he was reckless as to whether she consented to it.

i. Consent and submission

[12] Further, I also direct myself that submission, even in the absence of threats of or acts of force to the complainant, is not consent. Consent must be a true consent namely by a woman who is able to understand the significance of what was to happen and who was able to make an informed and rational decisions as to whether she would consent or not. Consent must be freely given to the act of intercourse by the accused. *R v Fonua* [2002] Tonga LR 4, at 11. *R v Lasike* [2006] Tonga LR 161, 164.

j. Recklessness

[13] Recklessness as to consent, requires me to direct myself that the prosecution have proved the accused committed rape if at the time of intercourse, the accused actually knew there was a possibility that the accused was not consenting to intercourse and he carried on regardless. Smith and Hogan, 10th ed, Lexis Nexis Uk, at pp 471-2 Smith and Hogan further state;

> "Though the mens rea is formulated in various ways, it seems there is, in substance, a return to *Cunningham* recklessness. If D is aware that there is any possibility that P is not consenting and proceeds to have intercourse, he does so recklessly. Lord Hailsham in *Morgan* required, "an intention of having intercourse, willy-nilly, not caring whether the victim consents or not". Another way of putting it is to ask," was D's attitude one of "I could not care less whether she is consenting or not I am going to her intercourse with her regardless."

k. Honest belief on reasonable grounds

[14] As the evidence evolved, there was room in my view also for the defence to contend that if complainant B, as he contended was the case, had not consented to intercourse, he honestly believed on reasonable grounds that she was consenting. I approach the case also by asking myself in relation to this aspect of the defence, has the Crown also negative, beyond reasonable doubt, this possibility?

l. The effect of the accused's guilty pleas to sexual offending relating to complainant C

[15] I record that I approached counsel about how I should deal with the matter that the accused had pleaded guilty before me in relation to carnal knowledge and indecency of a third complainant referred to here, as C, who was the younger sister of the complainants A and B, who was under the age of 15 on an earlier occasion. During the course of the evidence, it became plain also that complaints against A and B came to light as a consequence of the allegations against C. No objection had been taken to the fact of this evidence being led by the prosecution. As a consequence, of

his actions, the mother of the three sisters A, B and C became aware of the sexual offending of the accused, who was well known to the complainants and their mother because he was married to the mother's cousin, and she was referred to as an aunt. The girls and mother, the evidence revealed, had regularly visited the accused residence and had stayed there from time to time overnight during the periods in question. It was, as a consequence of the mother's inquiries of sisters A and B after offending against C had come to the notice of the third party who was not called to give evidence (who had also discussed the offending with A and B before referring it to the mother) that his alleged offending came to light. I propose other, than as it becomes relevant as to the way in which the allegations relating to A and B came to light, to put his offending with C to one side in considering the separate cases of A and B. The Crown did not submit that I should take the offending in relation to C into account as similar fact evidence within *Boardman* [1974] 3 All ER 887, and *P* [1991] 2 AC 447 principles and so I approach the matter on the basis of assessing each complainant's evidence individually without considering the accused's offending with C, or complainants A or B as mutual corroboration. Each complainant's case will be separately considered on the evidence relevant to the counts in issue.

m. Sexual complaint

[16] I also record that I do not intend, in this case, to view complaints by B to her mother in May 2014, as evidence assisting her credit or of lack of consent that is as sexual complaint evidencing consistency. I am concerned that both complainant A and B were spoken to together by a third party who later suggested to her mother that she pursue the matter with her daughters. That third party was not called to give evidence as to just what the girls told her. Accordingly, I put that aspect of the mother's evidence to one side also, other than that it supports when the fact of complaint was made, and how that arose.

n. Corroboration

[17] Finally, I avert to the issue of whether I am required to give myself a corroboration warning. The Crown has in other cases suggested that I did not have to do so and referred me to the judgment of the Court of Appeal in *Teisina v R* [1999] Tonga LR 145 but I am not certain that the Court did intend to abrogate the common law practice in that case. I note by 1999, however, the rule relating to sexual offences and accomplices had been abrogated by statute in England (section 32 Criminal Justice and Public Order Act, 1994) and it may well be that any Tongan requirement, based on English practice, could also be said now no longer to apply. I proceed to warn myself, however, out of an abundance of caution that it is dangerous to act on the uncorroborated evidence of the complainant, accepting, however, that it is possible to do so if the evidence satisfies me beyond reasonable doubt that the complainant is telling the truth. I pause simply to say that statutory reform concerning corroboration in sexual cases and accomplices (where it still applies under the Evidence Act) should be expeditiously considered.

2. The Evidence

Complainant A

[18] Complainant A was aged 21 when she gave her evidence. She said in May 2012 she was at the accused's residence when the accused came and fondled her breast. It was at night time. She said she cried when the accused touched her. She said she told complainant B this when B had said what had happened to her. She said that she had told her mother what happened in 2014 when a complaint was made to the police.

[19] Under cross-examination from Mrs Vaihu she said she was upset by what had happened to B. She said that was the reason she spoke out about the accused. She had learned about what happened to C and that had upset her. She said she had been afraid to tell her mother because of a threat by the accused to chop her up with a knife. She also gave evidence about another incident involving the accused putting his penis onto her vagina. That was not the subject charge by the prosecution because she had not told the prosecution about it. She later said he had put it in her and that was the truth. She spoke about the accused taking away her future and that of her sisters. She said she had seen the knife when he said he would chop her up. She said the fondling had taken about half an hour. She felt pain. She did not scream because she was afraid.

[20] In re-examination she said the breast handling incident had taken place in 2012.

[21] This witness had received an injury to the brain during a car accident, and attended also a special school.

Complainant B

[22] The accused's wife was an aunt to her, although her mother and the wife were cousins. She gave evidence of staying at the accused's residence in 2012 when he had entered her bedroom, took the bed sheet off her and removed her clothes. She said his wife came into the room and found him naked. She said he inserted his penis and it was painful. He told her he would kill her if she told anyone. She said she did not consent to intercourse. She told her mother about this in 2014. She said he did this about three times in 2012.

[23] In 2013, there was an incident in the living room. She slept there and the light went off. The accused felt heavy on her and she felt his penis inside her. She was in the room with a child of the accused. She said she pushed the accused. He left.

[24] He did this kind of thing twice in 2013. The second time she said was in the hurricane house. She had gone to collect water and the accused had called her over to assist. She said he caught her there and forced her to have intercourse. She had not consented. He told her not to tell. She said she told her mother about this in 2014.

[25] She said in 2014, when only she and the child were in the house, there was an incident where he sucked her breast, and also her vagina. He then put his finger in to fiddle with her vagina. That was during the day. She had watched movies from a small square like thing he had brought before that.

[26] In 2014, she also gave evidence that she was in the bathroom and he forced his way in and she pushed him away but he took her clothes off and he put his penis inside her vagina. She did not consent. Only she and the child were present. It took place she said last year. She told her mother about this in 2014. Later in another incident she spoke of he putting his finger in her beside a shop.

[27] She went to the police with her mother and complainant B and C in 2014. She said she had not told earlier because she was afraid to do so. She said he had threatened her with a knife she said he held the knife and, when the police came, he took it and hid it.

[28] Cross-examination was delayed due to her illness – a medical certificate was produced stating she had a epileptic fit and had been admitted to hospital. She told Mrs Vaihu she was 18 now. She did not know the year she was born. She said she would reside many times with the accused. She said she helped them with household chores.

[29] As to the first incident, she said the accused was lying when he said he had seen her touching her vagina in the bedroom She denied she had touched her vagina in the bedroom before intercourse had taken place. She admitted she did not scream out. She said she pushed him and his wife came in and caught them. The accused had already jumped off. The accused's wife had not spoken to her. Nor had she as the accused said spoke to her in the kitchen. She said she did not enjoy intercourse. She said the accused had told her not to tell his wife.

[30] Mrs Vaihu asked her about a second incident in 2012 which she agreed took place in the living room. The child was present. She said she was on a couch. She denied she had been masturbating. She denied ever having been aroused and desiring to have sexual intercourse with the accused. She said she used to push him during intercourse. That would stop him. She said she did not know what ejaculation was or an orgasm. She denied sexual intercourse with him was with her consent. She also agreed sexual intercourse had taken place in a bedroom in 2012. There were incidents, she agreed, relating to his inserting his finger in her vagina; she said he ate her vagina, and her breasts, also.

[31] She admitted he had intercourse with her in the hurricane house and that this took place during 2013. It was in the day time. She said she did not consent. She said she did not like it. She could not recall other occasions in 2013. She said that the hurricane house was the second incident.

[32] She said she had had intercourse with the accused in 2014 contrary to the accused's assertion that she had not.

[33] She admitted she was angry with the accused about what had happened to complainant C. She said she wanted the accused punished. She said she was not lying in her evidence.

[34] In re-examination, she maintained the bathroom incident had occurred in 2014, and she had not consented.

The mother's evidence

[35] The mother of complainant B and C gave evidence that C was 17 now. B was born on the 26th February, 1997. As to complainant A she was her aunt. She confirmed she was 21. The accused was her sister's husband. She had known him for 8 years. They used to live at the accused's mother's house in Kolomatu'a. She had been customarily adopted by the accused's wife's parents.

[36] She would visit and sleep over there. All of her children would visit. C was living at the accused's residence because she had been customarily adopted by the accused's wife. A was living with the witness but would visit the accused's residence at Kolomotu'a. Sometimes she said they went and slept over and A went and stayed temporarily. She said they would visit in 2012 and in 2013 because complainant C was living there in 2013. She said they would also go also in 2014. She said she only stayed there herself in 2014, staying elsewhere in Tofoa when the children went to the accused's residence. She said when she stayed there only the accused, his wife and their child were present. It was a three bedroom house. The bathroom is inside the house. It has a living room.

[37] She said B in 2012, 13, 14 would stay over on her own. She told of staying there herself in 2014. During that incident, she was sleeping in the living room, with complainant C. She heard the accused getting back from kava at around three or four. She observed the accused receiving a slap and his wife asking him what he had done to the complainant C. C was crying. She was aged 16. C told her that the accused had touched her breast and vagina. It was after a conversation concerning C that the accused and his wife apologised.

[38] She said B had told her in May 2014 what the accused had done to her in March 2014. Complainant A and C had told her at the same time what had happened to them. B had told her of the accused being naked in March but she had not believed her because of her mental state. She was slow. She was unable to write her name and unable to read.

[39] As a consequence of a relative of the accused's sister coming from Australia, in 2014 discussions took place with the children, and as a consequence the mother was told to listen to what they had to say she said in October 2014. The accused and his wife had by then moved elsewhere. After that a complaint was made to the police in 2014. She went to the three complainants.

[40] She confirmed that B attended normal school only to class 3. She then went to OTA special school in 2010. She had health issues when she was born. She was normal until she was hit by a van in class 3. She also went to OTA after that.

[41] She recounted what the complainants B had told her but I do not, as I have said regard this as admissible as sexual complaint evidence, and will not act upon it, as consistency.

[42] In cross-examination, it seemed that it was only after the relative from Australia had told the mother what had occurred that A and B spoke to her. It was earlier than October she admitted that she went to the police. Her statement was recorded as 13th May 2014. In that statement she records that B told her about a matter concerning the

accused namely he coming into her room naked in January 2014, rather than March. She confirmed that B was not able to write her name until she was taken to the special school. She was about 8. She was not able to write more than her name. She said she did not know about intercourse with C until after the police interview. She had not discussed that with the girls. She said A was also slow and they were not able to think financially or support themselves. They were unable to study or be educated. She also gave evidence that she noticed nothing adverse after A and B returned to her home after staying with the accused.

[43] The officer in charge Paea Penisoni gave evidence of an interview he had with the accused. This related to B only. He admitted he had known her for 7 years. She used to stay and then go home. She, he said, attended OTA, a school he knew as one for the mentally unstable, feeble-minded and sometimes they become mentally affected. He said that, on a couple of occasions, he found her masturbating and he said he knew she wanted sex, so he just went and had sex with her in her room. He said he was rubbing her vagina and then he had sex with her. He denied on the first occasion she was bleeding. He said he had sexual intercourse with her in 2012, usually in the bedroom and living room. He said he would touch her breast and then they would have sex.

[44] He said sex took place around the afternoon hours. He said he had sex approximately 3 times in 2012. In 2013 he had sex with her 3 to 4 times. He admitted he had sex in the hurricane house. He denied sex had taken place in 2014. He denied having sex with her in 2014 because there were too many people in the house and they usually went to Tofoa so it was difficult to have sex. He said there was no talking after sex. He denied that he would tell her not to say anything; that was a lie, he said.

[45] He said she was between 15-16 when he first had sex with her. When asked whether she consented to this, his answer was, 'Yes, if she did not consent, she would have screamed or told someone on the first sex."He said he felt sexually aroused when he found her touching her vagina. Then he thought of having sex with her.

[46] He admitted he knew she was feeble-minded and mentally unstable when he had intercourse with her. He was charged with rape and indecencies being aware that she was feeble-minded and insane. He said the charge upon me is true. I was informed that the charge of rape was not laid on the basis of section 118(1) (c) of the Criminal Offences Act because the opinion of Dr Puloka, a psychiatrist, did not support a clinical diagnosis that B was feeble-minded, as opposed to being merely slow intellectually.

[47] The accused gave evidence essentially consistent with what he had said in his record of interview. He said he was 36 and a carpenter. He married in 2007 and had one adopted child. He admitted A had come and stayed with them in 2012. A was the daughter of his wife's first cousin. He denied touching her.

[48] He admitted B had come and stayed with them in 2011, 2012, and 2013. He said he caught B in the act of masturbation in 2012, about three times, and he became sexually aroused. He touched her between her vagina and legs and also her breast. It took place three times, twice in the bedroom and once in the living room. He said he

asked B in the living room and she went to the bedroom and waited for him there. He talked of foreplay and she consented, he thought, because she had waited in the bedroom for him. She copulated back. Sexual intercourse would last 20 minutes. She never pushed him to stop.

[49] The first incident in 2012 took place in the bedroom, there was no blood – she was not in pain. She would caress him and copulate back. The second time was in the living room. He had been drinking kava and came back. She consented. He had come back from Kava about 1am. He had sexual intercourse on the couch. The third occasion occurred after he had asked her in the living room to have sex and she had gone into the bedroom and waited for him. He touched her and she did not move. He touched her breast, sucked on it, and she did not object or refuse. She had an orgasm and he ejaculated.

[50] He said he never stopped B from telling anyone. In 2013, the first time they had intercourse was in the hurricane aid house which he said he had invited her to for the purpose of intercourse. He had gone first and waited. She had consented to it because he had gone ahead to wait for her. There was no one else aside from the child in the house. She did not show any objection in the hurricane house and copulated back. The second occasion took place in 2013, in the living room at night time. She again consented to it without objection. The third occasion took place in the hallway to the bathroom and toilet. She consented to it.

[51] He spoke of a fourth occasion, when he had been drinking and she was sleeping in the bedroom. This was about 2pm. He was drunk. He said that he had sexual intercourse with her and his wife pushed the door open and he jumped up. He told her he was looking for cigarettes and some marijuana. He said he had a conversation with his wife in the kitchen and he denied doing anything to B. He said that his wife woke B up and asked her if anything happened to he and she said no. He said he was standing by the door. This was denied by B, under cross-examination by Mrs Vaihu.

[52] He denied intercourse in 2014 because she had stopped living with them. She did not sleep over he said in 2014. He said after the witness from Australia came there was a fight and they left to reside elsewhere in March or April 2014. He said B's mind was fine because she could do well in every chore. B could explain clearly what the movie means to her. He talked of Filipino movies that when played back B could read the text of the subtitles in English. He also described A as fine. He denied any allegations concerning her. He maintained his statement to the police was true.

[53] Under cross-examination, he admitted that A and B would say that his wife was their mother. It was put to him his evidence concerning innocent association with A and B was a lie. He said they both lied. He admitted that in 2012 he had sexual intercourse with B in a bedroom but that it was consensual. He did not threaten her. He maintained that a second incident had taken place in the living room. He also admitted a third act of intercourse in the bedroom. He admitted again intercourse in the hurricane shed and the living room in 2013. He maintained she had consented. He said of the incident when she was sleeping in the lounge on a couch, B consented to it because she could have screamed out to his wife who was sleeping in the bedroom or she could have told her after sexual intercourse if she did not consent. On one

occasion, when he had been drinking the issue of recklessly proceeding regardless of her consent was the subject of cross-examination and he denied this.

[54] He maintained the sexual intercourse took place in the bathroom not in 2014 but in 2013. He said there was a fourth incident after he had got drunk and she was asleep. This took place in a bedroom. He denied that she ever pushed him or that he forced her to have intercourse in the hurricane house. He denied ever threatening her. He maintained B and A had manufactured their evidence because they wanted to see him falsely convicted. He said he had argued with his wife's brother, who was the husband of the Australian visitor and they left the house in March or April 2014. He denied any act of intercourse in 2014.

3. Submissions

1. Mrs Vaihu submitted that I should give the accused the benefit of the doubt in relation to all the charges, and contended that I should accept that he was telling the truth or might be telling the truth, and given the benefit of the doubt.

2. She said that in relation to complainant B her client had in his police record consistently maintained his innocence of non – consensual intercourse, as he did at trial. Indeed, she said he had stated it had happened on additional occasions, and gave detailed accounts of this at trial.

3. She emphasised that the complainants had plenty of opportunity to inform their mother and others concerning the fact that the accused had sexually abused them if this indeed had been the case. They did not do so until May 2014.

4. She submitted that there was a motive for the complainants to manufacture false charges that was to strengthen the case of sexual abuse in support of their younger sister C.

5. She accepted that findings of credibility were for me but that, in all the circumstances, I should have doubts about the credibility of the complainants' testimony and acquit her client of all charges. She said the accused had denied any sexual activity in 2014 and I should accept that. All other sexual activity was consensual.

6. Ms Moa for the Crown accepted also that issues of credibility were for me, but she said that the complainants' accounts were credible. Both girls were for different reasons intellectually of limited intelligence, and had attended special schools. She contended that the accused, knowing this, had taken advantage of them.

7. She submitted that I should accept beyond reasonable doubt that the indecency alleged by Complainant A had occurred. She had been the subject of a threat and it was understandable she had not made a complaint to her mother earlier, if as she said, she had been threatened.

8. She submitted also this of complainant B. She said that the accused had admitted intercourse on several occasions with the complainant who was a much older man and the husband of their mother's cousin whom she visited frequently. She submitted that I should accept the evidence of the complainant that she had not consented

pointing to her learning disability, slowness, and that consent meant a genuine consent and that she had given evidence of attempting to push the accused away and she said he had forced her to go into the hurricane house and have sexual intercourse against her will, there.

9. She submitted that I should accept beyond reasonable doubt that, knowing of her intellectual limitation, that the accused must have known she was not giving a true consent to intercourse or was reckless as to whether she was truly consenting or not. She submitted that there was no room for any honest belief on reasonable grounds on the accused's part that she was consenting, in this case.

10. She also submitted that it was understandable the complainant would not make a complaint earlier to her aunt or mother if she had been threatened by the accused as she submitted had been the case.

11. She submitted that, although it was a matter for me, that the complainants had not manufactured false evidence. They were simply disadvantaged young persons whom the accused had sought to take advantage of in a predatory way.

4. Findings

1. I considered the evidence of complainant A to be credible. I did not find any suggestion that she was making her evidence up concerning the accused having sexually caressed her breasts. That is the only allegation in regard to her in the amended indictment that the Crown proceeded with though she did give evidence of other acts that the accused performed upon her, of a more serious nature. Although it may well be that other acts were performed which she had not spoken about earlier to the police, I did not detect in her evidence any malicious motive to lie as had been suggested by the defence so as to support or strengthen the case against the accused of performing sexual acts with her sister C. The accused denied that any sexual activity had taken place with A. I prefer in this regard, beyond any reasonable doubt, the evidence of A to that of the accused. As frequent visitors, with the knowledge their mother was related to the accused's wife, who was their aunt, in what was a closely meshed family, I would have thought it most unlikely that A would have engaged in consensual sexual activity with the accused a man many years older than herself. She, like her sister B, was slow academically as I have said being taught at a special school, although her disability was attributable to childhood injury, rather than any inherent condition, as was her sister's B. I did not detect in her the guile required to consistently maintain a false allegation as the accused maintained; still less to contrive false allegations to support claims made by a younger sister.

2. Further I accept beyond reasonable doubt that the accused had threatened her to preserve her silence, and had used the threat of a knife. The accused would not want to have risked his conduct being exposed to his wife, as on one occasion with complainant B it nearly was, and he on his own admission lied about that to his wife. I consider that, in these circumstances, it was understandable the offending did not come to light until she was spoken to much later in 2014.

3. Even though there was no corroboration of her evidence, I am satisfied beyond any reasonable doubt that she told the truth concerning the indecent assault by touching of

her breasts and that it was without her consent. More may well have occurred to her as she said but the indictment is limited to the charge of touching of her breasts. I find the charge proven.

Complainant B

4. As to complainant B, I found her a more retiring, shy witness than A. She was hesitant in her evidence, at times. She obviously found the experience a physical strain and bearing in mind her health, that is understandable. She is an epileptic and her very limited education, means that for her the proceedings would have been very stressful. The trial had to be adjourned because, after her evidence in chief, she had been admitted to hospital with an epileptic fit. I accept her mother's evidence that she could only write her name after she attended a special school and could do little more. I did not find convincing the accused's suggestion that she was able to read the English subtitles of foreign films, and I consider he was asserting this deliberately and conveniently because he knew full well that she was a slow learner and he wanted to place her ability to consent to sexual intercourse and his involvement with her in a more positive light. Like her elder sister, I found her evidence credible beyond a reasonable doubt as to the offending. She was aged about 15 when the offending commenced and I have no doubt that with her limited intellect, (a person described as slow), she would have essentially submitted to the accused's approaches with little resistance. She, however, said she tried to push him away and I accept that. Like her sister, she knew that her mother was related to the accused's wife, and I find it most unlikely that she would have ever voluntarily engaged in sexual activity with the accused whom she knew to be her aunt's husband. As well, the accused was much older than her. The complainant did not strike me as anything but a quiet and retiring girl, very simple, and again one who was incapable of having the guile to sustain false allegations of rape to wrongly accuse the accused or to bolster a case against him to benefit her younger sister.

5. Again, I accept that the accused, who on his own admission had lied to his wife about sexual activity taking place after she had come into the bedroom where they were, on, the complainant says the first occasion and I accept this, did not want his misconduct exposed. I accept B was also seriously threatened. In those circumstances, I consider it perfectly understandable that her complaint was not ventilated until 2014; a point Mrs Vaihu for the accused made much of, after the offending against complainant C had come to light. In any event, I consider it would be a difficult and very embarrassing matter for a young person such as her to bring a complaint against a man who she knew was married to her aunt. I accept she did not scream out and continued it seems to return to the home notwithstanding the unwanted sexual activity but, whilst in a young person, who was not impaired intellectually, that might have required greater scrutiny, I do not find it surprising that she did not reveal what had happened to her until there was some more positive intervention by a third party and inquiry of her in 2014, particularly as I find she had been threatened with serious harm if she did. It seems from the evidence that an attempt by her to do so in January or March 2015 was not taken seriously by her mother and indeed she only did so after the third party had told her what A and B said had occurred to them later in probably May 2014.

6. I find that she would have been compliant in the hands of the accused. He well knew, as with A, that she was a young person with a serious learning disability, and indeed went to a special school, and that she would be very unlikely in these circumstances to consent to intercourse in the home of a person she regarded as an aunt. His attempt to portray her as "fine" in that regard, and able to read the subtitles of Filipino films I consider convenient, and a lie to distance himself from the suggestion that she was so limited she could not truly consent to intercourse. I remind myself that people tell lies for various reasons, sometimes inconsistently with guilt, but I see no other reason for his assertion. I prefer the mother's evidence she was only able to write her name and did not know about ejaculation or climax. I consider beyond any reasonable doubt he opportunistically, and in a predatory way, decided to take advantage of her presence and have intercourse with her, and possibly on his own admission on occasions when under the influence of kava or alcohol. He, I consider must have known that she was not truly consenting on each occasion that he had intercourse with her. Further, and in any event, because she was to his knowledge very slow, her failure to scream out or do much more then push him to resist his actions, as I accept occurred, must have meant that, at the very least, there was always the possibility that her silence meant she was not truly consenting but at most was submitting to his advances being those of an older and strongly built man who had threatened her with harm if she told. I consider that he was determined to have his way with her, regardless, and I reject his assertions beyond any reasonable doubt that he saw her masturbating, as if this were some overture to him, or that she went willingly with him into the hurricane shed or anywhere else to have consensual sexual intercourse with him. I consider beyond any reasonable doubt that he must have known that, either she was not consenting to intercourse that is giving a true consent in the Fonua sense, or was indifferent or reckless as to whether she was in circumstances where he must at least have known that there was a real possibility that she was not consenting. I find beyond reasonable doubt that she was not consenting in any Fonua sense. The accused came across to me as a reasonably astute person. I gained the impression that he would be well able to assess for himself the true position as to whether she was truly consenting, in the circumstances he knew existed namely her youthfulness, very limited intellect, her limited attempts to resist, but chose opportunistically to proceed with intercourse (on two occasions on his admission having consumed intoxicants), regardless of whether the complainant was truly consenting. In those circumstances, I reject beyond any reasonable doubt that he had any genuine belief that she was consenting to any act of intercourse, for the reasons I have given, and that is my view in relation to each of the counts.

7. I emphasise also that I have considered all the circumstances put to me by Mrs Vaihu why I should not convict, and I have also out of an abundance of caution directed myself that in the absence of clear corroboration of absence of consent, (and I approach this on the basis there is no item here of that quality) that it is dangerous to convict. However, I consider for all the reasons I have given that complainant B was giving a truthful account and I prefer her evidence to that of the accused. I find all the complaints proven beyond a reasonable doubt, notwithstanding the absence of corroboration.

8. The only matter, that caused me some difficulty was the allegation of the bathroom incident which the complainant said took place in 2014, and the accused said in 2013,

there not being any activity he said in 2014. I have carefully considered all the evidence on this point and accept the complainant beyond reasonable doubt on this matter also. It was not until May 2014 that the complaints were made to police, and on the accused own admission he was residing at the residence until March or April 2014. The mother gave evidence she was present with C in 2014 at the accused's residence in Kolomotu'a when she learned of the accused's interference with her, and I accept that she overheard a conversation between the accused and his wife concerning this. She said in other years she used to stay in Tofoa and the children at his residence but in 2014 she stayed at his and his wife's residence. I do not regard this as a year when it was impossible for the incident to have taken place as the complainant said and I prefer her evidence, on this point.

5. Verdicts

1. As to complainant A, I find the charge of indecent assault as pleaded in the amended indictment proven beyond a reasonable doubt and I convict him accordingly.

2. As to complainant B, I find him guilty of four counts of rape as alleged in the counts in the amended indictment and I convict him accordingly.

[55] He is remanded in custody for sentence.

R v Lui Lomu

Supreme Court, Nuku'alofa
Cato J
CR 92/2014

23 July 2015

Sentencing – rape, carnal knowledge of girl under 15, and indecent assault – 9 years sentence imposed with the final 2 years suspended

For the full facts, see the report in this volume at page 250.

The prisoner was found guilty on 5 June 2015 of six counts of rape of complainant B under an amended indictment and one count of indecent assault on complainant A. He had already pleaded guilty to the offence of carnally knowing a girl under the age of 15 which carried a maximum sentence of five years and one count of indecent assault on complainant C. He appeared for sentence today on all counts. After he was arrested and on bail the prisoner underwent counselling for alcohol and drug abuse and participated in voluntary community programs about which references were provided.

Held:

1. In relation to complainant C and the conviction for carnally knowing a girl under the age of 15, where a much older man had carnal knowledge of a female under 15 and was in a position of trust, a starting point in the upper level about four years was appropriate. Because of the early guilty plea and his former good character, this was reduced to a sentence of imprisonment of two years and nine months. On the count of indecency to which he also pleaded guilty, he was sentenced to 12 months imprisonment to be served concurrently with count 2.
2. The court considered the totality of the offending and found that the head sentence on count two of eight years imprisonment (which would have been imposed for singular offending) should be increased to nine years imprisonment to reflect one year of the 2 years and nine months imprisonment imposed for his offending with complainant C, the balance of this sentence to be served concurrently with count 2. This was not excessive because it reflected the totality of his offending against this family. It was predatory behaviour showing a callous disregard for these young complainants' welfare. All other sentences were served concurrently with count 2.

3. The probation report and attached references show that the prisoner attended a course of drug and alcohol and performed satisfactorily. He also assisted in community activities during this period, and received a favourable reference from his town clerk. The court considered that he may be able to be rehabilitated. His wife was still supportive of him and was in a financial position to look after their adopted child. The final two years of his 9 years sentence on count 2 was suspended with conditions.

Statute considered:
Criminal Offences Act (Cap 18)

Counsel for the prosecution	:	Ms Moa
Counsel for the defendant	:	Mrs Vaihu

Sentence

[1] The prisoner, Lui Lomu, was found guilty by me on a Judge alone trial on the 5th June 2015 of 6 counts of rape of complainant B under an amended indictment contrary to section 118 (1) (a) of the Criminal Offences Act and one count of indecent assault on complainant A contrary to section 124 (1) (3) of the Criminal Offences Act. He had already pleaded guilty to the offence of carnally knowing a girl under the age of 15 contrary to section 121 (2) of the Criminal Offences Act, which carries a maximum sentence of 5 years and one count of indecent assault on complainant C contrary to section 124 (3) of the Criminal Offences Act. He appears for sentence today on all counts.

[2] I heard submissions from both counsel on the 21st July after an earlier sentencing hearing was adjourned until a probation report was received. I have read that report and the enclosures which suggest that after he was arrested and on bail the prisoner underwent counselling for alcohol and drug abuse and participated in voluntary community programs about which references were provided.

[3] This is a serious sentencing for sexual offending made more serious because complainant C was only 13 when I am told the carnal knowledge offending occurred, and the accused was in his early thirties. In so far as the other offending is concerned, it is serous also not only because of the number of rapes involving complainant B but also because she, like complainant A, was to the knowledge of the prisoner intellectually disabled, both complainants attending a special learning school. Complainant A had earlier in her life suffered a brain injury as a consequence of being run over by a motor vehicle and complainant B, who had very severe learning limitations, had suffered her impairment as a consequence of birth difficulties. B and C are sisters and the third victim A is a cousin. All three, bearing the same surname were in the care it seems of B and C's mother although C had spent rather more time with the prisoner and his wife because prior to her death the prisoner's mother-in-law had adopted her. I am satisfied that all three were well known to the prisoner.

[4] The mother of B and C was the cousin of the prisoner's wife. At various times, all the victims spent time with the prisoner and his wife and were very familiar with them. I have no doubt the victims would have looked up to the prisoner as a person

they could trust. The prisoner in committing the crimes he did in relation to all the victims seriously breached this trust as he did so also the confidence of his wife and the victims' mother.

[5] I have recounted the nature of the rapes in my earlier judgment. Suffice it to say here that on count 2 (year 2012) of the indictment, which I shall regard as the head offence, the allegation, which I found proven, was he had entered the bedroom and had intercourse with her without her consent. I found proven this allegation and I also accept as she said it was painful and that he had threatened to kill her if she told anyone. That was an incident where the accused's wife, I accept also, came very close to finding the accused in her bedroom with the victim. Another incident occurred being count 3 (year 2012) in the living room also. As to count 5 (2013) the prisoner, I found, forced B to have intercourse in a building known as the Hurricane house, and a final count of rape arose in 2014 in the bathroom area. The accused gave evidence of other acts of intercourse which claimed were all consensual. I rejected his claim that the acts were consensual in relation to any of the counts charged upon which he appears to day for sentence. It was my finding that he took advantage of the complainant, knowing full well she was of low intellect and on one occasion at least he, on his own admission, was under the influence of kava. A more serious picture of alcohol and drug abuse was given to me today by Mrs Vaihu when she suggested that all his offending was attributable to the consumption of alcohol or drugs and in drugs she included marijuana and ice. Whether this is so I have no confirmation, but I am prepared to find that he may have been affected by some form of stimulant on some occasions, but this does not justify or excuse his actions, in any way, or his predatory behaviour.

[6] The Crown has presented a number of sentencing precedents on rape including R v Latu AC 3/14 which has some parallels with this case. There, the offending was repeat offending for rape, as here. Here, there was a consideration disparity between the age of the victim aged between 15-16 at the time of the offending and also being seriously intellectually disable, whereas, he was aged in his early thirties. Third, as I have said the prisoner was in a position of trust being the husband of a cousin of their mother and a person the victims should have been able to rely upon to protect not abuse them. There was a serious threat made to secure the victim's silence, and the prisoner must have been aware that owing to her intellectual deficiency she was in no position to sensibly resist his advances, although she said she had tried to do so. The protection of girls and young women and the deterrence of predatory behaviour of this kind towards women or girls and this kind of conduct will be met with condign sentences.

[7] In my view, taking the bench mark starting point of 5 years, the fact that this occurred on six occasions and on one was accompanied by a serious threat, was an aggravating feature, of the offending. Other aggravating features were the difference in age, the intellectual deficiency of the victim known to the prisoner, and his abuse of trust. In my view, a starting point of 9 years is in order. The only basis I can see for mitigation is the fact he was a first offender, has expressed some remorse and has made some effort to rehabilitate himself since being charges. However, this must be tempered by the fact he had chosen to defend the proceedings during which the victim was hospitalized as a consequence of an epileptic fit when giving her evidence.

Accordingly any expression of remorse must be regarded as qualified. I reduce the sentence of 9 years for rape on count 2 by one year for mitigating factors, and according, I would have imposed an eight year sentence upon count 2, with each of the other counts being 3, 4, 5, 6 of the amended indictment sentence being sentences of 5 years to be served concurrently with count two. However, because in paragraph 11 I have viewed the overall or totality of the offending as sufficiently serious to justify accumulating an additional one year taking into account the carnal knowledge of C, I have increased the sentence on count 2 to one of 9 years imprisonment.

[8] In relation to complainant A, the allegation being that he touched her breast, an allegation which he denied, I found him guilty also she being a young woman of 17 at the time of the offending and also being of limited intellectual capacity, know to him. On this charge taking into account, the factors of breach of trust, the age disparity, and also his knowledge of her intellectual weakness, I sentence him to 12 months imprisonment to be served also concurrently with count 2.

[9] In relation to complainant C, she lived in the house which the prisoner shared with this wife and, until her death, his mother in law who had adopted the complainant. She was 13 at the time of the offending and at the time, although residing with her mother was staying at the prisoner's residence, after the mother-in-law's death. The charge to which the prisoner pleaded guilty is a comparatively new provision in Tonga. I have been involved in a number of the sentencings under this provision, (the maximum sentence being 5 years) which have principally involved younger prisoners than here. Where a much older man has carnal knowledge of a female under 15 and is in a position of trust, a starting point in the upper level about 4 years is, in my view, appropriate. However, here because of his early guilty plea and his former good character, I reduce this to a sentence of imprisonment of 2 years and nine months.

[10] On the count of indecency to which he also pleaded guilty namely fondling her breast and vagina I sentence him to 12 months imprisonment to be served concurrently with count 2.

[11] Considering the totality of the offending, I consider that the head sentence on count two of eight years imprisonment which I would have imposed for singular offending, should be increased to 9 years imprisonment to reflect one year of the 2 years and nine months imprisonment imposed for his offending with complainant C, the balance of this sentence to be served concurrently with count 2. I do not consider this can be said to be excessive. It reflects the totality of his offending against this family. It was predatory behaviour showing a callous disregard for these young complainants' welfare. All other sentences are served concurrently with count 2.

[12] I now turn to the issue of whether the head sentence of 9 years imprisonment on count two should be suspended in any part. I consider I should do this after hearing submissions form Mrs. Vaihu. The probation report and attached references show that the prisoner after being released after charge attended a course of drug and alcohol and performed satisfactorily. He also assisted in community activities during this period, and received a favourable reference from his town clerk. That suggests to me he may well have learned his lesson and be able to be rehabilitated. I am told his wife is still supportive of him and will be in a financial position to look after their adopted

child who is a young girl. For these reasons, I suspend the final two years of his 9 years sentence on count 2 on the following conditions;

a. He is not to commit an offence punishable by imprisonment for a period of three years.
b. He is on his release to be placed on probation for a period of 18 months with the following conditions;
   i. He is to live where directed;
   ii. Probation is to take steps to ensure that he should not be able to live in any residence during his probation where he will be residing with girls or young women. That may be varied in the case of his own child, should his present wife still be married to him, be content to live with him, and the child remains living with his wife. I express the concern that he may still remain a threat to young women despite his present intention to reform. He is not however, to live with the child on his own.
   iii. He is to attend a drug and alcohol program under the direction of Probation and Salvation Army;
   iv. He is not to drink alcohol or consume drugs during the period of probation;
   v. He is to attend a suitable course under the direction of the Probation office on sexual abuse of women.

[13] The sentence of 9 years imprisonment on count 2 is backdated to the date he was placed on remand. This is to include a lengthy period when he was placed on remand after charge before being granted bail.

[14] He is warned that a failure to abide by the conditions of suspension may mean he is recalled to serve the balance of his term of imprisonment.

[15] I have considered the position in relation to publication of name. I consider that, in cases of this kind, it is in the public interest that the name of the prisoner be published, to eliminate any ongoing threat to others, but no victim should be named and nor should there be any publication of material that may have the effect of identifying them from either judgment. My earlier order limiting the intituling of my judgment on conviction to R v L is accordingly varied to allow the judgment to be referred to as R v Lui Lomu, consistently with this sentencing judgment.

Taxpayer A v Minister of Revenue

Supreme Court, Nuku'alofa
Paulsen CJ
AM 8/2014

9 June 2015

Civil procedure – costs order – higher rate for overseas counsel – must be applied for prior to hearing – unless exceptional circumstances

Taxpayer A was successful in an appeal from a decision of the Tax Tribunal. The ruling was issued on 19 September 2014 by the Chief Justice and he called for submissions as to costs. On 5 November 2014 he awarded the appellant costs to be taxed if not agreed. The costs were taxed by the Registrar who issued a decision on 8 April 2015. Taxpayer A filed an application to extend time under Order 5 Rule 1 Supreme Court Rules for applying for an order to recover costs at a higher rate than provided for under the relevant Practice Direction; and an appeal from the Registrar's refusal to award costs for legal research, the higher rate of overseas Counsel and flight costs. Counsel agreed that the court should deal with the application to extend time on the basis of written legal submissions without a hearing. The case would be called again to set the date for the hearing of the appeal.

Held:

1. The Registrar did not certify for the higher rate claimed for overseas Counsel because of Order 47 Rule 5 which provided that application must be made prior to the hearing. Taxpayer A did not make the application to a Judge to recover costs at a higher rate prior to the hearing or when objection was raised before the Registrar on taxation.
2. The appellant's reliance on Order 5, Rule 1 was misconceived. That rule gave the Court a wide discretion to extend a period of 'time' within which some act must be done under the Rules. It did not apply where the Rules require that some act must be done before another.
3. Even if the court considered that it had the power under Order 5 Rule 1 to extend time, it would not have done so. The appellant could have applied to a Judge to have a higher rate certified for at any time up to the issue of the Registrar's decision. No such application was made despite the appellant knowing of the respondent's objection to its application to recover costs at a higher rate and four months elapsing between the first taxation hearing and the Registrar's decision.
4. The application for an extension of time was dismissed.

Cases considered:
Pilcher, Re (1879) 11 Ch D 905
Saunders v Pawley (1885) 14 QBD 234

Rules considered:
Supreme Court Rules 2007

Counsel for the appellant/applicant	:	Mrs P Tupou
Counsel for the respondent	:	Mr M O'Shannassy

Ruling

[1] Taxpayer A was successful in an appeal from a decision of the Tax Tribunal. The appeal was heard by Chief Justice Scott who issued his ruling on 19 September 2014. He called for submissions as to costs and on 5 November 2014 he awarded the appellant costs to be taxed if not agreed. The costs were taxed by the Registrar who issued a decision on 8 April 2015. From that decision Taxpayer A has filed the following:

> [1.1] An application to extend time under Order 5 Rule 1 Supreme Court Rules for applying for an order to recover costs at a higher rate than provided for under the relevant Practice Direction; and
>
> [1.2] An appeal from the Registrar's refusal to award costs for legal research, the higher rate of overseas Counsel and flight costs.

[2] When the matter came before me on 15 May 2015 Counsel agreed that I should deal with the application to extend time on the basis of written legal submissions without a hearing. The case is to be called again for mention on 12 June 2015 to set the date for the hearing of the appeal.

[3] This ruling therefore deals only with the application to extend time.

Order 47 Rule 5 Supreme Court Rules

[4] The Registrar would not certify for the higher rate claimed for overseas Counsel because of Order 47 Rule 5 which provides:

> (1) Any party seeking to recover costs at a higher rate than those provided for in the relevant practice direction shall make application to a Judge to have the higher rate certified for.
>
> (2) Application for certification under this rule may be made orally at a directions hearing or informally by letter to the Registrar.
>
> (3) In the absence of exceptional circumstances, application under this rule must be made prior to the hearing in respect of which the costs are to be incurred.
>
> (4) Additional costs may be certified as appropriate under paragraph (1) upon special cause being shown.

[5] There is no dispute that Taxpayer A did not make application to a Judge to recover costs at a higher rate prior to the hearing or when objection was raised before the Registrar on taxation.

[6] The appellant accepts that such an application ought to have been made in advance of the hearing and that it is not open to it to argue exceptional circumstances for delay in making application until after the hearing.[49] For that reason it applies for an extension of time under Order 5 Rule 1 to have the rate of overseas counsel certified for.

The application of Order 5 Rule 1

[7] The reliance upon Order 5 Rule 1 is misconceived. That rule gives the Court a wide discretion to extend a period of 'time' within which some act must be done under the Rules. It does not apply where the Rules require that some act must be done before another. *Re Pilcher*[50] and *Saunders v Pawley*.[51]

[8] In the absence of exceptional circumstances Order 47 Rule 5(3) requires an application for higher costs to be made to a Judge prior to the hearing. There is no 'time' appointed by the Rule with which a party is "required to or authorised to do any act". Order 47 Rule 5 provides a right to apply for certification of higher costs but the right exists only because of the Rule and must be limited by its terms.

[9] In support of this view, I note that Order 47 Rule 5 has at least two objects. First, to ensure that costs awards are limited to what is reasonable and sensible for Tongan conditions and, secondly, to ensure that parties to litigation are forewarned as soon as it is apparent that costs are to be claimed at a higher than normal rate (which is an important factor against which parties assess their risk). Contrary to what appears to be the appellant's position, I consider that the exceptional circumstances referred to in Order 47 Rule 5 (3) might arise before or at/before the hearing. In the former case, the exceptional circumstances might have caused the failure to apply to a Judge. In the latter case, something totally unforeseen might have arisen at the hearing which resulted in the successful party incurring costs for which recovery at a higher than normal rate is appropriate. A general right to apply for an extension of time under Order 5 Rule 1 is inconsistent with the second of the objects of Order 47 Rule 5 and would render the requirement to prove exceptional circumstances under Order 47 Rule 5 (3) redundant.

[10] Even if I had considered that the Court had the power under Order 5 Rule 1 to extend time I would not have done so in this case despite all that has been said in the appellant's submissions. The appellant could have applied to a Judge to have a higher rate certified for at any time up to the issue of the Registrar's decision. No such application was made despite the appellant knowing of the respondent's objection to its application to recover costs at a higher rate and four months elapsing between the first taxation hearing and the Registrar's decision.

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[49] Paragraph 22 of appellant's notice of appeal dated 22 April 2015.
[50] (1879) 11 Ch.D. 905.
[51] (1885) 14 Q.B.D. 234.

[11] The Registrar exercises a quasi-judicial function when taxing costs and his decisions are subject to appeal. Having failed to apply to a Judge under Order 47 Rule 5(3), despite having plenty of opportunity to do so, the appellant is limited, in my view, to its right of appeal.

Result

120 [12] The application for an extension of time is dismissed.

[13] The respondent is entitled to this costs which are to be taxed if not agreed.

Pohiva v Magistrates' Court anors

Supreme Court, Nuku'alofa
Paulsen CJ
AM 4/15

9 June 2015; 22 June 2015

Magistrates' Court – question of power to award costs – no express or implied power – no abuse of process – no power to award costs

For full facts, see *Pohiva v Tu'ivakano anors* [2014] Tonga LR 9

Mr Pohiva commenced private criminal prosecutions against the second respondents (the respondents) in the Magistrate's Court on 12 February 2013. The charges alleged serious dishonesty. The Magistrate conducted a preliminary inquiry (also known as a committal hearing). He found that a sufficient case had not been made out to put the respondents on trial before the Supreme Court. He discharged them. Mr Pohiva appealed the discharge to the Supreme Court. His appeal was dismissed by Scott CJ on 17 January 2014 (se Report at [2014] Tonga LR 9). The respondents applied to the Magistrate for the costs of the preliminary inquiry and on 16 July 2014 the Magistrate awarded them costs. In a written ruling of 10 September 2014 he assessed the quantum of the costs at $22,000. Mr Pohiva challenged the power of the Magistrate to award costs of the preliminary inquiry. He also challenged the award that was made on its merits (assuming power to award costs exists). The issue to determine was whether the Magistrate had the power to award costs as a discrete issue.

Held:

1. The express powers conferred on a Magistrate at the conclusion of a preliminary inquiry were limited by section 32(4)(c) and (d) to committing the accused to the Supreme Court for trial or discharging him. There was no reference to the Magistrate having the power to award costs either for or against the prosecutor (be they the Crown or a private individual) or the accused, or of any ancillary powers.
2. As both a matter of common sense and statutory construction the specific conferral of power to award costs in other parts of the Act led to a proper inference that such power had by implication been excluded in the Court's preliminary inquiry jurisdiction.
3. The absence of a power to award costs was consistent with the objects and procedures that apply to preliminary inquiries. The preliminary inquiry was undertaken according to the procedures introduced by the 2012

Amendment Act which replaced the outmoded, cumbersome, costly and time wasting procedure that was previously in place. Features of the process were that the prosecutor must lodge statements and other documents relied upon five days before the hearing, no oral evidence was placed before the Court and no cross-examination took place. It could be inferred that the Legislative Assembly would not have foreseen that an accused would incur substantial costs at this stage of the criminal process requiring provision to be made for the awarding of costs.

4. As a matter of principle, in circumstances where there was no express or implied statutory power to award costs, it was difficult to see how the Court's inherent power could extend so far, except as was necessary to prevent an abuse of the Court's processes. That Mr Pohiva, acting in good faith, failed to make out a sufficient case to put the respondents on trial did not amount to an abuse of process.

5. The Magistrate had no express or implied statutory power to award costs in the preliminary inquiry proceedings under Part III of the Magistrate's Courts Act or, in the particular circumstances, any inherent power to do so. The appeal was allowed and the decision of the Magistrate awarding the respondents costs was set aside.

Cases considered:

Bodden v Commissioner of Police of the Metropolis [1990] 2 WLR 76
Brynes v Barry and John Fairfax Pty Ltd [2003] ACTSC 84
Byrnes v Barry [2004] ACTCA 24
DPP v Carey [1970] AC 1072
Ferguson v Reid [2007] SASC 445
Garnett v Bradley (1878) 3 App Cas 944
Guardian of West Ham Union v The Church Wardens etc St Matthew, Bethnal Green [1896] AC 477
Latoudis v Casey [1990] 170 CLR 534
Moevao v Department of Labour [1980] 1 NZLR 464
Perkins v County Court of Victoria [2000] VSCA 171
Pohiva v Tu'ivakano anors [2014] Tonga LR 9
Pringle v Secretary of State for India [1888] 40 Ch.D 288
R v Puloka [2000] Tonga LR 335
Seimer v Solicitor-General [2013] 3 NZLR 441
Wright v Judge Keon-Cohen (1992) 77 A Crim R 67
Zaoui v Attorney-General [2005] 1 NZLR 577

Statutes considered:

Criminal Offences Act (Cap 18)
Magistrate's Courts Act (Cap 11)

Counsel for the appellant : Dr R Harrison QC SC
Counsel for the second respondent : Mr Stanton SC and Mr Edwards

Written submission from Mr 'A Kefu SC to assist the Court

Ruling

[1] The issue in this case is whether a Magistrate has the power to award costs against a private informant when exercising the preliminary inquiry jurisdiction under Part III, section 32 of the Magistrate's Courts Act.

The facts

[2] A detailed statement of the facts can be obtained from the ruling of Scott CJ dated 17 January 2014 in the proceeding between the same parties under AM 20 of 2013. The facts relevant to this appeal are as set out below.

[3] Mr. Pohiva commenced private criminal prosecutions against the second respondents (the respondents) in the Magistrate's Court on 12 February 2013. The charges alleged serious dishonesty. The Magistrate conducted a preliminary inquiry (also known as a committal hearing) under section 32 of the Magistrate's Courts Act (as enacted by section 9 of the Magistrate's Court (Amendment) Act 2012). He found that a sufficient case had not been made out to put the respondents on trial before the Supreme Court. He discharged them. Mr. Pohiva appealed the discharge to the Supreme Court under AM 20 of 2013. His appeal was dismissed by Scott CJ on 17 January 2014.

[4] The respondents applied to the Magistrate for the costs of the preliminary inquiry. On 16 July 2014 the Magistrate awarded them costs. In a written ruling of 10 September 2014 he assessed the quantum of the costs at T$22,000.

[5] Mr. Pohiva initially sought judicial review of the Magistrate's ruling on costs under CV 75 of 2014. When that matter came before Scott CJ it was agreed that Mr. Pohiva should have proceeded by way of an appeal. An appeal was filed out of time by leave and it is the appeal that is the subject of this ruling. Costs in CV 75 of 2014 were reserved pending the hearing of this appeal.

[6] Mr. Pohiva challenges the power of the Magistrate to award costs of the preliminary inquiry. He also challenges the award that was made on its merits (assuming power to award costs exists). I am to determine whether the Magistrate had the power to award costs as a discrete issue. Should it be necessary, I am to allow the parties to present further evidence and submissions on the other matters raised by Mr. Pohiva's appeal.

The Magistrate's ruling

[7] In the Magistrate's ruling he does not specifically identify the source of his power to award costs. He states, "upon the arguments on the cost submissions of the defendants, I will award them their cost". The Magistrate ought to have both identified the source of his power to award costs and given his reasons for finding the respondents' arguments meritorious. A Judge's duty to give reasons is a requirement of due process and therefore of justice. The parties are entitled to know why the Judge arrived at the result that he did. In the case of the losing party, the reasons of the Judge allow him to assess the merits of an appeal. It is also important to a Court hearing the case on appeal that reasons are given. It is from those reasons that it will

usually make its assessment of whether the Judge fell into error. Finally, the requirement to give reasons concentrates the mind of the Judge and a decision is much more likely to be soundly based than if no reasons are given.

[8] The submissions for the respondents before the Magistrate contained no analysis of the provisions of the Magistrate's Courts Act as a source of the Court's jurisdiction or powers (either express or implied) to award costs. The respondents' sought to invoke the Magistrate's Court's power to control and avoid abuse of its own processes. It was submitted for the respondents that a costs award was needed to "redress the wrong done" to the respondents by the laying of the charges against them.

The arguments on this appeal

The appellant's case

[9] The appellant's starting point was that the Magistrate's Court is a creature of statute and its jurisdiction is conferred on it by statute. There is no express power in the Magistrate's Courts Act to award costs in a preliminary inquiry. In the absence of an express power to award costs the appellant contends that the question to be determined is whether the Magistrate had an implied power to do so. It was submitted that this issue has to be considered in its statutory context but also in the broader context of customary and common law criminal procedure.

[10] Dr Harrison argued that the fact that there is no express power 'speaks volumes' when viewed against the express conferral of power to award costs in other areas of the Magistrate's Court's jurisdiction and the common law principle that the Crown in criminal cases neither receives nor pays costs. He submitted that this "pre-existing long standing rule of the common law" pre-dated the Magistrate's Courts Act and it would require express wording or clear implication to confer on the Magistrate's Court a general power to award costs in criminal cases.

[11] Dr Harrison also submitted that the argument advanced for the respondents, that a power to award costs should be implied, ignored the full ramifications of that position, which included that such power, if brought into being, would have to be reciprocal (that is, it would have to allow for costs against the Crown and accused, including in proceedings for committal for trial). He said it would also require the implication of powers to tax costs, enforce the payment of costs and to appeal from costs awards. To the extent that the respondents wanted to limit the Magistrate's power, so that costs could be awarded but only against a private prosecutor and not the Crown, Dr Harrison argued that was an illogical stance.

The respondents' case

[12] The respondents argue that the lack of an express power to award costs is of no moment. They submit that the Magistrate's Court has the power to award costs in committal proceedings either as the exercise of its inherent powers, which are necessary to enable it to carry out its functions effectively, or as a matter of necessary

implication from the Court's express powers, particularly those contained in sections 8(c), 11, 24(9) and 32 of the Magistrate's Courts Act.

[13] In both his written and oral submissions Mr. Stanton focused on the status of Mr. Pohiva as a private prosecutor who had brought the prosecutions against the respondents as a 'person aggrieved' in reliance upon section 197 Criminal Offences Act (as amended by No 20 of 2007). He said that the appellant's arguments failed to address the significance of private prosecutions which do not come within the conventional category of proceedings of a criminal nature and, in particular, could not be equated with proceedings brought by the Crown. He submitted that prior to the 2007 amendment of section 197 there was no right to bring private prosecutions in Tonga. The amendment, he said, allowed private litigants to bring criminal cases, and, as a result, the rules in relation to costs in criminal cases were displaced.

[14] Mr. Stanton referred me to a number of cases which he argued supported the view that there is no rationale for a prohibition on costs awards in private prosecutions. He accepted that in all of the cases cited there was an express statutory grant of power to award costs, which is not the case here.[52]

Counsel assisting the Court

[15] In submissions filed to assist the Court, Mr. Kefu also submitted that the Magistrate had implied power to make an order of costs against an unsuccessful private prosecutor at the preliminary inquiry stage. He appeared to accept that this meant that costs could also be awarded against the Crown but considered that would only rarely be appropriate in an unsuccessful public prosecution. Mr. Kefu argued that the circumstances of public and private prosecutions are different because public prosecutors have a public duty to prosecute on behalf of the Crown in the public interest and are bound by a code of conduct and professional standards that do not apply to private prosecutors.

[16] Mr. Kefu submitted that, to ensure the due administration of justice, the Magistrate's Court should be held to have an implied power from its express power to 'hear and determine' a preliminary inquiry, to award costs against an unsuccessful private prosecutor. I note that it is section 11(1) that refers to the Magistrate's Court having jurisdiction to 'hear and determine' criminal cases. This is not the language of section 32, which is significant for reasons I shall come to.

[17] Mr. Kefu also submitted that the interests of justice supported the implication of a power to award costs to allow a successful defendant to recoup the costs that he has been forced to incur.

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[52] Latoudis v Casey [1990] 170 CLR 534; Byrnes v Barry [2004] ACTCA 24; Brynes v Barry and John Fairfax Pty Ltd [2003] ACTSC 84; Perkins v County Court of Victoria [2000] VSCA 171 and Ferguson v Reid [2007] SASC 445.

Discussion

The test for implication of a power

[18] The respondents argue that the power of the Magistrate to award costs arises by 'necessary implication' from its statutory jurisdiction. The appellant submits that the test for the implication of powers in the case of a Court of limited statutory jurisdiction is a test of "necessary implication derived by way of interpretation of the statute in question". Dr Harrison noted that in real terms there was probably little difference in the positions contended for by Counsel.

[19] The legal meaning of a statute (which is not necessarily the same as its grammatical meaning) can be determined from the express words and by implication. In my view, implications may arise because they are directly suggested by the express words that appear in the statute or because they are necessary and proper as being indirectly suggested by principles of interpretation and law that are not displaced by the words expressed.[53] The role of the Court in a case like this, where there are two competing legal meanings contended for, is to weigh competing interpretative factors and determine which is, on balance, the correct interpretation.

The words of the Act

[20] The starting point is the words of the Magistrate's Courts Act. Relevantly for present purposes, the Magistrate's Courts Act confers jurisdiction upon the Magistrate's Court over summary criminal trials (Part II), preliminary inquiries for offences triable in the Supreme Court (Part III)[54] and civil cases (Part V). I set out below sections 8(c), 11(1), 24(9) and 32 of the Magistrates Courts Act which are the sections that were the main focus of Counsels' submissions. Section 8(c) appears in Part I of the Act and is a provision of general application. Sections 11 and 24 appear in Part II and therefore relate to the Magistrate's Court's summary criminal jurisdiction. Section 32 is in Part III which deals with the Magistrate's Court's preliminary inquiry jurisdiction. The sections provide:

> **8. General powers and jurisdiction**
>
> Every magistrate shall have jurisdiction-
>
> (c) to investigate all charges of criminal offences which he is not empowered to try and to discharge the accused or commit him for trial before the Supreme Court.
>
> **11. Criminal jurisdiction**
>
> (1) The Magistrate's Court has jurisdiction to hear and determine criminal cases which the Court is empowered to hear and determine by this or any other Act.

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[53] Bennion "Statutory Interpretation" 2nd Ed at page 361.
[54] Which is subject to section 35 but this is not of significance for present purposes.

24 Hearing of case where both parties appear

(9) At the conclusion of the case the Magistrate shall either at the same or at an adjourned sitting of the Court give his decision by either dismissing the complaint or convicting the defendant and making such order against him as the justice of the case requires.

32 Committal hearings

(1) If a person is accused of having committed an offence which is triable only in the Supreme Court (except by operation of section 35) a Magistrate shall hold a preliminary inquiry in the Magistrate's Court without the calling of witnesses.

(2) The Magistrate shall notify the prosecutor and the accused of the date on which the preliminary inquiry shall be held and shall require the attendance of the accused —

(a) by issuing a summons; or

(b) if it appears to the Magistrate, from evidence on oath, that the person is likely to abscond – by issuing a warrant.

(3) For every preliminary inquiry the prosecutor shall lodge with the Magistrate, at least 5 days before the date thereof, 2 sets of documents each consisting of one copy of a fair summary of the statements of the prosecution witnesses, one copy of the list of exhibits he proposes to produce and one copy of any documentary exhibits he proposed to produce.

(4) At the preliminary inquiry the Magistrate shall —

(a) cause to be handed to the accused in open Court, the accused's set of documents consisting of one summary of the statements of the prosecution witnesses, one copy of the list of exhibits, and one copy of the documentary exhibits; and

(b) endorse on the remaining copy that the accused has received his set of documents; and

(c) if he considers that the documents disclose that a sufficient case has been made out to put the accused upon his trial before the Supreme Court, commit the accused to the Supreme Court for trial in custody or on bail as appropriate, and forward the remaining set of documents together with a record of the proceedings in Form 21 in the Schedule hereto to the Registrar of the Supreme Court; or

(d) if he considers that the documents do not disclose that a sufficient case has been made out to put the accused upon his trial before the Supreme Court, shall discharge him.

[21] Section 8(c) (which as I have said is a provision of general application) confers on a Magistrate jurisdiction to investigate all charges of criminal offences which he is not empowered to try, and to discharge the accused or commit him for trial before the Supreme Court. There is no reference to any power to award costs or of any ancillary powers that might be exercised upon discharging or committing the accused for trial.

[22] Despite the submissions of Mr. Kefu to the contrary, sections 11 and 24(9) of the Act do not support the implication of a power to award costs in the Magistrate's preliminary inquiry jurisdiction. They are in Part II of the Act (which deals with the Court's summary jurisdiction in criminal cases) and are of no relevance to the exercise of the Magistrate's Courts preliminary inquiry jurisdiction under Part III. Furthermore, whilst the words "making such order against him as the justice of the case requires" in section 24(9) might arguably confer the power to award costs in summary cases, the use of the pronoun "him" makes clear that such award could only be made against the defendant and not the prosecutor.

[23] The express powers conferred on a Magistrate at the conclusion of a preliminary inquiry are limited by section 32(4)(c) and (d) to committing the accused to the Supreme Court for trial or discharging him. There is, again, no reference to the Magistrate having the power to award costs either for or against the prosecutor (be they the Crown or a private individual) or the accused, or of any ancillary powers.

[24] The absence of any express power to award costs in committal proceedings is to be contrasted with the express powers conferred in civil cases (sections 60(1) and 66(f)), against the parent or guardian of a child between 7 and 14 years who is convicted of an offence in the Magistrate's Court's summary jurisdiction (section 29), and on the Supreme Court on appeal from decisions of the Magistrate's Court (section 80(1)).

The implied exclusion rule

[25] Dr Harrison submits that the failure to expressly confer the power to award costs in the Magistrate's Court's criminal jurisdiction (except to the limited extent in section 29) must be seen as a deliberate omission giving rise to a "powerful *expressio unis est exclusio alterius* interpretation, against the existence of a power to award costs in any committal hearing/preliminary inquiry". Rules of construction, such as the implied exclusion rule, are today regarded as mere guides to be handled warily.[55] I do not accept that the application of the implied exclusion rule completely excludes the prospect of implying a power to award costs. I do accept that as both a matter of common sense and statutory construction the specific conferral of power to award costs in other parts of the Act leads to a proper inference that such power has by implication been excluded in the Court's preliminary inquiry jurisdiction.

[55] Burrows and Carter "Statute Law in New Zealand" 4th Ed at 213 and 214.

Relevant principles of common law and section 197

[26] Acts are to be read and applied consistently with the existing body of law.[56] It is a rule at common law that costs are entirely a creature of statute and absent a statutory power the Court has no power to award costs.[57] Whilst courts of equity always maintained the power to award costs, reflecting their flexible and discretionary jurisdiction, the common law courts were obliged to go back to a legislative enactment in order to arrive at their power (if any) of dealing with costs.[58] Related to this, the rule that the Crown neither receives nor pays costs in criminal cases has usually been explained on the basis that it was the Crown's prerogative not to pay costs to a subject and beneath his dignity to receive costs.[59] The rule may be explained on the simpler basis that in the absence of statute, there is simply no power to award costs.[60]

[27] I do not accept Mr. Stanton's argument that section 197 of the Criminal Offences Act (as amended in 2007) displaced the rules on costs in criminal cases, at least in respect of private prosecutions. The right to bring private prosecutions has been a long standing feature of Tongan law. That this is so can be seen from section 175 of the Criminal Offences Act, as it appeared in the 1929 Revised and Consolidated Laws of Tonga and section 188 of the Criminal Offences Act, as it appeared in the 1966 Revised and Consolidated Laws of Tonga.

[28] The 2007 amendment to section 197 cannot possibly mandate an implication that the Magistrate's Court has power to award costs in its preliminary inquiry jurisdiction. The section makes no reference to costs. The preliminary inquiry jurisdiction of the Magistrate's Court is prescribed in the Magistrate's Courts Act (not the Criminal Offences Act) and the procedures now followed were introduced only in 2012. I also agree with Dr Harrison that any power to award costs, if it exists, could only be fully reciprocal, which is not what Mr. Stanton argues for.

[29] Consistent with the common law, to which I have referred, the pattern in other jurisdictions is to address costs in legislation by specific powers. That is what would be expected had there been an intention to grant the Magistrate's Court the power to award costs in its preliminary inquiry jurisdiction. As noted earlier, Mr. Stanton referred me to many cases involving costs in criminal cases all dealing with specific statutory provisions allowing for the award of costs.

An implication is not necessary

[30] The Courts will imply powers where other powers contained in statute would be rendered ineffective without them.[61] There were no arguments presented to me that

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[56] Bennion at 727-728 and Burrows and Carter at 543-549.
[57] *Byrnes v Barry* [2004] ACTCA 24 at para 60 per French J.
[58] *Garnett v Bradley* (1878) 3 App Cas 944,953-954 per Lord Hatherley.
[59] Dal Pont "Law of Costs" at page 806.
[60] *Wright v Judge Keon-Cohen* (1992) 77 A Crim R 67 at 68.
[61] *DPP v Carey* [1970] AC 1072, *Bodden v Commissioner of Police of the Metropolis* [1990] 2 WLR 76 referred to in *Bennion* (supra) at 368 and *R v Kahu* [1995] 2 NZLR 3 (CA).

persuaded me that the implication of a power to award costs was 'necessary' for the Magistrate to effectively exercise his preliminary inquiry jurisdiction. Mr. Stanton submitted that it "simply defies credulity" that costs cannot be awarded against a private prosecutor upon the discharge of the defendant at a committal hearing stage, that it was "a nonsense" for the appellant to submit that such power was neither appropriate nor necessary and "patently obvious" that upon discharging the respondents in a case which was devoid of merit that the Magistrate should receive submissions and then award them their costs. Those submissions simply state a conclusion and so are unhelpful. A Magistrate who conducts an inquiry under section 32(4) has a limited suite of options available to him. They are limited to either committing the accused for trial or discharging him. I cannot see that these powers are rendered ineffective by the absence of a further power to award costs.

The preliminary inquiry procedure

[31] The absence of a power to award costs is consistent with the objects and procedures that apply to preliminary inquiries. The preliminary inquiry was undertaken according to the procedures introduced by section 9 of the Magistrate's Courts (Amendment) Act 2012 which as Scott CJ said in his judgment in AM 20 of 2013, at paragraph [9], was to replace the outmoded, cumbersome, costly and time wasting procedure that was previously in place. Features of the process are that the prosecutor must lodge statements and other documents relied upon five days before the hearing, no oral evidence is placed before the Court and no cross-examination takes place. It can be inferred that the Legislative Assembly would not have foreseen that an accused would incur substantial costs at this stage of the criminal process requiring provision to be made for the awarding of costs.

The interests of justice

[32] I am very mindful of the submission made by both Mr. Stanton and Mr. Kefu that it is unjust that a party may bring an unsuccessful private prosecution, putting the accused to considerable cost and inconvenience, with no risk of an adverse costs order being made against them. The respondents understandably took steps, with the assistance of Counsel, to defend themselves against very serious criminal charges. However, the role of the Court is to interpret the Magistrate's Court Act according to its terms and by reference to relevant principles of statutory construction and law. In so far as it is thought that the legal meaning of a statute produces some injustice that is a matter for legislative reconsideration of the statute.

[33] Looking at the matter in a wider context, I do not consider that the interests of justice require that the Magistrate have the power to award costs on a preliminary inquiry. A successful accused has the right to recover wasted costs in an action for malicious prosecution, although I accept this will mean that he must incur more costs on an uncertain outcome. Perhaps more significantly, as I have noted the preliminary inquiry process is designed to minimise costs. Also, there is existing protection against vexatious prosecutions in the power that the Attorney-General has to stay a private prosecution. There is also the Court's power to stay a proceeding if it is an abuse of process.

There is no implied statutory power to award costs

[34] Weighing the factors I have referred to, I have come to the clear view that the Magistrate had no statutory power (express or implied) to award costs against Mr. Pohiva.

The Court's inherent powers

[35] As noted above, the respondents also argue that the Magistrate had the power to award costs under his inherent powers. I accept that the Magistrate's Court has implied power to prevent abuse of its processes and to develop procedures to facilitate its jurisdiction. Mr. Stanton referred me to *Zaoui v Attorney-General*,[62] *Seimer v Solicitor-General*[63] and also *Moevao v Department of Labour*[64]. I take no issue with the principles expressed in those cases.

[36] There have been cases where the Courts have awarded costs in reliance upon their inherent powers. In *R v Puloka*[65] the Court of Appeal awarded costs under its inherent powers in respect of what it described as an 'incompetent' application for leave to appeal. There was no discussion of the relevant principles upon which the Court of Appeal relied. In *Pringle v Secretary of State for India*[66] the English Court of Appeal awarded costs upon staying a civil action. The Court described the claim as "a fruitless and unjustifiable application made to the Court".[67] In *The Guardian of West Ham Union v The Church Wardens etc St Matthew, Bethnal Green*[68] the House of Lords held it had power to award costs in civil proceedings in circumstances where is was argued that there was no statutory power to do so. Lord Herschell considered such power was 'assumed' in the relevant statute.[69] Lord MacNaughten considered that the House of Lords "as the highest Court of Appeal, has and necessarily must have an inherent jurisdiction as regards costs."[70]

[37] Recent cases, including *Seimer* at paragraphs [113] and [114] upon which Mr. Stanton placed reliance in his written submissions, have made clear that there are limits on the exercise of the Court's inherent powers. The Court has only such powers as are necessary to enable it to act effectively. The Court's powers do not extend to further general public interest other than the due administration of justice. I do not consider that the Court has power to award costs as part of its inherent ancillary jurisdiction "as it sees fit" which is what I understood Mr. Stanton was submitting to me.[71] That puts the position far too broadly. As a matter of principle, in circumstances where (as I have held) there is no express or implied statutory power to

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[62] [2005] 1 NZLR 577.
[63] [2013] 3 NZLR 441.
[64] [1980] 1 NZLR 464.
[65] [2000] Tonga LR 335.
[66] [1888] 40 Ch.D 288.
[67] Ibid at 290 per Bowen LJ.
[68] [1896] AC 477.
[69] At 484.
[70] At 489.
[71] Paragraph 29 of respondents' submissions.

award costs, it is difficult to see how the Court's inherent power could extend so far, except as is necessary to prevent an abuse of the Court's processes.[72]

[38] The Magistrate discharged the respondents "as the Prosecution has not been able to provide sufficient admissible evidence….to require these defendants to be committed to the Supreme Court."[73] He did not do so on the basis that the prosecutions were an abuse of process and did not make any finding that Mr. Pohiva was acting in bad faith or for an ulterior purpose in commencing the prosecutions. Scott CJ dismissed Mr. Pohiva's appeal on the basis that taken at its highest the evidence presented was not sufficient that a jury properly directed could convict. Scott CJ said that Mr. Pohiva "launched these prosecutions because of his genuine concern at the way these funds had been disbursed"[74] and, in relation to his appeal, that his grounds were "advanced in good faith"[75] albeit misconceived.

[39] That Mr. Pohiva, acting in good faith, failed to make out a sufficient case to put the respondents on trial does not amount to an abuse of process.

[40] I therefore find that the Magistrate had no inherent power to award costs against Mr. Pohiva.

The result

[41] The Magistrate had no express or implied statutory power to award costs in the preliminary inquiry proceedings under Part III of the Magistrate's Courts Act or, in the circumstances of this case, any inherent power to do so. The appeal is allowed and the decision of the Magistrate awarding the respondents costs is set aside.

[42] It would seem that the T$22,000, which Mr. Pohiva has paid into Court, should be paid out to him but, as I have not heard from Mr. Stanton on that matter, I direct that the respondents are to advise within seven days if they wish to object to the release of those funds. Dr Harrison will have seven days to reply if objection is taken.

[43] As far as the costs of this appeal and CV 75 of 2014 are concerned the parties are to file memoranda as to costs if they cannot agree within 21 days.

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[72] Dal Pont at 6.8 and 6.11 at 193-196.
[73] At page 46 of the Appeal Booklet in Am 20 of 2103.
[74] Final unnumbered paragraph of ruling of 17 January 2014.
[75] At paragraph [27].

Attorney-General v Vatikani anors

Supreme Court, Nuku'alofa
Paulsen CJ
CV 14/15

5 June 2015; 24 June 2015

Contempt of court – article published in newspaper reporting on a hearing – article scandalised the court – guilty of contempt

On 2 March 2015 an article was published in the Kele'a newspaper that reported on a hearing conducted by Magistrate Mafi. The Attorney-General applied for committal of the respondents on the ground that they were guilty of contempt by scandalising the Court. The first respondent was the Editor of the Kele'a and the second respondent was the Publisher of the Kele'a. Both respondents denied that the article was written with malice or to abuse the authority of Magistrate Mafi, the Magistrate's Court or the Tongan judiciary. They also said that they did not accept the Attorney-General's analysis of the content of the article or its claimed effect. However, if the Court were to hold that the article "went too far" and amounted to a contempt of Court then they wished to tender an apology.

Held:

1. In an action for contempt by scandalising the Court, what must be proved beyond reasonable doubt was that the publication of material was calculated, in the sense of likely, to bring a Court or a Judge into contempt or lower their authority in the eyes of the community. There was no requirement that it be proved that they were in fact so undermined.
2. The court found that the article was, when read as a whole and in context, likely to bring the Magistrate's Court and Magistrate Mafi into contempt and lower their authority in the eyes of the community. The article was unbalanced, in some respects factually incorrect and pointed. It offered little opportunity for the reader to exercise sound and prudent judgement of the situation presented.
3. The court was satisfied beyond reasonable doubt that the article scandalised the Court and the respondents were found guilty of the offence of contempt of Court.

Cases considered:

Attorney-General v Namoa [2000] Tonga LR 59
Attorney-General v Tapueluelu (Supreme Court, CV 52/2013, 30 August 2013)

Gallagher v Durack (1983) 152 CLR 238
Namoa v Attorney General [2000] Tonga LR 70
R v Editor of the New Statesman, ex p DPP (1928) 44 TLR 301
R v Gray [1900] 2 QB 36

Rules considered:
Supreme Court Rules 2007

Counsel for the applicant	:	Mr Kefu SC
Counsel for the respondents	:	Dr Harrison QC SC

Ruling

[1] This is an application for committal of the respondents on the ground that they are guilty of contempt by scandalising the Court. The proceeding is brought in reliance upon Order 38 Supreme Court Rules and following the grant leave on 20 March 2015.

[2] The application arises from the publication of an article in the Kele'a Newspaper of 2 March 2015 reporting on a hearing conducted by Magistrate Mafi (the article). The article was published in the Tongan language but I have been provided with an English translation which appears later in this ruling.

[3] The Kele'a is widely distributed in Tonga. It is also distributed in some overseas countries. The first respondent is the Editor of the Kele'a and the second respondent is the Publisher of the Kele'a.

[4] The affidavit filed in support of the application of James Bruce Lutui provides details of the hearing before Magistrate Mafi. Mr. Latui is a Crown Counsel and was the Prosecutor appearing at the hearing before Magistrate Mafi.

[5] On 27 January 2015, Magistrate Mafi, heard charges against Meilin Liu and Fe Kaifeng Tian. Liu was charged by summonses 30-31/15 with (1) attempting to export prohibited goods and (2) possession of sea cucumber during the closed season. Tian was charged by summonses 29, 32-33/15 with (1) attempting to export prohibited goods, (2) attempting to export restricted goods and (3) possession of sea cucumber during the closed season. Liu and Tian pleaded guilty to the charges and, after their Counsel made submissions on their behalf, they were sentenced by Magistrate Mafi.

[6] Liu was sentenced as follows: (1) attempting to export prohibited goods (summons 30/15) to a fine $1000 or one month imprisonment in default of payment, and (2) possession of sea cucumber during the closed season (summons 31/15) to be convicted and discharged. Tian was sentenced as follows: (1) attempting to export prohibited goods (summons 29/15) to a fine of $1,000 or one month imprisonment in default of payment, and (2) attempting to export restricted goods (summons 32/15) to a fine of $1,000 or one month imprisonment in default of payment, and (3) possession of sea cucumber during the closed season (summons 33/2015) to be convicted and discharged.

[7] In his affidavit, Mr. Lutui refers to the matters that Magistrate Mafi took into account in sentencing Liu and Tian. He says that Magistrate Mafi imposed the sentences upon Liu and Tian in open Court and that the written Court Decision was subsequently issued. It appears that he is referring to the official record of the charges and the sentences issued by the Court. The written Court Decision in the case of Liu contained an error in that the summonses numbers stated at the top of the document were wrong and corresponded to the summonses numbers in relation to Tian. However, the summonses numbers in the body of the document were correct. Magistrate Mafi's reasons for his decisions on sentence were not typed up.

[8] The article (translated into English) reads as follows:

> *Questionable whether a Court Order should look like this*
>
> A Decision of a Magistrate is published in the Kele'a this week about a trial of two Asians on the 27th of January this year, after they were found to be in possession of sea cucumber at the Fua'amotu, Airport over the past weeks. These two Asians were Fe Kaifeng Tian and Meilin Liu, both from China. However, in this trial, both accused were found guilty, including Fe Kaifeng Tian. He was convicted on 3 criminal summons which were: 1. Summons Number 29/2015 – Attempting to export prohibited goods. 2. Summons Number 32/2015 – You exported restricted goods, and 3. Summons Number 33/2015 – Possession of sea cucumber during the closed season.
>
> *Fe Kaifeng Tian's Decision*
>
> In a decision handed down by Magistrates Salesi Mafi to the accused, he ordered that for summons number one – "Fined $1000 to be paid immediately, or one month imprisonment in default".
>
> For the 2nd summons, Salesi Mafi imposed, a fine of $1,000 to be paid immediately, or one month imprisonment in default. The sandalwood is to be given to the Bailiff division on the Ministry of Justice to be auctioned off.
>
> For the last summons, he "convicted and discharged" the accused and "the sea cucumber is to be destroyed".
>
> This decision is questionable because the Magistrate does not give any explanation or reasons and the basis for the discharge. Did the prosecution or counsel for the two accused make submission to that effect, which is the reason for the discharge.
>
> Those matters are not shown on the court order which contains the Government of Tonga and Magistrate's Court stamps.

Meilin Liu Decision Suspicious

The decision of Magistrate Salesi Mafi's in relation to Meilin Liu is suspicious in this way. In the court order shown above, it shows that the case number is Cr No. 29, 32, 33/2015.

It looks suspicious because the core of the order is not the same with the summons number of the case shown on the court order.

It is stated on the summons given to Meilin Liu that – Summons Number 30/2015 – Attempted export of prohibited goods. And on the 2nd summons it shows – Summons Number 31/2015 – Which is a summons for "possession of sea cucumber during the closed season".

In relation to the second summons, it shows on the decision that the accused (Meilin) is convicted and discharged and the sea cucumber seized is to be destroyed. The sea cucumber refers to the sea cucumber that was found on the two Asians that were accused.

However, it shows on Magistrate Salesi Mafi's decision in relation to Meilin Liu's, that he gave his final decision on the 27th of January this year as well. **The question is why is the summons number different from the case number that is shown above in his court order?**

In accordance with reliable information that the Kele'a has received, there was communication from high authorities in Government to the Ministry of Justice to release these Asians because they are friends of the Former Prime Minister. Those that are alleged to have made these communications, are the two Edwards and also the Acting Secretary to Cabinet?"

[9] The written Court Decisions were reproduced in the article underneath which were written the words "This was the order of Magistrate Salesi Mafi. It is questioned whether this is the correct procedure in entering an order of the Court where no details are given."

[10] There were also photographs of Magistrate Mafi, Mr. Clive Edwards and the Acting Secretary of Cabinet, Mr. 'Aholotu Palu, with their names on the photographs identifying each of them.

[11] The application contends that the article made statements to the effect that:

> [11.1] Magistrate Salesi Mafi gave preferential treatment to the two accused because he was contacted by Clive Edwards, William Edwards and 'Aholotu Palu to release the two Accused because they were friends of the former Prime Minister, Lord Tu'ivakano.

[11.2] Magistrate Salesi Mafi had been influenced by Clive Edwards, William Edwards and 'Aholotu Palu to convict and discharge the two Accused on some of the charges against them.

[11.3] Magistrate Salesi Mafi was not impartial in sentencing the two Accused.

[11.4] The statements were calculated to lower the authority of Magistrate Salesi Mafi, the Magistrate's Court and the Tongan judiciary as a whole.

[11.5] The statements were made with malice to abuse the authority of Magistrate Mafi, the Magistrate's Court and the Tongan judiciary as a whole.

[11.6] The article created a real risk of undermining the public confidence in the due administration of justice by Magistrate Mafi, the Magistrate's Court and the Tongan judiciary as a whole.

[12] In his affidavit, the first respondent, Mr. 'Ofa Vatikani, acknowledges that he is the Editor of the Kele'a and responsible for its editorial content. He wrote the article and published it because he considered features of the cases appeared unusual. Those features were, what appeared to him to be, the absence of reasons for the Magistrate's decisions and discrepancies on the face of the Court documents. He says that he raised these issues in the article as questions rather than "by way of actual claims as to the true facts of this case". He said that at the time of writing, and based on the information that he had to hand, he believed that the factual content of the article was true and correct and that he has not had reason to question the factual content of the article.

[13] In her affidavit, the second respondent, Ms. Laucala Pohiva, acknowledges that she is the publisher of the Kele'a and that, whilst she does not exercise editorial control or review content, she is ultimately responsible for its content. She did not see or approve the article before it was published.

[14] Both Mr. Vatikani and Ms. Pohiva deny that the article was written with malice or to abuse the authority of Magistrate Mafi, the Magistrate's Court or the Tongan judiciary. They also say that they do not accept the Attorney-General's analysis of the content of the article or its claimed effect. However, if the Court were to hold that the article "went too far" and amounted to a contempt of Court then they wish to tender an apology.

The law

[15] The relevant law has been set out in some detail by the Court of Appeal in *Namoa v Attorney General*[76] and more recently by Scott CJ in *Attorney-General v Tapueluelu.*[77] I consider that the law is well settled and for present purpose the relevant principles are as set out below.

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[76] [2000] Tonga LR 70.

[77] CV 52 of 2013 30 August 2013.

[16] Any act done or writing published calculated to bring a Court or a Judge into contempt or to lower his authority is a contempt of Court.[78] The purpose of this form of contempt is to protect the public (not the Court or Judge) from the mischief that will occur if the authority of the Court is undermined or impaired.

[17] Anyone is free to criticise the decisions of the Court or the conduct of any Judge, even if the criticism is outspoken, mistaken or wrongheaded, provided that it is not likely to undermine the public confidence in the administration of justice. In many cases the good sense of the community can be relied upon as sufficient safeguard against a scandalous disparagement of a Court or Judge.[79]

[18] In an action for contempt by scandalising the Court, what must be proved beyond reasonable doubt is the publication of material that is calculated, in the sense of likely, to bring a Court or a Judge into contempt or lower their authority in the eyes of the community. There is no requirement that it be proved that they were in fact so undermined.[80]

[19] In reaching its conclusion the Court must take into account the whole of the material and the context in which the material is published.[81] In this regard, Dr. Harrison took issue with the view expressed by Ward CJ in his judgment in the Supreme Court in *Attorney-General v Namoa*[82] (referred to by Scott CJ in *Tapueluelu*[83]) that the level of criticism likely to undermine public confidence in the administration of justice is lower in a small community with few judges and a relatively undeveloped press and media. Dr. Harrison argued that this was illogical and unsupported by empirical evidence. He went so far as to suggest that a less stringent standard should be applied than in a larger community where higher journalistic standards can be expected to prevail.

[20] I place no reliance upon Ward CJ's words. I proceed on the basis that regardless of the characteristics of the community to which Ward CJ referred the legal test is the same. It must be proved beyond a reasonable doubt that the words are likely to bring a Court or a Judge into contempt or lower their authority in the eyes of the community. In a case such as this, it will be necessary to prove to the required standard that a publication has a wide circulation in the area where it is claimed confidence is impaired. There is no dispute that the Kele'a has a wide circulation in Tonga.

[21] It is well established that an allegation that a Judge is partial or biased is calculated to bring that Judge into contempt. Such allegations are serious because they undermine confidence in the basic function of a Judge[84] Dr. Harrison submitted that it was the law in Tonga that the falsity of the particular imputation that was being

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[78] *R v Gray* [1900] 2 QB 36.
[79] *Gallagher v Durack* (1983) 152 CLR 238.
[80] Scott CJ in *Attorney-General v Tapueluelu* at 19.
[81] *Namoa v Attorney-General* at 81.
[82] [2000] Tonga LR 59, 64,65
[83] At paragraph 10.
[84] *R v Editor of the New Statesman, ex p DPP* (1928) 44 TLR 301.

made against a Judge is an element of the offence of contempt by scandalising the Court. Falsity, he said, had to be proved beyond reasonable doubt. He relied upon the judgment of Ward CJ in *Attorney-General v Namoa*[85] where the Judge said that "*untrue allegations of bias or impropriety will amount to a serious contempt*". These words were quoted by Scott CJ in *Tapueluelu*.[86]

[22] I do not accept Dr. Harrison's submission. A requirement to prove that an imputation made against a Judge is false is inconsistent with the principal objective of this category of contempt. The law seeks to protect the interests of the public not sit and try the conduct of the Judge. Furthermore, the judgment of Ward CJ was appealed to the Court of Appeal. I find no support in that Court's analysis for a requirement that falsity be proved. Whilst Scott CJ did quote the words of Ward CJ in *Tapueluelu* he did not consider that there was a requirement to prove falsity. At paragraph [19] Scott CJ said:

> Once publication of contemptuous words has been proven it only remains for it to be proved that the words carried a real risk that confidence in the Courts would be undermined.

Did the article constitute a contempt by scandalising the court?

[23] Dr. Harrison argued that apart from the last paragraph of the article its thrust and effect was to criticise the Magistrate's Court process due to the absence or inadequacy of reasons for the sentencing decisions in respect of Liu and Tian. He acknowledged that the article might contain the implication that Liu and Tian were dealt with overly leniently. He said that this could not even remotely be said to amount to scandalising the Court.

[24] As to the last paragraph of the article, he noted that it queried whether "high authorities in Government" had communicated with the "Ministry of Justice" to "release" the defendants. He submitted that what was written did not carry implications that there was any form of communication to the Magistrate, that the Magistrate had been influenced by those said to have communicated with the Ministry of Justice or that the Magistrate was not impartial. Taken as a whole, it could not be said, he argued, that the article impaired public confidence in the integrity or impartiality of the Courts or the Magistrate and that this was a case where the good sense of the community was sufficient safeguard so that intervention of the Court was not necessary.

[25] Whilst acknowledging the need to read the article as a whole Dr. Harrison, in his analysis, does not do that. He reads the final paragraph disjunctively from the rest of the article and his literal interpretation of the final paragraph does not reflect how the words would be understood in the context of the article as a whole. In my view, the article was, when read as a whole and in context, likely to bring the Magistrate's

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[85] At 62.
[86] At paragraph 19.

Court and Magistrate Mafi into contempt and lower their authority in the eyes of the community.

[26] The article states that the Magistrate did not give reasons for his decision "for the discharge" and that there was an error as the case numbers shown on the Court record were not the same as on the summonses "given to Meilin Liu". Even if incorrect those comments would not amount to a contempt of Court.

[27] However, that is not all that the article says. The article highlights the fact of the discharge of Liu and Tian on some of the charges. It states that the decision of Magistrate Mafi was "questionable" because he did not "give any explanation or reasons and the basis of the discharge" and goes on and asks "Did the prosecution or counsel for the two accused make submissions to that effect, which is the reason for the discharge".

[28] There follows a heading "Meilin Liu Decision Suspicious". In relation to the error in the Court record, the article does not state that the record is incorrect rather it states that the decision of the Magistrate is "suspicious". The word "suspicious" is used two more times in the article when describing the decision.

[29] The reader is to understand that the Magistrate has given a decision to discharge Liu and Tian on some charges without reasons, that it is not known if his decision to discharge Liu and Tian was in accordance with submissions of the prosecution or defence counsel and that there is an irregularity in the Court record such that the decision is "suspicious".

[30] The article then asks; "The question is why is the summons number different from the case number that is shown above in his court order? This is in bold for emphasis. The last paragraph, that immediately follows, is clearly intended to provide the answer to this question as well as an explanation for what has been set out in the rest of the article.

[31] The reader would understand from the last paragraph that the explanation for the "questionable" court order and the "suspicious" decision of Magistrate Mafi were communications from high authorities to the Ministry of Justice to release Liu and Tian. That would have the effect, in my view, to lead members of the community to conclude that Magistrate Mafi was influenced to discharge the defendants, that he is not impartial and that the Magistrate Court is not an independent institution, but one that is subject to influence from people in high authority.

[32] Contrary to Dr. Harrison's submissions, I do not believe a reader would distinguish between a communication made to the Ministry of Justice and a communication made to the Courts. I do not consider that it matters either that there is no express statement in the article that there was communication direct with the Magistrate or that the Magistrate was in fact influenced. These are matters that are clearly implied.

[33] Dr. Harrison also argued that this was a case where the good sense of the community can safely be relied upon as a sufficient safeguard so as not to warrant the

Court's intervention.[87] I do not accept that submission. The article was unbalanced, in some respects factually incorrect and pointed. It offered little opportunity for the reader to exercise sound and prudent judgement of the situation presented.

[34] For those reasons I am satisfied beyond reasonable doubt that the article scandalised the Court.

[35] For completeness, I note that Dr. Harrison pursued an argument that the
310 applicant had not proved beyond reasonable doubt "that the statements made in the article falsely imputed bias or improper motives to the Magistrate". For reasons I have already given, that is not something that the applicant was required to prove.

The result

[36] I am satisfied beyond reasonable doubt that the charges against the respondents have been proved. I find them guilty of the offence of contempt of Court.

[37] I will hear Counsel as to penalty and costs.

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[87] *Gallagher v Durack* [1983] HCA 2 referred to in *Namoa v Attorney-General* [2000] Tonga LR 56, 78.

Sete v Palu anors

Land Court, Nuku'alofa
Paulsen, President
LA 11/2014

4 and 5 May 2015; 13 July 2015

Land law – Minister cancelled deed of grant – no power to cancel deeds of grant – directed to reissue deed of grant to plaintiff

On 24 November 1989 the plaintiff was registered as the holder of a town allotment and a deed of grant was issued to him. On 15 May 2013 the Minister of Lands cancelled the plaintiff's deed of grant. On 13 January 2014 the Minister made a grant of an allotment to the first defendant. This allotment included the land that had previously been the plaintiff's allotment. The plaintiff applied for orders declaring the cancellation of his deed of grant unlawful, directing the Minister to cancel the registration of the allotment to the first defendant, and evicting the first and the second defendant from his land. He also claimed damages in respect of their alleged unlawful occupation of the land. The defendants maintained that the Minister had an implied statutory power to cancel the plaintiff's deed of grant. They also submitted that the Minister exercised that power lawfully because the plaintiff should never have been granted the allotment as it was registered as being held on trust for the benefit of the first defendant. The principal issue was whether the Minister of Lands had the power to cancel the plaintiff's deed of grant.

Held:

1. The Minister's powers were derived from the Land Act. It was fundamental that in purporting to exercise a statutory power the Minister must act within the limits of the power conferred upon him. If he acted outside those limits then he did so unlawfully.
2. Under the Land Act it was the Land Court that had the primary role in resolving disputes relating to land. Disputes over land commonly involved complex facts and difficult questions of law. Often parties were challenging decisions that the Minister, or his predecessors, made. Such disputes could only be heard impartially and appropriately in proceedings before the Land Court, which was a specialist tribunal that had tailored procedures for hearing only land cases. Had the Legislative Assembly intended that the Minister was to have the power to cancel deeds of grant that he considered were unlawful it would have been a simple matter to

say so. If such power had been included in the Act it could be expected that there would have been rules and processes governing its exercise.

3. The Minister did not have the power to cancel the deed of grant or to grant the plaintiff's land to the first defendant. Therefore the Minister was directed to cancel the deed of grant to the first defendant dated 13 January 2014, and to re-issue the deed of grant dated 24 November 1989 to the plaintiff.

4. The plaintiff's application for an order for possession of the land was granted and the first and second defendants were to vacate the land within 21 days. The claim for damages for trespass were unproven so the court awarded no more than nominal damages assessed at $100.

Cases considered:

Church of Jesus Christ of Latter Day Saints in Tonga Trust Board v Fepale anors [2011] Tonga LR 71
Fifita v Minister of Lands (1972) Tonga LR Vol III 45
Hakeai v Minister of Lands anors [1996] Tonga LR 142
Lokotui v Fifita & Ors [1992] Tonga LR 18 (CA)
Ma'asi v Akau'ola and The Deputy Minister of Lands (LC) 1923-1962 Vol II Tonga LR 107
Maka v Minister of Lands (LC) 1923-1962 Vol II Tonga LR 111
Minister of Lands v Finau [2001] Tonga LR 221
Mokofisi v Minister of Lands AC 23 of 2014
Motuliki v Namoa & Ors (1981-1988) Tonga LR 141
Pohiva v Magistrate's Court anors [2015] Tonga LR 275
Yew Bon Tew v Kenderaan Bas Mara [1983] 1 AC 553

Statute considered:

Land Act (Cap 132)

Counsel for the plaintiff	:	Mr Fakahua
Counsel for the first and second defendants	:	Mr Tu'utafaiva and Mr Taione
Counsel for the third defendant	:	Mr Sisifa (Solicitor General)

Ruling

The issue

[1] On 24 November 1989 the plaintiff (Talanoa) was registered as the holder of a town allotment at Ma'ufanga known as Tauangemai 'O Mascot, contained in Book 191 Folio 51 being Lot 1 Plan 2453 with an area of 39.39 perches, and a deed of grant was issued to him. On 15 May 2013 the Minister of Lands cancelled Talanoa's deed of grant. On 13 January 2014 the Minister made a grant of an allotment known as Mamakoula to the first defendant (Sosefo). Mamakoula included the land that had previously been Talanoa's allotment, Tauangemai 'O Mascot.

[2] Talanoa is applying for orders declaring the cancellation of his deed of grant of Tauangemai 'O Mascot unlawful, directing the Minister to cancel the registration of Mamakoula to Sosefo and evicting Sosefo and the second defendant (Tupetaiki) from his land. He is also claiming damages from Sosefo and Tupetaiki in respect of their alleged unlawful occupation of the land.

[3] All of the defendants maintain that the Minister had an implied statutory power to cancel Talanoa's deed of grant. They also submit that the Minister exercised that power lawfully because Talanoa should never have been granted Tauangemai 'O Mascot as it was registered as being held on trust for the benefit of Sosefo. Sosefo and Tupetaiki also deny that Talanoa is entitled to any damages for their occupation of Tauangemai 'O Mascot as they say he did not acquire any rights to the land according to law.

[4] The principal issue in this case is whether the Minister of Lands had the power to cancel Talanoa's deed of grant.

The facts

[5] On around 16 June 1948 a town allotment known as Mamakoula, which consisted of an area of 1 rood 24.2 perches, was registered to 'Etuate Palu. Sosefo was 'Etuate Palu's son and heir. Talanoa's father, Penisimani Sete, was 'Etuate Palu's younger brother. Tupetaiki is Sosefo's half brother.

[6] 'Etuate Palu died on 5 October 1958 when Sosefo was 10 years old. 'Etuate Palu's widow remarried and was not entitled to a life estate in Mamakoula. On 6 October 1959 the Minister of Lands approved the appointment of Setefano Moala to hold Mamakoula on trust for Sosefo (the trust).

[7] Sosefo was then brought up by Talanoa's parents and raised as if he was their own child and an older brother to Talanoa. Talanoa's unchallenged evidence was that in the 1960's the Minister of Lands gave a tax allotment at 'Eua to Penisimani Sete and this was given to Sosefo as his tax allotment because Penisimani Sete treated Sosefo as his eldest son and Talanoa was still a minor. Sosefo also travelled with Penisimani Sete to Pago Pago and New Zealand to work.

[8] The trust was not cancelled upon Sosefo attaining the age of 16 years in 1964. However, on 26 May 1971 the Minister of Lands directed that Mamakoula be subdivided into two allotments, one for Sosefo and one for Penisimani Sete. Sosefo, who was by then 23 years old, says that neither he nor his trustee consented to the subdivision of Mamakoula.

[9] There is very little documentation before the Court about this dealing. There was an acknowledgement from Mr. Fataua Halatanu, from the Ministry of Lands, that it was possible that relevant documents had been lost. That is self-evident. One document that was produced into evidence was a Savingram dated 26 May 1971. Its heading is "Equally subdivide the Town Allotment of S. Vaitafe Palu of Ma'ufanga so they can have 30 perches each with Peni Sete". The Savingram confirms the payment of survey fees and the Estate Holder's approval to the application for subdivision. It

states "Survey has been paid by the above-named couple…". The land was subdivided into Lots 1 (Tauangemai 'O Mascot) and 2, Plan 2453.

[10] Tauangemai 'O Mascot was allocated to Penisimani Sete although his title was not perfected by registration. His name was written on the plan of the allotment. This is confirmed by the handwritten note on document 6 of the third defendant's bundle which states "…On this allotment, the name Peni Sete is written on it, but he has written on 5/1/87 (G3/3/3. NK) requesting that this man, his son, apply for it. A letter from the Town Officer is also provided". A deed of grant of Tauangemai 'O Mascot was prepared in the name of Penisimani Sete but it was never signed by the Minister. I note that the Minister has acknowledged that Tauangemai 'O Mascot was held in the name of Penismani Sete in paragraphs 6, 7 and 18 of his statement of defence.

[11] Sosefo was resident overseas in the early 1970s but in around 1977 he returned to Tonga and built his house on Lot 2.

[12] On 6 January 1987 Talanoa applied for registration of Tauangemai 'O Mascot into his name. His application was accompanied by a letter from Penisimani Sete dated 5 January 1987 which stated that he wished to surrender his "registered town allotment at Ma'ufanga to my eldest son (heir) namely Nikola Sete." Before the land was registered to him Talanoa also submitted a letter dated 22 November 1989 from the Town Officer of Ma'ufanga that incorrectly stated that he had built a modern house on the land. Talanoa was cross-examined about these letters. As far as the letter of Penisimani Sete was concerned he was questioned about the fact that the letter he produced into evidence was an unsigned copy and that it was not found on the Ministry's file. I am satisfied that Penisimani Sete did consent to Talanoa's application. This is clear from the notation on document 6 of the third defendant's bundle. As far as the Town Officer's letter was concerned, it was put to Talanoa that he had lied to obtain the grant. The evidence was insufficient for me to make such a serious finding but I do not need to do so as in my view it cannot change the result of this case.

[13] Talanoa understood that there had been a surrender of Tauangemai 'O Mascot by his father to him. The evidence of Mr. Fataua Halatanu was that as the land had not been registered under the name of Penisimani Sete it could not be surrendered. This evidence explains the letter of the then Minister of Lands, Baron Tuita, to the Senior Surveyor at the Ministry of Lands dated 20 January 1987, which is document 7 of the third defendant's bundle, that states in relation to the deed of grant that had been prepared in Penisimani Sete's name "Please cancel Peni Sete from it as he has surrendered it on 5/1/1987, but draw up and prepare the Deed of Grant in the name of Talanoa Nikola Sete, as the Estate Holder has already signed his application on 15/1/1987".

[14] The deed of grant of Tauangemai 'O Mascot was issued to Talanoa on 24 November 1989. At the same time, a deed of grant for Lot 2 was prepared in the name of Sosefo. This was never signed by the Minister. The deeds of grant were prepared at the same time and have consecutive numbers in the register of allotments. On 23 June 2004, the trust, which subsisted in respect of Lot 2, was cancelled. No deed of grant in favour of Sosefo was prepared at the time.

[15] I am satisfied that Sosefo was aware of the subdivision of Mamakoula at the time that it occurred. The evidence that has a bearing on this is as follows. The Savingram of 26 May 1971 indicates that Sosefo and Penisimani Sete had paid the survey fees for the subdivision of Mamakoula. This is consistent with the facts that Sosefo was treated as a son by Penisimani Sete and had been given the allotment in 'Eua at the request of Penisimani Sete. There was little likelihood, in those circumstances, that Penisimani Sete would undertake the subdivision of Sosefo's land without Sosefo's knowledge and consent. Furthermore, when Sosefo built his house he did so entirely on Lot 2 and there is no evidence that he used or occupied any part of Tauangemai 'O Mascot. This takes on added significance when one considers the letter that Sosefo sent to the Minister of Lands dated 10 September 2012 where he described Tauangemai 'O Mascot as "the face of my land". Sosefo's conduct is consistent with him having given up any rights to Tauangemai 'O Mascot. In addition, Talanoa said that Sosefo was allocated Lot 2 because he had been paid compensation for the loss of land from it when the By-Pass Road was constructed. This evidence was not challenged. It was also Talanoa's unchallenged evidence that in 1980 Sosefo asked him to allow Tupetaiki to occupy Tauangemai 'O Mascot even though it was still registered in Penisimani Sete's name. This is consistent with Sosefo recognising Talanoa's rights as Penisimani Sete's heir.

[16] A further factor is that Sosefo variously said that he first learned that Mamakoula was subdivided in the 1980's, the 1990's, and 2004 when the trust was cancelled. He also said that he learned from Penisimani Sete that Talanoa had gone to register Tauangemai 'O Mascot but then that he learned the land had been registered to Talanoa in 2009 or 2010, when he was told of it by Talanoa's wife, and when he went to see the Minister of Lands, which would have been in 2012. I found Sosefo to be an unconvincing witness on these matters.

[17] Tupetaiki had been in occupation of Tauangemai 'O Mascot for some years with Talanoa's permission. In 2010, Talanoa asked Tupetaiki to pay rent. Tupetaiki was not prepared to pay rent and said he would vacate the land but he did not do so. In response to a dispute that arose when Talanoa fenced Tauangemai 'O Mascot, Sosefo, who resides in Australia, came to Tonga and went to the Ministry of Lands to determine the status of the land. At about that time Tupetaiki removed the southern side of the fence. Sosefo said in his evidence that he has authorised Tupetaiki to continue to occupy the land.

[18] Sosefo sent a letter to the Minister of Lands dated 10 September 2012 asserting that he had not agreed to the subdivision of Mamakoula or the surrender of his land and asking for Talanoa's registration to be cancelled. On 15 October 2012, Talanoa wrote to the Minister asserting that his father was right to subdivide Mamakoula. Sosefo sent a further letter to the Minister on 29 April 2013 asking the Minister to make a decision so that he could "proceed developing my allotment".

[19] In May 2013, the Minister conducted meetings with Talanoa and Sosefo. The minutes of those meetings are before the Court and were not disputed. The Minister decided that Mamakoula had been subdivided unlawfully because he considered it was subject to a trust in favour of Sosefo. At a meeting on 15 May 2013 the Minister advised Talanoa of his intention to cancel his deed of grant to correct what he

regarded as a mistake. He said that if Talanoa wanted, an alternative allotment would be found for him. Talanoa indicated at that time that he accepted the Minister's decision. Had he not done so it appears the Minister would have had the matter resolved by the Court. The minutes of the meeting state "If they want to go to court, then we will go to court". On 15 May 2013 in a Savingram to the Secretary of Lands the Minister directed:

> Because it is confirmed that the work conducted was not lawful, it was decided today to cancel the registration of Talanoa Nikola Sete on 21.11.1989 (Refer D/G 191/51) and a new survey for 1R 24P to 'Etuate Palu's registration on 16.04.1948.
>
> Once the survey is complete prepare the Deed of Grant and put to it the changes made above for the registration of the area of the allotment which is 1R 24P.

[20] The Minister also directed that land be found for Talanoa but nothing to Talanoa's satisfaction has been found and these proceedings were commenced. In the meantime on 6 August 2013, Mamakoula was posthumously registered in the name of 'Etuate Palu and a deed of grant (Book 4 Folio 42) was issued. On 13 January 2014, Mamakoula was transferred to Sosefo as his allotment as 'Etuate Palu's heir.

The Minister's powers

[21] The Minister's powers are derived from the Land Act. Pursuant to section s19(1) he is the representative of the Crown in all matters concerning the land of the Kingdom. It is fundamental that in purporting to exercise a statutory power the Minister must act within the limits of the power conferred upon him. If he acts outside those limits then he does so unlawfully.

[22] It is common ground that the Land Act confers no express power on the Minister to cancel a deed of grant in the circumstances of this case. For Talanoa, Mr. Fakahua submits that only the Land Court could cancel Talanoa's deed of grant under the jurisdiction conferred upon it by section 149 of the Land Act. The defendants argue that such power to cancel Talanoa's registration is to be implied from the fact that under the Act the Minister has the power to grant allotments. The argument is that what the Minister has the power to grant he must also have the power to revoke.

[23] Sometimes the Courts will fill in gaps in a statutory framework when this is required to make an Act work as it was intended. In my view, such an implication could only arise if it is directly suggested by the express words in the Land Act or because it is necessary and proper as being indirectly suggested by principles of interpretation and law that are not displaced by the words expressed in the Act.[88]

[24] Section 19 of the Act confers general powers on the Minister. Section 19(2) provides that the Minister "shall grant allotments to Tongan subjects duly entitled thereto by law". There is nothing in the section that confers a power on the Minister to cancel registrations of land in particular circumstances or as he considers fit. There

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[88] Bennion "Statutory Interpretation" 2 Ed at page 361. This was the approach that I recently took also in *Pohiva v Magistrate's Court* [2015] Tonga LR 275.

is power in section 22 of the Act for the King in Privy Council to make regulations for the convenient administration of the Act but it was not suggested that any such regulations are relevant in this case.

[25] In granting allotments the Minister performs an administrative function and his decisions are subject to review by the Court. Powers conferred upon the Minister under the Act to cancel deeds of grant in particular circumstances are administrative in nature also. An example is contained in section 73 upon the surrender of land. Under section 49 the Minister may have power to cancel a grant in excess of the maximum area permitted.[89] Under section 123, the Minister may issue a new deed of grant to a person entitled to succeed to an allotment who is unable to produce to the Minister the relevant deed of grant for endorsement, at which time the former deed is "deemed to be duly cancelled".

[26] In this case the Minister did not act administratively when he cancelled Talanoa's deed of grant. He was acting quasi-judicially to resolve a dispute between Talanoa and Sosefo as to who owned the land. That is a power that is conferred by the Act on the Land Court but not on the Minister. Section 149 (1)(b) provides that the Land Court has jurisdiction "to hear and determine all disputes, claims and questions of title concerning any land...". Importantly, section 150 provides that the jurisdiction of the Land Court may be exercised "on the application of any person claiming to be interested or on the application of the Minister".

[27] The first and second defendants argue that the Minister only has the power to grant an allotment to someone lawfully entitled to it. It follows, they argue, that in cases where a grant is unlawful the Minister must by necessary implication have the power to cancel the grant. I do not accept this submission. It contains within it the unexpressed, and in my view incorrect, assumption that the Minister has the right, capacity and facility to determine which grants are lawful and which are not.

[28] Under the Land Act it is the Land Court that has the primary role in resolving disputes relating to land. This is clear from many sections in the Act, including the following examples. Under section 23, the Minister is to endeavour to define the holdings and boundaries of every landholder but under section 23(2) and (3) it is the Land Court that determines disputes that arise from the exercise by the Minister of his function. Under section 34, where the Minister and the holder of an hereditary estate do not agree to the making of a grant the Minister may grant land as a tax allotment subject to review of the Land Court. Under section 44, the Minister must take forfeiture proceedings in the Land Court for recovery of an allotment on Crown Land. Under section 68, a holder of an allotment may be ejected in an action brought against him by the Minister in the Land Court. Under section 81, proceedings to recover any tax or town allotment from a widow on the grounds that she has committed fornication or adultery are brought in the Land Court and it is the Land Court that declares the widow's estate terminated and forwards a certificate of such finding to the Minister. Section 112C(3) provides that it is the Land Court that hears objections from the exercise of the Minister's powers to compel the granting of an easement.

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[89] *Fifita v Minister of Lands* (1972) Tonga LR Vol III 45, 46.

[29] I note also that the Land Act has detailed provisions dealing with the granting, registration, devolution and surrender of allotments (Part IV Division 1, Part IV Division V, Part IV Division VII and Part VIII Division II) but no such provisions dealing with the circumstances, processes or consequences of the cancellation of registrations of allotments at the discretion of the Minister.

[30] Contrary to the submissions for the defendants, the implication of the power that they contend for is neither necessary nor reasonable. Disputes over land commonly involve complex facts and difficult questions of law. Often parties are challenging decisions that the Minister, or his predecessors, have made. Such disputes can only be heard impartially and appropriately in proceedings before the Land Court, which is a specialist tribunal that has tailored procedures for hearing only land cases.

[31] The existence of such a power would also circumvent the operation of the statutory limitation defense under section 170 of the Act which only applies to actions "in the Court". This case is apposite. Assuming that Sosefo could prove that Talanoa's registration of Tauangemai 'O Mascot in 1989 was unlawful, his right to bring an action in the Land Court to recover Tauangemai 'O Mascot was time barred in 1999. That is 14 years before the Minister purported to cancel Talanoa's registration.[90] If the defendants are correct the Minister would have the power to cancel a deed of grant at any time notwithstanding that the Land Court had no such power after the expiration of 10 years from when the right to bring the action had first accrued. That cannot possibly have been intended and is an important factor telling against the defendants' case. Certainty in the law is important and 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.[91]

[32] The defendants' Counsel have referred me to case law which they submit is authority that the Minister may cancel a registration in circumstances were it was obtained by mistake.

[33] In *Fifita v Minister of Lands*[92] the Minister cancelled the plaintiff's grant of a town allotment pursuant to section 49 of the Land Act on the ground that the allotment exceeded the statutory area. Section 49 provides that it shall be unlawful for a grant of an allotment to be made in excess of the area specified in section 7 and that any such grant shall be "null and void". The Land Court had held that the cancellation of the plaintiff's grant was lawful. The Privy Council allowed an appeal from that decision on the basis that section 49 had to be read as enacting that, where a grant is made of an allotment in excess of the specified area, what is rendered null and void is the grant of the excess not the whole grant. The Minister submits that *Fifita* is authority that it can be implied "that the Minister may cancel the grant or he may apply to the Court for an order, at his option, subject always to the right of any other party claiming to be interested to apply to the Court." That is not so in my view. *Fifita* involved a grant which, to the extent that it exceeded the statutory limit, was "null and

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[90] *Mokofisi v Minister of Lands* AC 23 of 2014; *Motuliki v Namoa & Ors* (1981-1988) Tonga LR 141 and *Lokotui v Fifita & Ors* [1992] Tonga LR 18 (CA).
[91] *Yew Bon Tew v Kenderaan Bas Mara* [1983] 1 AC 553, 563.
[92] Supra at fn 2.

void". In purporting to cancel such a grant the Minister was exercising an administrative function not a judicial one.

[34] *Ma'asi v Akau'ola and The Deputy Minister of Lands*[93] concerned an unsuccessful challenge by the plaintiff to the deletion of his name as the registered holder of an allotment known as Maliunga and his registration as the holder of an allotment known as Onega. The Minister relies upon the statement by Hunter J that "the Court is bound by the entries in the Register…" but as the Learned Judge noted this is "unless it can be shown that they have been made by fraud, mistake, or without jurisdiction". The issue in this case is the scope of the Minister's jurisdiction and upon that issue *Ma'asi* does not assist. The next case I was referred to is *Maka v Minister of Lands*[94] which concerned a challenge to a grant of an allotment and so is quite different from the present case. *Maka* was referred to me because the Court said that a grant should not be upset by the Court unless it be shown that the Minister's discretion has been "improperly exercised or that the grantee is not legally entitled to the allotment..". The Court also noted that a grant could be set aside if the registration was made by "mistake, fraud, or without jurisdiction". I see nothing in *Ma'asi* or *Maka* that supports the defendants' position.

[35] *Hakeai v Minister of Lands*[95] and *Minister of Lands v Finau*[96] are cases where there were competing claims to an allotment. In both cases the land in question had been granted to one party and the Minister cancelled those grants and registered the land to the competing claimant. Neither case is authority that the Minister has a general power to cancel deeds of grant that he considers unlawful. The point was not raised or decided in either case. In both cases, the Minister's conduct in cancelling deeds of grant was held to be unlawful but on other grounds.

[36] Had the Legislative Assembly intended that the Minister was to have the power to cancel deeds of grant that he considered were unlawful it would have been a simple matter to say so. If such power had been included in the Act it could be expected that there would have been rules and processes governing its exercise.[97]

[37] For the reasons I have given, the Minister had no power to cancel Talanoa's deed of grant to Tauangemai 'O Mascot or to grant his land to Sosefo.

[38] Had I found that the Minister did have the implied statutory power for which the defendants contend, I would have set aside his decision to cancel Talanoa's deed of grant in this case in any event. It has long been recognised that the Land Court may set aside the Minister's administrative decisions if they are made under a material mistake. The Minister was mistaken in his view that the grant of Tauangemai 'O Mascot to Talanoa was made at a time that the land was held in trust for Sosefo. When Talanoa applied for the land it was owned by Penisimani Sete and was not held

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[93] (LC) 1923-1962 Vol II Tonga LR 107.
[94] (LC) 1923-1962 Vol II Tonga LR 111
[95] [1996] Tonga LR 142.
[96] [2001] Tonga LR 221.
[97] *Church of Jesus Christ of Latter Day Saints in Tonga Trust Board v Fepale anors* [2011] Tonga LR 71.

on trust. The land was allocated to Penisimani Sete in or around 1971 following the subdivision of Mamakoula. That was when Sosefo's cause of action (if any) accrued. Any ability that he may have had to recover the land was time-barred well before it was transferred to Talanoa.

Talanoa's claim for possession

[39] Sosefo and Tupetaiki opposed Talanoa's claim for possession of Tauangemai 'O Mascot on the basis that he did not acquire any rights to the land according to law. I have found otherwise. As they have no other basis to resist the claim, and have been given adequate notice to vacate, Talanoa is entitled to an order for possession of Tauangemai 'O Mascot.

The damages claim

[40] In his amended statement of claim, Talanoa has sought judgment for T$20,000 which represents damages for Sosefo's and Tupetaiki's alleged trespass and unlawful occupation of Tauangemai 'O Mascot since December 2012. Mr. Fakahua also argued for an additional T$9,000 representing the cost to Talanoa to build the fence that was partially removed by Tupetaiki.

[41] There is no claim for the T$9,000 in the prayer for relief in Talanoa's amended statement of claim. I am not prepared to grant Talanoa relief that has not been sought in the amended statement of claim. In any event the claim is unproven. The evidence that the fence cost T$9,000 to build was unsupported by adequate proof of the cost of materials or labour. Furthermore, there was no evidence of the present day value of the fence or of that part of it that was removed. There was no evidence of what it would cost to restore the fence or what loss flowed from the removal of part of the fence.

[42] The claim for damages for trespass are unproven. In the absence of proof of actual damage to the land or a reasonable rate of remuneration for the period of unlawful occupation I can award no more than nominal damages. I assess them at T$100.

The result

[43] I find that the Minister's cancellation of Talanoa's deed of grant of Tauangemai 'O Mascot and the issue of a deed of grant of Mamakoula to Sosefo were invalid and of no effect.

[44] I direct that the Minister cancel the deed of grant of Mamakoula to Sosefo dated 13 January 2014. I also direct him to re-issue the deed of grant of Tauangemai 'O Mascot dated 24 November 1989 to Talanoa.

[45] Sosefo and Tupetaiki are to vacate Tauangemai 'O Mascot within 21 days.

[46] Talanoa is awarded damages for Sosefo's and Tupetaiki's unlawful occupation of Tauangemai 'O Mascot in the sum of T$100.

[47] Counsel should file memoranda on costs within 14 days.

Faleafa v Faleafa

Land Court, Nuku'alofa
Paulsen, President
LA 18/2012

27 May 2015; 4 August 2015

Land law – eviction sought – plaintiff stopped from evicting defendant
Equitable interest in land – not registrable under the Land Act

The plaintiff (Sione) was the registered owner of a town allotment at Kolomotu'a. The defendant (Viliami) has lived on the land with his wife and family for many years. The relationship between Sione and Viliami soured – they were uncle and nephew. Sione sought to evict Viliami from the land and also sought damages for trespass. Viliami says that Sione gave him the land or was estopped from evicting him. Viliami filed a counterclaim for an order that Sione register the town allotment to reflect his interest in the land. The issues that arise were was Sione estopped from evicting Viliami from the land? And did Viliami have any interest in the land?

Held:

1. An equity clearly arose which prevented Sione from evicting Viliami and Poli from the land. Sione invited Viliami and Poli to live on his land from at least 1981. In 1994, Sione represented that the land was Viliami's land and told him to build his house. Viliami relied upon that representation and raised a loan, built his house and gave up other land offered by the 'Ulumotu'a. Viliami and Poli have now lived undisturbed on the land for 34 years and raised their family there. It would be unconscionable for them to be now evicted from the land.
2. The court ordered that Sione was estopped from disturbing Viliami's and Poli's occupation of the land. Viliami was not a trespasser and Sione's claim for damages was dismissed. It should be noted that the equity imposed a personal restriction on Sione while he had legal title to the land. What happened from the point in time when Sione died or was no longer the owner of the land was a matter for consideration at that time.
3. Viliami's counterclaim was dismissed. No estate, right, title or interest in land could be created except in accordance with the Land Act. Section 6 provided that every verbal or documentary disposition by a holder of any estate or allotment to effect a voluntary conveyance was null and void. Viliami had no interest in the land recognised by the Land Act.

Cases considered:

Alofi v Fine [1998] Tonga LR 24
Fakatava v Koloamatangi and Fakatava [1974] Tonga LR 15
Inwards v Baker [1965] 1 All ER 446
Matavalea v 'Uata [1989] Tonga LR 101
Ongolea v Finau [2003] Tonga LR 147
Schaumkel v 'Aholelei [2012] LA 18 of 2007, 12 August 2012.
Tafolo v Vete [1998] Tonga LR 164
Vai v 'Uliafu [1989] Tonga LR 56
Veikune v To'a [1981-1988] Tonga LR 138

Statute considered:

Land Act (Cap 132)

Counsel for the plaintiff : Mrs Taufaeteau
Counsel for the defendant : Mr Pifeleti

Ruling

The issues

[1] The plaintiff (Sione) is the registered owner of a town allotment at Kolomotu'a. The defendant (Viliami) has lived on the land with his wife and family for many years. The relationship between Sione and Viliami has now soured. Sione seeks to evict Viliami from the land and also damages for trespass. Viliami says that Sione gave him the land or is estopped from evicting him. Viliami has filed a counterclaim for an order that Sione register the town allotment to reflect his interest in the land.

[2] The issues that arise are:

[2.1] Is Sione estopped from evicting Viliami from the land?
[2.2] Does Viliami have any interest in the land?

The facts

[3] Since 1969, Sione has been the registered owner of a town allotment situated at Siulikutapu Road, Kolomotu'a contained in Book 130 Folio 72. The allotment is divided by substantial wire fencing and by plantings of trees and shrubs. It presents as two sections of roughly the same size. I understand that before the fences were built the land was divided by a row of Tanetane trees planted by Sione sometime before 1981.

[4] There are two houses on the allotment. On one side of the fence is Sione's house. An earlier house was removed and this house was built in around 2007. Sione lives in New Zealand but stays in his house when he visits Tonga. On the other side of the fence is Viliami's house, some outbuildings, an established garden and a plant nursery. This house was built in 1994. Viliami lives there with his wife, Poli, and it is where their children grew up. It is clear that the house cannot be moved except at very considerable cost, if at all.

[5] Sione and Viliami are uncle and nephew respectively. Viliami's father was one of Sione's older brothers, Lesinali Tovo. Sione's allotment was previously owned by another older brother, Folauha'amoa, who died in around 1966. Folauha'amoa did not marry and had no children.

[6] There was some disputed evidence that Viliami was customarily adopted by Folauha'amoa and lived on the land as a young child in a Tongan house with Folauha'amoa and an aunt called Katoalu. It was suggested also that after Folauha'amoa's death Sione applied for his land secretly and that this caused conflict in the family as the land had been promised to Viliami. The evidence was scant and unsatisfactory and I can make no findings on these matters. I am satisfied that it is not necessary to do so to decide this case.

[7] In January 1981, Viliami married 'Ana Moaeteau (Poli) and they began to live together on Sione's land from around March 1981. Sione gave permission for Viliami and Poli to live on the land. Viliami and Poli built their first house that year. They lived in that house from 1981 until 1994.

[8] In 1994, Viliami commenced building another house on the land. Sione objected and told Viliami that he could not build the house. Viliami and Poli sought advice from Viliami's father and they went to discuss the matter with Sione Vave Faleafa, a family elder who was referred to in the evidence as the 'Ulumotu'a. This meeting took place at the 'Ulumotu'a's home sometime in 1994. The evidence of Viliami and Poli, which I accept, was that upon learning that Sione would not allow them to build their house the 'Ulumotu'a offered to give them some of his own land for that purpose. He said that Viliami should come with a machete and they would go and select the land. While this was being discussed, Sione and his wife, Mele, arrived and Sione apologised and told Viliami to build his house on the land. The 'Ulumotu'a asked Sione if he was sure about his decision as a house was not like "a wheelbarrow which is easy to move" or words to that effect. Sione replied that he was sure because the land was Viliami's land. The evidence of Viliami and Poli, as to what occurred at this meeting, was substantially confirmed by Meleane Moeata who was also present. She was the wife of the 'Ulumotu'a's eldest son.

[9] Sione agrees that a meeting occurred at the 'Ulumotu'a's house but says he only went there because Viliami's father had cursed him and so that he could tell the 'Ulumotu'a what had happened. He acknowledged that he did consent to Viliami building his house on the land but, he said, only because Viliami and Poli had been living in a shelter under the trees and he felt love for them. He said that he did not expect them to live there forever more and that when he wanted them to leave they had to leave. He also said that he would not have surrendered his land to Viliami as he had children of his own to consider.

[10] I do not accept Sione's evidence on these matters. I am satisfied that Sione gave Viliami and Poli permission to build and live on the land understanding and intending that this would be a permanent arrangement. In accepting Sione's offer, Viliami gave up the opportunity to obtain other land that the 'Ulumotu'a was prepared to make available to him. Furthermore, shortly after the meeting Sione mortgaged the land and gave his personal guarantee for a loan that Viliami obtained to build the house. Sione also told Viliami to go to the Survey Office and have his land registered. When

Viliami did this he found that, at 24 perches, the land was not big enough to register. Viliami's evidence, which I accept, was that when told of this Sione said that Viliami would just have to live on the land and wait until the law changed.

[11] It was alleged in the statement of claim that Viliami defaulted on his loan repayments so that Sione had to pay off the loan himself to avoid the Bank taking possession of the land. Sione acknowledged in his evidence that this was incorrect. The loan was repaid by Viliami and the mortgage was discharged.

[12] Between 1994 and 2012 Viliami and his family lived peacefully on the land and his relations with Sione were good. In around 2012 something happened which changed that. I do not know what was the cause of the breakdown of the relationship between Sione and Viliami. Various issues were raised but, in the end, it does not matter. Sione resolved that he wanted Viliami off the land and these proceedings are the result.

Is Sione estopped from evicting Viliami from the land?

[13] Mrs Taufaeteau argued that estoppel was not pleaded and should not be considered. I reject this argument. Whilst the pleadings are not ideal, both parties were aware that estoppel was Viliami's principal defence and the hearing proceeded on that basis. I note that in her written submissions Mrs. Taufaeteau states that "From the foregoing pleadings, the issues that this Land Court is being called to resolve are ... Can the defendant used the law of equity for defence ... on the equitable doctrine of estopple?" There is no unfairness or prejudice to Sione in allowing estoppel to be considered.

[14] Mrs. Taufaeteau argues that Viliami was given a licence to live on the land which was revocable at any time and that this is the case even if Viliami spent money in reliance upon the licence. She quoted from paragraph 41 of the Land Court decision in *Schaumkel v 'Aholelei*[98] as authority that being lawfully on land is not the same as having a right to continue that occupation indefinitely. However, in the same paragraph of that decision Scott CJ recognised that this principle is subject to any express agreement between the parties and:

> ... what is reasonable and what other conditions will apply will depend on the nature of the equity which the licensee has been found by the Court to be entitled to have satisfied ...

[15] Mrs Taufaeteau also referred me to *Veikune v To'a.*[99] As I understand her submission, she regarded this case as authority that equitable principles have no application to a case such as this. That is incorrect[100] and in *Veikune* Martin CJ held that a registered owner of land was estopped from evicting a person in possession because he had been promised that he could stay on the land, had spent a considerable sum of money building and enlarging his house and as a result made no effort to find

[98] [2012] LA 18 of 2007, 12 August 2012
[99] [1981-1988] Tonga LR 138
[100] See paragraphs 37 and 38 in *Schaumkel* and also *Matavalea v 'Uata* [1989] Tonga LR 101

land elsewhere. The similarities with the present case are obvious. Other cases where the Courts have refused claims by a registered owner for possession of land on equitable principles include *Alofi v Fine,*[101] *Ongolea v Finau,*[102] *Fakatava v Koloamatangi and Fakatava*[103] and *Vai v 'Uliafu.*[104]

[16] If an owner of land allows a licensee to expend money on the land under an expectation that he will be able to remain there, that raises an equity in the licensee such as to entitle him to stay. As Lord Denning said in *Inwards v Baker*[105] "He has a license coupled with an equity". In *Tafolo v Vete*[106] the Court of Appeal recognised an equity of possession and quoted from Halsbury's Laws of England as follows:

> Equity recognises and enforces rights (sometimes referred to as 'equities of possession' or 'equitable licences') so as to restrict the revocation of licences to occupy or use premises which at common law would be regarded as revocable. This restriction occurs where a person who is occupying or using land has acted in reliance upon the representation or the acquiescence of the person having a proprietary interest in respect of that land. Where a person has established an express or implied licence to occupy premises, the role of equity is supportive and supplementary, but, if the legal relationship between the parties is such that the true arrangement between them will be frustrated if they are left to their legal rights and duties at law, an equity will arise notwithstanding that there has been no agreement (so that there is no contractual licence), and notwithstanding that the representation made or the belief which has been acted upon is so imprecise as not to define the duration of the right to occupy or use the premises; in such circumstances it is for the court to determine what period of occupation or use is sufficient to satisfy the equity. Such rights arise by operation of the principles of equitable estoppel.

[17] In *Ongolea v Finau* Ford J also recognised these principles and referred to *Tafolo*. He said:

> In that case the Court of Appeal held that equity will recognise and enforce a right to occupy where the person in occupation has acted in reliance upon the representation or the acquiescence of the person having a proprietary interest in the land. The representation in the present case was one made all those years ago by the title holder Mikaele when he invited the first defendant and his wife to go and live on his land "until death or the end of the world".

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[101] [1998] Tonga LR 24
[102] [2003] Tonga LR 147
[103] [1974] Tonga LR 15
[104] [1989] Tonga LR 56
[105] [1965] 1 All ER 446
[106] [1998] Tonga LR 164

[18] Applying these principles to the present case, an equity has clearly arisen preventing Sione from evicting Viliami and Poli from the land. Sione invited Viliami and Poli to live on his land from at least 1981. In 1994, Sione represented that the land was Viliami's land and told him to build his house. Viliami relied upon that representation and raised a loan, built his house and gave up other land offered by the 'Ulumotu'a. Viliami and Poli have now lived undisturbed on the land for 34 years and raised their family there. It would be unconscionable for them to be now evicted from the land.

[19] In my view the equity that has arisen can only be satisfied by the making of an order that Sione is estopped from disturbing Viliami's and Poli's occupation of the land for so long as they wish that it remain their home and I so order. It should be noted that the equity in a case such as this imposes a personal restriction on Sione while he has legal title to the land. What happens from the point in time when Sione dies or is no longer the owner of the land is a matter for consideration at that time.

[20] For completeness, I note that Mrs. Taufaeteau also submitted that section 170 of the Land Act prevents Viliami from raising estoppel. Section 170 does not apply. It provides that 'No person shall bring in the Court any action...'. In the present context Viliami is not bringing an action. He is raising estoppel as a defence.

[21] It follows from what I have said above that Viliami is not and has never been a trespasser and Sione's claim for damages is dismissed also.

Does Viliami have any interest in the land?

[22] Viliami claims an interest in the land that he wants to have recognised by registration. This claim is misconceived and must fail.

[23] No estate, right, title or interest in land can be created except in accordance with the Land Act. Section 5 of the Land Act provides that every estate and allotment is hereditary according to the prescribed rules of succession. Section 6 provides that every verbal or documentary disposition by a holder of any estate or allotment to effect a voluntary conveyance is null and void.

[24] It follows that Sione's representation that the land was Viliami's land does not create an interest in the land. Nor does the fact that Sione is estopped from evicting Viliami from the land. It is well established that the only effect of an estoppel, in a case such as this, is to impose a personal restriction on the registered owner on obtaining an eviction order and as the Privy Council noted in *Matavalea v Uata*:[107]

> …the Respondent acquires no rights under the Land Act by virtue of estoppel. We would go further and say that she acquires no rights in land of any description and neither do her heirs

[107] [1989] Tonga LR 101, 102

THE RESULT

[25] Sione's claim for possession of the land and damages for trespass is dismissed. Sione is estopped from disturbing Viliami's and Poli's occupation of the land. Whilst Sione remains the owner of the land their right to remain on the land shall continue until such time as they no longer wish to occupy the land as their home.

[26] Viliami's counterclaim is dismissed. Viliami has no interest in the land recognised by the Land Act.

[27] Both parties have been unsuccessful with their respective claims. This appears to
240 me to be a case where each party should bear their own costs but I have not heard from Counsel about that. If any party does not agree with that course then memoranda should be filed as to the orders sought in respect of costs within 14 days.

Tapealave v Minister of Lands anor

Land Court, Nuku'alofa
Paulsen, President
LA 24/2011

29 June and 21 July 2015; 4 August 2015

Land law – question of hereditary title – could not own more than one allotment – father's title null and void – no title for son

The plaintiff (Benjamin) was the eldest son of Moi Tapealava (Moi) who died in 1999. Moi was registered as the owner of a town allotment at Haveluloto, Tongatapu. Benjamin applied, as Moi's heir, for the Haveluloto town allotment. The Minister did not grant Benjamin the land as he considered Moi's registration was null and void on the ground that Moi had a prior grant of a town allotment at Mo'unga'one that had never been surrendered in his lifetime. Benjamin sought orders quashing the Minister's decision and requiring the Minister to grant him the Haveluloto town allotment. He argued that Moi did not have a prior grant of a town allotment at Mo'unga'one, that the Minister was estopped from "reversing" Moi's registration of the Haveluloto town allotment, and that the Minister's decision was unlawful as he failed to consult with him.

Held:

1. The Land Act did not make registration the test of ownership and the intention of the Act was that registration was a method of proof of ownership and nothing more. There was ample evidence that Moi was granted a town and a tax allotment at Ha'apai and that he exercised rights of ownership over his allotments. The court found that Moi was granted the town allotment at Mo'unga'one in 1953 and was the owner of it, notwithstanding the fact that no deed of grant was ever issued to him.
2. Benjamin's application for the town allotment was made in reliance upon sections 82 and 84 of the Land Act. Section 82 provided that, subject to the life estate of the widow, the succession to a tax or town allotment shall be by way of descent from the last lawful male holder. Section 84 provided that the son or grandson of a deceased holder who already holds a tax or town allotment shall be permitted to make an election between the allotment he already held and the one to which he became entitled as heir. As Moi was not at any stage the lawful male holder of the Haveluloto town allotment, section 82 conferred no rights on Benjamin to succeed to the land or to make an election under section 84.

3. Estoppels bind individuals on the ground that it would be unconscionable for them to deny what they have represented or agreed. It was a concept of private law and did not extend to the performance of public duties. A public law authority, such as the Minister of Lands, could not be estopped from exercising a public discretion or performing a public duty.
4. No estoppel could be made out. There was no representation by the Minister to Benjamin. Neither the fact and duration of Moi's registration nor the approval of the Minister to a mortgage over the Haveluloto town allotment was a representation that Moi's interest in the land was beyond challenge. The interest of every registered owner of land was subject to the provisions of the Land Act. Knowledge of the prohibition on holding more than one allotment of the same kind was ubiquitous in Tonga. There was no evidence either that Benjamin relied on any representation of the Minister nor did the evidence come near to establishing unconscionability. For the same reasons, no statutory estoppel could arise under section 103 of the Evidence Act either.
5. There was no obligation for the Minister to consult with Benjamin. The Minister considered that Moi's registration was null and void. He had no power to the grant the land to Benjamin in those circumstances and there was no issue upon which he was required to consult with him.
6. Benjamin's claim was dismissed.

Cases considered:

Arms and Stratagem Trustee Services Ltd and ors v New Plymouth District Council [2008] NZHC 684
Blakesfield Limited v Foote [2015] NZHC 1325
Challis v Destination Marlborough Trust Board Inc [2003] 2 NZLR 107
Folau Tokotaha v Deputy Minister of Lands anor [1923-1962] Tonga LR 159
Lisiate anor v 'Eli anors [2012] Tonga LR 30 (CA)
Manakotou v Vaha'i (Noble) Volume II 1923-1962 Tonga LR 121
Minister of Lands, Fotu, Ma'u and Pohiva v Ngahe [1974-1980] Tonga LR 40
Moala v Tu'I'afitu & Anor [1956] Vol II Tonga LR 104
Ongosia v Tu'inukuafe and Minister of Lands [1981-1988] Tonga LR 113
Regina v East Sussex County Council Ex Parte Reprotech (Pebsham) Limited [2002] 4 All ER 58
Schaumkel v 'Aholelei [2013] TOCA 1
Sete v Palu LA 11 of 2014, 13 July 2015
Sione Tonga v Minister of Lands Vol II 1923-1962 Tonga L.R 96
South Buckinghamshire District Council v Flanagan [2002] 1 WLR 2601

Statutes considered:

Evidence Act (Cap 15)
Land Act (Cap 132)

Counsel for the plaintiff : Mrs 'A Taumoepeau
Counsel for the first defendant : Mr 'A Kefu SC
Counsel for the second defendant : Mr L M Niu SC

Ruling

The issues

[1] The plaintiff (Benjamin) is the eldest son of Moi Tapealava (Moi) who died in 1999. Moi was registered as the owner of a town allotment at Haveluloto, Tongatapu. Benjamin applied, as Moi's heir, for the Haveluloto town allotment. The Minister will not grant Benjamin the land as he considers Moi's registration is null and void on the ground that Moi had a prior grant of a town allotment at Mo'unga'one that had never been surrendered in his lifetime.

[2] Benjamin seeks orders quashing the Minister's decision and requiring the Minister to grant him the Haveluloto town allotment. He argues that Moi did not have a prior grant of a town allotment at Mo'unga'one, that the Minister is estopped from "reversing" Moi's registration of the Haveluloto town allotment and that the Minister's decision is unlawful as he failed to consult with him.

[3] The issues that arise are the following:

[3.1] Did Moi have a prior grant of a town allotment at Mo'unga'one?

[3.2] If so, what is the effect of Moi's subsequent registration of the Haveluloto town allotment?

[3.3] Is the Minister estopped from declaring Moi's registration of the Haveluloto town allotment null and void and/or from refusing to register Benjamin as the owner of the land?

[3.4] Was the Minister required to consult with Benjamin?

The parties

[4] Benjamin commenced this proceeding against the Minister only. The second defendant (Makineti) successfully applied to be joined as a party by Order of Scott CJ on 18 July 2014. Makineti takes the same position as the Minister in this action and argues that Moi's registration of the Haveluloto town allotment was null and void and that Benjamin has no right to the land.

The facts

[5] To understand how this case arose it is necessary to go back to recount some family history starting with Benjamin's grandfather, Siosaia Tapealava. Siosaia Tapealava owned a town allotment at Mo'unga'one and a tax allotment at Ofolanga (both at Ha'apai). He was married to Makelesi Naule'o Tapealava (Naule'o) and together they had seven children. The eldest was a son named Viliami Tafokitau Tapealava (Tafokitau). Makineti was the next child. The fourth child, and second son, was Moi.

[6] In the 1940's Siosaia and his family moved to Tongatapu and lived at Fua'amotu. When Siosaia died, Naule'o remarried. Tafokitau succeeded to Siosaia's town and tax allotments in June 1946. In December 1951, Tafokitau surrendered the tax and town

allotments in favour of tax and town allotments that had previously been registered to his grandfather, Nehasi Moi.

[7] In 1953, Makineti learned that Sosaia's town and tax allotments would be lost unless a claim was made for them. Moi was then 19 years old. Makineti had Moi travel to Ha'apai to apply for the allotments. The unchallenged evidence is that Makineti paid for Moi's travel to and from Ha'apai and also paid for survey and registration fees and the first annual rent of the tax allotment. Makineti said that upon Moi's return from Ha'apai she confirmed, from the receipt that he had in his possession, that he had been registered as the owner of both the tax and town allotments.

[8] The Minister's bundle of documents contains the relevant pages from the register of allotments and show that Moi was granted the tax and town allotments on 17 August 1953. No deeds of grant were issued to him at that time and, in respect of the town allotment, no deed of grant was ever issued to him. A deed of grant was issued for the tax allotment but not until February 1973. The evidence of Mr. Fataua Halatanu, from the Ministry of Lands, was that deeds of grant were not issued because the land at Mo'unga'one had not been surveyed. However, it is clear from the register of allotments that in the case of Moi's town allotment a plan had been prepared and Moi's town allotment was lot 51 on that plan.

[9] A relevant feature of the deeds of grant issued to Moi for his tax allotment is they state the location of the allotment is at 'Ofolanga (Mo'unganoe)' and 'Ofolonga (Mounganone)'. The evidence was that 'Ofolonga and Mo'unga'one are islands in the Ha'apai group and that the parenthesis 'Mo'unga'one' meant that Moi had a town allotment or lived at Mo'unga'one.

[10] Makineti's evidence was that Moi was well aware that he was registered as the owner of the town and tax allotments at Ha'apai. Makineti said that Moi asked her to send a telegram to Paula Kolo to look after the allotments for him and she sent that telegram as Moi directed. She recounted how Moi had instructed Paula Kolo to make copra from his tax allotment and to send the money to him. Moi would tell her and his other siblings how he visited his allotments and during the 1970's Moi would talk about taking fishing boats to 'Ofolanga and Mo'unga'one where there was the best fishing and where he had his town and tax allotments. Makineti also said that at no time did Moi forget that he had a town allotment and a tax allotment in Ha'apai. None of this evidence was challenged.

[11] Naule'o's second husband died in 1961 and in 1963 she was forced from the land upon which they had been living by her husband's heir. Makineti has lived in Australia since 1956 but was friends with Kaifonua, the daughter of the Fielakepa. She asked Kaifonua if there was any land where her mother could live. Makineti says that she was gifted land at Haveluloto by the Fielakepa for her mother to live on. Her mother's house was moved onto that land at around this time. She also says that all her brothers and sisters were aware of the gift of the land to her and they always regarded it as her land.

[12] At some stage prior to 1972, Moi moved his mother from the Haveluloto land. Makineti came to Tonga in 1972 and built a brick house on the land and returned her

mother to the land. Later, Moi, who had become a dentist, built a house on the Haveluloto land and ran his dental practice from there. He did not live on the land as he also worked for the Government and had Government Quarters at Railway Road. Makineti came to Tonga again in 1976 and was unhappy that Moi had built the house on the land. At that time she made significant extensions to the house and developed the property by fencing and plantings so that the house would accommodate all the family when they visited.

[13] In 1982, Moi had the Haveluloto land registered in his name without Makineti's knowledge. A deed of grant was issued to him on 22 December 1982. The allotment is 38.2 perches in Book 108 Folio 57. At paragraph 31 of her brief of evidence, Markineti says that Moi had registered the land when he knew that the Fielakepa had died and that the Fielakepa's successor was not aware of the gift of the land to her.

[14] Moi borrowed money on the security of a mortgage over the Haveluloto town allotment. A number of advances were made to him between 1983 and 1996. There is no evidence as to how that money was used. The mortgage was discharged in April 1999, shortly after Moi's death in January 1999. Makineti says that it was only after Moi's funeral that she learned that Moi had registered the Haveluloto town allotment in his name.

[15] After Moi's death the Haveluloto town allotment and the tax allotment at Ofolanga were transferred to his widow 'Ana. 'Ana moved to live on the Haveluloto town allotment and it continued to be used for the dental practice. That business was taken over by Moi's son, William, who is also a dentist. I understand that the business still operates from the allotment.

[16] 'Ana died on 31 July 2011 and Benjamin claimed the Haveluloto town allotment and the tax allotment at Ofolanga as Moi's heir. Benjamin has a town allotment at Popua but intends to surrender that in favour of the Haveluloto town allotment. Upon investigation of the application by the Ministry of Lands, the fact that Moi had a town allotment at Mo'unga'one was discovered. On 18 November 2011, the Minister of Lands determined that Moi's registration of the Haveluloto town allotment was null and void under section 48 of the Land Act. It followed, in the Minister's view, that Benjamin was not entitled to registration upon succession. The Minister directed that the Haveluloto town allotment revert back to the estate holder to decide what to do with it.

Did Moi receive a prior grant of the town allotment at Mo'unga'one?

[17] Mrs. Taumoepeau referred me to sections 120 and 121 of the Land Act and submitted that only a deed of grant was conclusive proof of ownership of land. She argued that as no deed of grant was ever issued for the town allotment at Mo'unga'one Moi had not in fact been granted that land. On this basis Moi's registration of the Haveluloto town allotment was not a mistake nor was it unlawful. I do not accept this submission.

[18] Section 43 of the Land Act provides that every Tongan male is entitled to a tax and town allotment provided he is not already in possession of one. An applicant must make an application in the prescribed form to the Minister of Lands, produce his

birth certificate or some other proof of his date of birth and pay the prescribed fee. Sections 120 and 121 require that deeds of grant of allotments shall be prepared in duplicate in the prescribed form (along with a diagram of the land), that one copy be delivered to the grantee and the other is registered by binding the same in a book called the register of allotments. However, sections 120 and 121 are procedural only.[108] The Land Act does not make registration the test of ownership and the intention of the Act is that registration is a method of proof of ownership and nothing more.[109] In *Lisiate and anor v Eli and ors* the Court of Appeal quoted with approval the words of Hunter J in *Fifita Manakotou v Vaha'i (Noble)* at page 123 as follows:

> 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 method of proof, nothing more …

[19] There is ample evidence that Moi was granted a town and a tax allotment at Ha'apai and that he exercised rights of ownership over his allotments. Moi went to Ha'apai to apply for his father's tax and town allotments and he returned with a receipt confirming his registration. Moi's name was entered in the register of allotments for both the tax and town allotments. There is no suggestion that the entries refer to anyone else. The fact that no deed of grant was issued was adequately explained by Mr. Halatanu when he said that tax allotments at Mo'unga'one had not been surveyed until the 1950's or 1960's and town allotments had still not been surveyed. Mr. Halatanu said that despite the fact that deeds of grant have not been issued, landowners are aware of their boundaries and are able to occupy their land without survey maps. There is also the fact that the deeds of grant issued to Moi in respect of his tax allotment contained the parenthesis 'Mo'unga'one'. This was recognition that Moi had his town allotment there. In addition, Moi visited the allotments on his trips to Ha'apai, arranged for Paula Kolo to look after his allotments for him and spoke of them to his siblings.

[20] For these reasons I find that Moi was granted the town allotment at Mo'unga'one in 1953 and was the owner of it, notwithstanding the fact that no deed of grant was ever issued to him.

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[108] Lisiate and anor v 'Eli and ors [AC 23 of 2011, 27 April 2012] at [27].
[109] Fifita Manakotou v Vaha'i (Noble) Volume II 1923-1962 Tonga L.R. 121, Ongosia v Tu'inukuafe and Minister of Lands [1981-1988] Tonga LR 113, Mesiu Moala v Tu'I'afitu & Anor [1956] Vol II Tonga LR 104 and Lisiate and anor v 'Eli and ors [AC 23 of 2011, 27 April 2012] distinguishing Folau Tokotaha [1923-1962] Tonga LR 159.

What is the effect of the prior grant?

[21] Section 48 of the Land Act provides as follows:

> No person who already holds a tax allotment or town allotment shall be granted a second allotment of the same kind as he already holds and any such grant shall be null and void.

[22] Mr. Kefu argues that a person who 'holds a tax allotment or town allotment' for the purposes of the section is a person who has been granted a tax allotment or town allotment. I agree with that submission. The word 'holds' cannot refer to the definition of 'landholder' or 'holder' in section 2, which is very wide and includes a person who is simply in occupation of land but claiming no greater interest in it. Mr. Kefu submitted that once it is proven that there is an existing grant of an allotment to a person, a second grant of the same kind to that person is null and void by operation of law.

[23] Mrs. Taumoepeau argued that the earlier grant of the Mo'unga'one town allotment to Moi was imperfect as there was no deed of grant. She submitted that when there was an imperfect grant followed by a grant perfected by registration the later should prevail. I cannot accept that submission which is contrary to the clear words of section 48. The reference in section 48 to 'any such grant shall be null and void' is a clear reference to the grant that is second in time.

[24] Benjamin's application for the Haveluloto town allotment was made in reliance upon sections 82 and 84 of the Land Act. Section 82 provides that, subject to the life estate of the widow, the succession to a tax or town allotment shall be by way of descent from the last lawful male holder. Section 84 provides that the son or grandson of a deceased holder who already holds a tax or town allotment shall be permitted to make an election between the allotment he already holds and the one to which he becomes entitled as heir. As Moi was not at any stage the lawful male holder of the Haveluloto town allotment, section 82 confers no rights on Benjamin to succeed to the land or to make an election under section 84.[110]

Does an estopped arise?

[25] Mrs. Taumoepeau argues that the Minister is estopped from reversing Moi's registration and therefore must register Benjamin as the successor to the allotment. The matters that are said to give rise to the estoppel are the fact and duration of Moi's registration, an alleged breach of a duty of care by the Minister in granting the allotment to Moi if he was not entitled to it, the fact that the Minister had consented to the mortgage over the land, the development of the land by Moi and his family and that Benjamin was not aware that Moi had a town allotment at Mo'unga'one. In my view no estoppel can arise in this case for the following reasons.

[26] This cause of action proceeds on what I regard as the erroneous assumption that the Minister took some action which had the effect of rendering Moi's registration

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[110] Minister of Lands, Fotu, Ma'u and Pohiva v Ngahe [1974-1980] Tonga LR 40.

null and void. I note paragraph 18 of the statement of claim pleads that the Minister had issued a Savingram 'directing that the registration of the town allotment ….is null and void'. Moi's registration was not null and void by reason of any act or direction of the Minister but because of the operation of section 48.[111]

[27] Estoppels bind individuals on the ground that it would be unconscionable for them to deny what they have represented or agreed. It is a concept of private law and does not extend to the performance of public duties. A public law authority, such as the Minister of Lands, cannot be estopped from exercising a public discretion or performing a public duty.[112] In refusing to grant the Haveluloto town allotment to Benjamin the Minister was complying with section 19(2) of the Land Act which provides that the Minister has power to make grants of land to Tongan subjects 'duly entitled thereto by law'. Benjamin is not entitled to the Haveluloto town allotment by law. He is not entitled to it because he has no right to succeed to the land under section 82 and, quite independently of that, he has a town allotment and is not entitled to another. The Minister cannot be ordered to grant him land in contravention of the Land Act. The requirements of the Land Act cannot be overridden by estoppel.[113]

[28] In any event, no estoppel could be made out on the facts of this case. The well established principles of equitable estoppel require a claimant to establish against the other party:

> [28.1] A belief or expectation has been created or encouraged by words or conduct of the other party;
>
> [28.2] To the extent an express representation is relied upon, it is clearly and unequivocally expressed;
>
> [28.3] The claimant reasonably relied to its detriment on the representation; and
>
> [27.4] It would be unconscionable for the other party to depart from the belief or expectation.[114]

[29] There was no representation by the Minister to Benjamin. Neither the fact and duration of Moi's registration nor the approval of the Minister to a mortgage over the Haveluloto town allotment is a representation that Moi's interest in the land was beyond challenge. The interest of every registered owner of land is subject to the provisions of the Land Act. Knowledge of the prohibition on holding more than one allotment of the same kind is ubiquitous in Tonga.[115]

[30] There is no evidence either that Benjamin relied on any representation of the Minister nor did the evidence come near to establishing unconscionability.

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[111] Sete v Palu LA 11 of 2014, 13 July 2015.
[112] Regina v East Sussex County Council Ex Parte Reprotech (Pebsham) Limited [2002] 4 All ER 58, Challis v Destination Marlborough Trust Board Inc [2003] 2 NZLR 107, South Buckinghamshire District Council v Flanagan [2002] 1 WLR 2601 and Arms and Stratagem Trustee Services Ltd and ors v New Plymouth District Council [2008] NZHC 684.
[113] This issue has previously arisen in a Tongan context in Sione Tonga v Minister of Lands Vol II 1923-1962 Tonga L.R 96
[114] Blakesfield Limited v Foote [2015] NZHC 1325.
[115] Lisiate v Eli at [35].

[31] For the same reasons, no statutory estoppel could arise under section 103 of the Evidence Act either.

Consultation

[32] Mrs. Taumoepeau did not rely on this ground in her written or oral submissions but it is raised in the pleadings and I will deal with it. The argument is that the Minister was required to consult with Benjamin. No such obligation arose. The
320 Minister has not exercised any discretion. He was concerned with the application of section 48 and the rules of succession. The Minister considered, correctly, that Moi's registration was null and void. He had no power to the grant the land to Benjamin in those circumstances and there was no issue upon which he was required to consult with him.[116]

The result

[33] Benjamin's claim is dismissed.

[34] The parties should try to reach agreement on costs but if they cannot then they are to submit memoranda within 21 days.

[116] Schaumkel v 'Aholelei [2013] TOCA 1

Application for letters of Administration for Taufahema

Supreme Court, Nuku'alofa
Paulsen, President
PA 14/2013

6 and 7 May 2015; 4 August 2015

Probate law – application for letters of administration – applicant's primary concern not the due and proper administration of estate – application refused

Tevita Taufahema died on 28 April 1992. He left no will. His wife, 'Atu Taufahema, predeceased him. As result of a dispute that arose between Tevita's children, the eldest child, Sitalini Taufahema (Sitalini), applied for letters of administration. The youngest child of the family, Nila Taufahema (Nila), opposed the application. There was only one asset in the estate of Tevita. That was a dwelling house. Upon the death of Tevita, the tax and town allotments were transferred to Sitalini as the eldest son and heir. In 2007, Sitalini, who lived overseas, surrendered his town allotment with the intention that it would be divided equally between his brothers, Paula and Nila. He said that it was agreed with Paula and Nila that Paula would get the front half of the town allotment upon which the house was built. The back half was to go to Nila. Sitalini said he would never have surrendered the land if Nila had not agreed to this. However, Paula and Nila both lodged applications with the Ministry of Lands for the front half of the land and no grant has as yet been made to either of them. Nila asserted that the house belonged to him because in 1986 Tevita met with Sitalini and him and it was agreed that he was to be given the front half of the land and the house. In March 2012, Nila moved into the house and would not leave.

Held:

1. The evidence was overwhelming that Tevita did not gift the house to Nila. Even if Tevita had met with Nila and Sitalini in 1986 and in the circumstances as Nila described them, there was no more than an expression of intention by Tevita to make a gift of the house at some stage in the future, which gift was never made. The court found that the house remained the property of Tevita at the time of his death.
2. From the death of Tevita until administration was granted all his personal property including the house vested in the court under section 11 Probate Act. Section 12 did not require that application for letters of administration be made within three years of the date of vesting the estate in the court. The word 'found' denoted an inquiry to discover if the deceased has next of

kin, which inquiry must be made before the estate became the property of the Crown. Had an enquiry been made the existence of next of kin would have been immediately apparent. Section 12 did not apply.

3. The selection of an administrator was in the discretion of the court and the court was not bound by the wishes or feelings of some of those entitled to the estate. The court looked to the benefit of the estate and of all the persons interested in the distribution of the property and placed the estate in the hands of that person who was likely best to convert it to the advantage of those who had claims. A circumstance where the court might refuse an otherwise eligible applicant letters of administration was where he had an interest which was incompatible with the due and proper administration of the estate.

4. Sitalini's intentions as far as the house was concerned were not to offer it to the highest bidder. He said that the house would be given to Paula as it was a family house and he considered Paula to be his heir. This was not the approach of a responsible administrator. The court found that it would be wrong to grant Sitalini letters of administration and refused his application. There were no competing applications for the grant. The court would hear further from the parties as to whether they were able to agree on the appointment of a suitable administrator other than the Registrar of the Court.

Cases considered:

Budd v Silver (1813) 2 Phill 115
Earl of Warwick v Greville, 161 ER 934
Fakafanua v Fakafanua [2008] Tonga LR 26

Statutes considered:

Land Act (Cap 132)
Miscellaneous Amendments (Privy Council) Act 2010
Probate Act
Supreme Court Act (Cap 10)

Counsel for the applicant : Mr L Niu SC
Counsel for Nila Taufahema : Mr S Tu'utafaiva and Ms M Kioa

Ruling

The application

[1] This is an application for the grant of letters of administration.

[2] Tevita Taufahema died on 28 April 1992. He left no will. His wife, 'Atu Taufahema, predeceased him. As result of a dispute that has arisen between Tevita's children, the eldest child, Sitalini Taufahema (Sitalini), has applied for letters of

administration. The youngest child of the family, Nila Taufahema (Nila), opposes the application. There is only one asset in the estate of Tevita. That is a dwelling house.

The dispute

[3] Tevita owned a tax allotment and a town allotment at Navutoka, Tongatapu upon which he built a substantial house. Upon his death, the tax and town allotments were transferred to Sitalini as the eldest son and heir. In 2007, Sitalini, who lives overseas, surrendered his town allotment with the intention that it would be divided equally between his brothers, Paula and Nila. He said that it was agreed with Paula and Nila that Paula would get the front half of the town allotment upon which the house was built. The back half was to go to Nila. That half of the land had an old house on it. The intention was that Nila would build a new house. Sitalini said he would never have surrendered the land if Nila had not agreed to this. However, Paula and Nila both lodged applications with the Ministry of Lands for the front half of the land and no grant has as yet been made to either of them. I am told that the estate holder's representative says that the estate holder will consent to the grant of that land to the brother who owns the house, but that Paula and Nila must first determine that issue by agreement or have the Court decide.

[4] Under the Probate Act, Tevita's children would share the house equally (with the children of any deceased child taking amongst them their deceased parent's share) but no letters of administration were applied for at the time of Tevita's death. Tevita and 'Atu had 10 children. Nine children are still alive. Of those nine children, seven of them have expressed the wish that their share in the house be given to Paula. One child, Salote, has taken no position. Tevita's deceased daughter, Taufa, had three children. The eldest of them has agreed that Paula should have the house with her two siblings expressing no wish.

[5] Nila does not agree that the house should be given to Paula. He says that the house belongs to him because in 1986 Tevita met with Sitalini and him and it was agreed that he was to be given the front half of the land and the house. Nila has now asserted his ownership of the house. In around March 2012, Nila moved into the house and is still in occupation and will not leave.

[6] The issues arising are as follows:

[6.1] Was the house owned by Tevita at the time of his death?
[6.2] Who owns the house now?
[6.3] Should letters of administration be granted to Sitalini?
[6.4] What is the value of the house?

Was the house owned by Tevita at the time of his death?

[7] This issue turns upon whether the house was gifted by Tevita to Nila. Nila's written evidence is notable for its lack of detail as to the circumstances under which the house was given to him. Under cross-examination from Mr. Niu, Nila said that in 1986 Tevita called a meeting with Sitalini and him and that Tevita said that his land would be divided between Sitalini and Nila. Nila said that Sitalini choose the land without the house on it. According to Nila, Tevita agreed to do as Sitalini wished and

said words to the effect "but no one knows what tomorrow might bring". It was on the basis of this conversation that Nila claims he owns the house. I do not accept Nila's evidence that Tevita gave him the house. My reasons are as follows.

[8] As Tevita's oldest son and heir, Sitalini was entitled to succeed to Tevita's land. It seems far-fetched, in those circumstances, that he would accept without demur the suggestion that half of the land would go to the youngest son and then choose for himself that part of the land without the house.

[9] Nila's conduct after Tevita's death was completely at variance with what he says was agreed. He made no claim to either the land or the house following Tevita's death. Tevita's town allotment and his tax allotment were both transferred to Sitalini without any complaint from Nila. Even if Nila was not aware that Sitalini had applied for and been granted the land as Tevita's heir, Nila made no claim on the land himself.

[10] Nila made no mention to anyone that Tevita had given him the house until 2009 when, he says, he told the estate holder's representative and his own wife. That was 17 years after Tevita's death. I note that Nila's evidence, in this regard, contradicted other evidence that he gave that he told his sister, Sela Pomana, that Tevita had given him the house in around 2006. Even that was 14 years after Tevita's death. It is simply unbelievable that Nila would not have mentioned his ownership of the house for 17 years after Tevita's death. During that 17 year period the house was lived in by other family members, including Sitalini and Sela, without complaint from Nila and a considerable sum was spent by the family on renovations. It is the case that Nila sent money in installments to Sela between November 2006 and March 2009 that was used on the renovations to the house. However, other siblings also contributed to the cost of the renovations and, whilst the amount contributed by each is not certain, the largest contribution came from Paula not Nila.

[11] This last matter disproves, to my mind, Nila's evidence that Tevita's gift of the house was well-known to his siblings. Sitalini, Paula and Sela all gave evidence denying any knowledge of the gift. I accept their evidence on this point, which seems entirely consistent with how all behaved.

[12] Nila called evidence from Sione Kafoa, who had built the house originally and undertook some of the renovations in around 2007. He said that he knew that Tevita gave the house to Nila. Under cross-examination he acknowledged that it was Nila who had told him about this. I find that Nila told him that he owned the house only in around mid-2009. The evidence is clearly hearsay and as the source of the information was Nila himself it has little probative value. Mr. Kafoa did say that his own family members had mentioned Nila's ownership of the house to him also but who those family members were and how they acquired their knowledge was not explored and I can take nothing from it.

[13] Under cross examination, Nila accepted Mr. Niu's proposition that there was only a 'proposal' by Tevita to give him the house at some future time. This is consistent with the evidence that Tevita said that "no one knows what tomorrow might bring". Nila also said that if Sitalini was a righteous son he would follow Tevita's wishes but if he was not righteous he would not. When asked if he accepted

that on Tevita's death Sitalini was entitled to the land and the house, Nila agreed that was the case. He said that as the youngest child he did not have any right to the house or the land. This is all inconsistent with the case Nila now presents that in 1986 Tevita gifted him the house.

[14] In his written submissions, Mr. Tu'utafaiva submitted that it was relevant that Nila had expended money to move his family and possessions here to Tonga on the understanding that the house was his but Paula had not. The money was only expended from November 2009 by which time the dispute between the parties had already arisen so I can take little from this evidence. What is more relevant, in my view, is that Nila did not move into the house until March 2012. Had he truly considered the house was his it is surprising that he waited such a long time before moving in.

[15] The evidence is overwhelming that Tevita did not gift the house to Nila as he alleges. At its very highest, even if Tevita had met with Nila and Sitalini in 1986 and in the circumstances as Nila described them, there was no more than an expression of intention by Tevita to make a gift of the house at some stage in the future, which gift was never made. Sitalini says no such meeting occurred in 1986 and on the state of the evidence I am of the view that he is correct about that.

[16] I find that the house remained the property of Tevita at the time of his death. In light of my finding I do not need to consider the further arguments advanced by Mr. Niu based on s.6 of the Land Act and s.16 Supreme Court Act.

Who owns the house now?

[17] Under section 11 of the Probate Act, from the death of Tevita until administration is granted all his personal property vests in the Court. *Fakafanua v Fakafanua* [2008] Tonga LR 26. Mr. Tu'utafaiva submits that under section 12 of the Probate Act the estate became the property of the Crown because no application was made for letters for administration within 3 years of the estate having become vested in the Court. He argues that this application cannot therefore proceed until the consent of the Minister has been obtained. (See Miscellaneous Amendments (Privy Council) Act 2010).

[18] Relevantly, section 12 provides:

> If within 3 years of the date of any estate having become vested in the Court as provided by section 11 of this Act no ... person has been found to be the next of kin to the deceased ... the proceeds of such estate shall become the property of the Crown and shall be paid into general revenue …

[19] I do not accept Mr. Tu'utafaiva's submission. Section 12 does not require that application for letters of administration be made within three years of the date of vesting the estate in the Court. The word 'found' denotes an inquiry to discover if the deceased has next of kin, which inquiry must be made before the estate shall become the property of the Crown. That enquiry would usually be made by the Court in whom an intestate estate vests under section 11. In this case, had an enquiry been

made the existence of next of kin would have been immediately apparent. Section 12 does not apply in my view.

[20] For completeness, I should add that in his submissions Mr. Niu raised a new argument. He submitted that Sitalini had continuous and undisputed possession of the house from 1992 until 2006 and, as a result, ownership of it. He submitted also that Sitalini had gifted the house to Paula in 2006. It is not open to Sitalini to pursue this argument. It is not the case he presented at the hearing and it is not the case that Nila was required to answer. Furthermore, it is completely at odds with the fact that Sitalini has applied for letters of administration at all. It is also inconsistent with his pleading, which at paragraph 19 asserts that the dwellinghouse vested in the Court since Tevita's death. I would add that I do not accept, in any event, that the evidence established that Sitalini had continuous and undisputed possession of the house between 1992 and 2006.

[21] I find that the house has vested in the Court since the death of Tevita under section 11 Probate Act.

Should letters of administration be granted to Sitalini?

[22] The selection of an administrator is in the discretion of the Court and the Court is not bound by the wishes or feelings of some of those entitled to the estate. The Court will look to the benefit of the estate and of all the persons interested in the distribution of the property and will place the estate in the hands of that person who is likely best to convert it to the advantage of those who have claims.

[23] A circumstance where the Court might refuse an otherwise eligible applicant letters of administration is where he has an interest which is incompatible with the due and proper administration of the estate. *Budd v Silver* (1813) 2 Phill 115 and *Earl of Warwick v Greville* 161 ER 934.

[24] Sitalini has made perfectly plain his intentions as far as the house is concerned if he is granted letters of administration. He will not offer it to the highest bidder and would never offer it to Nila at all. He said that the house will be given to Paula as it is a family house and he considers Paula to be his heir. This is not the approach of a responsible administrator. By proceeding in that way Sitalini might well deprive the estate of the opportunity to sell the house to the highest bidder (who may be Nila) and it may also deprive Nila, Salote and the 2 children of Taufa who have not taken a position on this application to their rightful entitlement from the proceeds of sale of the house. I have not overlooked that Sitalini has said that Paula must pay Nila for his share of the house. The amount he would require Paula to pay, if granted letters of administration, is nominal. In his application he suggests just $205, as one tenth of $2,050, yet in his evidence he said he believes the house could be worth as much as $220,000.

[25] In the exercise of my discretion I have decided that it would be wrong to grant Sitalini letters of administration and I refuse his application.

[26] There are no competing applications for the grant of letters of administration. On the face of it one option would be to appoint the Registrar of the Supreme Court to

administer the estate under section 13 of the Probate Act. Mr. Tu'utafavia supports that approach. Mr. Niu made no submissions in relation to it. The parties may now be able to resolve matters between themselves or agree on a suitable administrator. This is an issue upon which I will hear further from the parties.

What is the value of the house?

[27] No party called expert valuation evidence. The Court could not possibly determine the value of the house without such evidence. Furthermore, given the relationship that apparently exists between ownership of the house and securing the grant of the land upon which it is built, the house could be a very valuable asset. The evidence before me was that the house could be worth anywhere between $2,000 and $220,000. I can make no finding of actual value at this stage.

A further issue

[28] Mr. Nui submitted that the Court should determine whether Paula is entitled to the dwellinghouse subject to the payment by him for the share of Nila and Salote (and I must presume he would accept the children of Taufa also) and, if so, at what value. It is not appropriate for the Court to make any such determination of Paula's entitlement which will be affected by a range of factors. As I have noted also, at this stage I cannot determine the value of the house on the evidence the parties presented.

The result

[29] My findings are:

[29.1] The house is an asset of the estate of Tevita and has since his death been vested in the Court.

[29.2] Sitalini's application for letters of administration is refused.

[30] This case will be called again on Friday, 28 August 2015 at 9.00am for a conference. The issues upon which I anticipate directions will be made are the following:

[30.1] In light of the findings of the Court, are the parties now able to agree on the appointment of a suitable administrator other than the Registrar of the Court.

[30.2] Does any party seek costs?

[30.3] If the Registrar is to administer the estate, what steps must now be undertaken to do so for the benefit of all parties.

Yang v Manoa anor

Supreme Court, Nuku'alofa
Scott J
CV 39/2014

18 February 2015; 7 August 2015

Land law – question whether agreement was licence or lease – found relationship created was more a lease – agreements illegal

The preliminary issue before the Court for determination was the legality or effectiveness of an agreement dated 20 October 2007. A copy of the agreement was apparently signed by the plaintiff and the second defendant. A second copy of the same agreement appeared to have been signed by the plaintiff and the first defendant nine days later. The question was whether the agreement created between the parties the relationship of landlord and tenant or merely that of licensor and licensee. If the latter then a further question was whether the licence should be regarded as a permit provided for by the Land Act.

Held:

1. The particular features of the agreements seem characteristic not of a licence but of a lease. The relationship between a licensor and a licensee was not one of "landlord" and "tenant" but one of "grantor" and "grantee". The tenant's right to exclusive possession of the premises and the right to transfer the premises or sublet them to a third party from whom payment might be obtained point not to a mere licence but to an estate in the land being occupied.
2. If the agreements should in fact be regarded as licences then the court is of the opinion that such licences should be in Form 6 permit style and should be registered as required by the Land Act. It was entirely unsatisfactory that agreements which in reality result in the owner of the allotment being deprived of its use for many years, were prepared informally, need not even be in writing, were not available for inspection in the register and were varied by oral agreements at the whim of the parties. It was not intended that far-reaching agreements could validly exist outside the Land Act which was a "complete code" of Tongan land law. The Court of Appeal (in *Mortimer anor v Fe'aomoeata anors*) "expressed no view" on whether tenancy agreements (other than short term agreements) breached section 13 of the Land Act by creating title or interest in the land. The judge said that these agreements were to be found with increasing

frequency and it would be helpful for the Court definitively to pronounce on their status.

3. The court held that the agreements reached between the parties were either illegal or ineffective or both.

Cases considered:

Addiscombe Estates Ltd v Crabbe [1957] 3 All ER 563

Cowley v Tourist Services Ha'apai Ltd and Fund Management Ltd [2001] Tonga LR 183 (CA)

Kolo v Bank of Tonga [1997] Tonga LR 181

Mangisi v Koloamatangi [1999] TOCA 9

Matavalea v Uata (LA 1 of 1985)

Mortimer anor v Fe'aomoeata anors [2015] Tonga LR 91 (CA)

Nakao –v- Fua (unrep. 4 September 1989)

O.G. Sanft v Tonga Tourist and Development Co. Ltd and Ors [1981-88] To LR 26

Statute considered:

Land Act (Cap 132)

Counsel for the plaintiff : Mr Niu SC
Counsel for the defendants : Mr Fonua

Judgment

[1] It was thought wise to await the outcome of the appeal in *Mortimer & Anr v Piea Fe'aomoeata & Ors* AC 28 of 2014 and AC 2 of 2015 [editor's note: reported at [2015] Tonga LR 91 (CA)] before delivery of this preliminary judgment. Following that decision it seems clear that the matter now before the Court might have remained in the Land Court but that the Supreme Court is equally well able to rule on the issue.

[2] My Decision of 6 June 2014 following which the action was recommenced in the Supreme Court deals with several aspects of the circumstances and law which are relevant to the matter. I will not repeat what I wrote but instead respectfully refer to it and attach a copy hereto.

[3] The preliminary issue before the Court for determination is the legality or effectiveness of an agreement dated 20 October 2007. A copy of the agreement is Document P11-13 apparently signed by the Plaintiff Yuzhen Yang (a second-named Plaintiff Zhufu Wei discontinued on 16 February 2015) and the Second Defendant. A second copy of the same agreement appears to have been signed by the Plaintiff and the First Defendant nine days later (P-14-16).

[4] The question is whether the agreement creates between the parties the relationship of landlord and tenant or merely that of licensor and licensee. If the latter then a further question is whether the licence should be regarded as a permit provided for by the Land Act.

[5] The particular relevance of the distinction between a lease and a licence in the context of the Land Act is that a lease of an allotment must:

(i) be in Form 3 of Schedule IX to the Act;
(ii) must be approved by Cabinet (section 56(i)); and
(iii) is ineffective to pass or affect any interest in land unless registered (section 126).

A licence, on the other hand, eg. to enter an hotel, cinema or sports stadium does not fall within the purview of the Act unless in fact it amounts to a permit.

[6] Section 125 provides for two distinct forms of permit. The first is a Form 2 permit which allows an alien to reside in Tonga. This form of permit is not relevant to this case although the Defendants relied on section 15.

[7] The second type of permit is a Form 6 permit, the purpose of which is revealed in Form 6 of the Schedule IX. It is plainly a permit to occupy a "place" referred to in the permit upon payment of rent. It allows the permit holder to remove improvements made to the place at the end of the term. Section 126 also applies.

[8] Before examining the agreement in question several observations may be made. The first, on the authority of *Cowley v Tourist Services* [2001] To.L.R 183, 188 is that:

> "buildings (in Tonga) are not, *in general*, regarded as fixtures. They are treated as chattel houses are in Barbados – that is to say as personal property detachable from the land".

> "It would be inconsistent with this approach (and destructive of ordinary weekly tenancies of houses and shops in Tonga) to treat s.13 as applicable to the *short term* tenancy agreements in this case" (emphasis added)

[9] On the authority of *Kolo v Bank of Tonga* [1997] To.L.R 181, 183 "The *broad proposition* stated by Ward CJ should be accepted. That means it was open to Mr Kolo to pledge his house as an item separate from the land on which it stood" (emphasis added). The "broad proposition" was that "buildings ... have been regarded as items of personal property rather than forming part of the realty. "... the intricate law of fixtures and accretions to land which applies elsewhere is not wholly appropriate in Tonga".

[10] The source of this view is not clear. The Act does not directly refer to the matter but, as already noted, Form 6 makes provision for removal of improvements, not excluding buildings, while Form 3, the Form of Lease, provides that upon the termination of the lease:

> "It shall be lawful for the Lessee, his heirs and those who represent him to remove all houses and improvements which may have been built on the land."

[11] Although the Act does not say so, it seems clear that when advantage is taken of the right to remove what in most other jurisdictions would be considered fixtures, a

duty arises on the permit holder or tenant to make good any damage to the land occasioned by the removal. While a tenant may have a right to remove improvements the landholder must have a corresponding right to have his land returned to him in a reasonably usable condition.

[12] The Land Act dates back to 1903 and since that time enormous changes have taken place in building construction methods, both domestic and commercial. The original typical fale was made entirely of local materials chiefly timber and thatch. It stood on posts driven into the ground. It could easily be removed. The next stage was the evolution of the "lean to" made out of timber and corrugated iron. Again, such buildings can easily be dismantled, removed and re-erected. With the advent, however, of the concrete style of construction the situation was quite changed. Nowadays many domestic buildings are constructed out of concrete blocks standing on a concrete slab with windows, doors, roof, plumbing, electricity all embedded in the construction. Large commercial buildings such as the Reserve Bank, Little Italy or the Sanft Building need no description. The simple point is that nowadays the average home or commercial building cannot be removed from the land except at considerable cost and inconvenience. The option theoretically accorded by the law to remove such "chattels" is not one which, in practical reality, can usually be exercised.

[13] In the present case, it is not disputed that the building in question is a two storey construction. Some of it appears to be of concrete blocks. It has a corrugated iron roof. The original shop was built by the First Defendant. It was then extended by one Ming Sen Tsay who then sub-let the building to the Plaintiff who herself then built the upper storey before moving into it as her residence, meanwhile subletting the ground floor shop. The building is erected at the road frontage and occupies a substantial part of the First Defendant's town allotment.

[14] The agreement in question is the third dealing with the building. The first, between the First Defendant and Ming Sen Tsay is dated 26 June 1999. (Document P-3-6) It runs from 2 June 1999 to 1 June 2008.

[15] The second agreement, said to have been concluded on 9 June 2005 i.e. just under 3 years before the first agreement was due to expire, was between the two Defendants and the Plaintiff. A copy is document P-7-10. It runs from June 2008 to June 2013. The current agreement was said to have been reached on 20 October 2007, that is, just under 6 years *prior* to the expiry of the former agreement and is stated to run from June 2013 (a little under 5 years after the date of the agreement) until June 2023. The total term of the three agreements taken together is 24 years.

[16] The agreement is entitled "Tenancy Agreement". The Defendant(s) is/are described as "Landlord". The Plaintiff is described as "Tenant". The Landlord "gives the Tenant the right to occupy the premises at his residential place at Haveluloto."

[17] Paragraph 2.1 provides that "the Tenant has the right and freedom to transfer this tenancy to a third party during the period of the tenancy."

[18] Paragraph 3 provides that the "Landlord must insure and keep insured his interest in the premises."

[19] Paragraph 5.1 (which existed in similar form in the two previous agreements) is not clear: "the Landlord agrees to attach and fixtures to renovate, alter or add the premises to 230 square meters" (sic).

[20] Paragraph 20 requires the tenant "to ensure that such grounds and garden as form part of the premises are kept tidy and free of rubbish ..."

[21] The provisions for the payment of rent may be compared. In the first, the rent is $400 per month for 5 years with the whole sum ($24,000) being paid in advance upon the signing of the agreement. In the second, the rent has been reduced to $275 per month with the whole sum of $16,500 being paid upon signature. In the third, the rent has increased slightly to $291.6 per month with the whole payment in respect of the 10 years length of the tenancy being paid in advance after the signing of the agreement.

[22] Although the agreements contain a number of covenants, some of which have been noted, there appears to be no provision for forfeiture by breach. The third agreement however, contains an unusual clause:

> "[The Landlord] will not terminate this agreement during the period of the tenancy otherwise he will pay the tenant the amount of $117,000 pa'anga for the cost of the improvement and repair of the building and other expenses and losses."

This figure appears to be a penalty.

[23] The Defendants deny that they are bound by these agreements. Substantial issues of fact and law are raised in their Statement of Defence dated 21 June 2014. With the agreement of counsel and following my Decision of 6 June it was decided that the preliminary issues described in paragraph 3 above first be addressed.

[24] In my opinion the agreements upon which the Plaintiff relies go far beyond the short-term tenancies referred to in *Cowley*. This is not a case of estoppel such as *Matavalea v Uata* (LA 1 of 1985), a family agreement described in *Mangisi v Koloamatangi* [1999] TOCA 9 as being "a very similar case".

[25] It is not clear from *Mangisi* or *Matavalea* whether the buildings erected by the occupiers were also being lived in. In my opinion a permanent residence is a very different matter from merely operating a shop. In the present case I would hold as did Martin CJ in *Nakao –v- Fua* (unrep. 4 September 1989) that the building, partly erected by the Defendants, not the Plaintiff, is as a matter of fact affixed to the land, cannot reasonably be moved without demolition and has not been detached from the Defendants' land. It is, in other words, an exception to the *general* rule in *Kolo* (above).

[26] The particular features of the agreements which I have highlighted seem to me characteristic not of a licence but of a lease. The relationship between a licensor and a licensee is not one of "Landlord" and "Tenant" but one of "grantor" and "grantee". The Tenant's right to exclusive possession of the premises and the right to transfer the premises or sublet them to a third party from whom payment might be obtained point

not to a mere licence but to an estate in the land being occupied. (see generally *Addiscombe Estates Ltd v Crabbe* [1957] 3 All ER 563).

[27] If I am wrong, and these agreements should in fact be regarded as licences then I am of the opinion that such licences should be in Form 6 permit style and should be registered as required by the Land Act. In my opinion it is entirely unsatisfactory that agreements of this type which in reality result in the owner of the allotment being deprived of its use for many years, are prepared informally, need not even be in writing, are not available for inspection in the register and are apparently varied by oral agreements at the whim of the parties. I do not believe that it was intended that far-reaching agreements of this kind could validly exist outside the Land Act which is supposed to be a "complete code" of Tongan land law (*O.G. Sanft v Tonga Tourist and Development Co. Ltd and Ors*. [1981-88] To. L.R 26).

[28] In paragraph 13 of *Mortimer & Anr*. (above) the Court of Appeal "expressed no view" on whether tenancy agreements (other than short term agreements such as those referred to in *Cowley*) breached section 13 of the Land Act by creating title or interest in the land. In my experience these agreements are to be found with increasing frequency and it would be helpful for the Court definitively to pronounce on their status.

Result: In my opinion the agreements reached between the parties herein were either illegal or ineffective or both.

Church of Jesus Christ of Latter Day Saints in Tonga Trust Board v Kivalu

Land Court, Nuku'alofa
Scott, J and Madam Assessor Koloamatangi
LA 15/2012

13 and 14 July 2015; 7 August 2015

Employment law – wrongful dismissal counterclaim – employment was on "at-will" basis – counterclaim dismissed

The plaintiff had a school known as the Liahona High School. Towards the end of 2010 or in early 2011 the defendant (who had trained in the USA) and the principal agreed that the school would employ the defendant. He was offered and accepted "an interim offer of temporary employment as a substitute teacher" at the school beginning in early April 2011. The defendant wished to relocate his wife and children and all their possessions from the USA to Tonga and he therefore wanted one of the vacant staff quarters at the school to be allocated to him. The principal was agreeable to this request and in April 2011 the defendant and his family moved into the staff quarters. In September 2011, the Church Board approved the defendant's appointment as a permanent teacher. New standardised contracts were introduced in September 2011 which provided at clause 5.1 that the employee's employment was at-will and could be terminated by either party with or without cause. The defendant did not attend mandatory training and on 22 February he received a notice of termination of employment. He also received a letter which gave him 30 days to leave the staff quarters. On 25 September 2012, the defendant not having vacated the staff quarters, a writ was issued by the plaintiff which sought an order for vacant possession of the quarters, mesne profits and damages for unauthorised use of electricity. On 8 November 2012 a defence and counterclaim were filed which alleged that the defendant was given no opportunity "to show cause as to the actual reason for his employment being terminated", that the notice of termination was "unfounded", that he was wrongfully dismissed and that consequently there were no valid grounds for his eviction from the staff quarters. On 12 December 2012 the court granted the plaintiff an order for possession of the quarters and the defendant and his family vacated the quarters (see *Church of the Latter Day Saints in Tonga Trust Board v Kivalu* [2012] Tonga LR 153). The central issue was whether the defendant was wrongfully dismissed. If he was, then he was entitled to damages. If his dismissal was lawful then the plaintiff would prima facie be entitled to recover damages as sought resulting from the failure to comply with the notice to quit.

Held:

1. The court did not believe the defendant's claim not to have seen or been aware of clause 5.1 of the contract. Clause 5.1 was in similar terms to the corresponding paragraphs in the contracts he signed in January and March 2011. The defendant knew perfectly well that he was being employed on an at-will basis and that he was liable to be terminated at the will of the church with or without adequate reason.
2. Implied terms of contracts operate as default rules which the parties were free to exclude or modify. Clause 5.1 plainly excluded any requirement that any quasi-unfair dismissal procedures be implemented before the contract could be terminated.
3. The court was satisfied that the defendant's dismissal was not wrongful. From a human resources standpoint it might have been better to have given the defendant a proper opportunity to explain himself before a final decision was taken but there was no legal requirement to do so.
4. Judgment was for the plaintiff and the defence and counterclaim were dismissed.

Cases considered:

Church of the Latter Day Saints in Tonga Trust Board v Kivalu [2012] Tonga LR 153

Fu'ikava 'Ilangana v Westpac Bank of Tonga (AC 17 of 2014)

Malik v Bank of Credit [1998] AC 20; [1997] 3 All ER 1

Counsel for the plaintiff : L M Niu SC
Counsel for the defendant : O Pouono

Judgment

[1] The Plaintiff has a school known as the Liahona High School. The Principal of the school from 2009 to December 2012 was Inoke Kupu. Kupu had attended the school as a pupil and one of his class-mates was the Defendant.

[2] The Defendant told the Court that the Plaintiff Church had sponsored him to travel to the United States for further education after which he hoped to return to Tonga as a teacher.

[3] It appears that the Defendant in due course gained the necessary qualifications and began making enquiries about returning to Tonga. He came to Tonga in 2000, 2007, 2009 and 2010, each time visiting the school.

[4] Towards the end of 2010 or in early 2011 the Defendant arrived at the Principal's office where he and Kupu discussed the matter again and it was agreed that the school would employ the Defendant. Pending approval by the Church Board (the CES) for a permanent appointment he was offered and accepted "an interim offer of temporary employment as a substitute teacher" at the school beginning in early April 2011. He signed a contract dated 28 January 2011 setting out the terms and conditions of his employment (Document P39–40 which was followed by a second contract with slightly different terms – P1–4).

[5] The Defendant explained to Kupu that he wished to relocate his wife and children and all their possessions from the USA to Tonga and that he therefore wanted one of the vacant staff quarters at the school to be allocated to him. Kupu was agreeable to this request and the Defendant then returned to the USA.

[6] On 14 March the Defendant arrived back in Tonga. He and his family went straight from Fu'amotu to the school. On 22 March the Defendant entered into a Housing Rental Agreement (P3-4) and a Housing Deductions Agreement (P-5). The Defendant assumed his duties as a substitute teacher on 4 April and after some delays he and his family and their personal effects moved into the staff quarters.

[7] In September 2011, the Church Board approved the Defendant's appointment as a permanent teacher. No copy of the Board's decision or notification to the Defendant was produced but it is accepted that the appointment was with effect from 14 September 2011.

[8] According to Fatafehi Fifita, the present Principal of the school, the Plaintiff had for some time been working to standardise employees' contracts and to remove the requirement that these contracts be renewed each year. At the end of September the new contracts were introduced and explained: "We did a training for all employees, teachers and non-teachers". Ms Fifita who was the very experienced Human Resources Manager at the time told the Court that all the employees of the school were given contracts and that a copy of the contract as given to all employees, including the Defendant, was document P8-14. This particular document names the Defendant on page 1 and is signed by him on page 7.

[9] Paragraph 5 of the contract is entitled "Term of Employment". It reads as follows:

> "5.1. This Employment Agreement recognizes the Employee's Employment starting on 14 September 2011. Either Employee or Employer 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."

[10] On 5 January 2012 the Defendant went to see Kupu at his office. He sought and obtained approval to fly to the USA on 10 January and to return on the 19th. Kupu reminded the Defendant that teacher training was beginning on 23 January and that his attendance was mandatory. According to the Defendant he wished to visit the USA for "personal, medical and other reasons."

[11] The Defendant told the Court that upon his arrival in Los Angeles on 10 January he was arrested and taken into custody. In due course he was taken to Utah where he appeared in Court on 30 January. He was eventually released on 7 February and was finally able to return to Tonga on the 19th.

[12] On the morning of 22 February the Defendant's wife handed him a letter, P-18, entitled "Notice of termination of Employment". The letter informed the Defendant that, in reliance upon clause 5.1 of the contract of 1 October 2011 his employment as a teacher at the school had been terminated forthwith.

[13] It appears that on or about 18 February the Defendant had also received an email from the school advising him of his termination. No copy of this email was produced although the Defendant told the Court that he might have a copy at home. On 18 February the Defendant emailed the school (Document P-19) requesting a review of the decision to terminate him. He suggested that he was entitled to avail himself of the Employee's Grievance Procedure. He explained that the "major reason" for his non return by the 19th January was "a Court Order of arrest"; these legal matters had now been settled. He advised that confirmation that his termination was final would lead to legal proceedings being taken.

[14] On 22 February the Defendant received a second hand-delivered letter, P-21, giving him 30 days notice to quit the staff quarters. The second paragraph of the letter also replied to his email of 18 February, P-19, and advised him that the notice of termination was final.

[15] On 25 September 2012, the Defendant not having vacated the staff quarters, the writ was issued. It sought an order for vacant possession of the quarters, mesne profits and damages for unauthorised use of electricity.

[16] On 8 November 2012 a Defence and Counterclaim were filed. The Defendant alleged that he was given no opportunity "to show cause as to the actual reason for his Employment being terminated", that the notice of termination was "unfounded", that he was wrongfully dismissed and that consequently there were no valid grounds for his eviction from the staff quarters.

[17] The Counterclaim alleged that the Defendant had "Spent about $USD59,285.00 in preparation for his coming here and his establishment in Liahona to take up his post as a teacher". The Defendant sought dismissal of the eviction application, reinstatement as a teacher at the school, alternatively damages and costs.

[18] On 12 December 2012 I granted the Plaintiff an order for possession of the quarters. My Decision of even date sets out my reasons. I understand that the Defendant and his family vacated the quarters shortly after the Decision was delivered.

[19] The central issue in this case is whether the Defendant was wrongfully dismissed. If he was, then he will be entitled to damages. If his dismissal was lawful then the Plaintiff will prima facie be entitled to recover damages as sought resulting from the failure to comply with the notice to quit.

[20] The Plaintiff's witnesses were Kupu and Ms Fifita. The principal defence witnesses were the Defendant and his wife Tuanekinoa Kivalu.

[21] The Defendant's evidence was that following his arrest he was able to contact his brother in Utah. He asked him to tell his wife and Kupu what had happened. According to Tuanekinoa she first heard from the Defendant on 21st and when she

learned what had happened she went to see Kupu. She may have been to see Kupu before. She again went to see Kupu on the 23rd and told him that it seemed likely that the Defendant would not return for 30 days. Kupu told her that he would have to find a substitute teacher. She was worried about the Defendant's salary and the rental deductions on the quarters. Kupu reassured her that all these matters would be attended to on his return.

[22] Kupu told the Court that several meetings were held to consider the situation following the Defendant's non-return. On 16 February it was decided that his contract would be terminated. The principal reason for this decision was his failure to return to Tonga on 19th as promised.

[23] The Defendant advanced three grounds upon which contended that the dismissed was unlawful:-

(a) The contract had been varied when Kupu assured Tuanekinoa that a substitute teacher could be found to stand in for the Defendant and everything would be resolved on his return;

(b) He was unaware of Clause 5.1 of the contract and was therefore not bound by it; and

(c) Clause 5.1 did not relieve the Plaintiffs of the requirement that his dismissal was reasonable in all the circumstances and was carried out in a procedurally fair manner.

[24] As to the first, I do not accept that there was any variation of the Defendant's contract as a result of Kupu's reassurances. In my view Kupu was doing no more than comfort Tuanekinoa who was very distressed about what had occurred and worried about her husband's job and their accommodation. In any event, the contract was between the Plaintiff and the Defendant, any variation would have to be agreed between those parties, not between the Principal of the school and the Defendant's wife.

[25] I did not believe the Defendant's claim not to have seen or been aware of clause 5.1 of the contract. No such claim is pleaded or had been advanced before the hearing. I accept Ms Fifita's evidence that the Defendant was given the whole of the contract document which he then signed. I reject the Defendant's claim that he was told to access pages 1 – 13 of his contract on the computer but was unable to do so in the more than three months that elapsed between 1st October and his departure for the USA in the following year. Clause 5.1 was in similar terms to the corresponding paragraphs in the contracts he signed in January and March 2011. I am satisfied that the Defendant knew perfectly well that he was being employed on an at-will basis and that he was liable to be terminated at the will of the church with or without adequate reason.

[26] The third ground apart from being briefly adumbrated was not advanced in any detail. I have not overlooked *Fu'ikava 'Ilangana v Westpac Bank of Tonga* (AC 17 of 2014) in which the Court of Appeal suggested that a case of alleged wrongful dismissal might have been decided differently if an implied term of mutual trust and confidence had been relied upon (see *Malik v Bank of Credit* [1998] AC 20; [1997] 3

All ER 1). In the present case not only was this line of argument not pursued but I am also satisfied that it could not succeed. Unlike *'Ilangana* the Defendant had only been employed for a few months, as opposed to many years, before he was dismissed. Secondly, as pointed out in *Malik* implied terms of contracts operate as default rules which the parties are free to exclude or modify. In my opinion clause 5.1 plainly excludes any requirement that any quasi-unfair dismissal procedures be implemented before the contract could be terminated. The Preamble to The Faculty Handbook dated 28 November 2011 (unnumbered document in the Plaintiffs bundle, not referred to at all by either Counsel) which includes a section dealing with disciplinary action against teachers, specifically states: "If any conflict should exist between the handbook and a written Employee Agreement contract the Employee Agreement and local in-Country policies shall prevail."

[27] As pointed out by Mr Niu in his closing submissions the Defendant's disclosures raised considerable doubts about the Defendant's honesty and the truthfulness of his very skimpy account of why exactly he was arrested and detained in the USA. It seems clear, to give but one example, that his detention did not, or at least chiefly not, arise from non-payment of a gas bill as suggested in his letter of 22 January (P 16-17). The Defendant admitted that he had never given the school a full, detailed and document–supported explanation for his arrest. Given the view I have taken of the effect of clause 5.1 these matters, never fully explored at the trial, are not decisive in arriving my conclusion. They do not, however, suggest that any enquiry into the reasons for the Defendant's non-return would improve his position.

[28] I am satisfied that the Defendant's dismissal was not wrongful. From a Human Resources standpoint it might have been better to have given the Defendant a proper opportunity to explain himself before a final decision was taken but I am satisfied that there was no legal requirement to do so.

[29] It follows that the Defence and Counterclaim must be dismissed. In his helpful final submissions Mr Pouono accepted that the rent and electricity issues were not in dispute if judgment were given to the Plaintiff on the central issue. There will be judgment for the Plaintiff in respect of paragraphs (c) and (b) of the prayer of the Statement of Claim. Plaintiff's costs to be taxed if not agreed.

Naula v Tupou anors

Land Court, Nuku'alofa
Scott, J, and Madam Assessor Koloamatangi
LA 14/2008

15 and 16 July 2015; 7 August 2015

Land law – availability of land – only one applicant – licencee could not have better right to occupy than donor of licence – Minister made adequate consideration

The plaintiff was the son of Tevita Naulu who died earlier this year. Tevita had for many years lived on and cultivated a tax allotment. He lived there prior to his marriage and then after his marriage brought up his 8 children on the land. The whole time Tevita was in occupation of the land it was registered in the name of Siosaia 'Oto Tupou ('Oto), who was granted the land in 1948. Some time after the grant 'Oto left for England where he lived with his English wife and two daughters. He did not return to Tonga until 2001, shortly before his death in November 2002. 'Oto had no heir and no claim was lodged by anyone with the Ministry of Lands in the 12 months following his death. The second and third defendants were of the view that the land reverted to the Estate Holder (the second defendant) at the very latest, 12 months thereafter 'Oto's death. On 5 November 2006 the first defendant filed an application for the land to be granted to him. The application was supported by the second defendant as Estate Holder. The first defendant received his deed of grant on 3 March 2007 and he gave Tevita immediate notice to leave the land. Tevita did not comply and he commenced proceedings on 24 June 2008 with his son as the second plaintiff. Tevita died early in 2015. The claim was that the second defendant promised the land to Tevita, that the Minister of Lands made no enquiries about the land before granting it, and that the first defendant had no right to evict Tevita from the land.

Held:

1. The court was satisfied that at all times prior to 'Oto's death Tevita was lawfully on the land. A licencee could not have a better right to occupy the land than the donor of the licence. The donor, 'Oto, died and his interest in the land died with him since he had no heir. The licence expired at the same time. There was no evidence to show the creation of a proprietary estoppel as between 'Oto and Tevita, let alone one between 'Oto and Tevita's son, the plaintiff.
2. The Minister must consider whether the land was available before making a grant. There was only one applicant and the land had reverted to the

Estate Holder. The person cultivating the land who did not himself apply for a grant, was doing so with the consent of the Estate Holder, not 'Oto, and the Estate Holder had supported the first defendant's application to the Minister. Adequate consideration was given by the Minister to the question whether the land was available for grant and that he arrived at the correct conclusion in deciding that it was.

3. The claim was dismissed.

Cases considered:

Finau v Minister of Lands anor [2012] Tonga LR 127 (CA)
Tafa v Viau anors [2006] Tonga LR 287 (CA)
Tevita To'a v Taumoepeau & Minister of Lands (LA 10/12)

Statute considered:

Land Act (Cap 132)

Counsel for the plaintiff	:	L M Niu SC
Counsel for the first defendant	:	S T Tu'utafaiva
Second defendant appeared in person		
Counsel for the third defendant	:	S Sisifa SG

Judgment

[1] The Plaintiff is the son of Tevita Naulu who died earlier this year. Tevita had for many years lived on and cultivated a tax allotment at Lakepa known as Lokoloko. He lived there prior to his marriage and then after his marriage brought up his 8 children on the land. There was a traditional Tongan fale there and a partially completed concrete house. It is not in dispute that he planted many fruit bearing trees on the land and also kept animals.

[2] The whole time Tevita was in occupation of the land it was registered in the name of Siosaia 'Oto Tupou ('Oto), who was granted the land in 1948. Some time after the grant 'Oto left for England where he lived with his English wife and two daughters. He did not return to Tonga until 2001, shortly before his death in November 2002.

[3] There was no evidence to show how it came to be that Tevita moved onto 'Oto's land but on the other hand there is nothing to show that 'Oto was not agreeable to the arrangement. The Court was not told that 'Oto at any time, before or after his return, asked Tevita to leave. I am satisfied that Tevita went onto the land with 'Oto's permission and that this permission was not revoked. Although Tevita and his family ceased inhabiting the land in about 1993 he continued to cultivate the land himself until 2007 when he became ill. His son Pohahau told the Court that he took over the planting from his father in 2008 and is still working the land today.

[4] 'Oto had no heir and the Court was told that no claim was lodged by anyone with the Ministry of Lands in the 12 months following his death. In these circumstances the Second and Third Defendants were of the view that the land reverted to the Estate Holder (the Second Defendant) either, presumably, immediately upon 'Oto's death (Land Act – Section 83) or at the very latest, 12 months thereafter (section 87).

[5] On 5 November 2006, just under four years after 'Oto's death the First Defendant filed a Form 9 Application for the land to be granted to him under the provisions of section 43. The application was supported by the Second Defendant as Estate Holder. On 8 November, after the First Defendant had met the then Minister of Lands, Lord Tuita, a briefing was prepared in the Ministry by M. Matekitonga, a lands officer. A copy of this brief is document D-3-6. The Minister accepted the recommendation that the application was in order and on 3 March 2007 the First Defendant received his deed of grant of the land (Document D-3-10).

[6] On 7 December 2006 (presumably after he had become aware that his application had been successful but while awaiting receipt of the Deed) the First Defendant wrote to Tevita (Document P – 9). He gave Tevita immediate notice to quit the land. Tevita did not comply and on 24 June 2008 proceedings in this Court were commenced.

[7] The Writ and Statement of Claim named Tevita as the First Plaintiff and his elder son Fililangi Naulu as the Second Plaintiff; he was described as being "a driver (Lakepa)". This description of the Second Plaintiff was incorrect: the undisputed evidence of his sister Ma'ata Mahina was that Fililangi Naulu left for the USA in 1991 or 1992, that he lives there with his wife and children and that he is "in the process of filing his papers". It is the duty of Counsel to ensure that the location of parties is correctly described not least because a Plaintiff who resides ordinarily out of the jurisdiction may be required to furnish security for costs (see RSC O.17.)

[8] The pleadings as advanced on the day of the trial had not been amended to reflect the fact that Tevita had died and that his son Fililangi Naulu was the sole surviving Plaintiff. (see the White Book 1988 – 15/7/8). This failure to make application for directions following the death of Tevita caused inconvenience.

[9] The basis of the Plaintiff's claim was:-

(i) that the Second Defendant "promised" the land to Tevita;
(ii) that he broke his promise by supporting the First Defendant's application;
(iii) that the Second Defendant did not tell the Third Defendant that the land had been lawfully occupied by Tevita for decades;
(iv) that the Third Defendant made no enquiries to find out the truth about the land before granting it to the First Defendant;
(v) that the land was not available to be granted to the First Defendant;
(vi) that Tevita had "a legitimate expectation to own the land"; and
(vii) that the First Defendant had no right to evict Tevita from the land.

[10] The First Defendant denied that Tevita and the Plaintiff were occupying the land. He asserted that the grant to him was lawful.

[11] The Second Defendant denied giving any assurances to Tevita in respect of the land or promising it to him. He pleaded that following 'Oto's death the land had reverted to the estate and had then been properly granted to the First Defendant in accordance with the provisions of the Land Act.

[12] The Third Defendant pleaded that following the death of 'Oto, the land had reverted and became available for regrant. No inspection of the land was required as "the granting of the land was based on the information provided by the Second Defendant's father" (the late Lord Lasike).

[13] The principal witness for the Plaintiff was his sister Ma'ata Mahina. She told the Court that she had gone with Tevita to see the Second Defendant about three months after 'Oto's death. Her father told her that the Second Defendant "told him to remain on the allotment". About 9 months later Tevita again went to see the Second Defendant. She saw them shake hands and heard the Second Defendant tell Tevita "to go and plant kava for him and that he could remain on the land". She and her father were shocked and distressed when they first heard that the land had been registered in the First Defendant's name. The first they knew of the registration was when the town officer gave them a letter to vacate.

[14] In cross examination by Mr Tu'utafaiva Ma'ata claimed that the former Lord Lasike had encouraged Tevita to approach 'Oto to have the land transferred to him. This, however, had not been possible as they did not know how to contact him in England. When 'Oto returned to Tonga not long before he died he went to stay with the First Defendant and remained there until he passed away.

[15] In re-examination Ma'ata told the Court that after 'Oto returned, Tevita and the whole family went to see 'Oto, taking with them a quantity of food harvested from the land. "Tevita said I have come to thank you. I am here today to return your land. My family has survived. We have carried out our obligations and I hereby return your allotment to you". 'Oto did not accept but said "stay on the land and continue to carry out your obligations. Return to the land and continue to look after your children".

[16] The First Defendant told the Court that he had grown up at Lakepa. His father's land adjoins the land in issue. He was aware that the land belonged to 'Oto and that Tevita was cultivating it. After 'Oto came back and stayed with him, Tevita came to the house. He asked 'Oto for the land but 'Oto refused "he told him to return to Masilamea when he knows he has an allotment". 'Oto told Tevita that the land belonged to 'Oto's family. According to the First Defendant Tevita visited him three times to ask for the land but each time he was refused. It is not in dispute that 'Oto made no arrangements for the surrender and regrant of the land before his death.

[17] In cross examination the First Defendant told the Court that he spoke to the Second and Third Defendants before applying for the land. He told the Third Defendant that Tevita was farming the land. The Second Defendant already knew this. He want to look at the land before he applied for it. The fale and unfinished house had gone, only the concrete slab remained.

[18] The Second Defendant told the Court that he lived at Lakepa. He inherited the title from his father in 2001. He knew Tevita and the land in dispute. As long as he could remember Tevita has been cultivating 'Oto's land but he did not know the details of the arrangement between them. He knew that Tevita and 'Oto were related through 'Oto's mother whereas the First Defendant and 'Oto were related through 'Oto's father.

[19] The Second Defendant told the Court that Tevita came to see him after 'Oto's death and asked for the land to be registered in his name. The Second Defendant told Tevita that the land had reverted to him and would be regranted as provided for in the Land Act. He knew Tevita was a kava planter and he told Tevita that he could plant kava on the Second Defendant's land. He denied ever promising Tevita that he could have the land either before or after 'Oto's death. As to Tevita's son, the Plaintiff, he knew nothing about him and had never met him. Tevita had never mentioned him at all.

[20] The last witness was Warrick Vea, a Lands Registration Officer. He confirmed that the only applicant for the land was the First Defendant. No other application, either formal or informal had been received by the Ministry. The essential facts, as assessed by the Ministry, had been embodied in the brief to the Minister (Document P4-5) who, apparently six days after receiving the brief, had approved it.

[21] Vea agreed that the Ministry had not inspected the land before the grant was approved. The Ministry's policy was not to inspect land proposed for regrant out of Hereditary Estates 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 the application being granted.

[22] As already mentioned, the original claim for the land to be granted to Tevita had to be abandoned following his death. This event presented Mr Niu with considerable difficulties in advancing the case as first pleaded. With characteristic conscientiousness he presented careful and comprehensive written submissions. These were answered orally by the Defendants.

[23] Mr Niu's central submission was that it is clear from authority that the Minister has a duty to make reasonable enquiries before land is regranted (*Tafa v Viau* [2006] To.L.R 287). He failed to do so and, had he done so, he would have discovered that Tevita was in lawful occupation of the land which was accordingly unavailable for regrant. Mr Niu submitted that the grant to the First Defendant was vitiated by the failure to make due enquiries and therefore the grant should be set aside. The matter should be remitted to the Minister for reconsideration after giving any rival claimants an opportunity to be heard.

[24] As stated in paragraph 3 above, I am satisfied that at all times prior to 'Oto's death Tevita was lawfully on the land. The question that has however to be asked is whence did that lawfulness arise? Since the land was not registered in his name he could only lawfully be on the land either as a licencee or as the beneficiary of an equity.

[25] A licencee cannot have a better right to occupy the land than the donor of the licence and in this case the donor 'Oto died and his interest in the land died with him since he had no heir. The licence expired at the same time.

[26] There is no evidence at all that 'Oto ever agreed with Tevita that Tevita would have the right to remain on the land as long as he (Tevita) wished and in my opinion the evidence of Ma'ata (paragraph 15 above) suggests that Tevita was well aware that his tenure of the land depended on 'Oto's continuing agreement. In my view there is no evidence to show the creation of a proprietary estoppel as between 'Oto and

Tevita, let alone one between 'Oto and Tevita's son, the Plaintiff. In any event, with the death of 'Oto without an heir, the land reverted by operation of statute to the Estate Holder. I do not accept that any equitable right that Tevita might have had could survive that reversion and become binding on the Estate Holder.

[27] There is no reason not to accept Ma'ata's evidence that the Second Defendant told Tevita that he could continue cultivating the land. But the giving of this permission to cultivate reverted land does not amount to an undertaking to allow Tevita to continue the occupation of the land following its regrant to another person. I accept the Second Defendant's evidence that he told Tevita that the land would be regranted in accordance with the provisions of the Land Act and that in his view those provisions favoured an applicant who could rely on descent through the male line. Tevita himself never made a formal Land Act application for the land. In my opinion this tends to show that he was aware that the Second Defendant would not support such an application.

[28] In paragraphs 23 and 24 of his written submissions Mr Niu stated that the Third Defendant was unaware, when the land was applied for, that it was being cultivated by Tevita. This submission was withdrawn when I pointed out that I had recorded in my minute book the First Defendant's evidence: "I told the Minister that Tevita was farming the land".

[29] In *Finau v Minister of Lands & Heimuli* (AC 9 of 2012) paragraph [14] the Court explained that *Tafa v Viau* (above) is not authority for the proposition that lawful occupation by someone other than the potential grantee renders the land unavailable. It is however authority for the proposition that the Minister must consider whether the land is available before making a grant.

[30] In my view the extent of the enquiries that the Minister must make clearly depends on the circumstances of the case. Where there are competing applications or when the position is not at all clear then a detailed investigation has to be carried out. An example of this situation may be found in *Tevita To'a v Taumoepeau & Minister of Lands* (LA 10/12). In the present case, however, there was only one applicant and the land had reverted to the Estate Holder. The person cultivating the land who did not himself apply for a grant, was doing so with the consent of the Estate Holder, not 'Oto, and the Estate Holder had supported the First Defendant's application to the Minister. In these circumstances I am satisfied that adequate consideration was given by the Minister to the question whether the land was available for grant and that he arrived at the correct conclusion in deciding that it was.

Result

The Claim is dismissed. The Defendants are to have their costs, to be taxed if not agreed.

Folau v Police

Supreme Court, Nuku'alofa
Cato J
AM 13/2015

3 August 2015; 7 August 2015

Sentencing appeal – domestic violence - activation of suspended sentence – repeat offender – appeal dismissed

The appellant pleaded guilty to one count of assault under the Criminal Offences Act, and one count of domestic violence on his daughter. Both convictions carried a maximum sentence of one year imprisonment. The appellant had a history of assault on his defacto wife and the same daughter. The Magistrate was informed that on 13 May 2014, he was sentenced to imprisonment for three months to be suspended for one year and he was also informed that on the same day the appellant had been sentenced to six months imprisonment suspended for one year for an assault on his defacto wife. The Magistrate was informed he had violated his probation in committing this offence. The Magistrate sentenced the appellant to six months imprisonment to be served concurrently with the former sentence imposed. The appellant appealed against that sentence.

Held:

1. In the case of an unrepresented defendant, a Magistrate must take care and make inquiry about the defendant's personal circumstances before sentencing the defendant. Likewise, he should give clear reasons for any sentence that was imposed. In cases where imprisonment was contemplated, a probation report should be requested. However, taking into account the appellant's history of assault on his partner and his elder daughter, the court did not consider that the subjective factors referred to by the appellant were such that this court should interfere with sentence.
2. It may be that the assault in question of his daughter may not have necessitated a sentence of imprisonment had the defendant been a first offender, but taking into account his history the court did not consider that the sentence could have been said to be either manifestly excessive or inappropriate.
3. The appellant was a repeat offender and had been treated in the past with leniency with suspended sentences for previous assaults on his wife and the same daughter. He re-offended regardless of the previous sentences imposed upon him. Appeal was dismissed.

Case considered:
Fukofuka v Police AM 7 of 2012

Statute considered:
Criminal Offences Act (Cap 18)

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

Appeal against sentence

[1] The appellant appealed against a sentence imposed upon him by Magistrate Soakimi on the 6th May 2015.

[2] The appellant had pleaded guilty to one count of assault under the Criminal Offences Act, and one count of domestic violence on his daughter. Both convictions carry a maximum sentence of one year imprisonment.

[3] It appears the appellant also had a history of assault on his defacto wife and the same daughter. The Magistrate was informed that on the 13th May 2014, he was sentenced to imprisonment for three months to be suspended for one year for summons 373 /2014. He was also informed that on the same day the appellant had been sentenced to six months imprisonment suspended for one year on summons 374/2014, an assault on his defacto wife. The Magistrate was informed he had violated his probation in committing this offence. The Magistrate was informed by the daughter that she had been punched in the face and her face was swelled, as she put it. The Magistrate noted the previous assault, and his sentence was;

> "I order as follows; In case 374/14 where you were sentenced on 13th May 2014 to imprisonment for six months which was to be suspended for one year and because you have violated your probation you are to be sentenced to six months imprisonment of six months to be served concurrently with the former sentence imposed."

[4] It appears that the Learned Magistrate in his sentence reactivated the former suspended sentence of 6 months on CR 374/2014 as in my view he was entitled to do under s 24 (3) (c) of the Criminal Offences Act. The offending in the most recent assault had been committed on 16th September 2014 well within the period of suspension which for both offences under CR 373 and CR 374 had been imposed on the 13th May 2014, and expired on or about the 13th May 2015. Having done this, the Magistrate, who could well have imposed an additional or cumulative sentence the reactivated sentence of six months, did not do so but ordered the sentences of six months which he appears to have imposed on each new offence, to be served concurrently with the reactivated sentence.

[5] The appellant contended that the Magistrate did not take into account any of his personal circumstances being that he was the sole earner for his family which included his defacto partner, and their two infant children. The record does not show that the Magistrate made any inquiry of the appellant as to his personal

circumstances. The appellant did however, volunteer to the Magistrate that he had assaulted his elder daughter after she had at the plantation assaulted his younger child. The appellant claimed that he should not have been sentenced to a term of imprisonment and in his appeal grounds it was asserted that a fine should have been imposed.

[6] The file and record was rather spartan as is the case often of cases on appeal from the Magistrates Court. Mr Aho, who appeared for the Crown, advised me also that there was a further matter against the appellant CR 375/2014 another case of assault for which the appellant had been placed on probation on the 13th May 2014. The record is unclear as to who this assault was perpetrated upon, but it is clear that the three assaults were perpetrated on different days between the 17th April 2014 and the 25th April 2014.

[7] I heard both counsel and indicated that it was my view that although the Magistrate's reasons were brief and not entirely clear, I had formed the view that as a repeat offender the appellant merited a term of imprisonment. The Magistrate appeared to reactivate the suspended sentence of 6 months imprisonment for the assault which he was entitled to do. In my view, taking into account that this was the second occasion he had assaulted his daughter, it was well within the sentencing discretion of the Magistrate to also impose a sentence of six months for the most offending. As I have said no part of this was made cumulative to the reactivated sentence, as I interpret his sentence; and the appellant is perhaps fortunate that this was not the case.

[8] I have said on more than one occasion, that in the case of an unrepresented defendant, a Magistrate must take care and make inquiry about the defendant's personal circumstances before sentencing the defendant. Likewise, he should give clear reasons for any sentence that is imposed. In cases where imprisonment is contemplated, a probation report should be requested. A Magistrate should not forget either that, in some cases, a sentence of community work may be preferable to a period of imprisonment, in which case a probation report should be requested to ensure that the defendant is an appropriate candidate for such a sentence, and can be adequately placed.

[9] However, I do not consider in this case, taking into account the appellant's history of assault on his partner and his elder daughter that the subjective factors referred to by the appellant were such that this court should interfere with sentence. The complainant was punched in the face hard enough to make it swell, and this kind of domestic violence by a person with a history of assault requires a firm response from the Courts.

[10] It may be that the assault in question of his daughter on this occasion may not have necessitated a sentence of imprisonment had the defendant been a first offender, but taking into account his history I do not consider that the sentence could have been said to be either manifestly excessive or inappropriate. Parliament in Tonga has recently introduced domestic violence legislation to emphasise that domestic abuse will not be tolerated and the Court must be responsive to this sentiment. That is not to say, however, that principles of sentencing should be abandoned altogether because a case involves domestic violence as I have pointed out in *Fukofuka v Police* AM 7 of

2012. There, the defendant was imprisoned for a short period for an assault on his wife. It was not a particularly serious assault, in a situation where the parties had separated and there had been an argument over the children. The husband had no previous convictions and had been sentenced to 12 months imprisonment with 9 months suspended. No probation report had been requested. The Magistrate had placed, in my view, too great an emphasis on this being domestic violence before imposing sentence. The defendant was a first offender, aged 31 and had shared responsibility for the children. There was nothing in the sentencing judgment about the personal circumstances of the defendant. The Crown did not oppose the sentence being varied by me to a bond of two years, probation with the appellant attending a Salvation Army for an anger management and a drugs and alcohol awareness course. This case also is a reminder that merely because a case involves domestic violence does not mean that a defendant must be exposed to a greater penalty than might otherwise be the case. Every case must be considered in relation to its circumstances. However, as I have said here, the appellant is a repeat offender and had been treated in the past with leniency with suspended sentences for previous assaults on his wife and the same daughter. He has re-offended regardless of the previous sentences imposed upon him.

[11] To clarify the Magistrate's sentence for the record, the suspended sentence of 6 months imprisonment imposed on CR 374/2014 is reactivated. (This will incorporate also the suspended sentence on CR 373/2014 and breach of probation on Cr 375/2014 (which Mr Aho informed was the sentence imposed). On both new offences, the assault and domestic violence the defendant is sentenced to 6 months imprisonment to be served concurrently with each other and with the 6 months reactivated sentence on CR 374/2014. The overall effect is that he is sentenced to 6 months imprisonment.

[12] I also record that although I had indicated that I was likely to dismiss his appeal on the date it was heard being the 3rd August, 2015, the appellant's bail was continued on reporting terms, so that he could attend to his mother who is very ill in intensive care until judgment today.

Tu'ipelehake v Minister of Lands anor

Land Court, Nuku'alofa
Scott J and Madam Assessor Koloamatangi
LA 31/2014

7 August 2015

Land law – person could not hold more than one town allotment – Minister erred when he granted it – lawful occupant not lawful male holder – no estate to pass on to his widow

On 7 November 2014 the plaintiff commenced proceedings and claimed that the Minister had no power to reverse his predecessor's decision of 27 March 2007; that his predecessor's decision was good in law; that the Minister's section 84–based decision was bad in law and tainted with bias (section 159); that the allotment previously known as Fataimoemanu had been combined with Fatai Si'i and was accordingly not available to be granted to Sione Ngu; that the allotment previously known as Fataimoemanu was not available for regrant as it was lawfully being occupied by the plaintiff; that the Minister failed to make sufficient enquiries about the situation at Fataimoemanu and therefore the grant to Sione Ngu was vitiated; that the plaintiff was entitled to the registration of the whole of Fatai in her name; that the plaintiff was entitled to reside in one of the houses erected on Fatai; and that the plaintiff was entitled to the rents paid by the tenants occupying Fataimoemanu. The Minister's defence was that: the March 2007 decision of his predecessor breached section 84; the Minister had a duty to ensure compliance with the Act; the Minister had inherent power to cancel grants or approvals for grants made in breach of the Act; there was nothing to show breach of section 159; and he was in possession of sufficient information, including representations from the plaintiff, before reaching his decisions in August 2014. He sought dismissal of the plaintiff's claim to possession of Fataimoemanu and rejection of her claim to any of the properties standing on the land as being without the jurisdiction of the Land Court.

Held:

1. Section 84 of the Land Act prevented Mailefihi inheriting Fataimoemanu. The consequence was that, by virtue of section 83, Fataimoemanu reverted to the Crown. Upon reversion it became available for regrant under section 88, but not, by reason of sections 43(1) and 48, to someone who already had a town allotment. Since Mailefihi already had a town allotment the former Minister erred when he, in effect, granted approval for the regrant of Fataimoemanu to Mailefihi.

2. Approval for the grant of Fataimoemanu to Mailefihi had been given and approval entered in the register. Even though no deed was ever issued the Court would recognise grants which were merely procedurally defective or partially incomplete. While the grant had not been formalised Mailefihi and the plaintiff were nevertheless, lawfully on the land and lawfully used it as their own.
3. Although Mailefihi was lawfully on the land, sections 84 and 48 would have rendered any completed grant to him null and void. Since he was not entitled to the grant he did not become the "lawful male holder" of Fataimoemanu. A lawful occupant of land who did not lawfully hold it did not have any estate to pass on to his widow in accordance with section 80.
4. The deed of grant issued to the second defendant was ordered to be cancelled; this cancellation was stayed until disposal of the appeal of further order. No order was made on the Probate Act application.

Cases considered:

Church of Jesus Christ LDS v Fepale [2011] Tonga LR 71
Finau v Minister of Lands anor [2012] Tonga LR 127 (CA)
'Ilavalu & Anr v 'Ilavalu & Anr [1981-1988] To.L.R 1
Kolo v Bank of Tonga [1997] To.L.R 181
Lisiate anor v Eli anors [2012] Tonga LR 30 (CA)
Mahe v Tatafu & Ors [1974-1980] To.L.R 20
Mortimer & Anr v Fe'aomoeata & Ors (AC 2 of 2015 – LA 12 of 2012]
Tafa v Viau anors [2006] Tonga LR 287 (CA)
Vitikami Ma'afu v Minister of Lands [1923-1962] To.L.R 119

Statutes considered:

Land Act (Cap 132)
Probate Act

Counsel for the plaintiff	:	Mrs P Tupou
Counsel for the first defendant	:	Mr 'A Kefu SC (Acting AG)
Counsel for the second defendant	:	Mr WC Edwards SC

Judgment

Introduction

[1] For the sake of convenience and the avoidance of confusion but with the greatest respect and with the consent of counsel, much simplified forms of the names of the principal actors who are or have been involved in the subject matter of these proceedings will be used.

[2] The land in question, having an area of 2 acres 1 rood and 18.8 perches known as Fatai Vol 19 Folio 28 was registered in the name of Sione Ngu Fatafehi Manumataongo Tuku'aho, Prince Tu'ipelehake (Fatafehi) on 17 March 1939. A copy of the deed with a plan of the land is Document D1-1.

[3] Fatafehi had two sons, Prince 'Uluvalu Tuku'aho ('Uluvalu) and Prince Viliami Tupoulahi Mailefihi Tuku'aho (Mailefihi). In April 1989 the allotment was divided into two parts. The northern part, named Fataimoemanu and consisting of 1 acre 3 roods 32.9 perches was retained by Fatafehi but the southern portion having an area of 1 rood 24.2 perches and named Fatai Si'i was registered to Mailefihi. Plans of the two portions after the division are at D1-3 and D1-7. It should be noted that D1-3 purportedly dated November 1926 was in fact created in April 1989.

[4] On 6 June 2000, following the death of his father, Fatafehi, the northern part was registered in the name of 'Uluvalu, his heir and successor to the title of Prince Tu'ipelehake.

[5] Very sadly 'Uluvalu died suddenly in the USA in July 2006, without legitimate male issue. The title and hereditary estate were inherited by Mailefihi.

[6] Fataimoemanu was not part of the hereditary estate but is crown land; its devolution following the death of the previous holder is accordingly governed by Division VII of the Act.

[7] Section 48 of the Act provides that no person may hold more than one town allotment.

[8] Section 84 provides:

> "Save and except a son or grandson of the deceased holder, no person who already holds a tax or town allotment shall be permitted to succeed as heir to another allotment of the same kind as the allotment he already holds or to choose between an allotment already held by him and one to which he becomes entitled as heir."

[9] By operation of section 82(e) Mailefihi was 'Uluvalu's heir but as he was not his son or grandson and already had a town allotment of his own, Fatai Si'i, prima facie section 84 prevented him from inheriting 'Uluvalu's allotment or choosing between that allotment and the allotment that he already held (*Vitikami Ma'afu v Minister of Lands* [1923-1962] To.L.R 119).

[10] On 27 March 2007 Mailefihi wrote to the then Minister of Lands, Lord Tuita. A copy of his letter is D1-10. He sought "transfer" of 'Uluvalu's allotment to him "as heir in accordance with the law." He explained that following his brother's death he had inherited the title Prince Tu'ipelehake and that he wished, by "combining" Fataimoemanu with Fatai Si'i to restore the whole Fatai allotment to its original state.

[11] On the same day the Minister was briefed by a lands officer (D1-12) and consented to the "transfer request". According to Principal Lands Officer Sione Uele the necessary consequential amendments were made to the Register (D1 24 & 25). It is however not disputed that no fresh deed of grant reflecting consolidation of the two allotments, Fataimoemanu and Fatai Si'i has ever been issued.

[12] On 15 January 2011 Mailefihi married the Plaintiff. She was his fourth wife. His first wife Mele Vikatolia had given birth to his only son Viliami Sione Ngu Tuku'aho, Prince Tu'ipelehake (Sione Ngu – the Second Defendant) on 5 January 1986.

[13] Mailefihi died on 14 June 2014. He was survived by his widow, the Plaintiff, by his son and heir Sione Ngu and his daughter Taone.

[14] At some point, the Court was not told when, Fatai Si'i had been leased out. Mailefihi and the Plaintiff lived in a decent-sized house located in the southern part of Fataimoemanu. Also standing on that allotment are the offices of Air New Zealand and another sizeable building formerly occupied by Chathams Pacific. Apparently these buildings were let out by Mailefihi (on terms which were not revealed) who was receiving rent of about $2000 per month.

[15] In July 2014 Mrs Tupou, acting for the Plaintiff, approached the First Defendant (the Minister) and sought acceptance of her client's claim to the whole re-combined allotment of Fatai as Mailefihi's widow (section 80). After several exchanges the Chief Executive Officer of the Ministry wrote to Mrs Tupou (Document P-13). Paragraphs 8, 9 & 10 of the letter are as follows:

> "8 – On 20 August the Lord Minister had directed that the transfer and registration to Viliami Tupoulahi Mailefihi Tuku'aho (of the combined area) be cancelled on the grounds that it was a breach of section 84 of the Land Act. Therefore, the allotment had reverted to the Crown and was available for grant.
>
> 9 - On 21 August 2014 the Lord Minister of Lands granted as a Tax Allotment to (Sione Ngu) the allotment known as Fatai (Lot 1 s/plan 5170 – l A 3R 32.9 P) and a Deed of grant was issued on 9 October 2014.
>
> 10 - The allotment subdivided and registered as a town allotment to [Mailefihi] in 1989 (l R 24.2 P) remains on the register of Allotments and available for any claim that [the Plaintiff] may wish to file with the Lord Minister."

[16] A copy of the deed of grant to Sione Ngu is D1-19-20. It will be appreciated that the land granted to Sione Ngu as a *tax allotment* named Fatai is exactly the same piece of land known as Fataimoemanu previously held by 'Uluvalu as his *town allotment.*

Proceedings commenced

[17] Proceedings were commenced on 7 November 2014. The Plaintiff claimed:

(i) That the Minister had no power to reverse his predecessor's decision of 27 March 2007;
(ii) That his predecessor's decision was good in law;
(iii) That the Minister's section 84 – based decision was bad in law and tainted with bias (section 159);
(iv) That the allotment previously known as Fataimoemanu had been combined with Fatai Si'i and was accordingly not available to be granted to Sione Ngu;

(v) That the allotment previously known as Fataimoemanu was not available for regrant as it was lawfully being occupied by the Plaintiff;

(vi) That the Minister failed to make sufficient enquiries about the situation at Fataimoemanu and therefore the grant to Sione Ngu was vitiated;

(vii) That the Plaintiff was entitled to the registration of the whole of Fatai in her name;

(viii) That the Plaintiff was entitled to reside in one of the houses erected on Fatai; and

(ix) That the Plaintiff was entitled to the rents paid by the tenants occupying Fataimoemanu.

[18] Put shortly, the Minister's defence was that:

(i) The March 2007 decision breached section 84;

(ii) The Minister has a duty to ensure compliance with the Act;

(iii) He has inherent power to cancel grants or approvals for grants made in breach of the Act;

(iv) There was nothing to show breach of section 159; and

(v) He was in possession of sufficient information, including representations from the Plaintiff, before reaching his decisions in August 2014.

He sought dismissal of the Plaintiff's claim to possession of Fataimoemanu and rejection of her claim to any of the properties standing on the land as being without the jurisdiction of the Land Court.

[19] Sione Ngu's defence did not differ materially from that of the Minister.

[20] All Counsel filed comprehensive written closing submissions for which I am grateful.

Consideration of the issues

[21] The First Defendant asserts that section 84 operated to prevent Mailefihi inheriting Fataimoemanu for the reasons set out in paragraph [9] above. In my view that assertion is plainly correct, the consequence being that by virtue of section 83 Fataimoemanu reverted to the Crown. Upon reversion it became available for regrant under section 88, but not, by reason of sections 43(1) and 48 to someone who already had a town allotment. Since Mailefihi already had a town allotment I find that the former Minister erred when he, in effect, granted approval for the regrant of Fataimoemanu to Mailefihi.

[22] It was not asserted on behalf of the Plaintiff that Fataimoemanu could legally be granted to Mailefihi, rather Mrs Tupou relied on the fact that approval for the grant had been given and approval entered in the register. Even though no deed was ever issued the Court will recognise grants which are merely procedurally defective or partially incomplete (see, for example *Lisiate v Eli* [2012] TOCA 13).

[23] Following the approval, Mailefihi entered onto Fataimoemanu which he then treated as his own. In due course he took the Plaintiff there to live with him. He paid off a mortgage and had dealings with tenants occupying a substantial portion of the allotment.

[24] Mrs. Tupou submitted that while the grant had not been formalised Mailefihi and the Plaintiff were nevertheless, lawfully on the land and lawfully used it as their own. I agree.

[25] It is not disputed that the approval of the grant to Mailefihi was never challenged prior to his death, not in fact, until the Plaintiff noticed that rent payments had apparently stopped.

[26] Mrs. Tupou submitted that since Mailefihi was lawfully on Fataimoemanu and the Plaintiff was entitled by law to a life interest in his allotment she was therefore entitled to a life interest in the combined allotment Fatai. She referred to *Mahe v Tatafu & Ors* [1974-1980] To.L.R 20 and to *'Ilavalu & Anr v 'Ilavalu & Anr* [1981-1988] To.L.R 1. In my view neither of these authorities assists the Plaintiff. In the first, the Court merely corrected an error in the register. In the second the Court held that an allotment registered pre 1927 could devolve in its entirely after 1927 despite exceeding the size limit imposed by section 49.

[27] In my opinion although Mailefihi was lawfully on the land sections 84 and 48 would have rendered any completed grant to him null and void. Since he was not entitled to the grant he did not become the "lawful male holder" of Fataimoemanu. A lawful occupant of land who does not lawfully hold it does not have any estate to pass on to his widow in accordance with section 80.

[28] Mrs. Tupou suggested that the First Defendant had no power to cancel or reverse an approval given by his predecessor. In my view however, since the approval was plainly inconsistent with sections 84 and 48 and the facts were not in dispute, the decision reached by him cannot be faulted. It is what occurred after the reversal of the approval that gives rise to greater concern.

[29] Ever since *Tafa v Viau* [2006] To.L.R 287 it has been settled law that before reverted land can be granted out again the Minister must make reasonable enquiries to satisfy himself that the land (whether Crown or Estate) in question is available. In *Finau v Minister of Lands & Anr* [2012] TOCA 9 the Court of Appeal clarified that *Tafa*:

> "is not authority for the cumulative propositions that the statutory requirement in section 50 that land be available is, as a matter of law, a precondition to grant and that lawful occupation by someone other than the potential grantee renders the land unavailable. The case only establishes the element of the first proposition, namely that the Minister must consider whether the land is available before making the grant. A failure to do so vitiates the grant."

[30] Later in the judgment the Court said:

> "we have not sought to determine what "available" means for the purposes of section 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 whether land is "available" as a matter of fact for the purposes of section 50 having regard to the circumstances of the particular case or whether "available" has a legal meaning to be determined by a 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."

[31] The present case again brings that question into focus. Having made certain enquiries (the precise nature of which was not revealed to the Court) and having received representations by Mrs. Tupou on behalf of the Plaintiff, the Minister decided that:

> "the allotment had reverted to the Crown and was available for grant" (Uele brief of evidence paragraph 10).

[32] I am not satisfied that the enquiries made took all relevant factors into account or that the decision reached was the correct one. I arrive at this conclusion for three principal reasons.

[33] First, Mailefihi was lawfully on the land as a result of a promise made to him by the Minister who had authority to make such promises and whom Mailefihi was entitled to presume had made a promise that was not contrary to law. As a result of this promise he moved into lawful occupation of the land and apparently spent considerable sums on improving it. A mortgage debt of $500,000.00 was apparently discharged. In my view it is at least arguable that Mailefihi and the Plaintiff could have resisted any attempt to dispossess them on the grounds of promissory estoppel.

[34] Second, *Church of Jesus Christ LDS v Fepale* [2011] To.L.R 71 is authority for the proposition that land subject to a lease which has reverted cannot be regranted until the leases have expired. There is nothing to suggest that the exact nature of the occupancy agreements of the "tenants" established on the bulk of the property was ever investigated. Prima facie the grantee of an allotment is entitled to vacant possession. In this case the allotment was not vacant at all.

[35] Thirdly, it was central to the First Defendant's case that he had a duty to correct illegality and ensure that the limitations imposed by the Land Act were strictly complied with. As had already been noted Fataimoemanu was previously registered as a town allotment. It was far larger than allowed by section 49 however the section did not apply to the original grant as it was pre 1927. When however it reverted after 'Uluvalu's death it was no longer possible to regrant it in its original form because of its size. Therefore it was decided to re-label this piece of land in the centre of town, as a tax allotment.

[36] Section 74 (1) of the Act provides that:

> "Every male Tongan subject who has been granted a tax allotment by the Minister shall within one year from the date of the grant have growing on *such allotment* 200 coconut trees ....."

It is plain that this requirement of the Act cannot, by reason of the fact that the allotment is substantially covered with large buildings, be complied with. It may be argued, as suggested by Mr. Edwards, that this provision is not enforced. I do not think however that the Minister can decide to be complicit in the evasion of the requirements of the statute. It might also be suggested that the buildings are not part of the land (*Kolo v Bank of Tonga* [1997] To.L.R 181, 183) and should therefore be disregarded. In my opinion however they would present a budding palm planter with insuperable obstacles. Samuel Johnson's refutation of Bishop Berkeley comes to mind.

[37] I have some sympathy with the Minister who, it appears, is presently burdened with the duty to carry out a form of quasi-judicial enquiry into quite complicated issues of law and fact before arriving at his decision to regrant. This is precisely the kind of enquiry which the Royal Land Commission recently described as "inappropriate" and which it recommended should cease. When dealing with applications from relatives there is some risk of not being seen to act independently. Although I am satisfied that no bias has been shown in this case (and Counsel should be cautious before making such an allegation) the Minister might consider seeking a declaration from the Court under section 150 rather than try to resolve this problem himself.

[38] The last matter is the claim under the Probate Act. Following *Mortimer & Anr v Fe'aomoeata & Ors* (AC 2 of 2015 – LA 12 of 2012] I would hold that this question:

> "Concern(s) a dispute about land and interests in land within the meaning of s 149 (1) (b)"

and, accordingly this Court has the jurisdiction to decide the issue. It would certainly be much more convenient if that were the case. In my opinion however determination of this question should follow disposal of the appeal from this judgment when the question may well become moot. There was also a dearth of information to assist the Court to decide the matter. Perhaps a visit to the land would be appropriate if the issue remains live.

Result:

1. The deed of grant issued to the Second Defendant must be cancelled;
2. Cancellation of the deed is stayed until disposal of the appeal, or further order;
3. No order is made on the Probate Act application;
4. I will hear Counsel as to costs.

Australia and New Zealand Banking Group Ltd v Dandin Group (Tonga) Limited anor

Supreme Court, Nuku'alofa
Scott J
CV 204/08

7 August 2015

Banking – loan agreement breach – counterclaim for damages – bank advertised default – breach of contract – damages awarded to defendant

On about 10 April 2007 the plaintiff bank offered certain facilities to the defendants which were accepted by them on 2 July. The offer was the restructure of existing facilities by transferring total overdraft plus accrued interest and fees to Term Loan". The whole sum then owed, $189,463 was to be repaid at the rate of $3630 per month. The interest rate on the advance was the variable ANZ Indicator Lending rate which then stood at 10.5% plus 4.5% (15%). After taking legal advice the defendant proposed that the commencement date for repayments be July 2007, not April 2007, and this was approved in May 2007. The defendants did not comply with the repayments schedule and finally, on 14 October 2008 the bank issued a notice of demand amounting to $192,707.30. This demand was not complied with and a further demand was made in November 2008. Following non compliance, proceedings were commenced in December. On 26 June 2015 the defendants filed a statement of defence and a counterclaim explaining why they should not be required to refund the sums advanced by the bank and why, on the contrary they were entitled to compensatory damages.

Held:

1. The court did not accept the defendants' defences based on unconscionability, liability or quantum. However, it was troubled by the bank's decision to advertise the second defendant's default, not just once, but at least seven times. The bank had already moved to protect its interests by commencing legal proceedings before the great majority of these advertisements appeared. The court found that the purpose of the advertisements was simply to attempt to shame the defendants into repaying their debt. The publication of these advertisements breached the contract between the defendants and the bank.
2. As a general rule damages for breach of contract were not awarded for distress. However, there was one exception to this rule which the court found to be relevant: where the breach was of an express or implied

promise "to provide pleasure entertainment or relaxation or to prevent molestation or vexation". The bank knew full well that vexation would be the result of publication but, despite protests repeated the publication several more times. Suitable compensation for these breaches was $7,500.

3. There was judgment for the plaintiff on the claim in the amount of $192,747.24 with interest at the rate of 15% from 22 December 2012 until judgment. There was judgment for the defendants on the counterclaim in the amount of $7,500 with interest at the rate of 10% from 21 March 2013 until judgment.

Cases considered:

Baltic Shipping Co. v Dillon (1993) 176 CLR 344
Luna Park (NSW) Ltd v Tramways Advertising Pty Ltd (1936) 61 CLR 286
Sutherland v Barclay's Bank Ltd (1938) 5 LDAB 163
Tournier v National Provincial and Union Bank of England [1924] 1 KB 461

Statute considered:

Defamation Act (Cap 33)

Counsel for the plaintiff	:	Mrs P Tupou
Counsel for the defendants	:	S Fili

Judgment

[1] On about 10 April 2007 the bank offered certain facilities to the Defendants (Document P-24) which were accepted by them on 2 July.

[2] According to this letter of offer both Defendants had existing accounts with the bank. Dandin, account number 1133756, had an overdraft of $87,463 while the Second Defendant, Teulilo, had an account, number 1497147, a term loan with the amount owed then being $102,000.

[3] The principal purpose of the offer is stated to be: "restructure of existing facilities by transferring total overdraft plus accrued interest and fees to Term Loan". The whole sum then owed, $189,463.00 was to be repaid at the rate of $3630.00 per month. The interest rate on the advance was the variable ANZ Indicator Lending rate which then stood at 10.5% plus 4.5% ie. 15%. After taking legal advice Teulilo proposed that the commencement date for repayments be July 2007, not April 2007 as appears in the letter, and this was approved in May 2007 (P-47).

[4] It is not in issue that the Defendants did not comply with the repayments schedule and finally, on 14 October 2008 the bank issued a notice of demand amounting to $192,707.30 (P-64). This demand was not complied with and a further demand was made in November 2008 (P-66). Following non compliance, proceedings were commenced in December.

[5] In a re-amended Statement of Defence and Counterclaim filed on 26 June 2015 the Defendants explained why they should not be required to refund the sums

advanced by the bank and why, on the contrary they were entitled to compensatory damages.

[6] Put very briefly, the Defendants' case was that their business had been destroyed by fire during the riots which took place on 16 November 2006, that despite making every effort to recover from this disaster they had been unable to do so because of the crushing terms of the agreement imposed upon them in April 2007 by the bank and because their reputation was blackened by the notification to the public of their defaulter status, thus further weakening their ability to trade their way back to profit and repayment of their debt. They did not concede that their indebtedness had been correctly calculated; the original agreements that led to the establishment of the first two accounts and the originals of the bank statements had not been provided to them.

[7] The only witness for the bank was Siosifa Halahingano whose brief of evidence was admitted as Exhibit 1. Halahingano referred to copies of the bank statements for the two accounts P10-23, to the agreement P24 as a result of which they were amalgamated and copies of diary entries and correspondence between the parties after the Defendant's fell into arrears, culminating in the issuance of the notices of demand.

[8] Halahingano was also referred to P.69 a copy of an email sent to Teulilo on 5 December 2008, a few days before the writ was issued. In paragraph 5 the bank's relieving lending manager stated:

> "Your name will now be placed in the papers as a defaulter as well as the Company's".

Halahingano agreed that there was no provision in the agreement between the parties (in particular in paragraph 9) that default would be publicized. His explanation for publication was that it was part of the recovery process.

[9] Halahingano was asked why the original agreements which resulted in accounts 1133756 and 1497149 being established were not produced. He explained that as a consequence of the riots the bank's premises were destroyed and the hard copies of most of their documents, including these two agreements were lost. The copy of bank statements which had been produced P10-23 were downloaded from their back up computer system which fortunately had not been affected.

[10] In further evidence Halahingano explained that following the amalgamation of the two accounts, Government subsidies on loan interest repayments had been applied to the amalgamated account. These appear in the statements as "interest rate subsidies" the first in March 2008, the last in January 2010. He also told the Court that in January 2007 the bank had suspended interest payments for a period of 5 months as a way of assisting Dandin to recover from the disaster.

[11] Teulilo was the principal witness for the defence. He told the Court that after completing his secondary education he went on to obtain a diploma in electronics. He had begun working for an electronics company, Moore Electronics, in Nuku'alofa in 1987. When the Principal of that company emigrated to New Zealand Teulilo took the company over. In 1994 it changed its name to Dandin Group (Tonga) Ltd. He was and remains the sole director and shareholder. His copies of the articles of

incorporation together with the copies of the returns filed by Dandin prior to the fire had been destroyed. Returns following the fire were not produced.

[12] In 2006 Dandin was operating from premises in the Tungi Arcade. In his opinion the business was operating well and profitably. As can be seen from P33-39 it held stock, all said to be owned by the Company, worth $785,170.00. None of this stock was insured; Teulilo had an unhappy experience with insurers and thought insurance was a waste of money. When the Arcade was destroyed his entire stock was lost.

[13] Shortly after 16 November he went to the bank to tell them what had happened. He followed that visit with one or other of the letters P31 or P32 to which was attached the list of stock losses P33 to 39. This list was compiled from memory by one of his staff. The letters explained that Dandin's business was "completely destroyed" on 16 November but that:

> "although we have lost our business, office, together with all our stocks and equipment we are still motivated to stay on in business regardless of all difficulties."
>
> "I am more than happy to discuss with you on how we can clear our debt with your bank and may I ask if there would be a fixed appointment to meeting you in the future."

[14] On 11 April 2007 Teulilo went to the bank again. He did not dispute that P42, a diary note, was an accurate record of what transpired. According to the diary note, Teulilo told the lending officer that he was expecting to receive $200,000.00 from the Ministry of Education the following week. From this sum all arrears would be paid off. It was agreed that the balance from account 1133756 would be transferred to account 1497147.

[15] Mrs. Tupou referred Teulilo to pages P12 and 13. Teulilo was unable to point to any substantial payment into the account of the type promised on 11 April. The only credits which appear between the end of April 2007 and April 2008 are 7 payments of $3630.00 (the monthly repayment agreed) and 4 other payments of lesser sums. Teulilo conceded that while he had received some payment from the Ministry it was nowhere near the $200,000.00 promised; much the greatest part of the sum received had been owed to the suppliers. In other words, the expected gross receipts had been wrongly described as expected net profits.

[16] In September 2008 (P.63) similar assurances had been offered to the bank and a list of debtors totaling $88,000.00 had been supplied. Teulilo accepted that the impression gained by the bank that these were expected net receipts was also wrong. Dandin's trading position was in fact much less rosy than it was represented to be.

[17] After Mr. Fili closed his case both counsel asked to file written submissions and these were filed a few days later. I am grateful to counsel for the effort they put into preparing their very helpful submissions.

[18] Mr. Fili suggested that the bank's behaviour was unconscionable since it must have known that the terms of the April 2007 agreement could not be met first,

because the Defendants' business had been destroyed and second, because of the prevailing circumstances including the Global Financial Crisis. In my opinion Mrs. Tupou's analysis of this claim is correct. The April 2007 agreement was entered into at the request of Teulilo who advised the bank that he was "still motivated to stay in business regardless of the difficulties". It was after this approach to the bank that the existing liabilities to the bank were restructured. Before reaching the April 2007 agreement Teulilo, who was by no means ignorant or poor, had sought independent legal advice. The rate of interest, 15% was not very much higher than the rates of interest which he had been paying before the agreement. I do not believe that repayments would have been substantially more regular had the rate of interest been between 12.5% and 14.1500%. In my opinion it is plain on the evidence that the reason the April 2007 agreement was breached was that Dandin was unable to trade with sufficient profitability. In Teulilo's own words: "default is due to income problem" (D.111) "we are all acquainted with our depressed economy, all business levels are badly affected by a number of inescapable factors" (P.50) "I have tried every corner of marketing but the well has dried up" (P.70)". The blame for this situation cannot be laid at the door of the bank.

[19] In paragraphs 1 – 5 of his submissions Mr. Fili again pointed out that neither the original agreements not the original bank statements had been produced. In my opinion however a satisfactory explanation for this was offered by the bank and I find no reason to doubt the accuracy of the copy computer generated statements produced. In all essential respects they are consistent with the April 2007 agreement and the subsequent diary entries. There is nothing to suggest that the accuracy of the statements was queried at any time before proceedings were issued.

[20] In paragraph 6 of his submissions Mr. Fili suggested that it was only the First Defendant which entered into the April 2007 agreement. I do not agree. Following the amalgamation of the debts then owing, the account which was closed was that of Dandin. The Second Plaintiff's account then became a joint account in the name of "Lisiate Teulilo/Dandin Group (Tonga) Limited". In my opinion both the Defendants are equally liable for breach of the agreement. As also pointed out by Mrs. Tupou there is nothing to suggest that section 189 of the Companies Act has not been complied with.

[21] In November 2007 Teulilo wrote to the bank (P-50):

> "I write to thank you abundantly for your restless service and painstaking support that have sustained [Dandin] throughout the disheartened year 2007."

Hardly a complaint of unconscionable conduct.

[22] While I do not accept the Defendants' defences based on unconscionability, liability or quantum I am troubled by the bank's decision to advertise the Second Defendant's default, not just once, but at least seven times (see D 114 – 127). Teulilo's evidence was that additional notices had appeared in two other newspapers and that Dandin's default had also been advertised. I see no reason not to accept this evidence which is consistent with the bank's email referred to in paragraph 8 above.

[23] Mr. Fili submitted that these publications were defamatory and in breach of the bank's fiduciary duty to the Defendants. Teulilo told the Court that Dandin had lost substantial business as a result of the publications.

[24] The notices which were published contained the list of defaulters beneath the following preamble:

> "Listed below are those urgently required to contact the branch of ANZ bank taking care of default loans, regarding loans long unsettled. Come to our office so that we could make arrangements of a way of settling your loan. Failing to do so ANZ would add on fees for our legal proceedings as additional costs and your securities and reputation would be harmed".

This translation was made by Teulilo (see D-111) and was accepted as being sufficiently accurate for present purposes.

[25] I was not told when the advertisements began appearing, however the first date of publication was, in all probability, after the email of 5 December 2008 while legal proceedings were commenced on 12 December. It is evident that the great majority of the advertisements appeared after legal proceedings had already been commenced.

[26] Beyond drawing Teulilo's attention to the advantages of combining the two accounts so as to maximise the amount of Government interest subsidy there is nothing to suggest that the bank's relationship with Teulilo was more than that of lender and borrower. I agree with Mrs. Tupou that in the circumstances of this case no fiduciary duty is involved, let alone a breach of that duty.

[27] Despite the wording of the preamble to the notices with its reference to reputation being harmed, I do not agree that the publications were defamatory. The Defendants were indeed, as I have found in default and therefore I agree with Mrs. Tupou that section 14 the Defamation Act (Cap 33) provides a complete defence.

[28] There remains the question of breach of contract. Mrs. Tupou submitted that there was nothing in the agreement between the bank and the Defendants prohibiting publication of loan default. Referring to *Tournier v National Provincial and Union Bank of England* [1924] 1 KB 461 she submitted that the bank's own interests required disclosure and accordingly publication was permitted. I do not agree.

[29] In *Tournier* Bankes LJ explained that the contractual relationship between a banker and customer contained an implied duty of secrecy. That duty allowed of four qualifications, the third of which permitted disclosure "where the interest of the bank require disclosure" (473). I do not however interpret these words to mean that the duty of confidentiality can be avoided whenever the bank thinks that it would be advantageous to the bank to do so. Such an interpretation would render this qualification meaningless.

[30] Beyond Bankes LJ's own example of the qualification in operation (a bank issuing a writ claiming payment of an overdraft, stating in it the amount owed) the only other example I have been able to find reference to is *Sutherland v Barclay's Bank Ltd* (1938) 5 LDAB 163 in which the court found that the bank's disclosure had been with the customer's implied consent – not the case here.

[31] At *Tournier* p.486 Lord Atkin, after accepting that there was a duty of secrecy but that the difficult problem was to state its limits, said:

> "I think it is safe to say that the obligation not to disclose information such as I have mentioned is subject to the qualification that the bank have the right to disclose such information when and to the extent to which it is reasonably necessary for the protection of the bank's interests either as against their customer or against third parties in respect of transactions of the bank for or with their customer or for protecting the bank or persons interested, or the public against fraud or crime".

[32] In the present case the bank had already moved to protect its interests by commencing legal proceedings before the great majority of these advertisements appeared. In my view the purpose of the advertisements was simply to attempt to shame the Defendants into repaying their debt. In my view the publication of these advertisements breached the contract between the Defendants and the bank.

[33] The final questions are whether this breach entitles the Defendants to damages and if so how are they to be calculated?

[34] A party who has breached a contract is liable to pay at least nominal damages, even if no loss has been caused (*Luna Park (NSW) Ltd v Tramways Advertising Pty Ltd* (1936) 61 CLR 286). In the present case the Defendants say that the advertisements caused them to lose business which they would otherwise have obtained. In my view however it would not be right to award damages for loss of business which resulted from the Defendants' true financial situation being revealed, a situation which would in any event have been revealed by any potential investor carrying out due diligence, including inspection of any proceedings already pending in the Court.

[35] Teulilo also says that as a result of these advertisements he was caused distress. As a general rule damages for breach of contract are not awarded for distress (*Baltic Shipping Co. v Dillon* (1993) 176 CLR 344. There is one exception to this rule however which I find to be relevant: where the breach is of an express or implied promise "to provide pleasure entertainment or relaxation or to prevent molestation or vexation".

[36] As has been seen, the preamble to the advertised lists of defaulters predicted that the reputations of defaulters who failed to reach an accommodation with the bank would be harmed. As I find, the bank knew full well that vexation would be the result of publication but, despite protests (D-111) repeated the publication several more times. In my view suitable compensation for these breaches is TOP$7,500.00.

Result:

1. There will be judgment for the Plaintiff on the claim in the amount of $192,747.24 with interest at the rate of 15% from 22 December 2012 until judgment.

2. There will be judgment for the Defendants on the counterclaim in the amount of $7,500.00 with interest at the rate of 10% from 21 March 2013 until judgment.
3. I will hear counsel as to costs, if not agreed.

Westpac Bank of Tonga v Toloke anor

Supreme Court, Nuku'alofa
Paulsen CJ
CV 99/13

24 July 2015; 10 August 2015

Civil procedure – summary judgment application – counterclaim filed – found no triable defence or counterclaim – summary judgment entered

On 26 February 2008 the plaintiff provided the defendants with a term loan facility up to an amount of $2,521,000. The purpose of the term loan facility was to restructure existing debt and to allow for further advances for the construction of a restaurant, bar and accommodation at 'Umusi, Ma'ufanga. The terms of the facility were set out in a loan offer letter dated 14 February, a written loan agreement dated 26 February 2008 and loan terms and conditions dated 26 February 2008. All of these documents were signed by the defendants on 26 February 2008. The defendants missed a number of repayments and ceased making regular repayments altogether from October 2011. The plaintiff made written demand on 30 January 2013 for the arrears amounting to $304,800. When that sum was not paid, on 30 March 2013 the plaintiff exercised its power to call for payment of the full amount owing under the loan agreement in the sum of $2,386,404.36. That sum was not paid in full or part. In December 2013 the plaintiff exercised its power of sale of a leasehold property at Kolovai, over which it held a mortgage as security for the loan. Once the net proceeds of sale were applied to the loan the balance owing to the plaintiff was $2,260,222.89. The plaintiff now seeks judgment for the sum of $2,260,222.89 plus interest at the contractual rate of 12.5% per annum and costs. The plaintiff bank applied for summary judgment and to strike out the defendants' counterclaims.

Held:

1. The plaintiff established all the elements of its cause of action to recover the debt. The issue was whether the plaintiff also satisfied the onus upon it to establish that neither the matters raised by the defendants in defence nor the counterclaim were worthy of trial.
2. There was a well-recognised default rule that where a contract conferred a discretionary power on one contracting party, that party must not exercise the discretion arbitrarily, capriciously or in bad faith, or unreasonably in the sense that no reasonable contracting party could have so acted. The plaintiff was clearly entitled to refuse to make any further advances to the defendants in reliance upon the loan agreement. It set out in detail why it

acted as it did. It did not act capriciously or in bad faith but entirely reasonably in the circumstances.

3. The fact that a counterclaim was filed was one factor to be taken into account when deciding whether or not to grant or refuse summary judgment. When a defendant set up a *bona fide* counterclaim arising out of the same subject matter and connected with the ground of defence the court would generally give the defendant leave to defend. The court was satisfied that the counterclaim raised by the defendants was not bona fide and was without any merit whatsoever. The fact that an entirely unmeritorious counterclaim was raised would not prevent the plaintiff from obtaining its judgment.
4. The plaintiff discharged the onus upon it to satisfy the court that the defendants had no triable defence or counterclaim and that it was entitled to summary judgment for the sum claimed. Judgment was entered for the plaintiff against the defendants in the sum of $2,260,222.89 together with interest at the rate of 12.75% per annum from 13 April 2014 to the date of payment.
5. The plaintiff's application to strike out the defendants' counterclaim was granted.

Cases considered:

Abu Dhabi National Tanker Co v Product Star Shipping Co Ltd (No 2) [1993] 1 Lloyd's Rep 397 (CA)

Anglo-Italian Bank v Wells (1873) 38 LT 197

Bilbie Dymock Corp Ltd v Patel (1987) 1 PRNZ 84 (CA)

Eng Mee Yong v Letchmanan [1980] AC 331

Krukziener v Hanover Finance Limited [2008] NZCA 187

Lloyd's Bankplc v Cobb (UK Court of Appeal, 18 December 1991)

Westpac Bank of Tonga v Moehau CV 120 of 2011, 26 October 2012

Statute considered:

Land Act (Cap 132)

Rules considered:

Supreme Court Rules 2007

Counsel for the plaintiff : Mr Stephenson

Counsel for the defendants : Mrs Vaihu

Ruling

[1] These are opposed applications by the plaintiff for summary judgment and to strike out the defendants' counterclaim (the applications).

A preliminary issue

[2] At the hearing of the applications Mr. Stephenson sought leave to file a late affidavit Ms Siu'ivahamoana Latu, which produced a variation of mortgage document (a public record) that the plaintiff had recently located amongst its files. Mrs. Vaihu did not object to the admission of the affidavit but asked for seven days for the defendants to file any reply to the affidavit. I gave the defendants that time. No further evidence was filed but I have now had placed before me a letter from Mrs. Vaihu asking for a three week extension for the defendants to respond to the affidavit. The letter is dated 5 August 2015 but was not put before me until today. Notably, the letter does not state that any issue is taken with the content of Ms. Latu's affidavit. The extension of time is sought so that the defendants can "*check out the statement of accounts regarding all the payments they have made as well as the interests that were charged to their account*". Mr. Stephenson opposes the application and points out that the defendants have only been granted leave to respond to Ms. Latu's affidavit and that such leave does not extend to the filing of further evidence as to the amount claimed as set out in the plaintiff's statement of account.

[3] I am not prepared to grant the defendants an extension of time for the following reasons. First, Mr. Stephenson is correct that no leave was granted to file further evidence other than strictly in reply to Ms. Latu's affidavit. Secondly, there was no suggestion at the hearing that the defendants might want to file further evidence and no explanation provided in Ms. Vaihu's letter as to why they have not done so till now. Mrs. Toloke has filed five affidavits in opposition to the summary judgment application and has had plenty of time to put all of the defendants' evidence before the Court. Thirdly, I asked Mrs. Vaihu at the hearing what the issues were that the defendants relied upon in defence of the summary judgment application. I have set those out later in this ruling. They did not include a challenge to the plaintiff's interest charges. Fourthly, there is no suggestion that the defendants dispute the evidence in Ms. Latu's affidavit. Fifthly, the plaintiff's evidence was meticulous and included setting out how interest was charged. I have reviewed the evidence and find no fault with it. The defendants had every opportunity to respond to that evidence if they considered it incorrect in any material respect. Finally, if the defendants were now allowed to file further evidence the plaintiff would be entitled to respond and then to make submissions. That would cause considerable delay and expense in circumstances where it is quite apparent that the defendants have no defence to this claim.

The plaintiff's claim

[4] The plaintiff seeks judgment for a debt said to be jointly and severally owing by the defendants. The plaintiff says that the facts entitling it to judgment are the following.

[5] On 26 February 2008 the plaintiff provided the defendants with a term loan facility up to an amount of $2,521,000. The purpose of the term loan facility was to restructure existing debt and to allow for further advances for the construction of a restaurant, bar and accommodation at 'Umusi, Ma'ufanga. The terms of the facility were set out in a loan offer letter dated 14 February, a written loan agreement dated

26 February 2008 and loan terms and conditions dated 26 February 2008. All of these documents were signed by the defendants on 26 February 2008.

[6] The defendants made drawdowns on the loan facility from time to time. The amounts and dates of the drawdowns are detailed in paragraphs 5 and 11 of the amended statement of claim. There were also some variations agreed to the terms of the loan agreement from time to time, the details of which are set out in paragraphs 7 and 8 of the amended statement of claim. These variations involved extending the term of the loan facility and reducing the monthly repayments to accommodate the circumstances of the defendants.

[7] By July 2009 the total loan facility had been drawn down except for an amount of $295,000 which the defendants requested be released to them. The plaintiff refused that request, relying on a term of the loan agreement entitling it, in its sole discretion, to refuse disbursement of any amount of the loan. This was because, it says, the defendants were in substantial default of the terms of the loan agreement in a number of respects.

[8] The defendants missed a number of repayments and ceased making regular repayments altogether from October 2011. The plaintiff made written demand on 30 January 2013 for the arrears amounting to $304,800. When that sum was not paid, on 30 March 2013 the plaintiff exercised its power to call for payment of the full amount owing under the loan agreement in the sum of $2,386,404.36. That sum was not paid in full or part. In December 2013 the plaintiff exercised its power of sale of a leasehold property at Kolovai, over which it held a mortgage as security for the loan. Once the net proceeds of sale were applied to the loan the balance owing to the plaintiff was $2,260,222.89. The plaintiff now seeks judgment for the sum of $2,260,222.89 plus interest at the contractual rate of 12.5% per annum and costs.

The defence

[9] The defendants filed an amended statement of defence and counterclaim dated 16 June 2014. In addition, there are five affidavits of the first named defendant, Maryanne Toloke, in opposition to the application for summary judgment.

[10] Order 15 Rule 5(2) of the Supreme Court Rules 2007 requires a defendant's affidavit in opposition to a summary judgment application to state clearly what the defence is, and what facts are relied upon to support it. Mrs Toloke's affidavits do not do that in any coherent fashion but at the hearing Mrs. Vaihu advised me that the following matters were advanced in defence of the summary judgment application:

> [10.1] That the defendants never signed the loan documents of 26 February 2008 or the mortgage of the leasehold property at Kolovai.
>
> [10.2] That the defendants did not get all the money that the plaintiff says was advanced to them.
>
> [10.3] That the plaintiff acted in an unreasonable manner in not assessing the defendants' standing to repay the loan and in failing to accept building materials which it could have sold to repay the loan.

> [10.4] That the defendants have a counterclaim against the plaintiff for losses they suffered as a result of the plaintiff's refusal to allow them to drawdown the full amount of the loan, which would have been used to complete the defendants' project and repay the loan

[11] In addition, I note there is an allegation that the sale of the Kolovai leasehold property was illegal under the Land Act because the money advanced under the mortgage was used to 'improve other lands'. Mrs. Vaihu did not advance any argument on this ground but I will deal with it.

Summary judgment principles

[12] The principles governing summary judgment applications are well known. In *Westpac Bank of Tonga v Moehau* CV 120 of 2011, 26 October 2012 Scott CJ quoted with approval from the White Book as follows:

> The purpose of [the Rule] is to enable a plaintiff to obtain summary judgment without trial if he can prove his claim clearly and if the defendant is unable to set up a bona fide defence or raise an issue against the claim which ought to be tried. When the judge is satisfied not only that there is no defence but no fairly arguable point to be argued on behalf of the defendant, it is his duty to give judgment for the plaintiff (*Anglo-Italian Bank v Wells* (1873) 38 L.T. 197)

[13] The onus is on the plaintiff to establish that there is no real doubt or uncertainty as to his entitlement to summary judgment. Where the evidence is sufficient to show that there is no defence the defendant will need to respond if the application is to be defeated.

[14] The Court will not normally seek to resolve conflicts of evidence or assess the credibility of witnesses but the Court will not accept uncritically evidence that is "inherently lacking in credibility, as for example where the evidence is inconsistent with undisputed contemporary documents and other statements by the same deponent or is inherently improbable". *Krukziener v Hanover Finance Limited* [2008] NZCA 187 at [26] and *Eng Mee Yong v Letchmanan* [1980] AC 331, 341. The Court may take a robust and realistic approach when the facts warrant it. *Bilbie Dymock Corp Ltd v Patel* (1987) 1 PRNZ 84 (CA).

[15] The plaintiff has established all the elements of its cause of action to recover the debt. The issue is whether the plaintiff has also satisfied the onus upon it to establish that neither the matters raised by the defendants in defence nor the counterclaim are worthy of trial.

Did the defendants sign the loan documents and security documents

[16] Mrs. Toloke denies that she and her husband signed the loan documents of 26 February 2008 or the mortgage of lease of the Kolovai property. By way of illustration of her evidence, at paragraph 7 of her affidavit of 6 March 2015 in reply to Ms. Siu'ivahamoana Latu's affidavit, she says "*That I call for the originals ...to*

examine how it is shown that we did sign these documentation...as we never signed any loan agreements before 2009".[117] She goes on to state, at paragraph 28 of the same affidavit, that three loan agreements were signed in 2009 as follows, "*That, in connection with the mortgaging of the Good Samaritan Beach Resort we signed in May or June 2009 for the first time separate loan agreements one for Good Samaritan Inn Beach Resort, one for 'Umusi project…and one for Toloke Enterprises*". In an affidavit of 24 April 2015 Mrs. Toloke says, at paragraph 9, "*That, in February of 2008 there was no loan restructure of $2.5m as the application for the loan to build the hotel at Umusi was not applied for until April of same year*". Mrs. Toloke's evidence is patently incorrect. It is totally at odds with all the contemporary documents, is entirely implausible and is uncorroborated by documentary evidence that Mrs. Toloke could reasonably be expected to provide if her evidence was correct.

[17] Ms. Latu, the Relationship Manager for the plaintiff, in her affidavit of 11 September 2014, states that she was present when the loan documents of 26 February 2008 were signed by the defendants. The loan documents of 26 February 2008 are exhibited to her affidavit as exhibits A, B and C. She confirmed that she was present when the loan documents were signed at paragraph 4 of her affidavit of 2 April 2015. Mr. Peni Fakava, the Business Development Manager for the plaintiff, in paragraph 4 of his affidavit of 26 March 2015, confirms that the plaintiff entered into no loan agreements with the defendants after 26 February 2008.

[18] The memorandum of mortgage of the lease of the Kolovai property is exhibit J1 to Ms. Latu's affidavit of 11 September 2014. It was provided by the defendants in 2006 as security for existing and future advances. The defendants' signatures appear on that document. Their signatures also appear on a letter from the plaintiff to the Minister of Lands dated 28 December 2006 applying for the mortgage. In her affidavit of 27 July 2015, Ms. Latu has exhibited an application to the Minister of Lands for the variation of the mortgage by increasing the amount secured from $1,303,000 to $2,521,000. That is entirely consistent with the terms of the loan of 26 February 2008 upon which the plaintiff now relies. The application for variation of the mortgage was also signed by the defendants and, again, in Ms. Latu's presence.

[19] Contrary to Mrs. Toloke evidence, that no loan agreements were signed with the plaintiff until some unspecified time in 2009, the plaintiff has exhibited five separate loan agreements, as well as other related bank and security documents, signed by the defendants between March 2005 and February 2008. These are exhibited to Ms. Latu's affidavit of 11 September 2014.

[20] If three loan agreements were signed in 2009, as Mrs. Toloke says, then she could be expected to either produce them or provide some explanation as to why she cannot do so. Mrs. Toloke does neither. She cryptically, and unsatisfactorily, states at paragraph 9 of her affidavit of 6 March 2015 in reply to the affidavit of Ms Latu, "*I have not seen the plaintiff exhibiting these loan agreements signed in 2009*". In paragraph 7 of her affidavit of 24 April 2015 Mrs. Toloke ambiguously states "*That, I*

[117] I am advised by Counsel that the originals of the loan documents were made available for inspection.

have submitted the document that we still keep". She attaches no relevant documents to the affidavit.

[21] The evidence of Mrs. Toloke as to the nature of her dealings with the plaintiff prior to 2009 is entirely implausible. In paragraph 4 of her affidavit of 6 March 2015 in reply to Mrs. Latu's affidavit, Mrs. Toloke says that her first dealing with the plaintiff occurred in around March 2005 when she had a meeting with the Manager of the Bank, Mr. Sika, who handed her $250,000 in cash to purchase the Good Samaritan Resort. She says "*I never signed with them any papers about this transaction* ...". At paragraph 9 of her affidavit of 6 March 2015, in reply to the affidavit of Mr. Sika, she says that Mr. Sika approved a loan to the defendants of $1million and "*...it got approved straightaway by Mr. Sika. No loan documentation or mortgage documentation were ever prepared about this loan*". It defies belief that the Manager of a large bank would hand to a new customer $250,000 in cash, or agree to a loan of $1million for that matter, with no supporting documentation and it is clear that this is not what happened. The plaintiff has produced the defendants' complete loan account statement for the period March 2005 to December 2013 which shows that an initial advance was made by the plaintiff to the defendants in around March 2005 for $303,000. This advance was supported by a loan agreement signed by the defendants dated 8 March 2005. That loan agreement is part of exhibit N to Ms Latu's affidavit of 11 September 2014. The plaintiff has also produced a number of other loan agreements in relation to the later advances made to the defendants which are shown in the loan account statement.

[22] In addition to this, the defendants made payments to the plaintiff as required by the 26 February 2008 loan agreement. The initial terms required monthly repayments of $40,000. The defendants commenced making those payments. Contrary to the evidence of Mrs. Toloke, at paragraph 10 of her affidavit of 6 March 2015 in reply to the affidavit of Ms Latu, "*That we never agreed to repay $40,000.00 per month and no document shows that..*" the loan account statement produced by the plaintiff shows that the defendants' loan account was credited with sums totalling $40,000 in May 2008 and June 2008. The loan repayments were reduced to $33,500 per month from April 2009. This was recorded in a letter dated 16 March 2009 from the plaintiff's General Manager to the defendants which refers to term loan No 2000388617 (the number corresponding to the loan in issue) and the amount owing of $2,179,042.17. Those payments of $33,500 per month were regularly made between June 2009 and October 2010.

[23] I note also that in February 2012, Mrs. Toloke wrote to the plaintiff requesting further revised repayment terms. The letter was annexed as exhibit G2 to Ms. Latu's affidavit of 11 September 2014. Whilst the letter does not expressly refer to the loan agreement of 26 February 2008, what Mrs. Toloke was requesting was the deferral or waiver by the plaintiff of the terms of that agreement. Mrs. Toloke would not have written such a letter had she not signed the loan agreement and considered herself bound by its terms.

[24] For these reasons, I do not accept Mrs. Toloke's evidence that the defendants did not sign the loan documents of February 2008 or the mortgage of the registered lease.

The evidence that the defendants signed the loan and security documents is overwhelming. I reject this defence.

That the defendants did not get the advances

[25] In her affidavit Mrs. Toloke denies that certain drawdowns were made or received. At paragraph 6 of her affidavit of 6 March 2015, in reply to Mrs. Latu's affidavit, she says that a drawdown of $684,780 on 13 May 2005 was never received. In paragraph 6 and 7 of her affidavit of 6 March 2015, in reply to Mr. Henson's affidavit, and paragraph 14 of her affidavit of 6 March 2015, in reply to Mrs. Latu's affidavit, she says that $850,000 that the plaintiff says was drawn down on 9 June 2008 was not received. She also says that she does not recall getting three separate draw downs of $50,000 in July and August 2008 and denies knowledge of a payment of $9,862.50 paid as stamp duty on the variation of mortgage over the Kolovai lease. Again I reject Mrs. Toloke's evidence. It is contradictory, inconsistent with all of the documents before the Court and inherently improbable.

[26] As I have noted, the plaintiff has annexed the full loan account statement for the period March 2005 to December 2013. These are exhibit A of Mr. Henson's affidavit of 21 January 2015 and exhibit D of Ms. Latu's affidavit of 11 September 2015. Mr. Henson, who was the Head of Business Banking with the plaintiff, at paragraph 4 of his affidavit of 30 March 2015 confirms the accuracy of the loan account statement. In contrast, Mrs. Toloke has failed to put before the Court any documents to support her contention that the sums she has identified were not received by the defendants. At paragraph 3 of her affidavit of 6 March 2015 Mrs. Toloke says "*Anyway I do have a copy of Bank statements given by the plaintiff but is different from the one now exhibited and I attach marked "A" a copy of my bank statements*". No bank statements are attached to that affidavit. In a later affidavit, Mrs. Toloke does exhibit a bank statement from the defendants' business cheque account but it casts no doubt on the evidence of the plaintiff of the sums advanced to the defendants. However, importantly for present purposes, the business cheque account statement shows payments debited from the defendants' business cheque account and there are corresponding credit entries in the loan account statement, thereby confirming the accuracy of the plaintiff's records.

[27] The first amount Mrs. Toloke says was not received was $684,780. The plaintiff's loan account statement shows that this was drawn down on 13 May 2005, which is well before the loan agreement of February 2008 that is the subject of this claim. It is relevant because it forms part of the defendants' existing debt that was restructured under the 26 February 2008 agreement. When that sum was drawn down the debit balance in the defendants' loan account increased from $299,040 to $983,820. The plaintiff has exhibited a letter from Ms Latu to the defendants dated 29 August 2005, which is part of exhibit N to Mrs. Latu's affidavit of 11 September 2014, which records that the loan amount owing by the defendants was then *"$992,000 (no change)*" and that the defendants were to repay the loan at the rate of $13,000 per month. That letter was signed by the defendants and the loan account statement confirms payments by the defendants in the amount of $13,000 per month commencing from October 2005. Clearly then, contrary to Mrs. Toloke's evidence,

the $684,780 was received by the defendants and acknowledged by them as received in the letter of 29 August 2005.

[28] Mrs. Toloke denies the disbursement of $9,862.50 for the stamp duty on the variation of mortgage but, as I have noted above, she and he husband signed the application for the variation which was submitted to the Minister.

[29] Whilst Mrs. Toloke denies receipt of the drawdown of $850,000 in June 2008 she has acknowledged receiving and spending $600,000 on purchasing materials for the project that was the subject of the loan. She states at paragraph 7 of her 6 March 2015 affidavit, in reply to Ms. Latu's affidavit, that "*Our loan was for $1 million and $600,000 was initially disbursed for the acquirement of building materials*". This is again referred to at paragraphs 12 and 13 of her affidavit. I note also, that in apparent contradiction of this evidence, the defendants plead in their counterclaim that $700,000 was disbursed to them on the approval of the loan to acquire building materials.

[30] As far as the three separate draw downs of $50,000 in July and August 2008 are concerned, Mrs. Toloke acknowledges in paragraph 22 of her affidavit of 6 March 2015, in reply to the affidavit of Mrs. Latu, that in addition to the $600,000 spent on building materials the defendants incurred "*freight of $50,000 plus and duty of $30,000 plus and packing costs*". This may well account for the additional drawdowns in July and August 2008.

[31] As I noted earlier, on 16 March 2009 the General Manager of the plaintiff wrote to the defendants recording that the amount owing to the plaintiff was then $2,179,042.17 and advising that the amount of the loan repayments would be $33,500 per month from 30 April 2009. The letter was written following a discussion with the defendants as the letter states "*I refer to our discussion/meeting of even date…*". As the business cheque account statement that Mrs. Toloke has annexed to her affidavit confirms, the defendants did make monthly payments in accordance with this arrangement. They would not have done so if they disputed the amount that was owing. Then the plaintiff served upon the defendants a notice of demand dated 28 February 2013 for the arrears under the loan agreement which stood at $304,800. No challenge was taken to that demand and the defendants admit, at paragraph 13 of their amended statement of defence, that the arrears were owing. On 14 March 2013 the plaintiff served upon the defendants a notice of demand for the full amount owing under the loan agreement which was then $2,521,000. There is no evidence that the defendants challenged that demand. In April 2015 the plaintiff had served upon the defendants notices under section 109 Land Act which stated that the amount owing to the plaintiff then stood at $2,406,360.53. There is no evidence that any challenge was taken to that demand either. Importantly also, the defendants apparently took no steps to challenge the plaintiff's sale of the Kolovai leasehold property. All of this shows an acknowledgment by the defendants that the amounts claimed by the plaintiff were owing.

[32] I am left in no doubt that the plaintiff's records accurately record the amounts advanced to the defendants and that the amount claimed is correct. I reject this ground of defence.

That the plaintiff acted in an unreasonable manner

[33] The defendants argue that the plaintiff was unreasonable in not assessing their standing to repay the loan and in failing to accept building materials which it could have sold to repay the loan. I reject this defence also for the following reasons.

[34] There is no room for the imposition of a duty on the plaintiff to assess the defendants' ability to repay the loan, and protect them from the consequences of their own decision to borrow, in a case such as this where the defendants are very experienced business persons with a number of business interests and valuable assets, a history of borrowing large sums from the plaintiff on the same or similar terms and where they signed an acknowledgment that they should obtain advice before accepting the loan (refer page 7 of the signed terms and conditions of 26 February 2008 which is exhibit C to the affidavit of Ms Latu). *Lloyd's Bankplc v Cobb* (UK Court of Appeal, 18 December 1991) cited in *Tyree's Banking Law in New Zealand* at 4.8, p 132. Even if such a duty existed there is no evidence before that Court that the plaintiff failed to make reasonable enquires and, in any event, it is the defendants' case that they could have repaid in full had the plaintiff advanced the entire loan to them.

[35] I was referred to nothing in the terms of the loan agreement nor any principle of law that would require the plaintiff to accept building materials as payment and I do not consider any such obligation existed. As one would expect the loan agreement requires payment in pa'anga.

That the defendants have a counterclaim

[36] The defendants have counterclaimed against the plaintiff. The subject matter of the counterclaim is difficult to identify from the amended statement of defence which contains no discernible cause of action. What I understand from Mrs. Vaihu is that the defendants are alleging that they have suffered losses as a result of the plaintiff's refusal to allow them to draw down the full amount of the loan. The losses claimed are $400,000 expended on reclaiming and preparing groundwork for their project, $600,000 for the loss of the Good Samaritan leasehold land and $200,000 as general damages.

[37] There is no dispute that in or around July 2009 the plaintiff refused to allow the defendants to draw down the balance of the loan. At paragraph 15 of her affidavit of 24 April 2015, Mrs. Toloke says that the amount involved was more than $300,000. In the same paragraph she alleges that the reason the plaintiff took this stance was because it wanted to get security over her son's land at 'Umusi which the defendants refused to provide. The plaintiff says that the amount involved was $295,000 but that subsequently it allowed the defendants to draw down a further $56,257.50 to permit them to settle a lawsuit (which Mrs. Toloke acknowledges). (Refer to paragraphs 10 and 11 of the Amended Statement of Claim). The plaintiff also says that the reasons why it refused the further draw down were that the defendants were already in default under the loan agreement (paragraph 16 of Mrs. Latu's affidavit of 11 September 2014), the defendants had failed to comply with the mortgage security requirements of the loan agreement (paragraph 11 of Ms Manu's affidavit of 11 September 2014),

the defendants had failed to disclose to the plaintiff significant borrowings to the ANZ (in respect of which they defaulted and judgment has been entered against them for $1,178,000 by the Supreme Court in 2014 under CV 7 of 2012), the plaintiff had cause to doubt that money advanced to the defendants had been used for authorized purposes and the defendants had undertaken unauthorised land reclamation work (paragraphs 7 to 14 of Mrs. Manu's affidavit of 2 September 2014). There is before the Court internal memos of the plaintiff dated 29 July 2009 and 4 August 2009 confirming the matters that the plaintiff took into consideration when deciding not to make the further advance to the defendants (exhibits F and G1 of Ms. Latu's affidavit of 11 September 2014).

[38] By clause 4.1 of the Loan Terms and Conditions document (page 2 of exhibit C of Ms Latu's affidavit of 11 September 2014) it is provided as follows:

> Disbursement shall be made in the manner and at the times at which the Bank in its sole discretion considers appropriate and the Bank at any time may refuse to make any disbursement or cancel any amount of the Loan which has not been disbursed.

[39] In *Westpac Bank of Tonga v Moehau* at paragraph 16, to which Mr. Stephenson referred me, Scott CJ considered that motives of parties seeking to enforce a contract are generally irrelevant, so that an allegation of ill-will towards a defendant by one of the plaintiff's bank managers was considered irrelevant to the question of whether the defendant had any defence to an action by the bank. I would generally agree with that view, but, clause 4.1 provides the plaintiff with a unilateral contractual power. There is a well recognised default rule that where a contract confers a discretionary power on one contracting party, that party must not exercise the discretion arbitrarily, capriciously or in bad faith, or unreasonably in the sense that no reasonable contracting party could have so acted. *Abu Dhabi National Tanker Co v Product Star Shipping Co Ltd* (No 2) [1993] 1 Lloyd's Rep 397 (CA) at 404 per Leggatt LJ and see also the article by Hon Justice Stephen Kos "*Constraints on the Exercise of Contractual Powers*" [2011] VUWLawRw 3; (2011) 42(1) Victoria University of Wellington Law Review 17. In his article Kos J notes that the Courts have identified two limits to the default rule. First, the party in whom the contractual discretion is reposed is not obliged to justify objectively the exercise of its power. Second, that party is not obliged to prefer the interests of the other contracting party to the detriment of its own. Each limit is subject to clear words to the contrary in the contract.

[40] In this case, the plaintiff was clearly entitled to refuse to make any further advances to the defendants in reliance upon clause 4.1. It has set out in detail why it acted as it did. It did not act capriciously or in bad faith but entirely reasonably in the circumstances. In so far as Mrs. Toloke is critical of the plaintiff for wanting security over the land at 'Umusi, this was security that the defendants had agreed to provide by the terms of the loan agreement and were in breach of the loan agreement by their failure to provide it. Clause 4.1 is a complete answer to the defendants' counterclaim.

[41] The fact that a counterclaim has been filed is one factor to be taken into account when deciding whether or not to grant or refuse summary judgment. When a

defendant has set up a *bona fide* counterclaim arising out of the same subject matter and connected with the ground of defence the court will generally give the defendant leave to defend. In this case I am satisfied that the counterclaim raised by the defendants is not bona fide and is without any merit whatsoever. The fact that an entirely unmeritorious counterclaim is raised will not prevent the plaintiff from obtaining its judgment.

Was the mortgage of the lease illegal

[42] It is alleged that the mortgage of the registered lease was illegal as the money advanced was not intended to be used to improve the Kolovai property. This submission appears to be based on an erroneous reading of section 100(1)(iii) of the Land Act which relates only to the mortgage of allotments and not leasehold interests. The conditions that apply to the mortgage of a registered lease are contained in section 99 of the Land Act not section 100. Section 99 contains no equivalent to section 100(1)(iii). This ground of defence must fail also.

Resolution of the summary judgment application

[43] For the reasons given the plaintiff has discharged the onus upon it to satisfy me that the defendants have no triable defence or counterclaim and that it is entitled to summary judgment for the sum claimed.

Striking out the counterclaim

[44] The plaintiff applies to strike out the counterclaim on the basis that it is frivolous, vexatious, an abuse of the process of the Court and is likely to delay a fair trial. The counterclaim is entirely unsustainable and in its present form there is nothing pleaded that is recognisable as a cause of action. I also consider that the matters raised by the defendants, whether by way of defence or counterclaim, are simply a tardy and insincere attempt to avoid paying the plaintiff what they clearly owe. In those circumstances the only proper course is to strike out the counterclaim. (See White Book 1998 at 18/19/15 and the cases referred to).

THE RESULT

[45] The defendants' application for an extension of time to file further evidence is refused.

[46] The plaintiff's application for summary judgment is granted. Judgment is entered for the plaintiff against the defendants in the sum of $2,260,222.89 together with interest at the rate of 12.75% per annum from 13 April 2014 to the date of payment.

[47] The plaintiff's application to strike out the defendants' counterclaim is granted.

[48] The plaintiff is entitled to its costs on its claim and the counterclaim which if not agreed are to be fixed by the Registrar.

Police v Tupou

Supreme Court, Nuku'alofa
Cato J
AM 16/15

10 August 2015

Sentencing appeal – different sentences for co-offenders – based on personal circumstances – not wrong in principle – appeal dismissed

The Crown appealed against the sentence imposed on the respondent for one serious count of housebreaking and one count of theft. The Crown appeal and complaint was that the respondent had been sentenced differently from a co-accused; whereas the co-accused had been sentenced to 80 hours community work in an earlier sentence by Senior Magistrate Mafi, the respondent had, as a further condition, had been sentenced to a fine of $200 to be paid to the Magistrate Court by 4th July 2015, in lieu one month imprisonment. The Crown submitted that the sentence imposed on the respondent lacked parity with the co-accused, and he should have been sentenced to between 30 and 50 hours community work.

Held:

1. The general principle was that sentences on co-offenders should bear parity with one another. A sentencing judge was entitled to take into account the personal circumstances of an offender in differentiating between sentences based on co-offenders but there must be a good reason for this.
2. The Magistrate imposed a fine of $200 to be paid within a month and in default, one month imprisonment. This was plainly to enable the appellant to continue working and supporting his young family, unaffected by the constraints on his time of community work, whilst acknowledging that the respondent should be punished for his offending beyond the other conditions imposed about which there was no complaint. The fine represented two weeks of the respondent's wages and accordingly, if he worked 40 hours a week, amounted to 80 hours of labour. The court was not prepared to find that the sentence imposed on the respondent was so lacking in disparity or principle that it should correct it. The law was clear that a Crown appeal against sentence should be upheld only where it was clearly wrong in principle.
3. The appeal was dismissed.

Cases considered:
Fifita v R [2000] TLR 289
Lowe v The Queen (1994) 181 CLR 295
Misinale AC 13/99 (Court of Appeal)
R v Church 7 Cr App R (s) 370 CA

Statute considered:
Criminal Offences Act (Cap 18)

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

Appeal against sentence

[1] The Crown appealed against a sentence of Senior Magistrate Mafi who in his enhanced jurisdiction, sentenced the respondent on one serious count of housebreaking contrary to section 173(1) and 173(5) of the Criminal Offences Act, and one count of theft contrary to section 143(b) of the Criminal Offences Act to;

1. 2 years probation;
2. attend an alcohol and drugs course run by the Salvation Army;
3. fine $200.00 to be paid to the Magistrates Court by the 4th July in lieu of one month imprisonment;
4. to reside at home.

[2] The Magistrate did not impose it seems discrete sentences on the two offences but imposed one overall sentence. Sentences should be imposed on each charge even if those sentences are made concurrent with the head sentence imposed.

[3] The Crown appeal and complaint was that the respondent had been sentenced differently from a co-accused, who had been sentenced to the same conditions also in a global way, rather than with discrete sentences on separate counts. The Crown complained that, whereas the co-accused had been sentenced to 80 hours community work in an earlier sentence by Senior Magistrate Mafi, the respondent had, as a further condition, had been sentenced to a fine of $200 to be paid to the Magistrate Court by 4th July 2015, in lieu one month imprisonment. The Crown submitted that the sentence imposed on the respondent lacked parity with the co-accused, and he should have been sentenced to between 30 and 50 hours community work.

[4] Both offenders were in a similar position in that they were young men and, to the knowledge of the Magistrate, first offenders. Both had pleaded guilty at an early stage. The Learned Magistrate had drawn a distinction between the two accused in terms of his sentence on the basis that the co-accused, Siaosi 'Ulukivaiola CR 164/14, did not have a job but took classes at the University of the South Pacific. The respondent had a wife and two children to maintain and was currently working, the record showing that he earned about a $100.00 per week.

[5] The Crown referred to a number of comparable sentences for young housebreakers with no previous convictions in some of which quite a sizable amount of property was stolen where suspended sentences of imprisonment or bonds together

with probation had been imposed, some with conditions such as alcohol and drug course or other requirements together with community work (generally in cases of this kind imposed discretely on the theft charges). Mr Aho, who appeared for the Crown and presented a detailed memorandum, contended that the sentence lacked parity and the respondent received an inordinately low sentence. He submitted the sentence imposed here was inconsistent with the general pattern of sentences for offending of this kind and it was a proper case for intervention under *Misinale* AC 13/99 (Court of Appeal).

[6] During the housebreaking about $18,000.00 of property was stolen but the Magistrate was informed that half of this had been recovered. Mr Aho submitted Senior Magistrate Mafi had placed too much emphasis on the fact that the respondent was employed and had a family and was wrong not to have also ordered him to perform community work. He submitted that the Magistrate had in effect misdirected himself in reasoning that having a young family and being employed justified not imposing community work.

[7] I agree with Mr Aho that the general principle is that sentences on co-offenders should bear parity with one another. *Lowe v The Queen* (1994) 181 CLR 295, at 299. *Fifita v R* [2000] TLR 289 had the Magistrate declined altogether to impose a fine on the offender, I would have intervened because plainly the sentences would have lacked parity and for no good reason. But that was not what occurred. My reading of the Magistrates' assessment of the respondent's circumstances was that, because he was working and had responsibilities to maintain his family, he was not in the same position as the co-accused to perform community work. As is common in the Magistrate's court, reasons are ordinarily very brief and often rather inadequate but it this, I infer was the reason for the distinction.

[8] The law on sentencing is clear. A sentencing judge is entitled to take into account the personal circumstances of an offender in differentiating between sentences based on co-offenders but there must be a good reason for this. *R v Church* 7 Cr App R (s) 370 CA. Archbold 2001, at para 5-171. Here, the Magistrate imposed a fine of $200.00 to be paid within a month and in default, one month imprisonment. This was plainly to enable the appellant to continue working and supporting his young family, unaffected by the constraints on his time of community work, whilst acknowledging that the respondent should be punished for his offending beyond the other conditions imposed about which there is no complaint. The fine represents two weeks of the respondent's wages and accordingly, if he works 40 hours a week, amounts to 80 hours of labour. On this basis, I am not prepared to find that the sentence imposed on the respondent was so lacking in disparity or principle that I should correct it. The law is clear that a Crown appeal against sentence should be upheld only where it is clearly wrong in principle and I am not able to say that this was the case here.

[8] Accordingly, I dismiss the appeal.

R v 'Ilangana

Supreme Court, Nuku'alofa
Cato J
Cr 56/2015

12 August 2015

Sentencing – serious indecent assault on 7-year old girl – mitigating factors – sentenced to 15 months imprisonment with the last nine months suspended

On 19 February 2015 the prisoner aged 19 at the time committed assaults on a girl aged 7 when he removed her pants and underwear, then sat on her buttocks and rubbed his penis on her buttocks, then made her lie on her back and rubbed his penis on her vagina and finally massaged her buttocks and vagina. The prisoner's mother and the victim's mother were first cousins. He appeared for sentence on four counts of serious indecent assault under section 124(1), (2), and (3) of the Criminal Offences Act.

Held:

1. The principal sentencing criteria in cases involving sexual offending and young children was deterrence and protection of them. Children have to be protected by sentences that denounce and assist to deter such activity. The maximum sentence was five years imprisonment.
2. The starting point of two years imprisonment was appropriate for offending that involved a touching of the penis in the area of the vagina on a 7 year old girl, and had a likely injurious affect on her, although the full extent of psychological harm and whether there would be any permanent injury was more problematic.
3. The mitigating factors were that the prisoner pleaded guilty at an early stage, had no previous convictions and was remorseful and fully co-operative. Further his personal development was such that he was not much more than a shy, immature and retiring youth who was very dependent on his mother, and with little sophistication. The sentence was discounted by nine months which made a sentence of 15 months imprisonment. The court suspended the last nine months of the sentence on prescribed terms.

Cases considered:
R v Lui Lomu [2015] Tonga LR 266
R v Taulanga [2007] TLR 141

Statute considered:
Criminal Offences Act (Cap 18)

Counsel for the Crown : Mrs Langi
Counsel for the accused : Mr Edwards

Sentence

[1] Tevita 'Ilangana appears before me today for sentence on four counts of serious indecent assault under section 124(1) (2) and (3) of the Criminal Offences Act arising out of an incident that occurred on the 19 February 2015 at Mataika.

[2] The summary of facts agreed to is brief, but it recites that the prisoner aged 19 at the time committed assaults on a girl aged 7 when he removed her pants and underwear, then sat on her buttocks and rubbed his penis on her buttocks, then made her lie on her back and rubbed his penis on her vagina and finally massaged her buttocks and vagina.

[3] This incident arose when the prisoner was playing with the victim and her younger sister he being aged about 19, at the time of the incident, in a small dwelling outside the main premises of a building he occupied with his parents. I am satisfied that the incident did not go on very long and came to light the next day. It does not appear either that there was any prior activity in the nature of grooming of the child that would suggest that the prisoner had habour any prior sexual desire or indeed arousal. What appeared to occur was that when playing with the girls, and they piggy backing him the prisoner suffered an arousal and proceeded to commit these offences.

[4] The prisoner's mother and the victim's mother are first cousins. The families live next door to each other and the prisoner lives nearby in a small dwelling where the offending occurred, the younger sister being outside at the time. The offending took place over a period of about ten minutes.

[5] The prisoner plainly knew that what he was doing was wrong. When confronted about the offending, however, he was co-operative and was concerned to the point where the probation report indicates that he had ceased to go to his church because he was so ashamed of what he had done and was now going to a new Church. The probation report was useful. The prisoner was the second of four children and lives still with his parents. It seems that he did not have friends, was solitary and shy, and spent most of his time helping out his mother with domestic duties and making food to sell in the school canteen. He left school in Form 5, and was a low achiever; the report indicates that he was truant a lot of the time. I formed the view that, although now 20, the prisoner was an unsophisticated, and immature young man, of retiring and solitary disposition, and very dependent on his mother.

[6] He has done some casual work unloading cargo from ships that arrive in Tonga, and would contribute to the family when able.

[7] The prisoner expresses remorse for his offending and the family has made a financial contribution of $500.00 to the child's family which was accepted. I adjourned the proceedings to see whether and to what degree the victim's family had forgiven the prisoner and the mother, who was in court, stated they had forgiven him, but that, at the same time, they wanted the law to take its course so that their children were protected from this kind of activity. I requested a victim impact report and it seems that the acts have had some injurious effect on the complainant, particularly in relation to her schooling which appears to have suffered. It was for this reason that I requested Mr Clive Edwards, who appeared for the prisoner, to ascertain whether he could reside elsewhere away from the victim and her family. I was informed by Mr Edwards that he could live with his uncle.

[8] Mr Edwards commenced his submissions by advocating a sentence of probation and community work for his client. I indicated that I viewed his offending far more seriously than that even though he had been co-operative, had pleaded guilty, and had expressed remorse which I accept was real remorse for his offending. The Crown, (Mrs Langi) had filed a memorandum although Mr Aho appeared on the sentence, in which a number of aspects of aggravation were mentioned namely; the tender age of the victim, the relationship prisoner to the victim, and the breach of familial trust.

[9] Two sentencing comparables were placed before me; *Rex v Lui Lomu* CR92/14, a very much more serious case than this, where I had sentenced an offender engaged in multiple rapes and sexual activity with three young victims to a lengthy sentence of imprisonment. I did not find this case helpful.

[10] A second more helpful case was *R v Taulanga* [2007] TLR 141. Here, the complainant was 8 years old and the offender 49; however, he was a repeat offender. The offending took place at the prisoner's residence where the victim and other girls had gone and involved fondling of the vagina. The statutory maximum for the offending being indecent assault on a child under 12 was 7 years. The Court sentenced the offender, who had pleaded guilty, to 18 months imprisonment (after discounting six months for his guilty plea) with the final six months suspended for one year on the condition that he would be on probation for one year and he would undergo supervised counseling. The Crown, in its memorandum, expressed the view that, although the present case was distinguishable on the basis be adopted because the accused and the victim were closely related and had grown up at the same residence. Whilst I accept there is an element of trust involved here because of the family relationship, and the victim is very young, I accept also that, whereas the offender in Taulanga was a man well advanced in years and a repeat offender, the prisoner here is an immature, now 20 years old who has no previous convictions.

[10] I consider, however, that the principal sentencing criteria in cases involving sexual offending and young children is deterrence and protection of them. Children have to be protected by sentences of this Court that denounce and assist to deter such activity. The maximum sentence for this relatively new provision is 5 years imprisonment. The activity, in itself, removing the child's clothing, and then subjecting her to various indignities including touching her vagina with his penis, her tender age, and his relationship to her must mean that objectively the offending is in the medium level of the statutory penalty. Objectively, the offending was worse than

Taulanga where there was a fondling the girl's vagina and no contact of the penis – on or about the vaginal area. I accept, however, that there was no prior grooming of the child and the offending by an immature youth took place more spontaneously arising out of what had been previously playful activity. I consider a starting point of two years imprisonment is appropriate for offending that involves a touching of the penis in the area of the vagina on a 7 year old girl, and has had a likely injurious affect on her, although the full extent of psychological harm and whether there will be any permanent injury is more problematic. Hopefully, that will not be the case with appropriate counseling.

[11] From this, however, must be discounted the fact the prisoner has pleaded guilty, at an early stage, has no previous convictions and has I find been remorseful and fully co-operative. I find also that, whilst his offending took place when he was 19, his personal development, as I have said, suggests, at the time of his offending, he was not much more than a shy, immature and retiring youth, who was very dependent on his mother, and with little sophistication. I discount the sentence of 2 years imprisonment by 9 months making a sentence of imprisonment on count 3 which, I select as the head sentence, of 15 months imprisonment.

[12] I have now to consider whether the sentence of imprisonment should be suspended fully or party. I consider, having reflected on the matter over the period since submissions were heard on the 7th August, 2015, that I would be failing in my duty to protect young children in Tonga from sexual abuse were I to fully suspend the sentence and impose what I was urged to do by Mr Edwards namely a lengthy sentence of community work. However, given his early guilty plea, remorse, lack of previous convictions the fact this was isolated activity, and the view I have taken of him generally that he is a good candidate for rehabilitation, I will impose the least restrictive period of imprisonment I feel able to do consistently with the public interest in deterring such activity and protecting young children. I accordingly suspend the last 9 months of his sentence, on the following terms;

a. He is not to commit any offence punishable by imprisonment for a period of 2 years;
b. He is placed on probation for the period of his suspension;
c. He is to reside where directed by his probation officer with the recommendation that he placed with his uncle. He is not, however, to reside in the same community of housing as the victim in this case for the period of his probation;
d. He is to attend course on life skills, and a course on sexual abuse under the direction of probation and the Women's crisis center.

[13] I recommend that the Commissioner of Prisons endeavor to place the prisoner away from other adult prisoners, if he is able, so to better ensure his protection. A copy of this judgment is to be given to the Commissioner forthwith.

[14] On the remaining counts being one, two and four of the indictment, I convict him and sentence him on each to four months imprisonment to be served concurrently with count 3.

R v Malupo

Supreme Court, Nuku'alofa
Cato J
Cr 98/ 2014

26 August 2015

Criminal offence – attempted rape, serious indecent assault, housebreaking, and unlawful entry into a building at night – conflict of evidence – prosecution did not prove charges – accused acquitted

The complainant, A, was 16 and resided at a relative's home when she was not boarding at her school. She said that the accused came to her room one evening and strangled her and attempted to have sexual intercourse with her. The accused was indicted on originally four counts: attempted rape, serious indecent assault, housebreaking, and unlawful entry into a building by night. Later, the Crown was given leave to add an alternative count being a further count of serious indecent assault. The accused said that he had only gone to the house because he had been invited to do so and that only consensual activity had taken place. He denied any of his actions had been unlawful.

Held:

1. There was a conflict in the evidence about the alleged meeting between A and the accused, and whether the accused's presence in her room had been solicited by A or not. The police officer had access to the phones. It was a serious oversight by the prosecution not to have examined the phones or obtained records to ascertain whether any relevant calls or texts had been sent or received from those phones.
2. The court was left in a state of reasonable doubt as to where the truth lay and therefore the accused was acquitted on all counts. He was discharged.

Statute considered:

Criminal Offences Act (Cap 18)

Counsel for the prosecution : Mrs Langi
The accused was unrepresented

Verdict and reasons

[1] The accused was indicted on originally four counts; attempted rape contrary to section 120 of the Criminal Offences Act, serious indecent assault contrary to sections 124 (1) and 93) (a) of the Criminal Offences Act; housebreaking contrary to sections 173(1) and (5) of the Criminal Offences Act and unlawful entry into a building by night contrary to sections 174(1) and (3) of the Criminal Offences Act. Later, I gave leave to the Crown to add an alternative count to count one being a further count of serious indecent assault.

[2] The evidence was in a fairly narrow compass. The complainant A, who did not give evidence until a later stage in the trial due to her having to travel from Vava'u, said that on the 20th April 2013 she had been a student at Beulah College, and she was aged 16. It was the day reports were to be received and was the last day of the school term. She came to town with two friends Kalolaine Nisa, and Litia Tangimana. Only Kalolaine was called to give evidence.

[3] She said that they had gone to Teufaiva Stadium to watch sports it being a schools sports day, and they had got off school early. They went there on the bus. During the course of watching the sports she said she received a telephone call that she was to return to the school and pick up her report. She said she left on her own and picked up a bus and went back and picked up her report and then went home to the residence where she was living-the Tei residence, in Pili near Ma'ufanga. The complainant, it should be said although related to the Tei family, does not bear the surname Tei, and lived there when she was not boarding at school.

[4] She shared a room in an upstairs room of the house which could only be accessed by outside stairs. There was a door which had to be opened from the stairway area into the upper part of the house.

[5] She said she had been dressed in her school uniform at the sports event. She said she had a telephone with her but she had not met anybody else at the event. Later that evening, whilst Katalaine and Katrina Tei went out, she remained at home. She said she studied for some time and then fell asleep in one of the rooms upstairs. She said she was awakened by somebody behind her back. She thought the girls had returned but found that it was a young man who had covered his face and who smelt of the alcohol.

[6] She said, he said to her, "when I entered this room, I saw you lying there alone; my purpose was none other than to rape you". She said she felt very afraid. She thought about screaming but he said, if she screamed, he would kill her. He took off her clothes, her singlet and top, then her tights and shorts. He placed his penis against her vagina. Prior to that, he had licked and sucked her neck and then her breast. He then commenced to place his penis into her vagina and she felt pain.

[7] She said she struggled and got loose. As he started again, she heard a vehicle drive in. It was the girls coming back. She said he jumped up from the bed and she got up and put a towel around her. She said she ran out into the hallway as Katalaine walked in. She told Katalaine she was very afraid. She said her heart was beating out of all proportion. The young man, she said was in other room. The accused left the house

and was apprehended by some youths away from the residence after the girls had shouted out for assistance.

[8] She said that she had never met the accused before. She did not know him. She said the door to the outside had been left unlocked for the girls to return. She said he would know my name because Katalaine had called it out. She said that he had walked up after he was caught and saw him in a torch light. She said the light in the bedroom had been off with some light from the street.

[9] Under cross-examination from the accused, who I observed was restrained and unintimidating, being placed, at my request, some distance away from her at the bar table, she denied ever meeting him at Teufaiva stadium or speaking to him that day. She denied giving him her telephone number. She admitted her number was 7762489 but she said she never gave it to him. She said under cross-examintaion "I do not know you". She said he had not texted her and she had not texted him to come over to her residence or told him where she lived. She denied any contact with him by phone that evening. She denied ever unlocking the door for him to come in. She denied inviting him into the bedroom. She denied any consensual sexual activity or that she had gone into another room when Katalaine had returned, as he had suggested. She denied, when it was put to her by the accused that they had consensually met up at her request at the house. She denied also that she had falsely implicated him in unlawful sexual activity because she was covering up her fear of her finding out about what she had done. She said she had read her statement the day before giving evidence.

[10] Katalaine Tei testified that A was the grandchild of her mother's older sister and had been staying with them for two to three years. A was in form 6 and 15 to 16 years. She explained the layout of the house as two level house with all four bedrooms upstairs. A would ordinarily sleep with one of her sisters. No access was available to the upstairs other than by an outside stair case on to a verandah with two entrance doors. Her parents occupied one of the bedrooms. She said that, when the accused had been apprehended, she asked A, who also was known as Katrina (abbreviated Trina), whether she knew this person and she shook her head. The accused, she said, told A to speak and make things short. Katalaine said A had told her that the accused had held her neck, threatened her if she screamed, and said he was trying to have sexual intercourse with her.

[11] She said before she had left that evening, her parents, two younger brothers, her grandparents and A was at home. Under cross-examination, she said that Katrina had opened the door for her. She said she saw her trembling. She said someone was in the room. She said she had asked the complainant whether she knew this young man and her answer was no. She said she had spoken to A in another bedroom, whilst the accused was elsewhere, before he had walked out saying he was leaving.

[12] Mr Simione Tei, the owner of the house, gave evidence that he was sleeping downstairs when he heard the screaming. He chased after the accused. He said his wife was downstairs with him. His wife's mother was also downstairs.

[13] Katrina Tei, who had also gone out for the evening with Katalaine, gave evidence that the accused asked her to keep the door open so he could leave. He had no top on and his top was, she thought, hanging at his side.

[14] Kalolaine Nisa gave evidence that she was a student at Beulah College and had been boarding at the school with A. They had been discharged from boarding school and it was report day. They went to Teufaiva to watch sports and she recalled A receiving a call from her auntie to collect her report. It was about midday that they went to the stadium. About an hour later, A received the call to go and get her report. She said they walked around at Teufaiva with another girl who did not give evidence. They did not talk with any other boys. She said they were in school uniform. She said she knew it was A's auntie that called because she heard the conversation.

[15] PC Siale gave evidence that at about 9am on the 22nd October, 2013, the accused participated in a record of interview which was produced in evidence. He also confirmed that the accused had been in custody since being arrested. In it, the accused said that he had met A at Teufaiva stadium during the day. He said that later a girl from the house text him whom he knew as Trina and instructed him to go her house. She had given him her phone number which he said he did not remember anymore. He said he had texted her before going over. He said she had said she was alone. He said he had not been to the house before. He said he went over by foot. He said the door downstairs was already open. He walked into a room upstairs where they walked and then her family arrived and apprehended him.

[16] When asked did he do anything to A, he said we just talked. He denied a specific allegation that A had told police that, by the time she had looked up, he had strangled her by the neck and told her that, if she shouted out, he would kill her because he had come to rape her. He said that was a lie. When it was put to him that A had said that he had taken off her clothes, sucked her breasts and had inserted his penis into her vagina and thrust inside her, he said that is not true, either. He said the only truth is I was kissing with her. He said she was lying when she said he had not texted her or knew him. He said she told him she was at Queen Salote College. She was not wearing her uniform at Teufaiva. He said he thought he had a right to go into the house. The accused also said he had his phone taken by police and some money neither of which was returned.

[17] At the conclusion of his evidence, I asked PC Siale whether he had secured the phone of either the accused or A and he replied that he had not. He accepted that it would have been helpful had he done so. He was later recalled to attempt to explain how the accused had information A had been at the sports day prior to the record of interview but he was unable to shed any light on this. He had, he said, lost his notebook which had gone missing after a theft from home.

[18] The accused gave evidence. He essentially confirmed what he had said in his record of interview. After drinking with a friend, he had texted her and received the invitation to go over, she being alone and he did so. He admitted some consensual kissing but nothing more. Mrs Langi, for the Crown, cross-examination him about his recollection of A's telephone number. He said he did know the residence as one belonging to the Tei brothers, but he did not know she was living there, until she told him. He was cross-examined about his assertion that the door downstairs was unlocked by A for him to enter when there was no downstairs access to the upstairs area. It was suggested he did not know A's name but learned it only through the fact

that her abbreviated name Trina had been used by Katalaine Tei on the evening of his arrest.

Submissions

[19] The accused made submissions in accordance with his evidence that he had only gone to the house because he had been invited to do so and that only consensual activity had taken place. He denied any of his actions had been unlawful. Mrs Langi essentially urged me to accept the evidence of A and Kalolaine Nisa, being schoolgirls aged about 16, that A had been in uniform at Teufaiva and no meeting between A and any man had taken place. She submitted that it was no more than coincidence that the accused had said he met A there and he was lying about what followed. She said he gave unconvincing answers about whether the door was downstairs or upstairs that he had said had been opened for him. She submitted he was embellishing his evidence when he said he could not recall her number when he could not do so to the police.

Findings

[20] Aspects of this prosecution I have found very unsatisfactory and rather perplexing. The accused also told PC Siale and said in evidence that he met A at Teufaiva and that she had given him her number. Later, he had texted her and received an invitation to come over since she was alone. Although she was not alone in the house, she was in fact at the time alone in the upper part of the house when the accused entered. A was a relative of the Tei family. She was a boarder at school but resided with the Tei's when not at school.

[21] The coincidence referred to by Mrs Langi lies not just in the alleged meeting between A and the accused at Teufaiva but also extends to his being able to locate the residence where A was living with the Tei's, in Pili. He had been in custody after the incident and before participating in the record of interview early on the 22nd April, 2013. PC Siale who was recalled, with my leave, was unable to shed any light as to how the accused may have learned of A's presence at Teufaiva and used this knowledge falsely to his advantage in the record of interview. He did, however, say that he did not discuss anything with the accused before the record of interview.

[22] Officer Siale had access to the complainant's phone and according to the accused, his phone also. In my view, it was a serious oversight not to have examined the phones or obtained records to ascertain whether any relevant calls or texts had been sent or received from those phones. As the evidence stands, there is a conflict about the alleged meeting between A and the accused at Teufaiva and whether his presence at the Tei residence had been solicited by A, or not.

[23] Mrs Langi mentioned to me certain conflicts in the accused's evidence such as recall of A's phone number, the opening of a downstairs door, but none of them are so serious as to in my mind individually or collectively undermine the accused's assertions to the police that he had met the complainant and had been invited home by her. As I said to Mrs Langi, I found the absence of evidence concerning the phones and text messages troubling. I found also the failure by the police officer, who said

his notebook was in a bag at his home which had been stolen, concerning. Note books should be kept securely. There is no evidence before me to explain how the accused acquired information that the complainant had been at Teufaiva earlier on the day of the incident. The suggestion was made by A in her evidence that perhaps the accused had been shown her statement, a suggestion, she said, had been prompted by a discussion with Mrs Langi earlier. However, there was no evidence to support this; and nor were any phone records produced by the Crown despite a late endeavour to produce them.

[24] I am not prepared to reject the accused's explanation simply on the word of the complainant and her friend, Kalolaine Nisa. If it were all an invention by the accused, as Mrs Langi submits, then phone records evidencing there was no telephone contact with A during the relevant evening would have shown his account of texting between the two and A's invitation to be a material and very significant lie. I am left, as matters stand, in a state of reasonable doubt as to where the truth lies in this case and for this reason I acquit the accused on all counts. He is discharged.

[25] I also found it strange that when PC Siale asserts, in the record of interview of the complainant, that A had made an allegation of strangulation and, indeed, that penetration had taken place, (which she asserted to be the case also at trial) there was no medical examination, to support whether there were marks consistent with strangulation on the complainant or, indeed, evidence of penetration.

Westpac Bank of Tonga v Fakafanua

Supreme Court, Nuku'alofa
Paulsen CJ
CV 25/14

4 September 2015; 7 September 2015

Civil procedure – summary judgment – evidence must be verified by affidavit – defences had no prospect of success – summary judgment entered

The plaintiff bank applied for summary judgment against Mr Fakafanua and sought judgment for the amount alleged to be owing under a personal guarantee Mr Fakafanua gave in respect of a loan made by the bank to Mr Fakafanua's company Faua Developments Limited (Faua). Mr Fakafanua disputed his liability under the guarantee and said that the guarantee was obtained by undue influence and/or misrepresentations made by or on behalf of the bank. Mr Fakafanua filed a counterclaim against the bank and sought cancellation of the guarantee and damages. The bank applied to strike out the counterclaim.

Held:

1. In an application for summary judgment the onus was on the plaintiff to establish that there was no real doubt or uncertainty as to his entitlement to summary judgment. Where the evidence was sufficient to show that there was no defence the defendant would need to respond if the application was to be defeated.
2. The facts stated in the parties' pleadings were not evidence unless they were also set out in, or verified by, an affidavit. If they were not, the Court could not take them into account in determining the summary judgment application. The affidavits filed for the bank proved all of the elements of its cause of action under the guarantee. The issue was whether the plaintiff satisfied the onus upon it to establish that Mr Fakafanua had no arguable defence that the guarantee was obtained by undue influence and/or misrepresentation that was worthy of going to a hearing.
3. For undue influence there must be evidence of actual influence that overrode Mr Fakafanua's will. There was nothing in his affidavit to suggest that undue influence was brought to bear upon him to sign the guarantee. The court was satisfied that Mr Fakafanua's defence of undue influence had no prospect of success.
4. The other defence advanced was that Mr Fakafanua was induced to enter into the guarantee by misrepresentations made by Mr Stephenson on

behalf of the bank. There was nothing to displace the ordinary rule that a solicitor advising a guarantor did so exclusively as the guarantor's solicitor. If Mr Stephenson had misled Mr Fakafanua then he was acting as Mr Fakafanua's solicitor and not as the solicitor for the bank. Mr Fakafanua's remedy (if any) was against Mr Stephenson and not the bank. The court was satisfied that the defence of misrepresentation had no prospect of success.

5. In reality, the counterclaim was a defence to the bank's claim on the guarantee. It could not survive the finding that Mr Fakafanua had no defence to the bank's claim on the guarantee and must be struck out.
6. Judgment was entered in favour of the bank in the sum of $100,000 plus interest as claimed at the rate of 10.65% per annum from 17 July 2012 (being the date of demand under the guarantee) to the date of payment. The counterclaim was struck out.

Cases considered:

Australia and New Zealand Banking Group Limited v Civil Aviation anor [2003] Tonga LR 281
Bank of Baroda v Rayarel [1995] 2 FLR 376
Bank of Credit and Commerce International v Aboody [1990] 1 QB 923 (CA)
Bilbie Dymock Corp Ltd v Patel (1987) 1 PRNZ 84 (CA)
Contractors Bonding Ltd v Snee [1992] 2 NZLR 157 (CA)
Eng Mee Yong v Letchmanan [1980] AC 331
Gardiner v Westpac New Zealand Ltd [2014] NZCA 537
Halifax Mortgage Services Ltd v Stepsky [1996] 2 All ER 277
Krukziener v Hanover Finance Limited [2008] NZCA 187
MacLean v Stewart (1997) 11 PRNZ 66 (CA)
Midland Bank plc v Serter [1995] 3 FCR 711
National Westminster Bank plc v Breeds [2001] Lloyds' Rep Bank 98
Royal Bank of Scotland Plc v Etridge (No 2) [2001] UKHL 44, [2002] 2 AC 773
Southland Building Society v Austin [2012] NZHC 497
Westpac Bank of Tonga v Moehau (Supreme Court, CV 120/2011, 26 October 2012)
Westpac New Zealand Ltd v Gardiner [2013] NZHC 683

Rules considered:

Supreme Court Rules 2007

Counsel for the plaintiff	:	Ms Tonga
Counsel for the defendant	:	Mr Pouono as agent for Mr Stanton

Ruling

[1] The plaintiff bank applies for summary judgment against Kisione Fakafanua (Mr. Fakafanua) seeking judgment for the amount alleged to be owing under a personal

guarantee Mr. Fakafanua gave in respect of a loan made by the bank to Mr. Fakafanua's company Faua Developments Limited (Faua). Mr. Fakafanua disputes his liability under the guarantee and says that the guarantee was obtained by undue influence and/or misrepresentations made by or on behalf of the bank. Mr. Fakafanua has filed a counterclaim against the bank seeking cancellation of the guarantee and damages. The bank has in turn applied to strike out the counterclaim. This ruling deals with both the bank's application for summary judgment and its application to strike out the counterclaim.

The facts

[2] Mr. Fakafanua is a business man. In around 2006 Mr. Fakafanua and a company called Epic International Limited, which was controlled by one Sosaia Moehau, agreed on a joint enterprise to complete a bar and restaurant and carry on business on land owned by Mr. Fakafanua at Vuna Road, Ma'ufanga. A company called Vuna Development Limited was incorporated and arranged financed from the bank for the venture. Disagreements arose between Mr. Moehau and Mr. Fakafanua which were settled in early 2009. To implement the settlement Mr. Fakafanua's company, Faua Developments Limited, raised a loan for T$650,000 from the bank to acquire the assets and business of Vuna. Vuna in turn used this money to settle its obligations to the bank. Mr. Fakafanua was the sole director and shareholder of Faua. The bank required security to be provided for the loan to Faua which included Mr. Fakafanua's personal guarantee. This he gave on 3 April 2009. The guarantee was limited to the sum of $100,000 plus interest, costs and expenses.

[3] Faua defaulted in making loan payments and the bank took steps to enforce its securities. On 22 January 2010 the bank served a written demand upon Faua for the balance then outstanding under the loan which was $691,067.63. That was not paid. On 17 July 2012 the bank served a written demand upon Mr. Fakafanua under his guarantee but he failed to make payment upon the demand. The amount owing by Faua to the bank as at 8 May 2014 was $749,574 (exhibit D to first affidavit of Daniel Henson) and the debt continues to accrue interest and costs incurred by the bank.

Summary judgment principles

[4] The relevant principles governing summary judgment applications are well known. *Australia and New Zealand Banking Group Limited v Civil Aviation anor* [2003] Tonga LR 281. In *Westpac Bank of Tonga v Moehau* CV 120 of 2011, 26 October 2012 Scott LCJ quoted with approval from the White Book as follows:

> The purpose of [the Rule] is to enable a plaintiff to obtain summary judgment without trial if he can prove his claim clearly and if the defendant is unable to set up a bona fide defence or raise an issue against the claim which ought to be tried. When the judge is satisfied not only that there is no defence but no fairly arguable point to be argued on behalf of the defendant, it is his duty to give judgment for the plaintiff (*Anglo-Italian Bank v Wells* (1873) 38 L.T. 197).

[5] The onus is on the plaintiff to establish that there is no real doubt or uncertainty as to his entitlement to summary judgment. Where the evidence is sufficient to show that there is no defence the defendant will need to respond if the application is to be defeated. *MacLean v Stewart* (1997) 11 PRNZ 66 (CA).

[6] It was emphasized to me in both the written and oral submissions for Mr. Fakafanua, that the Court should not normally seek to resolve conflicts of evidence or assess the credibility of witnesses on a summary judgment application. I accept that principle but note also that the Court will not accept uncritically evidence that is "*inherently lacking in credibility, as for example where the evidence is inconsistent with undisputed contemporary documents and other statements by the same deponent or is inherently improbable*". *Krukziener v Hanover Finance Limited* [2008] NZCA 187 at [26] and *Eng Mee Yong v Letchmanan* [1980] AC 331, 341. The Court may take a robust and realistic approach when the facts warrant it. *Bilbie Dymock Corp Ltd v Patel* (1987) 1 PRNZ 84 (CA).

[7] A further point that is of particular relevance in this case is that under O15 Rule 3(1)(a) a plaintiff must file an affidavit "*verifying the facts on which the claim, or the part thereof to which the application relates, is based*" and under O15 Rule 5(2) a defendant's affidavit in opposition to an application for summary judgment "*must state clearly what the defence is, and what facts are relied upon to support it.*" The facts stated in the parties' pleadings are not evidence unless they are also set out in, or verified by, an affidavit. If they are not, the Court cannot take them into account in determining the summary judgment application.

[8] The affidavits filed for the bank prove all of the elements of its cause of action under the guarantee. The issue is whether the plaintiff has also satisfied the onus upon it to establish that Mr. Fakafanua has no arguable defence that the guarantee was obtained by undue influence and/or misrepresentation that is worthy of going to a hearing.

Undue influence

[9] The argument that the guarantee was obtained by undue influence and/or misrepresentation was not really developed in the submissions for Mr. Fakafanua in any meaningful way; rather the focus of the submissions was that there are factual matters in dispute that make this claim unsuitable for summary judgment. It appeared to have been assumed that the existence of factual disputes necessarily gave rise to an arguable defence of undue influence or misrepresentation.

[10] The principle allegation for Mr. Fakafanua is that Mr. Ralph Stephenson, a local lawyer who Mr. Fakafanua had instructed to act for him, also accepted instructions to act for the bank. It is said that the bank should have given Mr. Fakafanua the opportunity to get independent legal advice and also that "the plaintiff used its position and power through Mr. Stephenson to obtain the signature of the defendant" to the guarantee.

[11] Mr. Ashleigh Matheson, who was the General Manager of the bank at the relevant time, was involved with the arrangements between the bank, Faua and Mr. Fakafanua and was present when the guarantee was signed, says in his affidavit that

the bank did not engage Mr. Stephenson but relied upon its in-house Counsel and that it was only subsequently that Mr. Stephenson was instructed by the bank on other matters. Apart from Mr. Fakafanua's assertion that Mr. Stephenson was acting for both him and the bank there is nothing to suggest that this was so at the time Mr. Fakafanua provided his guarantee. I am satisfied that Mr. Stephenson was not acting for the bank in relation to the advance to Faua and the taking of Mr. Fakafanua's guarantee. In any event, the defense that Mr. Fakafanua advances is built on an unsound foundation as there is no requirement at law that a person providing a guarantee be given independent legal advice before signing it and an absence of such advice will not render a guarantee invalid. *Westpac New Zealand Ltd v Gardiner* [2013] NZHC 683 approved on appeal in *Gardiner v Westpac New Zealand Ltd* [2014] NZCA 537 and *Southland Building Society v Austin* [2012] NZHC 497. Furthermore, where, as was the case here, a guarantor deals with the bank through a lawyer the bank is entitled to assume, except in exceptional circumstances that do not apply here, that the solicitor has considered whether he has any conflicts of interest to make it necessary for him to refer the guarantor for independent advice. *Bank of Baroda v Rayarel* [1995] 2 FLR 376, 386 per Hoffmann LJ.

[12] This is not the typical sort of case that often comes before the Courts where undue influence is alleged or may be presumed due to the nature of the relationship between the borrower and the guarantor. *Royal Bank of Scotland Plc v Etridge (N*o 2) [2001] UKHL 44, [2002] 2 AC 773. Here the borrower was Faua, a company over which Mr. Fakafanua had complete control as its sole shareholder and director. What is in issue can only be whether there was actual undue influence exerted by the bank upon Mr. Fakafanua so that he did not enter into the guarantee of his own free will. *Contractors Bonding Ltd v Snee* [1992] 2 NZLR 157 (CA) at 165. There must be evidence of actual influence that overrides Mr. Fakafanua's will. *Bank of Credit and Commerce International v Aboody* [1990] 1 QB 923 (CA). There is nothing in Mr. Fakafanua's affidavit to suggest that undue influence was brought to bear upon him to sign the guarantee. He is an experienced businessman with substantial and valuable assets. Nowhere, does he say in his affidavit that he felt pressured to sign the guarantee. I note that in the statement of defense it is alleged that Mr. Stephenson did not explain the contents of the guarantee to Mr. Fakafanua and that due to gout he was "*not well to apprehend the provision of the guarantee*" but there are no statements to that effect in his affidavit and in any event these allegations are not evidence of undue influence by the bank. The guarantee was given only after Mr. Stephenson had successfully negotiated a limit on it of $100,000, contrary to the bank's usual lending requirements, and the transaction of which the guarantee was part was manifestly advantageous to Mr. Fakafanua in that resolved his dispute with Epic and Mr Moehau.

[13] For these reasons I am satisfied that Mr. Fakafanua's defense of undue influence has no prospect of success.

Misrepresentation

[14] The other defense advanced is that Mr. Fakafanua was induced to enter into the guarantee by misrepresentations made by Mr. Stephenson on behalf of the bank. In the circumstances of this case there is nothing to displace the ordinary rule that a

solicitor advising a guarantor does so exclusively as the guarantor's solicitor. *Midland Bank plc v Serter* [1995] 3 FCR 711; *Halifax Mortgage Services Ltd v Stepsky* [1996] 2 All ER 277. *National Westminster Bank plc v Breeds* [2001] Lloyds' Rep Bank 98. If Mr. Stephenson had misled Mr. Fakafanua then he was acting as Mr. Fakafanua solicitor and not as the solicitor for the bank. Mr. Fakafanua's remedy (if any) is against Mr. Stephenson and not the bank.

[15] More fundamental than that, there is in my view no evidence of any misrepresentations in any event. Mr. Pouono advised me that the misrepresentations relied upon are set out in paragraphs 11, 14, 15, 16 of Mr. Fakafanua's affidavit. Paragraphs 11 and 14 contain no allegations that Mr. Stephenson misled Mr. Fakafanua. Paragraphs 15 and 16 allege that Mr. Stephenson told Mr. Fakafanua that he could expect to pay interest on the loan of $6,000 to $7,000 and the loan repayments were in fact $8,000, yet the terms of the loan agreement (exhibit A to the affidavit of Daniel Henson) that Mr. Fakafanua signed show that the loan repayments were, consistent with what Mr. Stephenson is alleged to have said, initially $6,700 per month and were only to increase to $8,100 per month after 6 months. Mr. Fakafanua does not allege in his affidavit that he did not read the loan agreement or that did not understand its terms when he signed it so he must have known what the repayment terms were to be.

[16] Furthermore, the conditions of the loan agreement and Mr. Fakafanua's personal guarantee, both contain terms excluding any liability that the bank might have for misrepresentation. The loan terms state that in entering into the loan agreement the borrower "*has not and does not rely on any representation or advice given by the Bank howsoever arising but relies on his own judgment in doing so*" and that the borrower "*was advised by the Bank to obtain independent advice….and absolves the Bank from any liability for any misrepresentation or negligent advice made by the Bank, its officers, employees, agents or servants*". (page 7 of the terms and conditions attached as exhibit A to affidavit of Daniel Henson). Paragraph 17 of the guarantee provides, to similar effect, that "*the Guarantor does not execute this instrument as a result of or by reason of any promise representation statement or information of any nature or kind whatsoever given or offered to him by or on behalf of the Bank…*". No submissions were advanced that Faua and Mr. Fakafanua were not bound by these terms.

[17] Before leaving this topic, I note that Mr. Stanton's written submissions focused on matters set out in paragraphs 24 to 27 of Mr. Fakafanua's statement of counterclaim. I do not see that these paragraphs contain allegations of misrepresentations but, to the extent that they do, there is no sufficient evidential foundation for them in Mr. Fakafanua's affidavit. It appears that what is being alleged is that Mr. Fakafanua received inadequate advice from Mr. Stephenson in which case his remedy is against Mr. Stephenson and not the bank. In any event, the terms of the loan agreement and guarantee, to which I have referred above, preclude any claim against the bank in reliance on such matters.

[18] For these reasons I am satisfied that Mr. Fakafanua's defense of misrepresentation has no prospect of success.

The counterclaim

[19] The crucial allegations for present purposes are paragraphs 28 and 29 of the statement of counterclaim which allege that the bank and Mr. Stephenson took advantage of Mr. Fakafanua "*in order to induce him to enter the said loan*" and that the bank "*took advantage of the defendant through their counsel, who was acting for both parties*". I presume that the reference to "*the said loan*" was meant to read "*the said guarantee*" because the prayer for relief seeks an order for the cancellation of the guarantee not the loan. In truth the counterclaim is a defense to the bank's claim on the guarantee. It cannot survive my finding that the Mr. Fakafanua has no defense to the bank's claim on the guarantee and must be struck out.

The result

[20] I am satisfied that Mr. Fakafanua has no defense to the bank's claim. Judgment is entered in favour of the bank and against Mr. Fakafanua in the sum of $100,000 plus interest as claimed at the rate of 10.65% per annum from 17 July 2012 (being the date of demand under the guarantee) to the date of payment.

[21] Mr. Fakafanua's counterclaim is untenable and in light of my findings above cannot proceed. It is struck out.

[22] The plaintiff is awarded costs of the proceeding to be fixed by the registrar if not agreed.

R v Sinoti

Supreme Court, Nuku'alofa
Paulsen CJ
CR 116/2014

7 September 2015

Sentencing – indecent assault of a child – 18 months imprisonment with final six months suspended

At the time of the offending Mr. Sinoti was 23 years old and his victim was 11 years old. He was related to the victim in that her father was Mr Sinoti's first cousin. On the day the offence was committed Mr Sinoti coerced the victim to accompany him to an abandoned bus close to her home where he performed indecent acts upon her. Sinoti appeared for sentence on one count of indecent assault on a child arising out of an incident that occurred in February 2014. The offence was punishable by a maximum sentence of 7 years imprisonment. The offence upon which Mr Sinoti was convicted was an alternative to a more serious charge that he had attempted carnal knowledge of the victim. On that charge Mr Sinoti was acquitted.

Held:

1. The court adopted the starting point of two years for the sentence. He was given credit for the fact that he wished to plead guilty to the offence upon which he was convicted, although that was tempered by the fact that at his trial he did attempt to defend both charges and adopted as his strategy attacking the integrity and honesty of the prosecution witnesses. He was also given credit for the fact that he appeared to be remorseful and that he had no relevant previous convictions. His sentence was discounted by six months. He was therefore sentenced to 18 months imprisonment.
2. The final six months of his sentence was suspended on conditions.

Cases considered:

Mo'unga v R [1998] Tonga LR 154
R v 'Ilangana CR56 of 2015
R v Lui Lomu CR92/14
R v Motulalo [2000] Tonga LR 311
R v Taulanga [2007] Tonga LR 141
R v Vaiangina CR312 of 2011

Statute considered:
Criminal Offences Act (Cap 18)

Counsel for the Crown	:	Mr Aho (written submissions by Mrs Langi)
Counsel for the accused	:	Mr Corbett

Sentence remarks delivered orally

[1] Maikolo Sinoti appears before me today for sentence on one count of indecent assault on a child contrary to section 125 of the Criminal Offences Act arising out of an incident that occurred on February 2014. The offence is punishable by a maximum sentence of 7 years imprisonment. The offence upon which Mr. Sinoti was convicted was an alternative to a more serious charge that he had attempted carnal knowledge of the victim contrary to section 122(1) of the Criminal Offences Act. On that charge Mr. Sinoti was acquitted.

[2] The facts have been set in out in my earlier ruling and I do not proposed to repeat them in detail. A brief summary of the facts are as follows. At the time of the offending Mr. Sinoti was 23 years old and his victim was 11 years old. He was related to the victim in that her father is Mr. Sinoti's first cousin. On the day the offence was committed Mr. Sinoti coerced the victim to accompany him to an abandoned bus close to her home where he performed indecent acts upon her. I found these to be laying her on the floor of the bus, removing his pants and her clothes, laying on top of her, putting his penis on her vagina, kissing her, masturbating and ejaculating.

[3] In relation to sentencing I have received written and oral submissions from both Counsel of the Crown and Mr. Sinoti and have a Probation report. I have today been given two references in favour of Mr. Sinoti which I have had regard to also.

[4] In his submissions for Mr. Sinoti, Mr. Corbett acknowledges that Mr. Sinoti knew what he did was wrong. He says that Mr. Sinoti offered to plead guilty to the lesser of the two charges he was facing but no agreement could be reached about that. He said that was the reason the case had to proceed to trial and Mr. Sinoti was acquitted of the more serious charge. Although Mr. Corbett does not expressly say so, there appears to be a realistic acknowledgement that a custodial sentence is inevitable as the focus of his submissions is whether the period of imprisonment imposed should be suspended in whole or in part. He has referred me to the case of *Mo'unga v R* [1998] Tonga LR 154 where the Court of Appeal set out the principles to be applied in deciding whether to grant a suspended sentence of imprisonment. Mr. Corbett particularly noted the relevant matters as being:

1. Where the offender is young, has a previous good record, or has a long period free of criminal activity.
2. Where the offender is likely to take the opportunity offered by the sentence to rehabilitate himself.
3. Whether, despite the gravity of the offence there is some diminution of culpability through lack of premeditation, the presence of provocation or coercion by a co-offender.

4. Whether there has been cooperation with the authorities.

[5] In applying these principles to this case, Mr. Corbett submitted a suspended sentence of imprisonment was open here because:

1. Mr. Sinoti has only one previous conviction in 2012 and has committed no other offences.
2. Mr. Sinoti has no previous convictions for an offence of a sexual nature.
3. Mr. Sinoti is a young man at 24 years of age and therefore has an opportunity to rehabilitate himself.
4. Mr. Sinoti has only primary school education so giving him the opportunity to attend a life skills course would help to educate him.

[6] Mr. Corbett also referred me to the Court of Appeal decision of *R v Motulalo* [2000] Tonga LR 311 which involved more serious sexual offending that occurred in this case. In considering how to deal with Mr. Sinoti I find most relevant the comments of the Court at page 314 which highlight the need to recognise the serious emotional trauma that is bound to result from such offending which is likely to affect the victim for a very long time.

[7] In the written submissions for the Crown, Mrs. Langi noted in mitigation of the offending that Mr. Sinoti is relatively young and that he may be characterised as a person with no relevant previous convictions. However, she points out that there are significant aggravating features of the offending as follows:

1. The age disparity between Mr. Sinoti and his victim.
2. Mr. Sinoti was in a position of trust as he was victim's relative.
3. That Mr. Sinoti had coerced of victim to accompany him to the bus where he had performed the indecent acts.

[8] Mrs. Langi has referred me to a number of sentencing comparables and I have undertaken my own research. The cases that I have considered included *R v 'Ilangana* CR56 of 2015, *R v Lui Lomu* CR92/14, *R v Taulanga* [2007] Tonga LR 141 and *R v Vaiangina* CR312 of 2011. In my view, the most directly relevant incomparable is *R v 'Ilangana*. That case concerned, a 19 year old who committed indecent assaults on a girl aged 7 when he removed her pants and underwear, sat on her body and rubbed his penis on her buttocks and vagina and massaged her buttocks and vagina. Although charged with four offences they all appear to have arisen from the one incident which took place over a period of about 10 minutes. Justice Cato considered that the starting point for sentencing purposes was 2 years imprisonment which he discounted by 9 months to take into account the accused's guilty plea at an early stage, a lack of previous convictions, remorse and corporation with the authorities. He also considered it relevant that the defendant was a shy, immature and retiring individual, dependent upon his mother and of little sophistication. The result was a period of 15 months imprisonment but Justice Cato suspended the last 9 months of the sentence. Relevant for present purposes is paragraph 12 of Justice Cato's sentencing remarks where he said.

> I have now to consider whether the sentence of imprisonment should be suspended fully or partially. I consider, having reflected on the matter over the period since the submissions were heard on the 7 August 2015, that I would be failing in my duty to protect young children in Tonga from sexual abuse were I to fully suspended the sentence and impose what I was urged to do by Mr. Edwards namely a lengthy sentence of community work. However, given his early guilty plea, remorse, lack of previous convictions, the fact this was a isolated activity, and the view I have taken of him generally that he is a good candidate for rehabilitation, I will impose the least restricted period of imprisonment I feel able to do consistently with the public interest in deterring such activity and protecting young children. I accordingly suspend the last 9 months of his sentence.

[9] I turn now to the Probation Report. It paints a disturbing picture of Mr. Sinoti. He had a dysfunctional childhood, an unstable upbringing and a low level of education. Mr. Sinoti is married with a child but his wife and child live overseas and so he does not have the day to day support that such relationships would ordinarily provide. The report notes that Mr. Sinoti has employment as a chef, which he enjoys, and he has the support of his employer who regards him as well behaved, diligent and well socialised with his co-workers and customers. He also attends Church and there is a reference before me from the Assembly of God Church. However, on the negative side and most importantly, Mr. Sinoti has acknowledged disturbing sexual behaviors throughout his life, although it is not clear whether such behaviors would amount to criminal offending. Be that as it may, Mr. Sinoti has a deeply unhealthy attitude to sexual matters. The report suggests that when aroused he indiscriminately tries to persuade others to allow him to perform indecencies upon them while he satisfies himself sexually. The report notes that Mr. Sinoti's attitudes to sexual matters are very dangerous and questions whether he may be mildly intellectually impaired. The report writer was undecided whether Mr. Sinoti's responses were genuine or whether he was attempting to escape the burden and seriousness of his criminal actions. The report recommends the Court consider a custodial sentence.

[10] Having considered all the facts put before me I consider that the gravity of the offending in this case is very similar to what occurred in *'Ilangana.* I therefore propose to adopt the same starting point for sentencing purposes as was applied in that case, which is 2 years imprisonment. I am prepared to give Mr. Sinoti credit for the fact that he wished to plead guilty to the offence upon which he was convicted, although that is tempered by the fact that at his trial he did attempt to defend both charges and adopted as his strategy attacking the integrity and honesty of the prosecution witnesses. I also give him credit for the fact that he appears to be remorseful and that he has no relevant previous convictions. I therefore discount his sentence by 6 months to account for these matters. He is therefore sentenced to 18 months imprisonment.

[11] Turning to the issue of whether all or some part of the sentence should be suspended, Mr. Sinoti has exhibited predatory sexual behavior on this and other occasions and I feel he must actually serve a period of imprisonment consistent with my duty to deter such behavior and protect young children from the risk of his further

offending. However, it is also the case that Mr. Sinoti is young and there are indications that he will be able to rehabilitate himself. Certainly, his acknowledgment that what he did was wrong, his recent good work history and his attendance at Church support that view. On balance, and not without reservations, I will suspend the final 6 months of Mr. Sinoti's sentence on the following conditions:

1. He is not to commit any offence punishable by imprisonment for a period of two years;
2. He is placed on probation for the period of his suspension (that is the 6 months following his release);
3. He must reside where he is directed by his probation officer but under no circumstances is he to reside in the same community as the victim for the period of his probation;
4. He is to attend a course on life skills and a course on sexual abuse at dates and times as directed by his probation officer and the Women's Crisis Centre.

[12] I also recommend the Commissioner of Prisons endeavour to place Mr. Sinoti away from other adult prisoners so as to ensure his protection. A copy of these sentencing remarks when typed up should be given to the Commissioner forthwith.

R v Toetu'u

Supreme Court, Nuku'alofa
Cato J
Cr 113/2014

8 September 2015

Criminal law – rape charge – whether corroboration was required was unclear in Tongan law – found there was corroboration – charge proved beyond reasonable doubt

On 13 June 2014 the complainant, A aged 21, had gone out to a bar in Nuku'alofa with her mother. She said her mother became quite drunk. After the bar she intended to get a taxi to her aunt's house, but the driver of the car that she was in went to the wrong place and raped her in the back of the car. The accused, 'Alipate Toetu'u, was charged with one count of rape. In the police interview the accused denied that he had sexual intercourse with A. In court the accused gave evidence that he had picked A up after she called him. He said they then went to a kava party and then had consensual sex in the back seat of the car.

Held:

1. The court found the complainant a credible witness. She gave her evidence in a quiet and measured way. It was possible she may have had more to drink than she admitted and was clearly upset about other matters. However, that did not detract from her credibility.
2. The court did not find the accused a credible witness. He lied to the police. Had he engaged in consensual sexual intercourse the court would have expected him to have informed the police officer when asked to state what the truth was. He did not do that.
3. It was unclear whether corroboration was required in Tonga in sexual offences. However, if it was, the court found that there was corroboration.
4. The charge of rape was proved beyond reasonable doubt. The accused was convicted and remanded in custody for sentencing.

Statute considered:
Criminal Offences Act (Cap 18)

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

Verdict and reasons

[1] The accused, 'Alipate Toetu'u, was charged with one count of rape contrary section 118 (1) of the Criminal Offences Act. The particulars were that, on 13th June 2014, at Longolongo he did have carnal knowledge of A by using his penis into her vagina without her consent.

[2] The complainant A was aged 21. She gave evidence that, on the 13th June 2014, she had gone from her home with her mother in the one way Road in Nuku'alofa to the Time out bar some after 10pm. She was there for about 2 hours. Her mother, she said, became quite drunk but she said she had only three beers. Nothing untoward seems to have arisen in the bar. She saw some friends and the accused. She and her mother returned to their home, but her mother commenced talking with some other men and the complainant parted company with her on the street. She went to her home and then came out. There was no sign of her mother. She saw some youths who appear to harass her. She ran away from them in the vicinity of the Catholic Basilica. She said she was upset.

[3] She met her friend Simaima who later gave evidence. She said she was upset, it would seem, although this was not pursued regarding domestic matters involving her family. Simaima offered to take her home. She said she could not go home because of the boys.

[4] She said she wanted to go to her aunt's home at Touliki. Simaima told her she would get a taxi. They went into town and stopped at an intersection near the "Coffee Post" café. According to her, she asked Simaima when a car pulled up whether that was a taxi and she said yes. She told her to get in. She said she did not want to go alone and asked Simaima to go with her but she said she had to work. She said she told the driver she wanted to go to Houmakelikao to her aunts (also known as Touliki). The drove past the police station and then on the Vuna Road towards Ma'ufanga. She was upset and was not looking where the car was going. When the driver talked to her, she realised they were at Longolongo. She realized then that the driver was the accused. She told him she had enough to drink and wanted to go home. She said he said they were going to his house, and that they were just going to do something.

[5] She said the car was parked in Longolongo, at the accused residence, and he would not let her out. He was holding her and they were arguing. A man came out and talked to the accused and then left. There was a struggle. The accused grabbed her and took her into the back seat. He was on top of her and she tried to push him off. He started kissing her on her face and neck. She was struggling and he started to take her pants off. It happened so fast, she said. She told him to stop and he raped her. She said it was forced sex. He put his penis into her vagina. She felt pain. She felt wet and she knew he had ejaculated inside her.

[6] She said she was told to put her pants back on. She was afraid because she knew she could get pregnant. She was still in the back seat when they drove into town. He told her to get out near the palace but she said she did not want that, so he dropped her at a taxi stand in Wellington Road. When she got out, she said she asked him why he had done that and if he thought it was funny. He told her to stop acting like a child.

She told him she would get someone and went to the police station to make a complaint. She said she had her rights. Later she was taken to the hospital.

[7] Clothes were shown to her which she identified as wearing that night. She identified her panties as being ripped by the accused that night. She was able to identify a photograph of the car in exhibit 3 as the one that had picked her up. She said to Mr Lutui, she was still crying and holding her head in her hands when she got into the car and had not appreciated it was Alipate until later. She had tried to call out later to the man who had approached the car in Longolongo. He did not pay attention. She said the accused was wearing a blue Adidas sports t-shirt that evening and confirmed that a blue Adidas shirt produced in evidence which had been located at the accused's residence by police was the same shirt.

[8] She said she had been at the premises in Longolongo before when his ex-wife had asked her to go there. She gave evidence of a rock throwing incident that had occurred there with the accused.

[9] She also said she had been held by the mouth during the incident because she was being too loud.

[10] Under cross-examination, she confirmed her birthday was 14th December 1993. She said she did not know there was a kava party in the house or the man who had come out. She said she had tried to escape from the car. She confirmed her evidence that she had been raped in the backseat of the car.

[11] When the trial commenced, in his opening, Mr Lutui on the basis of the accused's answers given to the Officer in charge of the case, PC 'One'one said that it was anticipated that the accused would deny being present. It became plain, however, from the nature of the cross-examination of A that the defence no longer maintained this position. Mr Piukala, when asked by me whether the accused now admitted he was with the complainant, said that was the defence's position. As a consequence, Mr Lutui did not require certain witnesses on the issue of clothing to give evidence.

[12] A said to Mr Piukala she was not "happy with the Union". She did not cry out. She said she had asked him to let her go and take her home, lots of time. She denied she had ripped her underwear during the walk to the police station.

[13] PC 'One'one gave evidence of interviewing the accused under caution on the 15th June 2014, at about 1400 hours. For the purposes of this verdict, I record that the substance of the interview was a denial of sexual intercourse with A. Indeed, the accused stated that he had after visiting 'Oholei beach for dinner with friends, dropped them off at Puke and then went home to Longolongo. He said he had not gone to any other place other than his house on his return from Puke.

[14] He said, when he returned from Puke, a kava session was running and he sat there and after a while he went and slept. He said the evidence of Simaima Vea that he had picked up Malia was a lie. Similarly, he described her allegation of non-consensual sexual intercourse with him as a lie.

[15] He admitted, earlier in the record of interview, being in town at the Time out bar, having returned from 'Oholei and seeing Malea there. That was before taking them to

Puke. When asked about this clothing worn on the night, he said he was wearing a t-shirt Lavengamalie colour that had Samoan patterns.

[16] Simaima Vea gave evidence. She was 18 and she recalled meeting A who was crying and angry with her mother. She described the complainant as really drunk. A wanted to file a police complaint. She said a person called out A's name. A male person opened the door of the car. She declined to go with A. She identified the car as the accused's vehicle. She said in re-examination, the reason she thought she was drunk was because she was mumbling.

[17] The accused gave evidence. He confirmed picking up A and said that she had rung him to pick her up. He also said she had asked him to go and have a drink, rather than take her home as he intended to. He said they went to Longolongo where there was a kava party and there was a civil conversation about his ex-wife. Somebody texted her not to bother with him and to go with the accused. They then, he said, continued their conversation and agreed to have consensual sex. He agreed it was in the back seat. He said it was consensual and she was moaning. He said she had told him to drop her off at the Wellington taxi base so she could get a taxi. He said she was angry at somebody else. He denied forcing her to have sexual intercourse.

[18] He confirmed to his counsel that all his answers in the record of interview were correct. He confirmed that all of his evidence was truthful.

[19] Under cross-examination, by Mr Lutui, he said that it was after he went to sleep at home that A had rung him to pick her up. That was after it had been suggested to him that answers he had given about being at home and asleep dropping his friend off in Puke were lies.

[20] Pressed by Mr Lutui on his answers, he said what he told the police were partial facts but what he was saying in his evidence was true. When further pressed about why he had not told the police the truth as requested by the interviewing officer he said he told him he would get a lawyer and he thought he would tell the lawyer the rest of the information.

[21] He admitted that he had worn the blue Adidas shirt and not the one he had told police he was wearing. He said the police forced him to say it. He later said it was a mistake. He said she had wanted to be dropped off; not taken to Houmakelikao, after the incident. He said she was texted her earlier near the palace that he or she would be in that area. He said she took off her clothes and he had not ripped the panties.

[22] He admitted that he had made a mistake in his answer to question 29 that he had not picked A up in his car as Simaima Vea had said. He later admitted that he had lied to the police when he had said after question 29 that he had returned from Puke, a kava drinking session and sat there for a while and had gone to sleep. He said he lied because he was confused with the answers. He admitted, however, that that he had told a half truth and it was a deliberate suppression because he did not want to give them other information. He wanted to tell his lawyer the rest.

[23] It should be noted that he had been given the opportunity to engage a lawyer before the record of interview commenced. The accused said he wanted to complete the work and then I will find me a lawyer.

Submissions

[24] Mr Piukala for the accused reminded me of the burden and standard of proof. He submitted that, although the accused had admitted he had told the police only part of the story, he urged me to accept that in evidence he had told the truth. He pointed out to me that, contrary to what A said about her state of sobriety, her friend had suggested she was drunk. He submitted that I should prefer the evidence of the accused that the complainant had consented to intercourse and no rape had occurred.

[25] Mr Lutui submitted that the Crown case was plainly made out on the evidence of A who should be believed. He contended that her friend's evidence of her being drunk was based only on the fact A was moaning. He submitted that the accused's evidence was a manufactured account, inconsistent with his account to the police and he had made up his evidence as he went along. Aspects of the evidence such as the complainant texting him or her receiving texts from third parties had not been put in cross-examination to the complainant because they had been manufactured. He had told deliberate lies to the police about not picking up A in town, having intercourse with her, later and remaining home asleep after Paku so as to deliberately distance himself from the truth. This was corroboration or, in any event, evidence strongly supportive of his guilt.

Findings

[26] I found the complainant a credible witness. She gave her evidence in a quiet and measured way. It is possible she may have had more to drink than she admits and was clearly upset about other matters. However, I do not think that detracted from her credibility. The accused never suggested she was intoxicated, during his evidence. Nor was she cross-examined on the point.

[27] She consistently maintained her account that she had been raped by the accused. There is no evidence before the court of any pre-existing familiarity between A and the accused such as she would invite the accused to go drinking with her, as the accused claimed. She was plainly upset that night and the accused I find took advantage of the situation. Having had non-consensual intercourse with her, he then left in town to find her way home. The fact she went straight away to the police station to make a complaint is consistent with her account that she was raped.

[28] Conversely, I did not find the accused a credible witness. Despite his protestations, that he made mistakes in answers to some of the questions on material aspects of his whereabouts on the evening and his association with A, I find he plainly lied to the police to conceal his meeting with A late that evening. The only reason that he would have done this is to deliberately distance himself from the opportunity to have had unlawful sexual intercourse with her. Had he engaged in consensual sexual intercourse, as he now claims, I would have expected him to have informed the police officer when asked to state what the truth was. He did not do that. On his own admission, he said that he deliberately told the police part of the story only. I did not find this answer at all convincing. It was, in my view, plainly contrived as were his responses to questions put to him by Mr Lutui, concerning his

whereabouts that evening which were inconsistent with the evidence he gave concerning his activities and association with A, at trial.

[29] I find also his answers volunteered only in his evidence, and not put to the complainant in cross-examination that she had rung him to pick her up (after he had gone to sleep), that there were third party texts to her, (which he had apparently seen), that suggested she should go with him and not with the sender, contrived. I did not believe his account of consensual intercourse. I consider that he took advantage of the complainant and, was so determined to have intercourse with her, that he ripped her underwear as she claimed. Had this been a case of consensual intercourse, I find it strange also that he did not drive her home in the early hours of the morning to her aunt at Houmakelikao which is not very far from the Palace past Ma'ufanga and along the Vuna Road. I reject his explanation that she wanted to get off in the area because the sender of the text was there. The accused who is a soldier presented as a physically powerfully built young man.

[30] Accordingly, I find there is corroboration, that is (if corroboration is still required in Tonga in sexual offences which is unclear) in his deliberate and material lies told in his police interview as explained above. I cannot find any reason for such obvious lies and no satisfactory explanation was advanced for them consistent with innocence such as panic or embarrassment either. In any event, I found A's evidence so persuasive and his so unconvincing that I have no hesitation in finding the charge of rape, namely non-consensual sexual intercourse, (penetration of the vagina by the penis) proven beyond a reasonable doubt.

Verdict

[31] I convict the accused of rape and remand him in custody for sentence.

[32] I also wish to record that, whilst I have been critical of aspects of investigations and Tonga police practice in some recent judgments, I am pleased to say here that PC 'One'one had with him in evidence his notebook to assist his recollection and the record of interview and later follow up, with a search under warrant, demonstrated good police work. The record of interview and the evidence produced proved to be very important in the resolution of this case.

Fonua anor v Westpac Bank of Tonga

Court of Appeal, Nuku'alofa
Moore, Blanchard, Hansen, and Tupou JJ
AC 6/2015

8 September 2015; 16 September 2015

Land law – jurisdiction of Land Court – once invoked it was wide enough to deal with the whole legal dispute between parties

On 6 March 2015, the Land Court made an order declaring that the respondent bank was lawfully entitled to possession of certain leasehold land and a building (or dwelling house) erected on the land and other related orders. The court held that the owners of the leasehold, the appellants, were in default under a mortgage with Westpac. The judge made the orders in an application seeking summary judgment. The appellants appealed the orders. The appellants disputed the amount owing and submitted that in circumstances where the amount owing was contested, it was inappropriate to give summary judgment. The appellants submitted they had an arguable and bona fide defence. There should have been a trial so the amount owing under the mortgage could be determined. Westpac submitted that all that was necessary to satisfy s 109 was that the mortgagor was in default and that the notice informed the mortgagor that the mortgagee intended to take possession of the land.

Held:

1. The fact that the appellants were in dispute with Westpac about the total amount owing did not relieve them of the obligation to continue to make periodic payments. Different considerations might have arisen if the ambit of the dispute about the total amount owing involved an assertion by the mortgagor that the entire amount owing had already been paid but the mortgagee contended otherwise. However that was not the factual position. Accordingly, the appellants were in default and the only condition precedent to taking possession was the service of a notice in conformity with s 109. The condition precedent was satisfied and Westpac was entitled to possession.
2. If the jurisdiction of the Land Court was lawfully invoked by a party initiating proceedings against another party, then that court has jurisdiction to resolve the entire legal controversy between those parties, at least if the legal controversy concerns land and matters incidental or related to that land. It was unnecessary to define the boundaries of the jurisdiction of the Land Court because the dispute about the possession of the dwelling and

the amount owing under the mortgage were closely related to the dispute about the possession of the land. There was a clear nexus between them.

3. Accordingly, the Land Court should have determined the application before it by Westpac insofar as it raised issues about possession of the dwelling and should also have dealt with the counterclaim of the appellants.

4. The Court ordered that the appeal was dismissed insofar as the appellants sought to set aside the orders made by the Land Court on 6 March 2015; and the matter was remitted to the Land Court for determination of issues outstanding in the application of Westpac Bank of Tonga and the counterclaim of the appellants.

Cases considered:

Cowley v Tourist Services Ha'apai Ltd and Fund Management Ltd [2001] Tonga LR 183 (CA)

Mortimer anor v Fe'aomoeata anors [2015] Tonga LR 91 (CA)

Philip Morris Inc v Adam P Brown Male Fashions Ply Ltd (1981) 148 CLR 457

Statute considered:

Land Act (Cap 132)

Rules considered:

Supreme Court Rules 2007

Counsel for the appellants	:	Mr L Niu SC
Counsel for the respondent	:	Mrs D Stephenson

Judgment

[1] This is an appeal against a judgment of Scott J of 6 March 2015 sitting as a judge of the Land Court in an application by the respondent, Westpac Bank of Tonga (Westpac), for an order declaring it was lawfully entitled to possession of certain leasehold land and a building (or dwelling house) erected on the land and related orders. Scott J concluded that the owners of the leasehold, the appellants, were in default under a mortgage with Westpac. The judge made the orders in an application seeking summary judgment pursuant to Order 15 Rule 2 of the Supreme Court Rules 2007.

[2] It is convenient to note at the outset two aspects of both Scott J's reasons and the orders made. The first is that at paragraph [21] of his reasons, the judge found that "the conduct of the [appellants] clearly amounted to serious default" under the mortgage. This finding of mixed fact and law arose from the evidence concerning the appellants' history of payments to Westpac under the mortgage. The second matter is that the substantive orders made by Scott J were a declaration that Westpac was entitled to possession of the land the subject of the mortgage and secondly that the appellants give vacant possession of the land comprised in the lease within 28 days of the date of the judgment. No orders were made about possession of the building.

[3] The background to the proceedings before Scott J was that the appellants signed a loan agreement on 9 March 2007 and executed a mortgage in favour of Westpac. In these reasons, it is mostly unnecessary to draw repeatedly a distinction between the agreement creating contractual rights and obligations and the mortgage conferring on Westpac an interest in the land. A mortgage application form was, on the same day, executed by the appellants and on 21 May 2009 the mortgage was registered under the Land Act (Cap 132). The property the subject of the mortgage was the parcel of land comprised in registered lease 4837 expiring on 9 August 2038. From the evidence led before Scott J there appeared to be no significant dispute that payments were made by the appellants to Westpac, but those payments did not meet the contractual obligations under the mortgage. Indeed that was the substance of the finding referred to in the previous paragraph. Additionally, during the hearing of the appeal, senior counsel for the appellants accepted that they were required, under the terms of the mortgage, to make periodic payments of a specified amount and they had stopped making those payments in 2011.

[4] Section 109 of the Land Act provides:

> **109**. (1) In the event of the mortgagee wishing to take possession of the lands mortgaged following default by the mortgagor of any of the obligations to the mortgagee set out in the mortgage deed or in any other document lodged with the Minister in terms of the next succeeding section the mortgagee shall give notification both to the mortgagor and to the Minister of his intention to take possession of the lands mortgaged and may thereafter take possession at any time after the expiry of 14 days from the date of said notification.
>
> (2) After a mortgagee has taken possession, in terms of subsection (1) of the land mortgaged, he may either retain possession for the unexpired term of the mortgage lease or he may sublease the lands for the unexpired term of the mortgage lease or may sell the lease or sub-lease if the mortgaged land is a leasehold.

[5] The appellants argue that the expression "mortgage deed" in s.109(1) is a reference to a document in which a mortgagor mortgages, by way of mortgage lease, all his rights title and interests in the land the subject of the mortgage together with all buildings and fixed improvements thereon. This argument is founded on s 99 of the Land Act which defines "mortgage lease" as, in effect, a lease that is in the terms of Form 2 of Schedule VIII of the Land Act which says:

> *MORTGAGOR:.....*
> *MORTGAGEE: .....*
> *TYPE OF HOLDING:.....*
> *LAND: .....*
> *In consideration of a loan or loans made or to be made by the Mortgagee to the Mortgagor not exceeding in total the sum of T$ ..... (..... pa'anga) the Mortgagor COVENANTS with the Mortgagee as set out in the Schedule AND for the purpose of securing the repayment of such loan and interest*

and other moneys the Mortgagor HEREBY MORTGAGES BY WAY OF A LEASE to the Mortgagee all his rights title and interests in the land above described ***together with all buildings and fixed improvements*** *thereon for a period of..... years from the date hereof.*
Dated this ..... day of .....19.....

SIGNED by the above named)
.....)
as Mortgagor in the presence of:)
Correct for the purposes of the Land Act
.....

Mortgagee/Solicitor for the Mortgagee.

(Emphasis added)

[6] While it is not free from doubt, we proceed on the basis that a mortgage lease is necessary to effect a mortgage over leasehold land notwithstanding that this is not an express requirement in s.99 of the Land Act though, in contrast, it is an express requirement in relation to allotments (see s.100(1)(v)) and hereditary estates (see s.101(1)(iv)). The appellants emphasise that the mortgage lease concerns not only the leasehold but buildings as well. This founds the argument that the Land Court jurisdiction does extend, having regard to s.149(1)(b), to a claim seeking the enforcement of a mortgage lease covering both the leasehold and the buildings. This also founds the argument that in the present matter Scott J was incorrect in concluding, as his Honour did at paragraph [22], that sitting as the Land Court he could not deal with a claim for possession of the building and also was incorrect in saying at paragraph [23] that a dispute between a mortgagor and a mortgagee about the amount owing under the mortgage would have to be dealt with in the Supreme Court.

[7] In the present proceedings, as noted earlier, Westpac sought a declaration that it was lawfully entitled to possession of not only the leasehold but also the building. Scott J held, in effect, at paragraph [22] of his judgment that a notice under s.109 could not issue in relation to a building as it was a chattel, referring to *Cowley v Tourist Services Ha'apai Ltd and Fund Management Ltd* [2001] Tonga LR 183. The order actually made related only to the leasehold. It was an order clearly within the jurisdiction of the Land Court. However the question raised by the appellants concerns the jurisdiction of the Land Court to deal not only with possession of land but also any issues concerning possession of a building erected on the land and any dispute, by way of defence or counterclaim, concerning the total amount owing under a mortgage.

[8] The s.109 notice of 13 June 2013 asserted that the appellants were indebted to Westpac in the sum of $379,202.94 which the appellants dispute. They submit that in circumstances where the amount owing is contested, it is inappropriate to give summary judgment. The appellants submit they had an arguable and bona fide defence. There should have been a trial so the amount owing under the mortgage could be determined. The appellants say that, in particular, Westpac unlawfully charged to the loan account loan administration charges ($32,000), late payment fees

($4667.50), interest charged on interest ($81,027.34) and legal fees ($31,711.62). The total of these amounts is $149,406.46. They submit that they were not "in default of the grossly inflated sum of $379,202.94".

[9] Westpac submits that all that is necessary to satisfy s.109 is that the mortgagor is in default and that the notice informs the mortgagor that the mortgagee intends to take possession of the land. We agree. That is what the section says and there is no basis for implying some further or additional requirement.

[10] As noted earlier, the trial judge made a finding of mixed fact and law that the appellants were in default and, as a matter of fact, the notice of 13 June 2013 said that Westpac intended to take possession of the land, namely lease 4837 expiring on 9 August 2038. It is not a question of whether the appellants were "in default" in relation to the payment of the total amount said by Westpac to be owing but rather whether they were in default under the mortgage. The appellants were in default under the mortgage because, as conceded by senior counsel, they were contractually obliged to make periodic payments and ceased doing so in 2011. This constituted default and the fact that the appellants were in dispute with Westpac about the total amount owing did not relieve them of the obligation to continue to make periodic payments. Different considerations might arise if the ambit of the dispute about the total amount owing involved an assertion by the mortgagor that the entire amount owing had already been paid but the mortgagee contended otherwise. However that is not the factual position arising in this case. Accordingly, the appellants were in default and, in those circumstances, the only condition precedent to taking possession was the service of a notice in conformity with s.109. In this case that condition precedent was satisfied and Westpac was entitled to possession.

[11] The appellants argue that the Land Court impermissibly separated the issue of the amount owing under the mortgage from the issue of whether Westpac should have possession. The amount owing was raised in a defence to the claim for possession and also in support of a counterclaim. The defence that the appellants were entitled to stop making periodic payments because they were in dispute with Westpac and, for that reason, were not in default, is untenable. For the reasons already explained, the appellants were in default. Thus it would have been entirely appropriate for Scott J to make an order for possession in favour of Westpac by the process of summary judgment in the absence of the appellants' counterclaim. His Honour made no formal orders in relation to the counterclaim though it is clear from paragraph [23] of his judgment referred to earlier, that he believed he had no jurisdiction to deal with the counterclaim. In our view, this conclusion is wrong. Thus it is necessary to explain why the Land Court did have jurisdiction to deal with the counterclaim and, indeed, had jurisdiction to deal with Westpac's application for a declaration concerning possession of the building. Our conclusion does not depend on the argument advanced by the appellants based on the terms of the mortgage lease prescribed by the Land Act. Rather, it depends on more fundamental notions concerning the role of courts in resolving controversies between parties to litigation.

[12] A similar question about the jurisdiction of the Federal Court of Australia arose comparatively early in the life of that court. The Federal Court, established by legislation of the Australian Parliament and not the States, had been conferred with

federal jurisdiction under that legislation. The fundamental issue was whether the Federal Court could also exercise jurisdiction in relation to claims based on state law or the common law or equity when considering claims based on federal laws. The answer was yes. Though the answer turned on the construction of the Australian Constitution and the legislation establishing the Federal Court, the rationale for the answer lay in the public interest in having one court whose jurisdiction was lawfully invoked dealing with the entire legal controversy between the parties. That was so even if that controversy contained elements that the court would otherwise not have had jurisdiction to determine if those elements only were raised in proceedings.

[13] This rationale is illustrated by the following observations of Barwick CJ in *Philip Morris Inc v Adam P Brown Male Fashions Ply Ltd* (1981) 148 CLR 457 at 475:

> "It is settled doctrine in Australia that when a court which can exercise federal jurisdiction has its jurisdiction attracted in relation to a matter, that jurisdiction extends to the resolution of the whole matter. This accrued federal jurisdiction is not limited to matters incidental to that aspect of the matter which has, in the first place, attracted federal jurisdiction. It extends, in my opinion, to the resolution of the whole matter between the parties. This accrued jurisdiction carries with it the authority to make such remedial orders as are necessary or convenient for or in consequence of that resolution. For this purpose, the court exercising federal jurisdiction may enforce rights which derive from a non-federal source. This exercise of this jurisdiction, which for want of a better term I shall call 'accrued' jurisdiction, is discretionary and not mandatory, though it will be obligatory to exercise the federal jurisdiction which has been attracted in relation to the matter."

And later at 479 – 480:

> "The substantial matter between the parties was their difference as to the assertion of and attempt to protect the rights claimed to belong to the plaintiffs by reason of the trade marks or the acquired business reputation. The claim to relief under Ch. V of the Act was one endeavour to protect these rights. The claim to equitable relief for passing off was another. The former attracted federal jurisdiction: the latter, not being disparate and independent of the former, was part of the whole matter between the parties and thus within the accrued federal jurisdiction. Thus, it seems to me that the federal jurisdiction attracted by the claim for misleading and deceptive conduct extends to the resolution of the entire matter between the parties, which includes the claim for passing off, not merely as an associated claim but as part of the entirety of the matter between the parties in relation to which federal jurisdiction has been attracted." (at p604).

[14] It is desirable to repeat what the Court of Appeal recently said in *Mortimer v Fe'aomoeata* in AC 2 of 2015 and AC 28 of 2014, 31 March 2015 at [10] and following:

> The exclusion in clause 90 of the Constitution limiting the jurisdiction of the Supreme Court should not be taken to identify the boundaries of the jurisdiction of the Land Court. The Courts can have concurrent jurisdiction. That is clear from the judgment of the Court of Appeal in Niu and Ors v Tapealava AC 15 of 2012, 17 April 2013. That the jurisdiction of the Land Court is wider than the limit on jurisdiction of the Supreme Court was recognised by the Lord Chief Justice in Yuzhen Yang and another v Manoa at [24]. We agree. That being so, it is necessary to consider the ambit of the jurisdiction of the Land Court conferred by s.149(1).
>
> It is clear, in our opinion, that the proper construction of s.149(1)(b) results in the Land Court having jurisdiction to hear and determine disputes affecting any land or any interest in land, claims affecting any land or any interest in land, or questions of title affecting any land or any interest in land. So much is clear from the language used together with the punctuation in the paragraph. The Crown argued in this appeal for a narrower construction of this paragraph effectively confining the jurisdiction it confers to disputes about title. However the language used is clear and the expression "questions of title" is but one of three classes of matters identified in the opening part of s.149(1)(b), the other two being disputes and claims. What is necessary is that each of these classes must be "affecting any land or interest in land". If that nexus or link exists then jurisdiction is conferred. If it is accepted, as it should be, that the Land Court and the Supreme Court can have concurrent jurisdiction then no violence is done to the system of administration of justice in the Kingdom or the system of land law to treat the Land Court as having a wide rather than narrow jurisdiction to the extent authorised by s.149 of the Land Act and the Act more generally. As a matter of general principle statutes conferring jurisdiction on a Court should not be narrowly construed: see, for example, The Owners of the Ship "Shin Kobe Maru" v Empire Shipping Company Inc (1994) 181 CLR 404 at 420 – 421 and Patrick Stevedores Operations No 2 Ply Ltd v Maritime Union of Australia (1998) 195 CLR 1 at [112].

[15] Thus the question becomes, in this case, whether, if the jurisdiction of the Land Court was lawfully invoked by an application for a declaration about the possession of land (as it plainly was), the Land Court could deal with other aspects of the entire controversy between the parties including the possession of the dwelling house and the determination of the amounts payable under the mortgage. The language of clause 90 of the Constitution and of s.149 of the Land Act do not, expressly or by necessary implication, restrict the nature of the controversy the Land Court can determine if the jurisdiction conferred on it is lawfully invoked. The Land Court exercises the judicial power of the Kingdom of Tonga. As observed in the quoted passage above from *Mortimer*, statutes conferring jurisdiction on courts should not be narrowly construed. It is obviously not in the public interest, indeed it is contrary to the public interest, for Tongan citizens, others or the Kingdom itself to be put to what is often the considerable expense and inconvenience (not to mention delay) of having to bring

proceedings in more than one court to resolve all issues between parties in legal dispute. It is in the interests of the administration of justice to avoid this outcome.

[16] In our opinion, if the jurisdiction of the Land Court is lawfully invoked by a party initiating proceedings against another party, then that court has jurisdiction to resolve the entire legal controversy between those parties, at least if the legal controversy concerns land and matters incidental or related to that land. In the present case it is unnecessary to define the boundaries of the jurisdiction of the Land Court because the dispute about the possession of the dwelling and the amount owing under the mortgage were closely related to the dispute about the possession of the land. There was a clear nexus between them.

[17] Different considerations arise in relation to the Supreme Court where s.90 of the Constitution expressly limits the jurisdiction of the Supreme Court by excising from its jurisdiction cases concerning title to land. But that is not an issue arising in these proceedings.

[18] Accordingly, the Land Court should have determined the application before it by Westpac insofar as it raised issues about possession of the dwelling and should also have dealt with the counterclaim of the appellants. This conclusion is not inconsistent with the judgment of the Court of Appeal in *Westpac Bank of Tonga v Fonua and Anor*, 9 April 2014 in AC 6/13 as that judgment concerned an application seeking only possession of the building (see paragraph [11] of the judgment).

[19] In these circumstances it may have been inappropriate for the Land Court to have given summary judgment on Westpac's claim concerning possession of the land without also dealing with the appellants' counterclaim. We propose to remit the matter to the Land Court to deal with Westpac's claim concerning possession of the building and the appellants' counterclaim if the parties wish to pursue those matters.

[20] However, in the circumstances of this case including the protracted litigation between the parties over a number of years, it is not in the interests of justice to interfere with the order of the Land Court concerning possession of the land. In the future, it will be a matter for the trial judge to determine how, procedurally, claims of the type raised by Westpac's application and the appellants' counterclaim should be progressed. Cases may arise where a counterclaim is brought for the sole or principal purpose of delaying the mortgagee gaining possession in a clear case of default. It does not follow from these reasons that in such a situation the trial judge would necessarily have to deal, by way of order, with the entire controversy before addressing aspects of it. However procedural decisions of this type will be within the discretion the trial judge having regard to, amongst other things, the applicable rules of court.

[21] In the result, the Court orders:

1. The appeal is dismissed insofar as the appellants seek to set aside the orders made by the Land Court on 6 March 2015;
2. The matter is remitted to the Land Court for determination of issues outstanding in the application of Westpac Bank of Tonga and the counterclaim of the appellants.
3. Each party bear their own costs of the appeal

Australia and New Zealand Banking Group Ltd v Kavaefiafi anor

Court of Appeal, Nuku'alofa
Moore, Blanchard, Hansen, and Tupou JJ
AC 8 and 10 /2015

10 September 2015; 16 September 2015

Civil procedure – appeal against obiter statement - if the bank was unable to resolve the terms of repayment it could still seek to enforce the mortgage in the Land Court – appeal dismissed

In May 2004 Australia and New Zealand Banking Group Ltd made an advance of $64,015 to one of its employees, Mr Kavaefiafi and his wife, "the borrowers". The loan was for the purpose of enabling them to build a house on a town allotment. The borrowers defaulted in their obligation to make the payments required under the loan agreement. The bank commenced a proceeding in the Supreme Court seeking judgment for $109,372 plus accruing interest. The appeal was confined to one issue, on which the parties were in agreement at the end of the hearing. It was alleged by the borrowers in their defence that because of their personal circumstances at the time the loan was made the transaction was unconscionable; that the bank knew very well when the loan was made that the borrowers would be unable to meet their monthly repayment obligations. On 13 March 2015, the Supreme Court found that the borrowers were at a special disadvantage vis-a-vis the bank and that the bank knew this. He also found that the bank had not discharged the onus of proving the fairness of the transaction. The Court made an order entering judgment for the bank for the sum originally lent to the borrowers together with interest from judgment until satisfaction of that debt. This order had the effect of reducing the principal amount that the bank had claimed and disallowing its claim for unpaid interest prior to the date of the judgment – the order said nothing about the mortgage security.

Held:

1. The bank was not attempting to challenge the Judge's order. Rather, it was concerned about the comment in which he appeared to say that if terms for repayment of the TOP$64,015 could not be negotiated the bank could not enforce its mortgage and would have to resort to other means to recover that amount. As that was an obiter remark and not part of the order of the Court, it was not appealable. The court appreciated, however, why the bank sought to bring the matter to this Court.

2. If the bank was unable to resolve the terms of repayment it could still seek to enforce the mortgage in the Land Court. No question of liability could be in issue in that Court as it was determined that the borrowers had indebtedness to the bank of TOP$64,015.
3. Because there was no appealable issue, the bank's appeal was dismissed. There was no order for costs in relation to either of the appeals.

Cases considered:
Elkofairi v Permanent Trustee Co. Ltd [2002] NSWCA 413
Maguire v Makaronis (1996) 188 CLR 449

Counsel for the appellant	:	Mrs Tupou
Counsel for the respondents	:	Mr Pouono

Judgment

[1] In May 2004 Australia and New Zealand Banking Group Ltd made an advance of TOP$64,015 to one of its employees, Mr. Kavaefiafi and his wife. We will call them "the borrowers". The loan was for the purpose of enabling them to build a house on a town allotment.

[2] As the appeal is now confined to one issue, on which the parties were in agreement at the end of the hearing before us, it is unnecessary to describe the terms of the loan or how it came about that the borrowers defaulted in their obligation to make the payments required under the loan agreement.

[3] The bank commenced a proceeding in the Supreme Court seeking judgment for $109,372 plus accruing interest.

[4] It was alleged by the borrowers in their defence that because of their personal circumstances at the time the loan was made the transaction was unconscionable; that the bank knew very well when the loan was made that the borrowers would be unable to meet their monthly repayment obligations.

[5] In a judgment delivered on 13 March 2015 Scott J found that the borrowers were at a special disadvantage vis-a-vis the bank and that the bank knew this. He also found that the bank had not discharged the onus of proving the fairness of the transaction.

[6] Then the Judge said:

> [25] The final question is: What follows from the conclusion that it would be inequitable to allow the mortgage contract to be enforced? As I see it, a distinction must be drawn between the money advanced and the security and its terms as required by the Bank. The finding that the bank cannot take advantage of the mortgage agreement does not mean that the capital sum advanced need not be repaid. The result therefore is that there will be judgment for the bank for the sum advanced, $64,015.00. If satisfactory terms for the repayment of this sum cannot be negotiated the bank will

have to resort to whatever means it may have to enforce repayment apart from those afforded to it by the mortgage.

[7] Scott J made an order entering judgment for the bank for the sum originally lent to the borrowers together with interest from judgment until satisfaction of that debt. This order had the effect of reducing the principal amount that the bank had claimed and disallowing its claim for unpaid interest prior to the date of the judgment. It will be noted that despite what was said in para [25] of the judgment, the order said nothing about the mortgage security.

[8] Both sides then appealed but at the commencement of the hearing the borrowers withdrew their appeal and by consent we made an order dismissing it. It had been made clear by the bank that it was not seeking to appeal against the order limiting the borrowers' liability to TOP$64,015.

[9] That left the bank's appeal but it had also became apparent that the bank was not attempting to challenge the Judge's order. Rather, it was concerned about the comment in which he appeared to say that if terms for repayment of the TOP$64,015 could not be negotiated the bank could not enforce its mortgage and would have to resort to other means to recover that amount.

[10] But, as that was an obiter remark and not part of the order of the Court, it was not appealable. We readily appreciate, however, why the bank has sought to bring the matter to this Court.

[11] For the bank, Mrs. Tupou submitted that the question of enforcement of the mortgage was never before the Supreme Court as the bank had simply sued the borrowers for the debt that it claimed was owing under the loan agreement. It had not yet sought to enforce the security.

[12] We accept that submission. If the bank is unable to resolve the terms of repayment it can still seek to enforce the mortgage in the Land Court. No question of liability can now be in issue in that Court as it has been determined that the borrowers have an indebtedness to the bank of TOP$64,015.

[13] The position that has been reached in the case is now broadly consistent with the view taken in Australian courts that a mortgage is not to be set aside as an unconscientious transaction unless the borrower accounts to the lender for any retained (or "unwarranted") benefit it has received: see *Maguire v Makaronis* (1996) 188 CLR 449 at 476 – 7 and *Elkofairi v Permanent Trustee Co. Ltd* [2002] NSWCA 413 at [80] and [98]. In this case the unwarranted benefit was the money the borrowers were able to use to build themselves a home.

[14] Because there was no appealable issue before us, the bank's appeal must be dismissed. There will be no order for costs in relation to either of the appeals.

Lavulavu v Latu anor

Court of Appeal, Nuku'alofa
Moore, Blanchard, Hansen, and Tupou JJ
AC 11/2015

11 September 2015; 16 September 2015

Constitutional law – election petition seeking declaration that election void – defence sought jury trial – denied because petition neither criminal nor civil in nature

The general elections were held on 27 November 2014. The appellant, 'Etuate Sungalu Lavulavu, was elected as the people's representative for the Electoral District of Vava'u 16. On 15 December 2014 the respondents filed an election petition seeking a declaration that the election of the appellant was void upon the grounds of bribery and corrupt or illegal practices in connection with his election contrary to the Electoral Act 1989. The appellant filed a defence to the election petition on 23 January 2015 denying all the allegations of bribery and corrupt or illegal practices. He also requested that the trial of the election petition be held before a jury. The Chief Justice made a ruling on 20 April 2015 deciding, inter alia, that the petition will be heard by a Judge of the Supreme Court sitting without a jury. The appellants appealed against that ruling.

Held:

1. The substantive question to be decided was whether a party to an election petition had the right to elect to be tried by a jury. It was an important question and this judgment could well influence the course of future election petitions. For this reason the court granted leave to appeal.
2. An election petition was brought under s 26 of the Electoral Act by filing with the Supreme Court. The petition may arise from a complaint of an election offence that may be criminal in nature, like the present alleging bribery, but the petition sought the voiding of the election and did not charge the appellant with any criminal offence. The standard of proof required of a petitioner was the civil rather than the criminal standard.
3. The Court of Appeal agreed with the Chief Justice's statement that electoral petitions were sui generis being neither civil nor criminal in nature. In nature they were not concerned with enforcement of individual rights but with the maintenance of free and fair elections which were the cornerstone of democratic society.

4. The appeal was dismissed with costs to the respondents, to be taxed if not agreed.

Cases considered:

Paasi v Sanft Civil Case No. 5 of 1987

Tomifa Fainga'a Paea v Samiu Kuita Vaipulu CV 91/2014

Statutes considered:

Constitution of Tonga (Cap 2)

Electoral Act 1989

Counsel for the appellant	:	Mr O Pouono
Counsel for the respondents	:	Mr WC Edwards SC

Judgment

[1] This is an appeal against a ruling of the Lord Chief Justice on 20 April 2015 denying trial by jury to the appellant in an election petition.

[2] The general elections were held on 27 November 2014. The appellant, 'Etuate Sungalu Lavulavu, was elected as the people's representative for the Electoral District of Vava'u 16. On 15 December 2014 the respondents filed an election petition seeking a declaration that the election of the appellant is void upon the grounds of bribery and corrupt or illegal practices in connection with his election contrary to ss.21 and 24 of the Electoral Act 1989.

[3] The appellant filed a defence to the election petition on 23 January 2015 denying all the allegations of bribery and corrupt or illegal practices. He also requested that the trial of the election petition be held before a jury.

[4] After several chambers hearings for directions, the Lord Chief Justice on 27 March 2015 directed that counsel were to make submissions on whether the defendant (appellant) has the right to elect for trial by jury under Clause 99 of the Constitution (or any other statutory provision). After a hearing on 2 April 2015, the Chief Justice made his ruling on 20 April 2015 deciding, inter alia, that the petition will be heard by a Judge of the Supreme Court sitting without a jury. This appeal is against that ruling.

[5] The notice of appeal was filed on 1 May 2015. On 4 May 2015 the President of the Court of Appeal (Chief Justice) directed that there was no appeal as of right from the decision of 20 April 2015 and that the appellant was required to apply for leave under s.10(1)(b) of the Court of Appeal Act 1990.

[6] Application for leave was filed on 12 May 2015. The Chief Justice referred this to Tupou J who on 13 May 2015 directed that the application for leave be referred to the Court of Appeal under Section 10(1)(b). This was confirmed by Tupou J in his minute dated 19 May 2015 where he directed, inter alia, that:

- in the event of leave being granted, the parties are to prepare for the hearing of the substantive issue in the September session, and
- in preparation for such hearing, the parties are required to file a reply and any other document on or before 24 August 2015.

[7] In a reply filed on 10 September 2015 the respondents indicated that they have no objection to the leave application.

[8] The substantive question to be decided is whether a party to an election petition has the right to elect to be tried by a jury. It is an important question and this judgment could well influence the course of future election petitions. For this reason we grant leave to appeal.

[9] The respondents filed a reply and submissions on 10 September and extensive submissions were filed by Mr. Pouono for the appellant late in the afternoon before the hearing. We have considered both. At the hearing Mr. Pouono said that he would not go through the submissions in full but wished to raise three issues. We took these to be the central issues raised in the grounds for appeal and that was accepted by Mr. Edwards for the respondents. These are:-

(i) That sections 19 to 22 of the Electoral Act create election offences which provide punishment of a fine or imprisonment or both. They are criminal offences which entitles the accused to elect for trial by jury under Clause 99 of the Constitution. The election petition involves allegations of bribery and corrupt or illegal practices that by analogy entitles the appellant to elect for trial by jury under Clause 99.

(ii) That the election petition involves a decision on a question of fact. Clause 99 allows a party where a question of fact is raised in any civil action before the Supreme Court to claim the right to trial by jury; "and the law of trial by jury shall never be repealed". An election petition is a civil action entitling the appellant to elect to have a trial by jury.

(iii) Trial by jury of an election petition is not new and this was allowed in *Paasi v Sanft* Civil Case No. 5 of 1987 where the Supreme Court in the exercise of its inherent jurisdiction allowed the petition to be tried by a jury.

[10] An election petition is brought under s.26 of the Electoral Act by filing with the Supreme Court. The petition may arise from a complaint of an election offence that may be criminal in nature, like the present alleging bribery, but the petition seeks the voiding of the election and does not charge the appellant with any criminal offence. The standard of proof required of a petitioner is the civil rather than the criminal standard. Mr. Pouono conceded that the criminal offences under ss.19 to 22 of the Electoral Act were referred to by way of analogy and that he could not say that election petitions are criminal prosecutions attracting the election of jury trial under Clause 99 of the Constitution. We therefore reject the first ground of appeal.

[11] The second ground addressed by Mr. Pouono is really the crux of the appeal, involving an interpretation of provisions of the Constitution, the Supreme Court Act and Rules and the Electoral Act. Mr. Pouono submitted that Clause 99 of the Constitution allows the appellant to elect for trial by jury because it involves a question of fact in a civil action. Clause 99 states:

> "whenever any issue of fact is raised in any civil action triable in the Supreme Court any party to such action may claim the right to be tried by jury; and the law of trial by jury shall never be repealed".

[12] Furthermore, Mr. Pouono said that Order 25 Rule 3 of the Supreme Court Rules prescribes that:-

> "an action shall be tried by a Judge sitting with a jury if any party so requests".

He therefore submitted that the appellant could elect to be tried by a jury.

[13] Mention was also made by counsel of clauses 11 and 100 of the Constitution which refer to trial by jury. But these references do not assist the appellant's case as the former concerns claims for large amounts, and the latter claims for compensation, neither of which is claimable by an election petition.

[14] The nub of the appellant's argument was that clause 99 of the Constitution gives the right to trial by jury "whenever any issue of fact is raised in any **civil action**". Section 13 (1) of the Supreme Court Act provides that "**civil actions** shall be commenced by a writ of summons ……". The Supreme Court Rules 2007, Order 25 Rule 3 also provide that an **action** shall be tried by a judge and jury, and the word **"action"** is defined in Order 3 Rule 2 to mean any civil proceeding commenced by a writ. The present petition was accompanied by a writ.

[15] Responding to this argument, in para [19] of his ruling, the Chief Justice stated:-

> "Electoral petitions are sui generis being neither civil nor criminal in nature. .... In nature they are not concerned with enforcement of individual rights but with the maintenance of free and fair elections which are the cornerstone of democratic society."

We agree.

[16] Para [20] of the ruling emphasises the special nature of electoral petitions which is reflected in the procedures that apply to them:

(i) Civil actions are commenced in the Supreme Court by way of a writ. Election petitions are commenced by petition in a form to be prescribed, but not yet promulgated.
(ii) The strict time limits for the filing of an election petition do not apply to a civil action.
(iii) There is no mention of the right to elect trial by jury of an election petition in the Electoral Act or any other statute.

(iv) The powers given to the Court in relation to a petition are incongruous with the right to elect trial by jury.

[17] We are not aware why the appellant chose to file a writ with his petition as there is no such requirement in the Electoral Act. The filing of a writ does not create an action if in fact the petition is not a form of action. As it happened, we were shown a copy of an election petition from the same election in 2014 in the case of *Tomifa Fainga'a Paea v Samiu Kuita Vaipulu* CV 91/2014 where the election petition was filed without a writ, which was proper.

[18] Para [24] of the ruling of the Chief Justice described the remedies that are available to the Court upon hearing an election petition, including directing a recount or scrutiny of votes, declaring the election of a candidate to be void and unseating him from the Legislative Assembly, or striking off from the number of votes received by a candidate one vote for every person who voted and is proved to have been bribed or threatened. Plainly none of these remedies is of a kind that can be granted by a jury under the Constitution or any other legislative provision.

[19] We agree with the detailed and comprehensive analysis made by the Chief Justice of the provisions of the Constitution, the Supreme Court Act and Rules, and the Electoral Act as they apply to the right to elect a trial by jury in a civil action. His analysis demonstrates that a jury trial may well be inappropriate and unworkable in an election petition.

[20] In para [27] of his ruling the Chief Justice nevertheless assumed that the Supreme Court might possess an inherent power to order a jury trial but said that he would not do so in this case. We think it doubtful that the Court has such a power because it would appear to be contradictory of the statutory provisions. And, in any event, we agree that this case of some apparent complexity involving more than 60 witnesses, is much better heard by a judge alone without a jury.

[21] The final point made by Mr. Pouono is that it is not novel that an election petition should be tried by a jury in Tonga. This happened in 1987 in the case *Paasi v Sanft* CV 5/1987. But that was prior to the Electoral Act. Mr. Edwards was counsel for the petitioner in that case and evidently agreed to the trial by jury. He no longer accepts that position. That there was an order for a jury trial in *Paasi* under pre-Electoral Act processes does not mean that the position remains the same. In any case, it would appear that both parties in *Paasi* agreed to have the election petition decided by a jury and that the Judge in that case did not go into the question.

[22] The appeal is dismissed with costs to the respondents, to be taxed if not agreed.

Foliaki anor v R

Court of Appeal, Nuku'alofa
Moore, Blanchard, and Hansen JJ
AC 4 & 16/2015

11 September 2015; 16 September 2015

Sentencing appeal – early guilty plea and must have regard to totality of offending – appeal allowed and sentences reduced

On 7 November 2008 the appellants and three others were sentenced to imprisonment for terms ranging from 8 to 18 years. They had pleaded guilty to charges arising, in the main, from two robberies that had taken place earlier in 2008. The appellants, who were still serving their sentences, applied for leave to appeal out of time. Mr Foliaki was granted leave and Mr Latu's application was declined as he had three previous applications for leave. Mr Foliaki had been sentenced to 15 years imprisonment on the two robbery charges and concurrent sentences of 5 and 2 years on the housebreaking and theft charges. A suspended sentence of 18 months imposed in 2006 was activated. He was accordingly serving a total of 16 ½ years imprisonment. Mr Latu also faced charges of conspiracy and abetment of armed robbery. He too was sentenced to 15 years imprisonment on those charges. He was also sentenced to a concurrent term of two years on an unrelated housebreaking charge. An earlier suspended sentence of 1 year on drug charges was invoked. His total sentence was therefore 16 years imprisonment. The appeals were heard sequentially and were dealt with in a single judgment.

Held:

1. The court acknowledged the difficulties facing the judge who was striving for consistency in sentencing co-offenders whose roles and overall culpability varied significantly. He sought to achieve that by adopting 15 years as the lead sentence for the most serious offending, the armed robbery in which all offenders participated. However he failed to give sufficient recognition and make appropriate adjustments in some cases for the totality of the offending and the credit to be given for early guilty pleas.
2. Mr Foliaki's appeal succeeded. The sentences of 15 years on the counts of conspiracy to commit armed robbery and abetment of armed robbery were quashed. In their place sentences of 7 ½ years imprisonment were imposed. The total sentence he was required to serve was amended accordingly to 9 years.

3. Mr Latu's application for leave to appeal was granted and his appeal allowed. The sentences imposed on the charges of conspiracy to commit armed robbery and abetment of armed robbery were quashed and sentences of 7 ½ years imprisonment substituted. The total sentence he was required to serve was amended to 8 ½ years imprisonment.

Cases considered:
Fifita v R [2000] Tonga LR 47
Malafu v R [2002] Tonga LR 36

Statute considered:
Criminal Offences Act (Cap 18)

Counsel for the appellants : Mr 'O Pouono
Counsel for the respondent : Mr 'A Kefu

Judgment

Introduction

[1] On 7 November 2008 the appellants and three others were sentenced to imprisonment by Ford CJ for terms ranging from 8 to 18 years. They had pleaded guilty to charges arising, in the main, from two robberies that had taken place earlier in 2008. The appellants, who are still serving their sentences, have applied for leave to appeal out of time. Mr. Foliaki was granted leave by Tupou J. Mr. Latu's application was declined as he had three previous applications for leave. The refusal to grant leave on the last two occasions was the subject of an unsuccessful appeal to this court. (AC 31 of 2014 & AC 3 of 2015).

[2] The appeals were heard sequentially. As a great deal of the background is common to both it is convenient that they are dealt with in a single judgment.

The facts

[3] The first robbery took place on 20 March 2008. Neither of the appellants was involved. It was carried out by two associates, Samuela 'Alatini and 'Opeti Fekau. They followed the victim's vehicle until it stopped at a shop. Both were disguised. 'Alatini went to the driver's side, threw the victim out of the vehicle and got into the driver's seat. Fekau got into the front passenger's seat. They drove off with a bag containing cash of $6,000, recharge cards to the value of $1,000 and a digital camera valued at $400 which had been on the back seat.

[4] The second robbery took place on 26 May 2008. Samuela 'Alatini and 'Opeti Fekau were again involved together with the appellants and Samuela 'Alatini's brother, Tevita. They rented a car. They changed its appearance the day before the robbery by tinting the windows, changing the licence plate and covering the back window. The following day all except Tevita 'Alatini went in the car and parked near a Westpac Bank at Kolofo'ou. They saw two people get out of a business vehicle and

approach the bank. One, a girl, was holding a handbag. Samuela 'Alatini and 'Opeti Fekau got out of the rental car and accosted the two. Both were disguised. Each carried a shotgun. Fekau attempted to wrench the handbag from the girl. She resisted. A colleague of the victims got out of their vehicle to try and assist them. Samuela 'Alatini fired at him hitting him in the thigh. The girl then let go of the bag. 'Alatini and Fekau rejoined the appellants who had remained sitting in the car. They drove off with the bag which contained approximately $3,000 and a mobile phone worth $375. They met up with Tevita 'Alatini and removed the disguise from the car, which was returned the following day by Tevita 'Alatini. They divided the proceeds of the robbery between them.

[5] All five admitted the offending when interviewed and pleaded guilty after a voir dire which found the statements of Mr. Latu and Tevita 'Alatini to be admissible.

The sentences

Mr. Foliaki

[6] Mr. Foliaki pleaded guilty to charges of conspiracy to commit armed robbery and abetment of armed robbery. They carry a maximum sentence of 20 years imprisonment, the same as armed robbery itself: sections 15 & 154(3) Criminal Offences Act (Cap 18). He was also sentenced on charges of housebreaking and theft arising out of entry into a house on 23 May 2008, a few days before the robbery.

[7] Mr. Foliaki, was sentenced to 15 years imprisonment on the two robbery charges and concurrent sentences of 5 and 2 years on the housebreaking and theft charges. A suspended sentence of 18 months imposed in 2006 was activated. He is accordingly serving a total of 16 ½ years imprisonment.

Mr. Latu

[8] Mr. Latu also faced charges of conspiracy and abetment of armed robbery. He too was sentenced to 15 years imprisonment on those charges. He was also sentenced to a concurrent term of two years on an unrelated housebreaking charge. An earlier suspended sentence of 1 year on drug charges was invoked. His total sentence is therefore 16 years imprisonment.

Tevita 'Alatini

[9] Like the appellants, Tevita 'Alatini faced charges of conspiracy and abetment of armed robbery. He was also sentenced on a charge of housebreaking of which he had been found guilty. Recognising his lesser role in the robbery, Ford CJ sentenced him to 8 years imprisonment with a sentence of 2 years on the housebreaking charge to be served concurrently. 4 years of the sentence was suspended for 3 years. His sentence was accordingly reduced to 4 years.

Samuela 'Alatini

[10] Samuela 'Alatini was sentenced on a single count of robbery in relation to the March robbery and a total of 5 charges in relation to the armed robbery. They included charges of possession of firearms and ammunition and of causing grievous bodily harm. Recognising his leading role in the robbery – the judge described him as the ringleader – and identifying a starting point of 15 years for armed robbery, the judge said that were it not for his guilty pleas he would have sentenced him to 18 years imprisonment. After credit for his guilty pleas he was sentenced to 15 years on the most serious charges with lesser concurrent sentences on the remainder. Unfortunately for Mr. 'Alatini he also had a suspended sentence (of 3 years) hanging over his head. His total sentence was thereby restored to 18 years.

'Opeti Fekau

[11] Mr. Fekau was sentenced on one count of abetment of robbery in relation to the March robbery and charges of armed robbery, conspiracy to commit armed robbery and unlawful possession of a firearm in relation to the second robbery. Unlike the others he had no previous convictions. From a starting point of 15 years, the sentencing judge deducted 2 years to take account of Mr. Fekau's guilty pleas, imposing sentences of 13 years on the armed robbery charges with concurrent sentences of 5 years on the lesser firearms and robbery charges. He suspended the last 4 years for 3 years, reducing the time Mr. Fekau would be required to serve to 9 years.

Comment

[12] Before considering the individual appeals of Mr. Foliaki and Mr. Latu, it is convenient to make some general observations on the sentences passed on the offenders. We acknowledge the difficulties facing the judge who was striving for consistency in sentencing co-offenders whose roles and overall culpability varied significantly. He sought to achieve that by adopting 15 years as the lead sentence for the most serious offending, the armed robbery in which all offenders participated. It appears however that he failed to give sufficient recognition and make appropriate adjustments in some cases for the totality of the offending and the credit to be given for early guilty pleas.

[13] It is, for example, anomalous that the starting point adopted for each of the appellants should be the same as for Samuela 'Alatini and 'Opeti Fekau who were the two who carried out the March robbery and had the leading role in the armed robbery. Even allowing for the housebreaking and (in Mr. Foliaki's case) theft charges on which they were also being sentenced, the overall criminality of the appellants was plainly a great deal less than that of Samuela 'Alatini and 'Opeti Fekau.

[14] The judge recognised that all offenders were entitled to a discount for what the Crown acknowledges were early guilty pleas. Samuela 'Alatini's was recognised by reducing the end sentence (after allowing for aggravating factors particular to him) from 18 years to 15 years. 'Opeti Fekau was given a credit of 2 years to reduce his sentence to 13 years. But neither of the appellants received any credit in fact, despite

the judge's acknowledgement that they were entitled to it. Their sentences remained at the starting point of 15 years.

[15] In the light of this disparity, it is necessary to revisit the sentencing of both appellants. For that purpose we invited submissions from counsel as to what would be an appropriate starting point and what credit should be given for the guilty pleas.

[16] Mr. Kefu had very helpfully provided us with a schedule of decisions in this court and the Supreme Court on sentences for robbery and armed robbery since 1999 when the maximum sentence for armed robbery was increased to 20 years. As sentences are always fact-specific, caution is required before taking too much from sentences in other cases. The decisions to which we were referred, however, including decisions of this Court (e.g. *Fifita v R* [2000] Tonga LR 47, *Malafu v R* [2002] Tonga LR 36) show that the starting point of 15 years was a great deal higher than has prevailed over that period. They are consistent with Mr. Kefu's submission that in a case such as the present a starting point of 10 years would be within the appropriate range.

[17] The armed robbery had a number of aggravating features including the level of premeditation as evidenced by the elaborate preparations made and the use of disguises; the targeting of vulnerable victims; the deployment of firearms and the actual violence inflicted. In our judgment they justify a starting point at the level suggested by Mr. Kefu.

[18] Counsel were agreed that a credit of up to 33% could appropriately be given for a guilty plea. We have no reason to question a discount of that order for an early guilty plea particularly if there is co-operation with the police and indications of genuine remorse.

Mr. Foliaki's appeal

[19] Mr. Foliaki participated fully in the planning, preparation and execution of the robbery. His overall culpability may be assessed as less than that of Samuela 'Alatini and 'Opeti Fekau (leaving aside the discharge of the firearm, a significantly aggravating feature of 'Alatini's offending), though not a great deal less. In our view a starting point of 9 years would appropriately reflect his offending. We must, however, have regard to the charges of housebreaking and theft. If the starting point is restored to 10 years, we consider the totality of his offending is appropriately captured.

[20] As we have said, all offenders entered early guilty pleas, not at the earliest opportunity it seems, but early enough to attract a generous discount. It appears also that there was full co-operation with the police. Mr. Foliaki made a full confession. He also pleaded guilty to the earlier charges. In the circumstances we consider or discount of 25% or 2 ½ years is warranted.

[21] That would reduce Mr. Foliaki's sentence to 7 ½ years. The suspended sentence will increase the time he is required to serve to 9 years.

Mr. Latu's appeal

[22] Mr. Latu sought leave to appeal out of time on the ground that he had recently married. That was clearly an insufficient reason to grant leave. However, the successful appeal of Mr. Foliaki and the implications it has for Mr. Latu's sentence plainly require that leave is granted.

[23] Mr. Latu's position does not differ materially from Mr. Foliaki's. His sentence must also reflect his housebreaking offence. The totality of his offending is broadly equivalent to Mr. Foliaki's. He also is entitled to receive a generous discount for his guilty plea. We conclude that his sentence on the robbery charges should also be reduced to 7 ½ years. His suspended sentence will increase the total time he is required to serve to 8 ½ years.

Result

[24] Mr. Foliaki's appeal succeeds. The sentences of 15 years on the counts of conspiracy to commit armed robbery and abetment of armed robbery are quashed. In their place we impose sentences of 7 ½ years imprisonment. The total sentence he is required to serve is amended accordingly to 9 years.

[25] Mr. Latu's application for leave to appeal is granted and his appeal allowed. The sentences imposed on the charges of conspiracy to commit armed robbery and abetment of armed robbery are quashed and sentences of 7 ½ years imprisonment substituted. The total sentence he is required to serve is amended to 8 ½ years imprisonment.

PSA anor v Tu'ivakano anor

Court of Appeal, Nuku'alofa
Moore, Blanchard, Hansen, and Tupou JJ
AC 5/2015

14 September 2015; 16 September 2015

Civil procedure – removal of proceedings from Magistrate's Court to Supreme Court – Supreme Court had jurisdiction to make order – significant legal question with high political interest - in interests of administration of justice to remove proceedings

On 6 March 2015 the Supreme Court dismissed an application for an order to remove proceedings in the Magistrate's Court to the Supreme Court or, alternatively, to stay those proceedings. The appellants sought leave to appeal (or an appeal). The status of the orders made was unclear. If the orders were interlocutory then leave would be necessary; if not the appellants could appeal as of right. The proceedings in the Magistrate's Court were defamation proceedings commenced in May 2014. The defamation alleged by each of the respondents related to the disbursement of significant aid funds paid to the Kingdom of Tonga by the People's Republic of China. As alleged, the amount involved was US$25,450,000 that the Kingdom of Tonga paid to the Friendly Islands Satellite Communications Limited trading as Tongasat. The appellants took the position that the payment of these funds to Tongasat was unlawful. The appellants would defend the proceedings on, inter alia, the ground of justification. That defence was likely to raise the question of whether the payment of the funds was illegal.

Held:

1. The Court adopted the reasoning in *Bienstein v Bienstein* [2003] HCA 7 and determined that the dismissal of the removal application did not determine finally the rights of the parties. Accordingly, it was necessary for the appellants to establish why leave to appeal should be granted.
2. There was no provision which expressly conferred power on the Supreme Court to make an order removing a proceeding from the Magistrate's Court or staying proceedings in that court. However, section 5(1) of the Supreme Court Act declared that the powers of the Supreme Court should include all the powers for the time being vested in or capable of being exercised by the High Court of Justice in England and Wales. Accordingly, the Court was satisfied that the Supreme Court in Tonga did have power to make an order removing the proceedings from the Magistrate's Court to the

Supreme Court. The Judge was in error in concluding he did not have the power to do so. This power would be rarely and sparingly used.

3. The jurisdictional question concerning removal was an important legal question that arose in proceedings that appeared to relate to an incident or incidents of high political controversy concerning the payment of significant funds granted to the Kingdom of Tonga by the People's Republic of China. It was appropriate that leave to appeal be given. Leave was granted.

4. It was in the interests of the administration of justice to remove the defamation proceedings from the Magistrate's Court to the Supreme Court to enable the Supreme Court to deal with the issue about the lawfulness of a payment of US$25,450,000 by the Kingdom of Tonga to Tongasat. It will be a matter for the Supreme Court to case manage both the defamation proceedings and CV 48 of 2015 (and, if relevant, other proceedings in the Supreme Court) and, as part of that process, determine when and how the legal issue concerning the alleged unlawfulness of the payment was determined. It would also be a matter for the Supreme Court to make such procedural orders and directions as necessary or desirable to constitute the defamation proceedings in the Supreme Court in a way conformable with the Supreme Court Rules.

5. The Court ordered that:

   i. Proceedings Case No 87 of 2014 in the Magistrate's Court be removed to the Supreme Court.

   ii. Proceedings Case No 95 of 2014 in the Magistrate's Court was removed to the Supreme Court.

   iii. The respondents to the application for leave to appeal and the appeal pay the applicants/appellants the costs of the application and of the appeal as agreed or taxed.

Cases considered:

Bienstein v Bienstein [2003] HCA 7

Chaplin v Lotus (Court of Appeal, Bingham MR, Rose and Waite LJJ, unreported 17 December 1993)

O'Toole v Charles David Pty Ltd (1990) 96 ALR 1

Statutes considered:

County Courts Act 1984 (UK)

Crimes and Courts Act 2013 (UK)

Supreme Court Act (Cap 10)

Counsel for the appellants	:	Dr Harrison QC SC
Counsel for the respondents	:	Mr Stanton SC and Mr Edwards

Judgment

[1] This is an application for leave to appeal (or an appeal) against a judgment of Scott J of 6 March 2015. In that judgment Scott J dismissed an application for an order removing to the Supreme Court proceedings then on foot in the Magistrate's Court or, alternatively, to stay those proceedings. Generally we will refer in these reasons to the Public Service Association Inc (Tonga PSA) and Mele 'Amanaki as the appellants and these proceedings as the appeal. The proceedings in the Magistrate's Court were defamation proceedings brought by Noble Tu'ivakano and William Clive Edwards (collectively the respondents) against the appellants.

[2] The reason why the appellants both applied for leave to appeal and appealed is that the status of the orders made by Scott J is unclear. If the orders were interlocutory then leave would be necessary; if not the appellants could appeal as of right. In *Bienstein v Bienstein* [2003] HCA 7 the High Court of Australia had to determine whether an order dismissing an application to remove proceedings to that Court under s.40 the Judiciary Act 1903 (Cth) from another court was interlocutory or not. The Court determined, for reasons given at paras [23] to [29], that the order was interlocutory and leave to appeal was necessary. We agree with those reasons and adopt them. The substance of those reasons was that the dismissal of the removal application did not determine finally the rights of the parties. Accordingly, it is necessary in these proceedings for the appellants to establish why leave to appeal should be granted.

[3] However, we will address the arguments advanced by the parties on the appeal before returning to the question of leave. Scott J appears to have determined the removal or stay application on three grounds. In the order in which those grounds were addressed in the reasons, with extreme brevity, the first was that the application was procedurally irregular in that it was not an application in proceedings already commenced by writ in the Supreme Court or, perhaps, that the wrong form of process was used to make the application. Exactly what Scott J meant is not entirely clear. The second ground was that any application for stay or transfer should be made in the Magistrate's Court being the court seized of the proceedings. The third ground was that the Supreme Court had no jurisdiction to make the orders sought. It is desirable to consider the third ground at the outset. That is because if the Supreme Court does have jurisdiction then the first two grounds are of no or little moment. If the Supreme Court can remove proceedings on foot in the Magistrate's Court then it could not be that the removal application necessarily had to be made in proceedings commenced by writ in the Supreme Court nor would it be necessary to apply for a transfer or stay in the Magistrate's Court. If the criticism of Scott J was that the wrong form was used, the Court should have waived compliance with the rules.

[4] There is no provision to which we were referred or of which we are aware in the Constitution of the Kingdom, the Supreme Court Act, the Magistrate's Court Act or other statute which, in terms, expressly confers power on the Supreme Court to make an order removing a proceedings from the Magistrate's Court or staying proceedings in that court.

[5] However such provisions do exist in other jurisdictions at least in relation to removal. They serve an important function in the distribution and redistribution of

matters between courts in a judicial hierarchy where courts higher in the judicial hierarchy (recognized in Tonga by clause 84 of the Constitution) are likely to deal with cases and issues of greater complexity or importance than courts lower in the judicial hierarchy. This is exemplified by s.40 of the Australian Judiciary Act referred to earlier. That provision enables the removal of proceedings to the High Court from another court lower in the judicial hierarchy by order of the High Court if the proceedings raise a constitutional issue. Initially this was the sole basis on which proceedings could be removed to the High Court. However in 1996, s.40 was amended to empower the High Court to remove proceedings more generally and not simply because they raised a constitutional issue. The statutory test in relation to removal of proceedings which do not raise a constitutional issue, in the absence of consent of the parties, is that the High Court is satisfied that it is appropriate to make the removal order having regard to all the circumstances, including the interests of the parties and the public interest.

[6] In *O'Toole v Charles David Pty Ltd* (1990) 96 ALR 1 Mason CJ addressed the purpose of the removal power at para [13]:

> The procedure for removal into this Court under s.40 of the Judiciary Act 1903 (Cth), which is designed to ensure that constitutional questions and other questions of public importance are determined by this Court, enables it to reconsider preliminary questions of law decided by the Full Court of the Federal Court, even though the decision of that Court is not the subject of an appeal and may not be appealable. Indeed, it verges on the ludicrous to suggest that the very purpose of removal may be frustrated simply because the cause removed has proceeded to the point at which an unappealable order has been made. It is no answer to this argument to say that an appeal will lie when the court below makes a determination resolving the rights in suit. That may take a long time and involve great expense. The object s.40 was to secure early resolution of constitutional questions and other issues of public importance.

[7] Similar provisions have existed in the United Kingdom since at least 1984 under the County Courts Act 1984 (UK) enabling, amongst other things, the High Court to order the removal of proceedings commenced in a county court: see s.41(1). In such a case, the application would be made to the High Court who would then make the removal order or, as it is described in the section, the transfer order.

[8] In *Chaplin v Lotus* (Court of Appeal, Bingham MR, Rose and Waite LJJ, unreported 17 December 1993) Sir Thomas Bingham, the then Master of the Rolls, discussed the jurisdiction of the Patents County Court and the question of transfers but also referred to s.41(1). Bingham MR said:

> The High Court and County Courts Jurisdiction Order 1991 governs the allocation of cases as between the High Court and the county court. Very broadly speaking, claims valued at less than £25,000 are to be tried in a county court and claims for more than £50,000 in the High Court. But these fixed limits are subject to Article 7(5) of the Order, which provides: "The High Court and the county courts, when considering whether to

> exercise their powers under section 40(2), 41(1) or 42(2) of the County Courts Act 1984 (Transfer) shall have regard to the following criteria — (a) the financial substance of the action, including the value of any counterclaim, (b) whether the action is otherwise important and, in particular, whether it raises questions of importance to persons who are not parties or questions of general public interest, (c) the complexity of the facts, legal issues, remedies or procedures involved, and (d) whether transfer is likely to result in a more speedy trial of the action, but no transfer shall be made on the grounds of subparagraph (d) alone.
>
> Read together, as they should be, these provisions indicate, to my mind quite clearly, how the discretion to transfer should be exercised by the judge of the Patents County Court. He is to have regard to the financial position of the parties. He is not obliged to transfer if it is shown that the proceedings are likely to raise an important question of fact or law. But subject to those rules he should bear in mind that the Patents County Court was established to handle the smaller, shorter, less complex, less important, lower value actions. It was to provide cheaper, speedier and more informal procedures to ensure that small and medium sized enterprises, and private individuals, were not deterred from innovation by the potential cost of litigation to safeguard their rights. Subject to the rules referred to, longer, heavier, more complex, more important and more valuable actions continue to belong in the High Court. Ultimately, as with any exercise of discretion, the decision must turn on what the interests of justice are judged to require: that means taking account not only of the interests of the plaintiff who wants to pursue his action in the Patents County Court but also the interests of the defendant who wants to have his liability determined in the High Court.

[9] Section 41(1) illustrates how a provision can operate to confer on a court higher in the judicial hierarchy a power to remove into that court proceedings commenced in a court lower in the judicial hierarchy. However the provision has greater significance than that in these proceedings.

[10] Section 5(1) of the Supreme Court Act declares that the powers of the Supreme Court shall include, mutatis mutandis, all the powers for the time being vested in or capable of being exercised by the High Court of Justice in England and Wales. Notwithstanding the creation of a single County Court effective 22 April 2014 by the Crimes and Courts Act 2013 (UK), section 41(1) continues to vest in the High Court a power to remove proceedings from the County Court. The expression "mutatis mutandis" in s.5 of the Supreme Court Act requires necessary changes to be made to the legislation or other instruments in the United Kingdom vesting powers in the High Court in order to render them applicable to the circumstances in the Kingdom of Tonga. In our opinion, section 41(1) can and should be applied to the Supreme Court by adapting the provision so as to empower the Supreme Court to remove proceedings from the court immediately below it in the judicial hierarchy, namely the Magistrate's Court.

[11] Accordingly, we are satisfied that the Supreme Court did have power, by reference to s.5, to make an order removing the proceedings from the Magistrate's Court to the Supreme Court. Scott J was in error in concluding he did not have the power to do so. We should add that we consider it is likely that this power will be rarely and sparingly used.

[12] This jurisdictional question concerning removal in this case is an important legal question arising in proceedings that appear to relate to an incident or incidents of high political controversy concerning the payment of significant funds granted to the Kingdom of Tonga by the People's Republic of China. It is appropriate that leave to appeal be given. We grant leave.

[13] Thus it is necessary for the Court of Appeal to address the merits of the appellants' application, though the focus of our consideration is the removal application which, we apprehend, was the primary method advanced by the appellants of dealing with the proceedings in the Magistrate's Court. Scott J did not address the merits of the application. However the judge did make some observations in his reasons that bear upon the merits.

[14] The proceedings in the Magistrate's Court are defamation proceedings by each of the respondents against the appellants. They were commenced in May 2014. The defamation alleged by each of the respondents related, as noted earlier, to the disbursement of significant aid funds paid to the Kingdom of Tonga by the People's Republic of China. As alleged, the amount involved is US$25,450,000 that the Kingdom of Tonga has paid to the Friendly Islands Satellite Communications Limited trading as Tongasat. The appellants took the position that the payment of these funds to Tongasat was unlawful. In the pleadings in the Magistrate's Court, the respondents as plaintiffs (the first respondent was the Prime Minister at the time of the payment to Tongasat and the second respondent was then the Minister of Justice) each allege they were defamed in either press releases of the Tonga PSA or in correspondence. As appears from the pleadings, a material element is that the plaintiffs were said to have been involved in illegal conduct, namely the payment of the funds. The appellants say these proceedings will be defended on, inter alia, the ground of justification. If so, that defence is likely to raise the question of whether the payment of the funds was illegal.

[15] In proceedings commenced in July 2014 by the Tonga PSA and Samiuela 'Akilisi Pohiva (the current Prime Minister) in the Supreme Court against the Kingdom of Tonga, the Attorney-General and Tongasat, orders are sought requiring the repayment of the US$25,450,000 or damages in an equivalent sum. Those proceedings raise, directly, the lawfulness of the payment of the funds. They became matter CV 48 of 2014.

[16] There are other proceedings in the Supreme Court arising from the same substratum of facts but it is, for present purposes, only necessary to discuss the defamation proceedings and the proceedings that became CV 48 of 2014. Of these proceedings Scott J said in his judgment in the removal application at para [17]:

> Having read the Respondents' claims in the Magistrates Court as "fairly" as I can, I have no doubt that the unlawfulness or otherwise of the

> payments to Tongasat, if not already determined elsewhere, would inevitably fall for consideration. I also agree with [the applicants' counsel] that the Magistrates' Court is not at all suitable for an enquiry into that alleged unlawfulness.

[17] We agree. The issue of the lawfulness of the payment is an extremely important and potentially difficult legal issue and involves the public interest. It is an issue that the Supreme Court will be far better placed to address. In our view it is in the interests of the administration of justice to remove the defamation proceedings from the Magistrate's Court to the Supreme Court to enable the Supreme Court to deal with that issue. It will be a matter for the Supreme Court to case manage both the defamation proceedings and CV 48 of 2015 (and, if relevant, other proceedings in the Supreme Court) and, as part of that process, determine when and how the legal issue concerning the alleged unlawfulness of the payment of the US$25,450,000 to Tongasat is determined. It will also be a matter for the Supreme Court to make such procedural orders and directions as it thinks necessary or desirable to constitute the defamation proceedings in the Supreme Court in a way conformable with the Supreme Court Rules.

[18] Accordingly, we propose to make orders removing the defamation proceedings from the Magistrate's Court to the Supreme Court. The appellants are entitled to the costs of the application for leave to appeal and the appeal.

[19] The Court orders that:

1. Proceedings Case No 87 of 2014 in the Magistrate's Court is removed to the Supreme Court.
2. Proceedings Case No 95 of 2014 in the Magistrate's Court is removed to the Supreme Court.
3. The respondents to the application for leave to appeal and the appeal pay the applicants/appellants the costs of the application and of the appeal as agreed or taxed.

Public Service Association Inc anor v Kingdom of Tonga anor

Court of Appeal, Nuku'alofa
Moore, Blanchard, Hansen, and Tupou JJ
AC 9/2015

14 September 2015; 16 September 2015

Civil procedure – security for costs order - application for leave to appeal against order – discretionary order – found error proved – order set aside

The substantive proceedings brought by the appellants claimed that a payment of US$25,450,000 said to have been made by the Government of Tonga to or for the benefit of Tongasat in or about June 2011 was contrary to law and/or without legal authority and accordingly beyond the powers of those making or authorising it and/or was invalid. The payment was made after the Government had received an aid grant in that amount from the Government of the People's Republic of China (PRC). The appellants sought a declaration that the funds remained the property of the Government (or Kingdom) of Tonga. An order for repayment, or alternatively damages, payable to the Government (or Kingdom) of Tonga was also sought. On 19 March 2015 the Supreme Court made a security for costs order against the plaintiffs/appellants for $20,000 each. This had the effect of staying the appellants' proceeding against the respondents until the security was provided. The appellants applied for leave to appeal against that order. The court allowed counsel to proceed to argue the merits of the appeal reserving the question of leave to appeal.

Held:

1. The jurisdiction of a court to make an order for security for costs existed in order to protect the efficacy of the exercise of its jurisdiction to award costs; it was undesirable for the court to permit a situation to arise where a party's success is pyrrhic because an order for costs could not be met. In making its assessment at each step of its consideration of the application the court should not lose sight of the fact that the onus of persuading it to make an order for security was borne by the applicant/defendant.
2. Section 17(1) of the Incorporated Societies Act did not reverse the normal onus of proof borne by an applicant for security for costs and did not require any different approach than that to be taken under Order 17 rule 1(b). Section 17 simply conferred concurrent jurisdiction to order security

for costs. The Judge erred in law in reversing the onus of proof in relation to the application against the Tonga PSA.

3. It was for the respondents to show that the Tonga PSA might be unable to pay costs if ordered to do so. The respondents put forward no credible evidence to support their allegation that the society was insolvent. The evidence that the society had a substantial term deposit and was fund-raising for the case was uncontradicted. The respondents therefore did not discharge the onus of proof resting upon them. Their application for security against the Tonga PSA failed at the second step and should have been dismissed by the Judge.
4. In relation to Mr Pohiva, the Judge reled on his knowledge of other associated proceedings in which costs awards had been made against Mr Pohiva which the Judge believed had not been paid. He should not have done this. It was unfair for the Judge to raise this matter when the second respondent had not chosen to do so. The Judge was not entitled on the evidence to find that the respondents had shown that Mr Pohiva would not be "good" for costs.
5. The Judge's exercise of discretion in relation to both appellants was in error. The court granted leave to appeal. The appeal was allowed and the order for security for costs was set aside.

Cases considered:

Airtourer Co-operative Ltd v Millicer Aircraft Industries Pty Ltd [2004] FCA [38]

Bat Advocacy NSW Inc v Minister for the Environment, Protection, Heritage and the Arts (No. 2) (2011) 280 ALR 91

Bryan E Fencott Pty Ltd v Eretta Pty Ltd (1987) 16 FCR 497

Culver v Beard [1937] 1 All ER 301

Fainga'a v Lelea [2005] Tonga LR 8

Friends of Houghton Valley Inc v Wellington City Council [2015] NZHC 1515

House v The Queen (1936) 55 CLR 499

Idoport Pty Ltd v National Australia Bank [2001] NSWSC 744

Pearson v Naydler [1977] 1 WLR 899

PS Chellaram v China Ocean Shipping (1991) 102 ALR 321

Statute considered:

Incorporated Societies Act (Cap 28)

Rules considered:

Supreme Court Rules 2007

Counsel for the appellants	:	Dr Harrison QC SC
Counsel for the first respondent	:	Mr Sisifa SG
Counsel for the second respondent	:	Mr Stanton SC and Mr Edwards

Judgment

Introduction

[1] This is an application for leave to appeal against an order made by Scott J on 19 March 2015 in the Supreme Court requiring the plaintiffs/appellants Public Service Association Inc (Tonga PSA) and Mr. 'Akilisi Pohiva (whom we will jointly call "the appellants") to pay to the Registrar sums of $20,000 each by way of security for costs. The effect of the order is to stay the appellants' proceeding against the Kingdom of Tonga and Friendly Islands Satellite Communications Ltd (trading as Tongasat) (whom we will jointly call "the respondents") until the security is provided.

[2] In view of the importance of the matter we allowed counsel to proceed to argue the merits of the appeal reserving the question of leave to appeal.

[3] The proceeding by the appellants against the respondents was commenced on 8 July 2014. In their statement of claim the appellants have impugned a payment of US$25,450,000 said to have been made by the Government of Tonga to or for the benefit of Tongasat in or about June 2011 after the Government had received an aid grant in that amount from the Government of the People's Republic of China (PRC). It is pleaded that the payment of the PRC aid grant funds to or for the benefit of Tongasat was contrary to law and/or without legal authority and accordingly beyond the powers of those making or authorising it and/or was invalid. The appellants seek a declaration that accordingly the funds remain the property of the Government (or Kingdom) of Tonga. An order for repayment, or alternatively damages, payable to the Government (or Kingdom) of Tonga is also sought.

[4] Mr. Pohiva brings his claim on behalf of an unincorporated body, the Friendly Islands Democratic Party, but accepts a personal liability for costs if he is unsuccessful. Indeed, contrary to the way in which the claim is put in the statement of claim, he maintains in an affidavit that he is also suing in his personal capacity.

[5] The respondents have not yet filed statements of defence but it is plain that they reject the pleaded allegations. Scott J recorded in his judgment (at [17]) that all parties were in agreement that the central issue, the lawfulness of the disbursement in question, is a matter of national concern which will involve careful consideration of important and sometimes difficult questions of fact and law.

[6] This is not the first court proceedings directed to the validity of the payment to Tongasat. Indeed there has already been skirmishing between the parties and persons allied to each side in the controversy in the form of an unsuccessful private prosecution and actions for defamation and malicious prosecution. Other aspects of the matter are the subject of judgments that this Court is also delivering at this time. It is fair to say, however, that the present proceeding appears to be the most convenient means of having the Supreme Court rule on the legality of the payment to Tongasat.

The application

[7] The applications for security for costs were made in reliance on Order 17 rule 1(b) of the Supreme Court Rules 2007:

> "Where on the application of a defendant to any proceeding it appears to the Court that:
>
> ....
>
> (b) The plaintiff may be unable to pay the costs of the defendant if ordered to do so;
>
> ....
>
> the Court may, if after having regard to all the circumstances of the case it thinks just to do so, order that all the action be stayed until the plaintiff gives security for the defendant's costs of the proceeding in such sum and in such manner as the Court may determine".

[8] In relation to the Tonga PSA, which is registered as an incorporated society, s.17 of the Incorporated Societies Act (Cap 28) is also relevant. It says:

> "17 Security for costs where society is plaintiff.
>
> Where a society is the plaintiff in any action or other legal proceeding, and there appears by any credible testimony to be reason to believe that if the defendant is successful in his defence the assets of the society will be insufficient to pay his costs, any Court or Judge having jurisdiction in the matter may require sufficient security to be given for those costs and may stay all proceedings until that security is given."

[9] In support of their applications for security for costs, which they brought at the same time as applications to strike out the appellants' statement of claim and which failed, the second respondent pointed to the complexity of the litigation and the involvement of overseas senior counsel on their behalf, and thus the substantial cost of defending the proceedings. Tongasat asserted the impecuniosity of both the Tonga PSA and Mr. Pohiva, alleging that the Tonga PSA was insolvent and that both appellants had been fundraising because they could not sustain the cost of paying their own lawyer. Tongasat also said that moneys so raised would not be able to be used, under the Tonga PSA's rules, for the purpose of meeting costs awarded against it. The respondents sought security of TOP$100,000 from each appellant.

[10] The Secretary-General of the Tonga PSA said in an affidavit that it held a term deposit of TOP$47,445 at its bank. There was also evidence that both appellants had been engaged in raising funds for the purposes of the litigation.

The Supreme Court's judgment

[11] Scott J dealt with the applications extremely briefly in four paragraphs of his judgment. He set out Order 17 rule 1(b). He stated that s.17 of the Incorporated Societies Act required a society to satisfy the Court that it has sufficient assets to meet the costs of an unsuccessful action. He observed that the central issue in the case

was of national concern, and said that leading counsel would be involved on both sides and that the trial would probably take at least one week.

[12] The Judge then referred to the financial position of the appellants as follows:

> The position of the [Tonga PSA] is that TOP$47,445 is held on term deposit. There is nothing however to show that the constitution of the Society permits member's funds to be spent on or secured to an action of the present kind in which the interests of the Society are at best tangentially involved.
>
> It is a matter of record that [Mr. Pohiva] has incurred substantial unpaid costs from previous associated proceedings and that he has previously made public appeal for donations to allow him to proceed further. In all the circumstances I am satisfied that each of the Plaintiffs should pay to the Registrar of the High [sic] Court TOP$20,000 by way of security. Pending payment the proceedings are stayed.

Appeal from exercise of discretion

[13] The appeal is one from an exercise of discretion by Scott J. The approach which must be taken by an appeal court is well-established and was put in this way in the joint judgment of Dixon, Evatt and McTiernan JJ in *House v The Queen* (1936) 55 CLR 499 at 504-505:

> "The manner in which an appeal against an exercise of discretion should be determined is governed by established principles. It is not enough that the judges composing the appellate court consider that, if they had been in the position of the primary judge, they would have taken a different course. It must appear that some error has been made in exercising the discretion. If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his if it has the materials for doing so. It may not appear how the primary judge has reached the result embodied in his order, but, if upon the facts it is unreasonable or plainly unjust, the appellate court may infer that in some way there has been a failure properly to exercise the discretion which the law reposes in the court of first instance. In such a case, although the nature of the error may not be discoverable, the exercise of the discretion is reviewed on the ground that a substantial wrong has in fact occurred."

Submissions for appellants

[14] Mr. Harrison QC summarised the argument for his clients in this way. He said that Scott J had:

- failed to exercise an overall discretion;
- not had regard to all the circumstances of the case;
- failed to consider whether it was just to order the giving of security;
- failed to weigh the competing interests of the parties and conduct a balancing exercise of their respective interests in terms of the impact of his decision;
- failed to take into account that the claim was one with reasonable prospects of success, having already withstood strike out applications from both respondents;
- failed to take into account the important public interest in having the claim determined; and
- failed to consider the overall effect of requiring the appellants to raise or provide security for a total of TOP$40,000, which imposed an unacceptably high burden on litigants acting in the public interest.

[15] The appellants say that Scott J's reasoning was conclusory and that he simply did not address considerations which a judge is required to balance in coming to a decision on security for costs. In particular, Scott J had failed to follow the approach of Ward CJ in *Fainga'a v Lelea* [2005] Tonga LR 8 who had said that where a plaintiff was alleging improper conduct by public officer the court should take a much more liberal view of the plaintiff's chances of success because it was in the public interest to have such complaints heard. The court should be cautious, Ward CJ had said, about making an order which might have the effect of stifling a genuine case involving a public interest:

> Whilst the court must always be conscious of the possibility that the claim is a sham or brought solely for reasons of malice, if it appears otherwise and is founded on a good cause of action, the court should only order security where it is clear there is no chance of success.

[16] As to the individual appellants, Mr. Harrison submitted that contrary to the Judge's view, s.17 of the Incorporated Societies Act did not reverse the normal onus on the applicant to make the case for an order for security of costs. He also criticised the Judge's view of the lack of powers for the Tonga PSA under its Constitution to use its term deposit to meet an award of costs. Counsel drew attention to Rule 3(1), (2), (3), (5) and (8) of the Constitution, which he said gave the necessary empowerment. Furthermore, the Tonga PSA was being sued in a related proceeding for defamation for what it had said about the payment to Tongasat. It was entitled to defend itself. The present proceeding was the best means of doing so by establishing whether the payment was lawful.

[17] As for Mr. Pohiva's position, counsel said that in the Supreme Court the respondents had not actually challenged his ability to pay. That was a matter raised by Scott J himself by reference to unpaid costs awards, which we were told by counsel had either been set aside or were awaiting taxation.

Submissions for respondents

[18] For the second respondent, Mr. Stanton SC emphasised the burden carried by someone attempting to overturn an exercise of discretion. He referred to the Tonga PSA's need to fund-raise as an indication of its impecuniosity and pointed to a statement in an affidavit of its Secretary-General, Ms 'Amanaki, that funds raised to date were earmarked for payment of the appellants' legal costs and would be insufficient and not available as security for costs.

[19] Mr. Stanton submitted that Scott J was aware from other cases that Mr. Pohiva had had substantial costs awards made against him. The Judge was entitled to draw from that fact the inference that Mr. Pohiva would be unable to meet a costs award in this case if the appellants' claim was not successful.

[20] Counsel said that Scott J had not erred in the exercise of his discretion so as to justify this Court in interfering with his decision.

[21] For the first respondent, Mr. Sisifa supported the position taken by Tongasat and submitted that this Court should not interfere unless the Judge was shown to have erred in the exercise of his discretion by failing to consider the real determining question in accordance with all the circumstances of the case: *Culver v Beard* [1937] 1 All ER 301 at 304.

How application for security should be determined

[22] The jurisdiction of a court to make an order for security for costs has been said to exist in order to protect the efficacy of the exercise of its jurisdiction to award costs; it is undesirable for the court to permit a situation to arise where a party's success is pyrrhic because an order for costs cannot be met: *Idoport Pty Ltd v National Australia Bank* [2001] NSWSC 744 at [33] per Einstein J.

[23] Order 17 Rule 1 confers on the Court a broad and unfettered discretion but one that must be exercised in a principled manner. It requires the Court to take four steps. It must assess:

1. The approximate level of costs likely to be awarded to the defendant, if successful;
2. Whether the plaintiff will be "good" for such an award;
3. Whether, in the light of all the circumstances of the case, justice requires that the plaintiff should be required to give some security for those costs and, if so;
4. In those circumstances, the amount of the security that should be ordered and the means by which it should be satisfied.

[24] In making its assessment at each step of its consideration of the application the court should not lose sight of the fact that the onus of persuading it to make an order for security is borne by the applicant/defendant.

[25] The first two of the steps are usually relatively straight-forward. The main difficulty lies in the latter two which require weighing up of a number of factors, bearing in mind the fundamental right of all persons, including corporations, to have

access to the courts. And, as McHugh J pointed out in *PS Chellaram v China Ocean Shipping* (1991) 102 ALR 321 at 323:

> "The weight to be given to any circumstance depends not only upon its own intrinsic persuasiveness but upon the impact of the other circumstances which have to be weighed."

[26] These factors or circumstances can include:

a) The strength or weakness and bona fides of the plaintiff's case.
This evaluation will often have to be made on what is quite limited information at an early stage of the case, and will consequently be "broad brush". It should not be turned into a mini-trial.

b) The degree of risk that a costs order will not be met.
There is a basic principle that a natural person who appears to have an arguable case should not be ordered to give security for costs, no matter how poor he or she is:
"The power to require security for costs ought not to be used so as to bar even the poorest litigant from the court". (*Pearson v Naydler* [1977] 1 WLR 899 at 904 per Megarry V-C).

However:

> "An order for security for costs made against an impecunious litigant when justified by a factor other than mere impecuniosity does not offend the general rule that poverty is no bar to the litigant": The Airtourer Co-operative Ltd v Millicer Aircraft Industries Pty Ltd. [2004] FCA at [38] per Branson J."

A body corporate will usually not be treated as accommodatingly as a natural person, but, even then, a defendant will not be entitled to an order for costs as of right where the impecuniosity of the body corporate has been established : *Bryan E Fencott Pty Ltd v Eretta Pty Ltd* (1987) 16 FCR 497 at 506 per French J.

a) *Whether the order would be oppressive because it will stifle a reasonably arguable claim.*
If the court concludes that the plaintiff has shown a reasonable prospect of success it will not make a security for costs order if and to the extent that it will have the practical effect of shutting the plaintiff out of the court.

b) *Whether any impecuniosity of the plaintiff has been caused or contributed to by the conduct of the defendant to which the plaintiff's claim is directed.*
It is a matter of common-sense that if the alleged wrong-doing of the defendant appears to have caused loss to the plaintiff whereby he or she has no or insufficient means to

provide security, it would be particularly unjust to order it.

c) *Whether there are aspects of public interest in the plaintiff's pursuit of the case.*

If a plaintiff is bona fide using the proceeding to ventilate an issue, or obtain some relief, for the public, such as the prevention of corrupt or unlawful practices or the enforcement of the law, the court will be less likely to require security to be given if that may create hardship for the plaintiff, in the same way that it may award reduced costs (or sometimes no costs at all) if such a case ultimately fails. We consider, however, that it goes too far to say as Ward CJ did in *Fainga'a v Lelea* that in a case of this kind challenging public conduct the court should only order security if the "public interest" plaintiff has no chance of success. The better view is that while the public interest character of the proceeding certainly weighs in the scales in favour of the plaintiff, something more than the mere categorisation of proceedings as public interest litigation is needed. That is because, if the claim fails, such categorisation will not per se justify a departure from the normal rule that costs follow the event: *Bat Advocacy NSW Inc v Minister for the Environment, Protection, Heritage and the Arts* (No. 2) (2011) 280 ALR 91 at [6].

d) *Whether the defendant has delayed in making the application.*

If there has been a substantial unexplained elapsing of time between the service of the proceeding and the making of the application, and during that period the plaintiff has devoted time and resources to progressing the proceedings, it may be unfair to belatedly put an obstacle in the way in the form of an order the plaintiff may now have difficulty meeting.

e) *Whether the plaintiff resides or has its assets outside the jurisdiction.*

A plaintiff who is not present in the jurisdiction (or whose assets are abroad) presents a greater risk of failing to pay a costs order and so an order for security may be justified.

f) *Whether there are third parties standing behind the plaintiff and likely to benefit from the litigation.*

If a plaintiff may not meet a costs order but has the backing of a more substantial third party who will benefit from success in the litigation (such as a parent company of a small local subsidiary), that may incline the court to order security.

g) *Whether there are any other matters relevant to the exercise of the court's discretion peculiar to the circumstances of the particular case.*

[27] In relation to step four, the quantum and the means by which security should be given will depend upon all the circumstances. Accordingly, in fixing the amount of security the estimate of costs from step one will be only one of the factors to be weighed. The court may sometimes order payment by instalments at certain stages of the proceedings.

This case

[28] It is unfortunate that in his judgment the Judge chose to deal with this matter so tersely and apparently without carrying out an analysis of the kind we have just described. The absence of proper reasons for decision is unhelpful to an appellate court and, as in this case, can lead the court to conclude that the Judge has failed to make a proper assessment and has thus arrived at an erroneous conclusion.

[29] It would seem from his reference to the subject matter of the case – the lawfulness of the payment to Tongasat – as being "a matter of national concern" which would involve "careful consideration of important and sometimes difficult questions of law," with leading counsel on both side and a trial of at least one week, that Scott J must have been of the view that quite substantial awards of costs against the plaintiffs could be made if their claim failed. If that was his view, which he did not actually state, we would agree with him. The public interest character of the litigation would not necessarily immunise the appellants from a costs award if it transpired that their claim proved to be unsubstantiated by the evidence at trial. We are of course expressing no view on the appellants' prospects of success. Indeed, one of the potential difficulties in carrying out a proper analysis at the third step in the exercise is that the respondents have chosen not to put before the Supreme Court any indication of how they propose to counter the appellants' allegation of unlawful conduct.

[30] But as it happens, we do not get to the third step. We are satisfied that the Judge's analysis went awry at the second step, because on the evidence before him, Scott J was simply not entitled to take the view, as without directly saying so he seems to have done, that the appellants were not "good" for the costs which might be awarded against them if their claim failed.

[31] Scott J said, in relation to the Tonga PSA, that s.17(1) required a society to satisfy the court that it has sufficient funds to meet the costs of an unsuccessful plaintiff. We do not accept, however, that s.17(1) reverses the normal onus of proof borne by an applicant for security for costs or requires any different approach than that to be taken under Order 17 rule 1(b). The "credible testimony" mentioned in the section must be the evidence relied on by the applicant to prove that the society does not have the necessary funds available to it. The insufficiency of assets to pay costs of which the section speaks equates with the inability to pay costs in para 1(b) of the Order. We reach this view on the language and purpose of the two provisions but it was also the view of Collins J of the High Court of New Zealand in *Friends of Houghton Valley Inc v Wellington City Council* [2015] NZHC 1515 on an identical provision in the New Zealand's Incorporated Societies Act 1908. Collins J said (at [20]) that he found it difficult to see any significant differences between s.17 and the High Court Rule equivalent to Order 17 rule 1. He regarded s.17 as "simply

conferring concurrent jurisdiction to order security for costs". In our view Scott J erred in law in reversing the onus of proof in relation to the application against the Tonga PSA.

[32] He also erred, we consider, in saying with reference to the TOP$47,445 held by the society on term deposit (and perhaps with reference to whatever amounts the society was able to obtain by fundraising for the case, though he does not appear to have adverted to them), that it had not been shown that the society's constitution permitted members' funds to be spent on or secured to an action "in which the interests of the society are at best tangentially involved." This overlooks the fact that the Tonga PSA was fully entitled to defend any claim brought against it. It is facing several defamation proceedings in which the lawfulness or unlawfulness of the payment to Tongasat will evidently be a crucial issue. The current proceedings are said to be aimed at securing a speedy determination of that issue. The Secretary-General of the Tonga PSA has deposed that the PSA's stance is that the proceedings raise issues of critical importance to it as defendant in the defamation proceedings.

[33] As we have said, it was for the respondents to show that the Tonga PSA might be unable to pay costs if ordered to do so. The respondents put forward no credible evidence to support their allegation that the society was insolvent. The evidence that the society had a substantial term deposit and was fund-raising for the case was uncontradicted. The respondents therefore did not discharge the onus of proof resting upon them. Their application for security against the Tonga PSA fails at the second step and should have been dismissed by the Judge.

[34] In relation to Mr. Pohiva, the second respondent concentrated its fire in the Supreme Court entirely on the unincorporated political party on behalf of whom he said he was suing. Tongasat set out to show that the party had no funds. But they overlooked the fact that Mr. Pohiva had made himself personally responsible for any costs award. His personal assets, such as they may be, are available. The Supreme Court was given by the respondent no information about Mr. Pohiva's personal position. The respondents did not suggest to the Court that he personally was not "good" for costs.

[35] Scott J took it upon himself to rely on his knowledge of other associated proceedings in which costs awards had been made against Mr. Pohiva which the Judge believed had not been paid. He should not have done this. For all he knew, there may have been a payment, or a reason other than impecuniosity for any non-payment. It was unfair for the Judge to raise this matter when the second respondent had not chosen to do so. On this appeal, Mr. Stanton made reference to awards of costs against Mr. Pohiva. We were told by Mr. Harrison, without objection, that one of these had been paid into court and then refunded after Mr. Pohiva successfully appealed. The other amount is awaiting taxation. Even if it is appropriate to have regard to these matters, which in our view it is not, they do not establish that Mr. Pohiva will not be able to meet the costs of the respondents in this proceeding if ordered to do so.

[36] Mr. Stanton tried to make something of the fact that Mr. Pohiva had made a public appeal for funds to defray the expense of the proceedings. But the fact that a litigant seeks to share the financial burden does not prove that he is unable to meet the

costs himself. It is understandable that someone conducting what he regards as public interest litigation without prospect of personal financial benefit may consider that others should be given an opportunity to contribute funding.

[37] The Judge was not entitled on the evidence to find that the respondents had shown that Mr. Pohiva would not be "good" for costs.

[38] The Judge's exercise of discretion in relation to both appellants was in error. We grant leave to appeal. The appeal is allowed and the order for security for costs is set aside.

[39] The second respondent must pay the appellants' costs in this court and in the Supreme Court, to be taxed if not agreed. We make no order for costs in this Court against the first respondent in view of its limited role. If there is any question of costs against it in relation to the application in the Supreme Court, that should be determined in that Court.

Friendly Islands Satellite Communications Ltd (Trading as Tongasat) v Pohiva anors

Court of Appeal, Nuku'alofa
Moore, Blanchard, Hansen, and Tupou JJ
AC 14/2015

14 September 2015; 16 September 2015

Civil procedure – appeal against discharge of restraining order – discretion of trial judge – no error identified – appeal dismissed

For the facts, see the Supreme Court decision reported at page 199 of this volume.

The plaintiff/appellant applied for leave to appeal from the interlocutory order of the Supreme Court on 19 May 2015 which discharged restraining orders made by the Supreme Court on 26 August 2014 and 12 November 2014.

The issues raised were, first, whether the Chief Justice erred in discharging the orders which had been made ex parte on 26 August 2014 on the application of Tongasat restraining the first to fifth defendants from, amongst other things, further publishing information about Tongasat's taxation affairs, and secondly, whether the Chief Justice erred in discharging the orders made on 12 November 2014.

Held:

1. The Court of Appeal agreed that a central element of Tongasat's case in the proceedings in the Supreme Court in opposition to the rescission of the restraining orders was not a strong one.
2. It could not be the case that the risk of future or further harm to a plaintiff who alleged breach of confidentiality was irrelevant in deciding whether to grant or continue interlocutory injunctive relief. This was all the more so when the risk of harm arising from a breach of confidentiality (which was ultimately about damage to Tongasat's reputation and the commercial consequences of that damage) had to be balanced against other considerations concerning freedom of speech and the right of the public to be informed about matters of real and substantial public interest.
3. It would only be in a compelling case that publication dealing with a matter of public concern would be restrained in a way that would curtail freedom of speech. The Chief Justice did not err in this matter in considering, as a factor in the mix of factors informing the balance of convenience, the extent to which Tongasat would, in the future, suffer damage if there was no interim injunctive relief. In the event there was

almost no evidence to show that Tongasat would suffer harm from republication or that damages would not be an adequate remedy if it did.

4. In an appeal from the exercise of a discretion the appellant must to demonstrate that the discretion was exercised on wrong principles, involved some fundamental misapprehension of the facts or involved taking into account irrelevant considerations or failing to take into account relevant considerations. The appellant did not identify any error and accordingly did not establish a basis for interfering with the exercise of the discretionary power by the Chief Justice to discharge the restraining orders made by Supreme Court in 2014.
5. The issues raised by the appellant and the factual context in which they arose were of some significance in the Kingdom of Tonga. It was appropriate to grant leave to appeal. However as no appealable legal error was established, the appeal was dismissed.

Cases considered:

Bonnard v Perryman [1891] 2 Ch 269

Klissers Farmhouse Bakeries Ltd v Harvest Bakeries Ltd [1985] 2 NZLR 140 (CA)

Lord Browne of Madingley v Associated Newspapers Ltd [2007] EWHC 202

Moala v Public Service Commission [2012] Tonga LR 44

Pale v Pohiva [2006] Tonga LR 148

R v Commissioners of Inland Revenue ex parte National Federation of Self-Employed and Small Businesses Ltd [1981] UKHL 2

Statute considered:

Revenue Services Administration Act 2002

Counsel for the appellant	:	Mr S Stanton SC and Mr W Edwards
Counsel for the respondents	:	Dr R Harrison QC SC

Judgment

[1] This is an application for leave to appeal from an interlocutory order of Lord Chief Justice Paulsen of 19 May 2015 discharging restraining orders made by a judge of the Supreme Court on 26 August 2014 and 12 November 2014. The hearing before the Court of Appeal proceeded on the basis that the parties would put their submissions on leave to appeal and, at the same time, their submissions on the appeal in the event that leave was given. Generally we will, for convenience, refer in these reasons to these proceedings as the appeal.

[2] The background was summarised by the Chief Justice in his reasons and it appears to have been an uncontentious summary though made with the appropriate qualification that it was made at an interlocutory stage on the basis of limited material. It is convenient to repeat that summary in this judgment. We will, for the purposes of repeating this summary, continue to refer to the parties by reference to their status in the proceedings in the Supreme Court.

[3] The first plaintiff Friendly Islands Satellite Communications Ltd (Tongasat) was the exclusive agent for the Kingdom of Tonga in the management of its orbital slot positions. The second and third plaintiffs were at all material times the managing director and marketing and finance directors respectively of Tongasat. The plaintiffs commenced this action against seven defendants. It includes a claim for breach of confidentiality. The first four defendants were involved in one capacity or other with the Tongan newspaper the Kele'a. Two of them are respondents to this appeal, namely the first defendant/respondent who published Kele'a and the second defendant/respondent who edited the newspaper. The fifth and sixth defendants/respondents were, respectively, the Tonga Public Service Association Inc (Tonga PSA) and its Secretary-General.

[4] On 1 February 2013, the Deputy CEO at the Commissioner of Revenue's office wrote to the Tax Agent for Tongasat advising that an objection by Tongasat to a 2010/2011 income tax assessment had been disallowed. The result was that Tongasat was said to owe $12,135,941.31 in income tax. On a date prior to 11 August 2014 the letter of 1 February 2013 was delivered to the offices of the Kele'a by a person unknown who slipped an envelope containing it under the Kele'a's office door. On 11 August 2014 a copy of the letter and other documents relating to Tongasat and its tax affairs, were separately delivered to the Tonga PSA in the same manner. The person or persons who delivered the documents to the Kele'a and the Tonga PSA was unknown to the plaintiffs and to the first to sixth defendants. There was no sharing of the documents received between the Kele'a and the Tonga PSA.

[5] On 11 August 2014 there were articles published in the Kele'a on pages 4 and 13 under the headline "Previous Sale of Satellite Slot in exchange of letters with Tax Department". On the same day Kele'a published on its website a similar article under the same headline. The focus of the article on page 4 of the Kele'a was past Government decisions and actions and in particular whether it had leased or sold orbital slots. The Commissioner of Revenue's letter of 1 February 2013 was referred to in the article as well as being reproduced in full. Its relevance to the subject matter of the article was as showing that a satellite slot had been sold. There was mention of the fact that the Tonga PSA and Mr 'Akilisi Pohiva had taken Court action to challenge that transaction. The second article in the Kele'a that day, on page 13, discussed in more detail the content of the letter of 1 February 2013. It noted that Tongasat had unsuccessfully sought a tax exemption on money received from the sale of orbital slots and that "the outstanding tax due for Tongasat remains unchanged at $12,135,941.31". The article also discussed whether orbital slots were sold or leased and concluded by asking whether Tongasat's tax remained unpaid.

[6] On 18 August 2014, the Tonga PSA issued a press release No 14/14 entitled "Concerns on Tax Arrears of Tongasat and its Employees". The press release complained of expressed concerns that the Tonga PSA had about the tax arrears of Tongasat with a recommendation for the Ministry of Revenue to conduct an internal compliance audit of "Tongasat's income for confirmation of tax due to Government for leasing out the orbital slots that belonged to Tonga". It asserted that it was not fair that small businesses paid their taxes in a timely manner while Tongasat had tax arrears from 2010/2011 in the millions of dollars. With reference to the letter of 1 February 2013 the press release stated that Tongasat's tax arrears were around $12

million and that "Tongasat had sued Government for this income tax charged to them and lost". It was asserted also that not included in the $12 million was PAYE tax as well as tax payable on revenue that it was estimated Tongasat had earned from leasing satellite slots under existing commercial contracts since 2009 totaling approximately $19.5 million and that it was not known whether Tongasat had declared this income to the Ministry of Revenue. The press release also focused on an agreement for the sale of two orbital slots at 134°E and 138°E said to have been negotiated by the Minister of Finance, Mr 'Aisake Eke, which it was said would produce taxable income to Tongasat. The press release opined that the agreement should be submitted to Parliament for approval. The press release contained a prominent picture of Her Royal Highness Princess Pilolevu, and identifies her as the "Chairlady of Tongasat" who had "directed for the sale price of the two orbital slots" and also a picture of Mr 'Aisake Eke the Minister of Finance.

[7] On 25 August 2014 there appeared in the Kele'a an article authored by the Tonga PSA headed "Pay all your taxes appropriately". The article complained of what might, on one view, be regarded as a public spirited attempt to have "rich companies" pay their taxes but its focus was on Tongasat. Tongasat was mentioned five times and no other companies were named. The article also referenced the letter of 1 February 2013 "from the Department to Tongasat requesting that they pay their tax due 2010/2011 which was T$12m odd tax due" and went on to make the point that more money may be owed for PAYE and Tongasat's "dues on 2011/20012 & 2012/2013?". Tongasat was said to have used the assets of the nation but not "meet their payment" and "That is why PSA suggested to the department that an audit should be done to Tongasat".

[8] On around 22 January 2015 the Tonga PSA was invited by the new Prime Minister, Mr. 'Akilisi Pohiva, to speak to Cabinet. Its presentation was on upholding the rule of law as the key to the sustainable socio-economic development for Tonga. On 23 January 2015 the Tonga PSA issued a further press release No 01/15 describing its presentation to Cabinet which was published both in hard copy and in electronic form on the Tonga PSA's Facebook page. The press release dealt with the broader controversies over Tongasat's administration of satellite slots, non-payment of license fees and appropriation of funds received from the People's Republic of China. It referred to millions of dollars in lost revenue to the Government of Tonga. It also questioned the legality of outright sales of orbital slots. It called for an investigation and the transfer of the Minister of Finance to another portfolio.

[9] The issues raised in this appeal are, first, whether the Chief Justice erred in discharging the orders which had been made ex parte on 26 August 2014 on the application of Tongasat restraining the first to fifth defendants from, amongst other things, further publishing information about Tongasat's taxation affairs. The orders were, relevantly, in the following terms:

> ... restraining the [first to fifth defendants] from further publishing disseminating and/or referring to or parting with possession of the documents (being confidential tax documentation and information of ... [Tongasat]) including their destruction.

And, secondly, whether the Chief Justice erred in discharging the orders made on 12 November 2014 requiring the fifth defendant, on behalf of the Tonga PSA, to provide written undertakings to this effect:

> (i) She on behalf of the PSA Association has no further documents emanating from the tax file relating to Tongasat that are confidential.
> (ii) That no further publication or use of those documents in any further publication will be made by her, her servants or agents on behalf of the Association.
> (iii) That those documents and indeed the affidavit she has filed in this proceeding will be treated as confidential to this litigation and are not to be given or allowed to be read by any person other than a party including counsel to this litigation. All documents are confidential to the court until further order.

[10] The Chief Justice dealt with the issue of the rescission or variation of the ex parte restraining orders in a discrete part of his reasons under a heading to that effect. Under a subheading "The principles to be applied", the Chief Justice indicated he adopted the approach in *Klissers Farmhouse Bakeries Ltd v Harvest Bakeries Ltd* [1985] 2 NZLR 140 (CA). He described that approach in the following terms:

> The purpose of an interlocutory injunction is to maintain the status quo until the rights of the parties can be determined at the hearing of the suit. In order to secure an injunction a plaintiff must show that there is a serious question to be tried (in the sense that the plaintiff has made out a prima facie case) and that the balance of convenience favours the granting of the injunction. This enquiry requires the Court to look at the impact on the parties of a granting or the refusal of an order. Finally, an assessment of the overall justice of the case is required. If it can be shown that a plaintiff will be adequately compensated in damages and will suffer no irreparable injury if the injunction is not granted that is an important factor against the making of an order. However, the grant of an interim injunction involves the exercise of a discretion and the approach that I have outlined cannot be taken as suggesting a rigid or mechanical approach.

[11] The Chief Justice then dealt with the question of whether there was a serious question to be tried under a subheading "The threshold".

[12] Before setting out the approach the Chief Justice took to this threshold question, it is convenient to set out the terms of s.57 of the Revenue Services Administration Act 2002:

> 57. (1) All documents and information coming into a taxation officer's possession or knowledge in connection with the performance of duties under any revenue law shall be confidential.
> (2) Nothing in subsection (1) shall prevent the disclosure of any document or information to -

(a) the Tax Tribunal or Supreme Court in relation to proceedings under this Act;
(b) any person in the service of Government in a revenue or statistical department where such disclosure is necessary for the performance of the person's official duties;
(c) the Auditor-General or any person authorised by the Auditor-General where such disclosure is necessary for the performance of official duties; or
(d) to the government of another country with which Tonga has an agreement, to the extent permitted under that agreement.

(3) All documents or information received by a person under subsection (2) shall be confidential.

(4) Any person who contravenes this section commits an offence and shall be liable upon conviction to a fine not exceeding $10,000 or to imprisonment for a term not exceeding 3 years, or both.

(5) In this section, "taxation officer" means any person employed by the Revenue Services Department in any capacity.

[13] In his discussion of the threshold, the Chief Justice said the following about Tongasat's case based on s.57:

> *Tongasat bases its breach of confidentiality claim on section 57 RSA and on equitable principles. The defendants argue that the overriding public interest dictates that the law not protect the confidential information. The extent to which it is necessary for a Court at this stage to examine the legal merits of the arguments will vary from case to case. Whilst I make no final findings, of course, at this interlocutory stage I do not find the plaintiffs' reliance upon section 57 compelling. The plaintiffs' submissions did not articulate a preferred interpretation of section 57 but it appears that the plaintiffs regard it as a very broad secrecy provision binding tax officers and the public alike and protecting all correspondence and documents provided to any taxation officer or emanating from any taxation officer in connection with the performance of his duties. I do not find support for that in the wording of the section. I read and considered the large number of authorities that the plaintiffs' Counsel referred me to on secrecy provisions in taxation and other legislation in other jurisdictions but derived very little assistance from them. What I can say is that the plaintiffs have satisfied me to the extent that I consider there is a serious issue to be tried on the breach of confidentiality claim based on equitable principles notwithstanding the defendants' intended reliance upon an iniquity defense.*

[14] From this point in his reasons, the Chief Justice addressed what he described as "the more difficult question", namely where the balance of convenience lay. He addressed a submission that there had been delay in seeking to discharge the restraining orders, concluding that the respondents had not been guilty of excessive delay. He then addressed a submission that the tax documents had been removed unlawfully from the offices of the Ministry of Revenue concluding that this was not an important consideration as there had been no suggestion that the respondents were involved in the removal and, as had been disavowed by counsel for Tongasat, there was no suggestion that the respondents had been engaged in criminal behaviour.

[15] The Chief Justice then addressed a proposition that disclosure of the information might cause irreparable harm to Tongasat or damages might be difficult to assess. On this question the Chief Justice said that although he considered the litigation had a "distinctly public flavour", he thought these were very important considerations to which he said he gave full weight in the balancing exercise. The Chief Justice next addressed an argument of the respondents that the restraining orders or their effect was a classic "gagging writ" in circumstances where the appellant's argument about s.57, central to the argument which secured the restraining orders, was very weak if not untenable. The Chief Justice indicated he was satisfied that as a general principle the Supreme Court should only restrain rights of free expression where there are clear and compelling reasons to do so.

[16] The Chief Justice next addressed an argument from the respondents that an extraordinary feature of the case was that Tongasat (and the other plaintiffs) had not pleaded that the Commissioner's letter did not reflect the true position. Effectively, the Chief Justice rejected this argument having regard to the pleadings. However the Chief Justice appeared to take cognizance of an argument that none of the plaintiffs' deponents asserted that the published statements derived from the Commissioner's letter were untrue. As to an argument by the respondents that there had already been publication, at least of the letter of 1 February 2013, the Chief Justice said this was not a strong point in the respondents favour as the publications in question have all been by them. He noted that if the publications were in breach of Tongasat's rights the Court "should be hesitant of allowing a repetition of the publication simply because of the effect of the earlier breach".

[17] The penultimate consideration addressed by the Chief Justice was what he described as the "real and genuine public interest in knowing how [Tonga's orbital slots (clearly very valuable assets of the nation)] have been managed and how revenue generated from them has been used". The Chief Justice then posed the question of whether this public interest overrode the competing need that Tongasat said it had to protect its confidential tax records.

[18] The Chief Justice concluded by saying that having taken these various arguments into account (and later reviewing the relevant evidence):

> …the matter that in my view is decisive in tipping the balance in favor of discharging the restraining orders is that there is almost no evidence before the Court that Tongasat will suffer any harm for the disclosure of

> the documents in question or that the payment of damages would not be sufficient remedy if it does.

[19] The final conclusion of the Chief Justice was:

> Taking all the matters I have mentioned above into consideration I have formed the clear view that the balance of convenience favors discharging the restraining orders. Standing back and looking at the overall justice of the case my view is confirmed by the fact that there will now be considerable delays in having this case determined as a result of the manner in which the plaintiffs' claims have been presented. There is no opportunity that the case can be fast tracked. It is unjust in those circumstances that the restraining orders should remain in place on an open ended basis.

[20] We now turn to consider the arguments advanced by Tongasat in the appeal. At the forefront of those arguments was a proposition concerning s.57. It was that the true construction of the section was contrary to the view taken by the Chief Justice when exercising his discretion to discharge the orders. Allied to this proposition was the argument that the Chief Justice gave no weight to the fact that the respondents knew or ought to have known that the documents were confidential tax documents and that they had not been given or disclosed lawfully and that bore upon the way in which they were received. Reference was made to *R v Commissioners of Inland Revenue ex parte National Federation of Self-Employed and Small Businesses Ltd* [1981] UKHL 2. Various passages from the judgments of their Lordships were quoted in Tongasat's written submissions concerning, amongst other things, the secrecy provisions of the UK Inland Revenue and taxation legislation.

[21] However ultimately the issue which falls for determination in relation to this argument of Tongasat is the meaning and effect of s.57 of the legislation of the Kingdom of Tonga and not broadly analogous provisions of legislation in other countries. The key to determining the proper construction of s.57 and therefore the scope of the section's operation are the opening words "all documents and information coming into a taxation officer's possession or knowledge … shall be confidential". Thus the section focuses only on information or documents which have "com[e] into the … possession" of a taxation officer. Fairly plainly this concerns documents and information provided by taxpayers as part of the process of assessing tax liability or documents or information gained or obtained by a taxation officer in the course of investigating the tax liability of a taxpayer. There is an obvious public purpose achieved by such a provision. As a broad generalisation, a taxpayer is liable to pay tax on, inter alia, taxable income. There needs to be a process whereby a taxpayer can disclose taxable income without fear that such disclosure will have consequences on the position of the taxpayer beyond the imposition of tax. A classic example would be a taxpayer who was engaged in immoral or even illegal activities generating income. Similar protection has to be provided, for the same reason, to documents or information gained or obtained during the investigation of a taxpayer's affairs.

[22] If this analysis of the section is correct, it militates against a conclusion that s.57 has a wider operation, as contended by Tongasat, to create statutory confidentiality (the breach of which attracts criminal sanctions) in relation to correspondence from the Commissioner of Revenue to a taxpayer setting out its tax liability as assessed by the Commissioner. It is our provisional view that it does not. It is true that the contentious documents contained information about the amount received by Tongasat for a particular transaction. It is conceivable that this information was otherwise not available in the public domain. However, even so, the argument of Tongasat proceeds on the premise that the documents are confidential by operation of s.57. We doubt very much this is so. While almost certainly the documents were confidential, it is not a confidentiality founded on taxation legislation the breach of which attracts criminal sanctions.

[23] Accordingly, we agree with the Chief Justice that a central element of Tongasat's case in the proceedings in the Supreme Court in opposition to the rescission of the restraining orders is not a strong one.

[24] Other alleged errors in the approach the Chief Justice were relied on by Tongasat.

[25] Allied to the submission that the documents were confidential by operation of s.57, was a submission that they were of the same character as those protected by the section. That is, some of the documents emanated from the Commissioner of Revenue's Office and this, it is apparently said, gave them a special character seemingly requiring a greater level of protection. But absent protection by s.57, those documents were no more than confidential documents concerning the financial affairs of Tongasat involving communications with a third party, the Commissioner, about Tongasat's tax liability. They appear to us to be of the same general character as other confidential commercial documents concerning Tongasat's financial affairs. In this and other contexts, Tongasat relies on passages from *Gatley on Libel and Slander*, 12th Ed in Chapter 22 concerning the misuse of private information. This commentary relates, specifically, to Article 8 of the European Convention on Human Rights and Fundamental Freedoms (which declares that everyone has the right to respect for his private and family life, his home and his correspondence) and concerned "private information". However we are prepared to assume, for present purposes, that private information is information that is subject to the equitable principles concerning breach of confidentiality.

[26] Tongasat points to a passage at 22.5 in *Gatley* which says that, amongst a list of many and varied classes of information, a person's personal financial and tax related information is private information. We note that tax related information is referred to, in an undifferentiated way, with financial information. More importantly it is not suggested in the text that taxation information has some special status that distinguishes it from other categories of private information. As confidential information, it is almost certainly the case that the publication of tax related information is protected by the equitable principles concerning breach of confidentiality. But, in assessing whether there was a serious question to be tried in the context of granting or refusing interlocutory injunctive relief, it would not have been appropriate for the Chief Justice to proceed on the basis, as suggested by

Tongasat, that the level or nature of the protection of taxation information differs from the protection afforded other confidential commercial information. Another potentially relevant distinction emerging from the application of Article 8 is between personal information and business information. However it is unnecessary for us to pursue this issue.

[27] It must be remembered that the Chief Justice accepted, in relation to the claimed breach of confidentiality, that there was a serious question to be tried. That necessarily involved an acceptance, for the limited purpose of assessing whether there was a serious question to be tried, that the documents in question were confidential. No error is revealed in the approach taken by the Chief Justice.

[28] This leads us to the second alleged error identified by Tongasat. It is to the effect that the Chief Justice erred in including in the mix of matters informing his consideration of the balance of convenience, the question of whether Tongasat would suffer damage or harm by the republication of the documents and discussion about them. However this proposition is tantamount to saying that interlocutory injunctive relief should continue pending trial simply by virtue of the fact that confidential documents had come into the possession of the respondents by means which were probably unlawful (on the part of the person or persons who provided the documents to the respondents). In our view, it cannot be the case that the risk of future or further harm to a plaintiff who alleges breach of confidentiality is irrelevant in deciding whether to grant or continue interlocutory injunctive relief. This is all the more so when, as discussed shortly, this risk of harm arising from a breach of confidentiality which is ultimately about damage to Tongasat's reputation and the commercial consequences of that damage, has to be balanced against other considerations concerning freedom of speech and the right of the public to be informed about matters of real and substantial public interest.

[29] This issue was addressed by Eady J in *Lord Browne of Madingley v Associated Newspapers Ltd* [2007] EWHC 202, an authority relied on by both Tongasat and the respondents. Eady J was dealing with an application for interlocutory injunctive relief restraining the publication of information concerning both the personal life of the plaintiff and his business dealings. At [28] and [29] Eady J discussed the intersection of a claim based on breach of confidentiality (though rooted in the provisions of the European Convention on Human Rights and Fundamental Freedoms) and the principles derived from *Bonnard v Perryman* [1891] 2 Ch 269 giving pre-eminence to the right of free speech in defamation cases. The following was said at [29] after a reference to the importance of not undermining the policy underlying *Bonnard v Perryman*:

> It is, therefore, appropriate in my view to ask the question in such a case as the present, whether, even though the claim is brought on the basis of breach of confidence, nevertheless the true object of the complaint is the protection of reputation. If it is, then it is probably right that the higher hurdle contemplated in Bonnard v Perryman should have to be surmounted.

[30] That higher hurdle has been discussed in Tonga in *Pale v Pohiva* [2006] Tonga LR 148. The test was propounded in a variety of ways. But its essence is that it would

only be in a compelling case that publication dealing with a matter of public concern would be restrained in a way that would curtail freedom of speech. The Chief Justice did not err in this matter in considering, as a factor in the mix of factors informing the balance of convenience, the extent to which Tongasat would, in the future, suffer damage if there was no interim injunctive relief. In the event, as noted earlier (above at [18]) that there was almost no evidence to show that Tongasat would suffer harm from republication or that damages would not be an adequate remedy if it did.

[31] The third and related error identified by Tongasat was the Chief Justice's approach to the public interest exemplified by his comments in para [88] of his reasons. They were to the effect that Tongasat was managing orbital slots that were clearly very valuable assets of the nation and there was a real and genuine public interest in knowing how those assets had been managed. Stripped to its essentials, the submission of Tongasat was that matters concerning freedom of speech and the public interest in informing the public of matters of importance must yield to the right of Tongasat to protect the confidentiality of the documents. However, for our part, we do not discern any error in the approach of the Chief Justice. He was engaged in a balancing exercise and he was entitled, as he did, to weigh in the mix of considerations informing the balance of convenience, the right of the public to gain an appreciation of the way Tongasat operated particularly in the light of other allegations in the public domain about Tongasat's business activities involving the allegedly unlawful payment to it of aid money in the sum of approximately US$25 million provided to the Kingdom by the Peoples' Republic of China.

[32] As noted earlier, the decision of the Chief Justice to discharge the orders was a discretionary decision. In an appeal from the exercise of a discretion it is necessary for the appellant to demonstrate that the discretion was exercised on wrong principles, involved some fundamental misapprehension of the facts or involved taking into account irrelevant considerations or failing to take into account relevant considerations. These principles were recently affirmed by the Court of Appeal in *Moala v Public Service Commission* [2012] Tonga LR 44 at para [10]. In the present case the appellant has not identified error of this type and accordingly has not established a basis for interfering with the exercise of the discretionary power by the Chief Justice to discharge the restraining orders made by Supreme Court in 2014. The issues raised by the appellant and the factual context in which they arise are of some significance in the Kingdom of Tonga. In these circumstances it is appropriate to grant leave to appeal. However as no appealable legal error has been established, the appeal should be dismissed.

[33] Accordingly, the Court orders:

1. Leave is given to the Friendly Islands Satellite Communications Limited to appeal against the order of the Chief Justice of 19 May 2015 discharging the restraining orders of 26 August 2014 and 12 November 2014.
2. The appeal is dismissed.
3. The Friendly Islands Satellite Communications Limited pay the respondents' costs of the application for leave to appeal and of the appeal as agreed or taxed.

R v Koloamatangi

Supreme Court, Nuku'alofa
Cato J
Cr 85/2014

16 September 2015

Criminal offences – rape and incest – conflict of evidence –court found complainant credible – charges found proved beyond reasonable doubt

The complainant was aged 14 at the time of the alleged offending. The accused was a mature man in his early fifties and had only arrived in Tonga in 2013. Both parties knew they were related as brother and sister. The complainant made two statements to the police on 18 and 21 April 2014 that the accused had had intercourse with her at their father's home. The accused was indicted on counts of rape, serious indecent assault, incest and domestic violence.

Held:

1. The court considered the evidence of the complainant and Lose and accepted their evidence as credible beyond any reasonable doubt. It did not find that the complainant A now aged 16 manifested any unusual antipathy towards the accused who was her brother. Likewise with A's sister, Lose. The court accepted he threatened A as he did Lose when he found out she had observed him later in 2013, and that she was scared. This fear continued on through to April 2014 when she left Kolomotu'a to stay with her mother.
2. The accused was found guilty of rape in that beyond any reasonable doubt he did have unlawful penile intercourse with the accused without her consent, in September, 2013. It also found proven beyond a reasonable doubt that he deliberately touched her on the breasts without her consent as she alleged in September 2013, and that he was guilty of an indecent assault preliminary to the intercourse. There was regular incestuous sexual intercourse over a long period from September 2013 and this occurred regularly through to her leaving the house in or about April 2014. The accused knew that she was his sister and that this was incestuous so this charge was also proven.
3. The accused was guilty of rape contrary to section 118(a) of the Criminal Offences Act; serious indecent assault contrary to sections 124(1) and (3) of the Criminal Offences Act; incest by a male person contrary to sections 132(1) and (3)(a) of the Criminal Offences Act, and domestic violence

contrary to sections 4 and 28 of the Family Protection Act 2013. He was acquitted of carnal knowledge of a young person under section 121(2) of the Criminal Offences Act.

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

Counsel for the prosecution	:	Mr Lutui
Counsel for the defendant	:	Mrs Fa'anunu

Verdict and reasons

[1] The Accused, Ma'afulele Kolamatangi, was indicted on the following counts;

(a) Rape contrary to section 118(a) of the Criminal Offences Act.

Particulars of which were that on or about 14th September, 2013 at Kolomotu'a he did rape A when he inserted his penis into her vagina without her consent.

(b) Serious indecent assault contrary to sections 124(1) and (3) (a) of the Criminal Offences Act.

Particulars of which were that he did on or about September 2013 at Kolomotu'a indecently assault A when he touched her breast without her consent.

(c) Incest by a male person contrary to section 132(1) of the Criminal offences Act.

Particulars of which were that on or about September 2013 at Kolomotu'a he did have carnal knowledge of A with the knowledge that she was his sister.

(d) Domestic violence contrary to sections 4 and 28 of the Family Protection Act 2013.

Particulars of which were that between November 2013 and April 2014, at Kolomotu'a, whilst living together in the same household, and beyond the reasonable expectations and acceptances of family and domestic life did sexually abuse A.

[2] A further charge of carnal knowledge of a young person contrary to section 121(2) of the Criminal offences Act was not proceeded with by the Crown and the accused is acquitted on that count.

The evidence

[3] A, at the time of the alleged offending, was aged 14. She was born on the 9th November, 1998. Her father was Ita Koloamatangi and her mother was Pepetua Taufa. The birth certificate evidences that she was born legitimate but having heard evidence from both her father and mother, I am satisfied beyond any doubt that she is

the illegitimate daughter of Ita and Pepetua, even though Ita registered the child's birth as legitimate according to the birth certificate produced in evidence.

[4] A gave evidence that at the time of the hearing in September, 2015 she was 16. At the time the offending occurred, she said she had been living with her father Ita, her half-sister Lose, and the accused who came to live with them in September, 2013. There was a younger child, a boy, aged about 7, Viliami, who also lived with them. Her mother, Pepetua, was separated from her father and had entered another relationship and lived elsewhere.

[5] She said in August, 2013, she saw the accused arrive in a vehicle and her father introduced him as his son from his first marriage. He had come to visit that day which was a Sunday. She was at a neighbour's house across the road when she saw the car arrive and went home.

[6] She saw him again the following week on a Saturday. He was visiting again and she spoke to him, in the evening. She saw him again on a Saturday in August when he visited. She can recall him visiting also in the second week of September and they went to town. There was a conversation in which he had said he liked A and her sister. Later, when they went home, she said the problem arose on a Saturday evening in the third week in September. She said she and her sister were lying down in the living room. She was closest to the wall, the accused, who she referred to as her brother, was in the middle and her elder sister Lose was against the wall. She said, when Lose was asleep, the accused touched her hands and then her breasts. She felt scared. He told her to get up and take off her pants. She said she did not want to get up and do this. She said she did not want anything like this done to her. The room was about 10 meters by 7. Her father was sleeping in her bedroom. It was about 10 pm.

[7] She said the house had a kitchen, two bedrooms, a toilet and a bathroom. Nobody occupied the second bedroom, which she later said, stored her father's tools.

[8] She said the accused threatened her that he would kill her if she did not do what he wanted. She said she got up, took off her pants, lay down and he inserted his penis into her. She tried to get him off her. She pushed him away. She said she lay down for a while after the accused had got off her and went for a shower. She said she knew she had lost her virginity. She had seen blood stains. She saw blood on her pants. She then put her clothes on and went back to the bedroom and slept. Lose was still sleep. She said that she told Lose the next day she had lost her virginity but she did not say to whom because it was shameful.

[9] She said the same thing followed in following weeks. She said she was no longer at school and the first offending in September 2013, had arisen when she was 14. She said she did not tell her father what had happened because she was scared he might hit her. She said she was shamed having intercourse with her brother. She spoke of a further occasion occurring at night time in September 2013 after the accused had moved from Longolongo where he had been staying. She was on a mattress as she had been before and intercourse took place. She said she was more ashamed this time than before. She said she got up and took off her pants after her sister had gone to sleep as she was told by the accused. She was concerned people would talk about it.

She said she did not tell Lose because she might spread things to others. She did not tell her father, either. She said the accused was living at Tofoa when the first incident occurred and at Longolongo when the second incident occurred. The first and second incidents occurred about two weeks apart.

[10] She spoke of a further incident in October that occurred during the daytime. Ita was at a church programme and Lose had gone to a neighbour's. The accused was on call but had not gone to work. She said again she was scared and complied with the accused's wishes to have sex. She gave evidence she was scared because of his threats. He had told her also to keep the relationship a secret. He had said this on the second occasion. Other acts of intercourse took place during the month of October. She said further it had occurred each month from October to April 2014, when she had returned to live with her mother. She said the accused had moved into live with them in 2013. She said that after she had returned to her mother she learned the accused had moved out. She confirmed she had not reported his offending to her sister or her father during this period. She said she was unhappy and wanted to return to live with her mother. She said she had been scared that if she returned to her mother earlier, that the accused might harm her. Her mother had told her she had known of the problem and she wanted her to return in or about April. She had collected her.

[11] She said she had made two statements to the police on the 18th and 21st of April, 2014. She said she had been taken for a medical examination. A medical certificate confirmed penetration had taken place.

[12] Under cross-examination, she maintained she had only met the accused in August and not February, 2013, as the accused had told the police. She maintained that during the first act of touching she knew it was the accused. She saw the shadow of a man. She said she had not told anybody because she felt ashamed. She said her father would not believe her. She said he valued his son more than her. She admitted the accused provided money for the family after he moved in. Her father was not working. She said the accused was drunk and only sometimes was good to her. She said she had trusted him. She said when the accused's wife came to Tonga, in November 2013, the accused was with her only sometimes. She admitted she had told the police she had intercourse with him about 22 times in the period of November. She said she was not counting but said that was an approximation. She said the allegations were all true and they occurred. She confirmed, in re-examination, that nothing had occurred on a Friday as she had initially told police and that the first incident took place on the Saturday. She admitted to be mistaken.

[13] Her older sister Lose gave evidence. She said she was 23. She lived with A and her father in Kolomotu'a in 2013. She had the same mother as A but they had different fathers. Ita had raised her, however, since she was one. She said she no longer lived with her father because of the problem that occurred. She said she had noticed that the accused commenced to give his board money not to her as before but to A and they went out together on occasions. She thought something was going on. She said the board money about $180.00 was spent by her sister on herself, rather than the family. She said she was 21 and A 15 at the time and that he accused also did want A to go anywhere with her. She said she had been responsible for keeping the

house. She said her suspicions had been confirmed when she saw an act of intercourse in November, 2013. It was at night time. She was sleeping in the living room. She said she was sleeping on the single bed in the room and there was a mattress. She had left her bedroom because it was too hot to sleep in the living room. They were lying a meter from her bed. The street light covered the area. She said she always slept on the bed when she was in the living room. She said there was an incident of oral intercourse which took place, also in November, which she saw. She said she left the room. She said on both occasions they were aware that she had seen what they were doing. She said she felt disgusted. They paid no respect to her. She was afraid to tell because the accused had said he would also kill her. He told her this after the accused had a meeting with her and A at a nearby school ground. The accused had told them to meet there. The accused had told her he had the same need as her sisters. He had also asked her if anybody else knew of the fact, he was having sexual intercourse with his sister. She said she was frightened about the threat. She said, however, she had told a neighbour about it. Her name was Kulukona Puniani, and she later gave evidence. She told one other person and also her mother. She told her mother who asked to see Kulokona. The witness says she moved to another area to live in January 2014 because she was afraid of the accused, and that he would find out she had told others.

[14] Under cross-examination, she confirmed that her brother, Viliami had a different father from her and A. She said the accused did not look after her family; he looked after her younger sister. She said she was told by her father to leave the house because she was arguing with A about the relationship. She admitted to telling a person by the name of Joe that she knew the person her father was having an affair with but admitted that was a lie because she was ashamed to tell Joe the truth that the accused and her sister were having an affair. She said these things because when she had texted him he asked her what was the reason for her still being awake, late at night. He had texted her first. She maintained that she had seen the acts of penile and oral intercourse and was not making her evidence up. In re-examination, he said she had told the police that she was shocked when she spoke to Joe, and agreed this was her reason for saying what she did. She said that she did stay with her father and the accused at another address after making her statement to the police because her father knew about the allegations, as did the police and she was no longer scared of the accused, as a consequence.

[15] Kulokona Puniani was a neighbour. She gave evidence Ita and his family were poor and her family would contribute to their needs. She confirmed that Lose had told her what she had seen at beginning of 2014. She said the accused's daughter from the USA had never had a bath at her place as the accused claimed, but had used the toilet.

[16] Pepetua Taufa, the mother of A and Lose, gave evidence that she had seven children, and that A was the product of her relationship with Ita Koloamatangi. She said it was an illegitimate birth. Lose was the product of a union with a man by the name of Taufa. She confirmed she had been told by Lose what she had seen in January 2014. She wanted to bring her home. She said that she had tried to get her back earlier but A was very afraid of the complainant. She came to live with her in April, 2014. Under cross-examination, she agreed that she had been married only

once and her husband had passed away in 1993. She confirmed that Viliami was her son and that he was not Ita's son.

[17] She said she had suspicious earlier than when Lose had told her about what she had seen in January 2014, but did not take action until A was under her care. She denied that the accused had ever got Ita to chase her out when she visited in Kolomotu'a. She denied she was making up her evidence because she had resentment against the accused. She admitted she made the complaint after Ita had made a complaint to the police against her of taking A away. She confirmed she had lived with Ita between 1996-2010 when they separated. The only child she had with Ita was A.

[18] Ita Koloamatangi said he was aged 77. He confirmed he was the father of the accused and also A. He confirmed A was illegitimate. He said he told Pepetua to leave his house because she was with another man. He confirmed the accused and Pepetua did not get along and that the accused did not approve of her being at the residence because she had another relationship. He confirmed he had told her to leave for good.

[19] Senior Constable Penisoni gave evidence of a record of interview she had conducted with the accused. In it he had denied any allegations of sexual misconduct with A, who he admitted he knew was his sister. He had been living in America with his mother who had divorced. He went to America in 1984 and returned to Tonga in 2013. He said he had been deported for drunk driving. He had stayed with his father Ita in Kolomotu'a. he said Viliami and Masalina also lived there. Lose also stayed with them. He said only he took care of them. He slept he said at Ita's and aslo went and visited his mother's family. He admitted he and Lose and A slept in the living room. He said he slept on the little bed and others on the floor. He denied being present in September. He only went there to live permanently in November. He went there on weekends in September. He said there were no problems. He said his wife came to Tonga in late November. She stayed in Havelu. He said he was there. He said he drank alcohol. He said whilst at Kolomotu'a he drank alcohol on weekends. Sometimes he had drunk with Lose. He admitted he had gone shopping with A and Lose into town. He denied he had said anything to them about there being something between the two of them. He admitted talking with A and Lose at the school but said it was because he had told them not to talk back to their father. He denied all sexual misconduct, as well as any threats to kill. He thought that A was may be 16 years old. He admitted both A and lose were in their right state of mind. He admitted he knew very well A and he were sister and brother.

[20] The Accused gave evidence, also. He was aged 52. He was married with one 23 year old daughter. His wife and daughter resided in the USA. He did not live with them because he had been deported for drunk driving, in March 2013. He worked full time. He said he arrived back in about February, 2013. He had lived at Tofoa, then at Longolongo with a cousin. He said he moved to Kolomotu'a in November, 2013. He said Ita was living there together with A, Viliami, and Lose. He said he first had visited his father in April, 2013. He said that, when he a staying in Longolongo, he would visit his father, every Saturday. He would stay one or two hours and then return. It was on only one occasion. He admitted he did sleep over, but could not

recall when and he admitted being introduced to A and knowing that he was her brother. He said he also met Pepetua when he first arrived and that she would stay for short periods. He said he had instructed her to leave because she was living with another man. That was in about August 2013. That was before he went to live with his father at Kolomotu'a.

[21] He denied having intercourse with her, in September 2013. He said he had never committed any indecent act because he knew she was his sister. He said she was lying. He was asked why he would say A was lying, if she were, as he had said to the police, mentally stable. He said that he had no doubt the allegations were the product of a discussion between the two girls. He said many times they would argue as a result from when he was scolding them for swearing at his father. Another reason was because he had often told them to leave and go away to where their mother was and leave me to look after my father. He spoke also of other incidents, involving lost property and the disappearance of his property. He referred to money, phones, and clothes. He said his father had instructed Lose to leave.

[22] He said he looked after A very well. He said Lose was telling a big lie about seeing him have intercourse in November, 2013. He said he managed his finances and contributed to the household along with overseas relatives. He gave money to Lose and A for their needs; about 10 paanga. They asked for money often.

[23] He said the living arrangements were that sometimes the girls slept in the spare bedroom and sometimes in the living room with him. He admitted it was not in accordance with Tongan custom for the girls to sleep on the bed and they were on the mattress. He said his father sometimes told them to sleep in the bedroom. He said he slept in the living room because, when he came to the house, they were sleeping in the bedroom. He said he told his father when they would not go to the bedroom. There was a bed in the small room and a mattress.

[24] He said his wife had come and lived at Havelu for two weeks in November 2013, and he had lived with her there. He denied threatening A. He admitted to drinking only on the weekends. He said he drank with Lose. He described Lose as a woman who wants things and also lies and steals. He said, after he came home from work, he would take a bath, eat dinner, and because he often finished late at midnight, he would go to sleep. Sometimes, he said he came home at 6-7pm. He said after work, he would spend time with a person by the name of Toko talking at his residence. He denied giving any money to Lose for household expenses.

[25] Under cross-examination, he said it was in November 2015 that he moved from Longolong because his mother's family had grown unhappy with him. He had become closer to his father. He said he was not close friends with Lose or A when he had come over before moving in. He admitted, however, developing a friendship between he and Lose before he moved in to stay. He denied, when it was put to him by Mr Lutui, that the first of the main reasons he gave for the women lying, namely scolding them for remarks to their father, was not a strong reason to fabricate. He seemed to also state the second reason, namely telling the girls to leave the house and live with their mother was a strong reason also, and not trivial, as Mr Lutui had said. Likewise, allegations about property were not trivial either. He accused both women of being used to lying. He said the reason he had gone to Kolomotu'a was to look after his

father. He said his wife had left in the first week of December and confirmed he had not moved to his father's to live until November, 2015. He later said his wife came in the first week, and not as had been suggested to him by Mr Lutui towards the last weekend of November. He said he did not want to sleep in the bedroom because it was torn, dirty and yucky. He admitted his clothes were kept in the bedroom. He said Lose and A would give his clothes away. He accused them of stealing. He later admitted he had never actually seen them steal. He said it was all right for the girls to go and sleep in a room that was disgusting with all his clothes in it. H said he did not leave because he loved his father. In re-examination he said he was upset at how the young women had treated his father.

[26] A neighbor, Mr Lome, known as Toko, was called to give evidence. He confirmed he knew the accused well as a friend. He would take with him after work. They would talk after dinner from 8 to midnight. He had known him a year and he was shocked about the allegations. On one occasion, he recalled the accused saying thank god for Lose looking after his father. He said the same about Lina. He agreed that it was about November, 2013 the accused moved into the residence at Kolomotu'a.

Submissions

[27] Mrs Fa'anunu submitted that matters involving credibility were difficult and I agree. She submitted the accused had chosen to give sworn evidence and he had no obligation to do so. She was critical of A's assertion that she had intercourse 22 times in November 2013. She submits how he could have done this so often with his wife and daughter present. Both young women A and Lose lacked credibility, she submitted, as did Pepetua who she criticized for not making a more timely complaint if it were true that she had suspicions and had been told by Lose in January 2014 of their having sexual relations. There was no independent evidence, aside from the young women, of sexual activity taking place. She submitted that the evidence was unsatisfactory that A was the sister of the accused even though he admitted this. The mother had children to various different men. She argued that it was incongruous for the accused to be on the one hand looking after the family and at the same time involved in doing these things to A. He had consistently denied since his arrest these charges both in his record of interview with police and at trial. She submitted that none of the charges had been proven beyond a reasonable doubt.

[28] Mr Lutui submitted essentially that I should accept the credibility of the complainant and there was no good reason to discount them on the basis of any of the reasons advanced by the accused. He submitted that the accused had the opportunity to commit the offences, admitting that he would stay over weekends in September 2013 before he moved, as the accused had said, permanently in November. He submitted that the wife did not come to Tonga until later in November, 2013 and there was plenty of opportunity for the accused to have sexual intercourse with the complainant during that period. He diminished the submission of the accused that the complainant had said 22 times as adversely affecting her credit, by this being explained by her to be an approximation, only. He complained that the reasons advanced by the accused for suggesting the complainant and Lose were making up false allegations were not put to any of the relevant witnesses, and were of recent

manufacture. The offending was over a long period, and it was understandable that there would be some conflicts in the evidence. I should consider, he submitted, all the evidence in its entirety. He submitted that, in the face of the statements of the defence witness Toko, that the accused had said that he was content or grateful to both young women for looking after his father, that it did not ring true that now he should be so critical of them. He submitted also that the medical report tendered in of them. He submitted also that the medical report tendered in evidence which showed that intercourse had taken place was some support for A's assertion that she had been a virgin, when the accused first had intercourse with her. He said she was young, only 14 at the time when intercourse first occurred, and most likely to have consented to intercourse with a much older man known to be her brother. Overall, he submitted the Crown had established a case beyond reasonable doubt in relation to all the charges with the exception of the count of carnal knowledge of a girl under the age of 15.

Reasons

[29] I have considered the evidence of the complainant and Lose, and I accept their evidence as credible beyond any reasonable doubt. I did not find that the complainant A now aged 16 who gave her evidence with care manifested any unusual antipathy towards the accused who was her brother. Likewise with Lose, who also gave her evidence carefully. It is true that on the question of how many times A had intercourse in November when she said to police about 22 times, I accept her evidence that was an approximation only. I accept her evidence beyond any reasonable doubt that there was a touching of her breasts on a Saturday night in September, 2013 prior to the accused sexually penetrating her without her consent, namely raping her in the living room. I accept he threatened her as he did Lose when he found out she had observed him later in 2013, and that she was scared. This fear I consider continued on through to April, 2014 when she left Kolomotu'a to stay with her mother.

[30] The accused was a mature man in his early fifties and had only arrived in Tonga in 2013. Both parties knew they were related as brother and sister. It was accepted that it was very much against custom and law in Tonga for incestuous relations to occur, and also against custom for brother and sister to sleep in the same room. It would in my view be a monstrous lie for the complainant to falsely assert her brother had raped her. It would also as she said be an allegation that would bring shame on her. I can see no good reason why this young woman of only 14 at the time should falsely claim rape by her brother. The reasons given by the accused, even if true, would be most unlikely to provide a foundation for false complaints of this serious kind to be made or a conspiracy to take place. I agree with Mr Lutui, if the accused genuinely believed that his conduct towards the women of scolding and telling them to leave had been sufficient to have led to these false allegations, I would have expected them to have been advanced in cross-examination of the various witness known as Toko's assertion that the accused had confided in him that he was pleased with A and Lose's treatment of their father. I add that I have considered this evidence independently also of any failure to abide by the rule in *Browne v Dunn* and I agree with Mr Lutui's submission, supported by his cross-examination of the accused, that the reasons he gave were not in my view sufficiently strong to have sensibly led to

false allegations of the kind that were made. The accused bears no onus to provide a reason, but the absence of a sufficient basis for a conspiracy strengthens the integrity and reliability of the women's evidence.

[31] I consider there was sufficient opportunity even if the accused had, as he said, only moved into the family's residence in Kolomotu'a in November for the allegation of touching of breasts as a preliminary to sexual intercourse to have taken place in September. On his own admission he had stayed over on earlier occasions at night, prior to moving in permanently in November. I did not hear much in the way of confirmatory evidence that in fact he moved permanently in November, but in any event on his own admission he did from time to time spend evenings over earlier than November, 2013.

[32] I accept also in all the circumstances, the fact that A did not make complaint earlier was unsurprising. It would be very difficult for a young woman to make a complaint to her father of his son's activities and shameful for her, also. Lose I am satisfied did make a complaint of her concerns to her neighbor whose evidence I accepted and to Pepetua. I also accept Pepetua's reasons for not taking actions earlier as advanced by her at trial. This was a family matter and one of serious embarrassment for all concerned. I accept it was when complaint was made to the police by Ita that she had taken A from his care, that she and her daughter made the complaint against the accused, even though this was some months after Lose had confirmed her suspicions in January 2014. I heard and saw Ita, the father, an elderly man, who had a rather formidable presence, and I can well understand how Pepetua and, indeed the complainant and Lose might well not have pressed this delicate family matter, involving his son before him earlier. I accepted all their evidence and I reject the accused's evidence and I do so beyond any reasonable doubt. I consider that the accused, who was in his early fifties, took advantage of A whom he knew to be his sister, and forced her to have sexual relations with him. I find entirely unconvincing his criticism of she or Lose and his suggestion they should have been sleeping and, not he, in the spare bedroom even though it was, as he said untidy, if not unkempt and dirty, and had his clothes in it. I accept what Lose said there was a meeting at the school when he threatened she and A and he told her he had sexual urges as did A.

[33] There may not be a need for corroboration in Tonga. Of this, the law is unclear. However, even if there is no corroboration of the rape incident, I accept beyond any reasonable doubt the evidence of the complainant; and I do not consider it dangerous to do so. I accept that Lose did see sexual activity, penile and oral intercourse taking place in November 2013, and whilst this may not be strictly corroborative of the count or rape in a *Baskerville* sense, it is certainly strongly confirmation of a sexual activity occurring, contrary to the accused's denial. Accordingly, I find the accused guilty of rape in that beyond any reasonable doubt he did have unlawful penile intercourse with the accused without her consent, in September, 2013. I also find proven beyond a reasonable doubt that he deliberately touched her on the breasts without her consent as she alleged in September 2013, and that he is guilty of an indecent assault preliminary to the intercourse. I accept that there was regular incestuous sexual intercourse over a long period from September 2013 (being the second incident of intercourse alleged in September as Mr Lutui said and the basis for

this charge at trial). I accept also that intercourse occurred regularly through to her leaving the house in or about April 2014, as she testified. To the knowledge of the accused this was incestuous because she was his sister as he acknowledged knowing, and I find beyond any reasonable doubt, this charge proven also. Finally, I find, over the period from November to April 2013 as pleaded, the accused sexually abused A, conduct which was plainly beyond the reasonable expectations of family and domestic life, whilst living together in the same household in Kolomotu'a. For reasons, I have mentioned, he is acquitted of carnal knowledge of a girl under the age of 15, on the basis the Crown elected at trial not to proceed with this charge but to allege the second incident in September 2013 of sexual intercourse constituted the crime of incest.

Verdicts

[34] I find the accused guilty of rape contrary to section 118(a) of the Criminal Offences Act; serious indecent assault contrary to sections 124(1) and (3) of the Criminal Offences Act; incest by a male person contrary to sections 132 (1) and 3(a) of the Criminal Offences Act, and domestic violence contrary to sections 4 and 28 of the Family Protection Act, 2013.

[35] He is acquitted of carnal knowledge of a young person under section 121 (2) of the Criminal Offences Act.

Ha'asini and Hamula v Free Wesleyan Church of Tonga

Land Court, Nuku'alofa
Paulsen, President
LA 15/2013

11-13 August 2015 and 4 September 2015; 23 September 2015

Land law – availability of land for lease – claim that land reserved for public health purposes – no evidence
Land law – no competing claim – Minister not obligated to consult

The Water Committee challenged the grant and registration of a lease dated 18 June 2013 over land in the Crown estate at Ha'asini in favour of the Free Wesleyan Church (FWC). It applied for an order cancelling the lease and for the removal of a residence built by FWC from the land. The Water Committee said that the leased land was reserved for public health purposes as a water catchment therefore the land was not available for lease. In the alternative, the Water Committee argued that if the land had not been so reserved then the grant of the lease was unlawful as the second defendant, the Minister of Lands (the Minister), was required to, but did not, consult with it before granting the lease.

Held:

1. For land to be reserved there must be both a Minister's decision as well as Cabinet's consent. These were invariably recorded in writing. The Water Committee could not produce relevant decisions of the Minister or of Cabinet creating a reserve of the land. The court was asked to infer that a reserve was validly created. As a matter of principle, in the absence of clear evidence, the court should be slow to draw such an inference. That would have the potential to create mischief by introducing unnecessary uncertainty into the operation of the Land Act. The court found that the surrendered allotments were never made reserved land under section 138 of the Land Act.
2. The land that was leased to FWC was part of the Crown estate and it was not reserved land. There was no basis for the argument that the land was not available to lease.
3. There was no justification to impose on the Minister an obligation to consult when there was no competing claim to either the right to possess/occupy the land nor title to land. The Water Committee was concerned with the risk of contamination of the village water source through the development of the land for residential purposes. It objected to

an intended land use. To require the Minister to consult with it in those circumstances would be a major and unwarranted extension of the Minister's obligations for which there was no authority. If an obligation to consult existed for the reasons advanced by the Water Committee then it must be an obligation to consult with the Ministry of Health. The Ministry of Health was consulted and had responded to the complaints about further allocations of the land.

4. The Water Committee's claim was dismissed.

5. It should be noted that the Ministry of Health recognised that it was obligated by law to ensure that the water catchment was not contaminated. It must monitor the water catchment of the village and tests in 2013 and 2014 had shown that the water was safe. Further, in other proceedings the Supreme Court issued a permanent injunction preventing the FWC from using its septic tank on the leased land. The decision of the Supreme Court was appealed to the Court of Appeal and that appeal was dismissed and so it was beyond challenge.

Cases considered:

Cocker v Palavi anor [1997] Tonga LR 203
Finau v Minister of Lands anor [2012] Tonga LR 127 (CA)
Hakeai v Minister of Land & Ors [1996] Tonga LR 142
Hausia v Vaka'uta anor [1974-1980] Tonga LR 58
Langa Fonua 'A Fefine Tonga anors v Manuofetoa anor [2008] Tonga LR 215
Manu v 'Aholelei anor [2015] Tonga LR 135
Tafa v Viau anors [2006] Tonga LR 287 (CA)
To'a v Taumoepeau [2015] Tonga LR 62
Tuita v Minister of Lands (1926) II Tonga LR 18

Statutes considered:

Land Act (Cap 132)
Public Health Act

Counsel for the plaintiff	:	Mr Niu SC
Counsel for the first defendant	:	Mrs Palelei
Counsel for the second defendant	:	Mr Kefu SC

Ruling

The issues

[1] The Water Committee seeks to challenge the grant and registration of a lease No 8378 dated 18 June 2013 over land in the Crown estate at Ha'asini in favour of the Free Wesleyan Church (FWC). It applies for an order cancelling the lease and for the removal of a residence built by FWC from the land.

[2] The Water Committee says that the leased land has been reserved for public health purposes under section 138 of the Land Act as a water catchment. For that reason, the

Water Committee says, the land was not available for lease. In the alternative, the Water Committee argues that if the land has not been so reserved then the grant of the lease was unlawful as the second defendant, the Minister of Lands (the Minister), was required to, but did not, consult with it before granting the lease.

[3] The issues that arise are:

[3.1] Was the land reserved for public health purposes as a water catchment under section 138 of the Land Act so that it was unavailable to be granted for lease?

[3.2] Alternatively, did the Minister have an obligation to consult with the Water Committee before granting the lease and, if so, was there adequate consultation?

[3.3] If I find that there was not adequate consultation, what is the effect of that on the lease?

The facts

[4] A Water Committee is an elected body established under the Water Supply Regulations of 9 October 1963, whose membership changes from time to time. Water Committees are established with the purpose of assisting village water schemes and to carry out necessary work to provide water to the village. The present Chairman and members of the Water Committee were elected in 2013 local elections.

[5] Ha'asini is a village on the south-eastern end of Tongatapu. In the 1960's a decision was made by the then Minister of Lands to relocate six registered landholders from land around the village underground water source and well. These landholders surrendered their land (the surrendered allotments). This was approved by Cabinet decision No 134 dated 18 February 1963. That Cabinet decision was not produced into evidence and cannot be found.

[6] The six landholders were relocated to another area in the village that became available by the surrender and subdivision of land owned by one Sione Liongiloto. There was some disputed evidence that all of this was necessary because of an outbreak of typhoid in the village. Whether this was so or not, there is no dispute that the six landholders were relocated to protect the village underground water source from contamination and, in particular, from contamination caused by leakage from septic tanks and pit latrines.

[7] Beginning in 1976 some of the surrendered allotments were progressively subdivided and again allocated as town allotments. In 1976, the Minister of Lands, Baron Tuita, directed that one of the surrendered allotments previously owned by 'Uaisele Puamau was to be subdivided into two 30 perches town allotments and allocated to 'Ofa Puamau and his son, Suliasi Puamau. This left a balance of land from 'Uaisele Puamau's allotment unallocated. It is from that balance of 'Uaisele Puamau's allotment that FWC was granted its lease.

[8] Six further allocations of land from the surrendered allotments were made but I was not told when the allocations were made nor were the Minister's files produced into evidence. There was a helpful plan which identifies each allocation. (Document

72 of the bundle) An area remained unallocated and vacant which I understand had formerly been the allotments of Siaosi Manu, Sione Manu and Sione Telefoni along with the balance of the allotment of 'Uaisele Puamau. There were no complaints received by the Minister about any of the allocations made from the surrendered allotments until 2000.

[9] The evidence was that the Water Committee and a local co-operative society mowed and maintained this land and that it has been used at times by the village for a range of community activities including meetings, sports events and village functions. On a visit to the site by the Court the land appeared largely unmaintained and there was evidence that someone had grown vegetables on it recently and there were animals roaming and grazing on the land.

[10] The two witnesses called for FWC, Semisi Fanua 'Ila Kata and Sione Foueti, gave evidence that in the 1980's the King granted the land to a local Noble Servant, Hu'akavameiliku. Semisi Fanua 'Ila Kata said that in the 1980s at the Agricultural Show the King, in front of all who attended, had made an oral grant of the land to Hu'akavameiliku and that later Hu'akavameiliku had intended to grant the land to FWC but this not been implemented before his death. This evidence is too vague for the Court to make any determinations about what land the King intended to confer upon Hu'akavameiliku, whether he intended to grant title to that land or some lesser interest (such as a right of occupation only) and the basis upon which he did so.[118]

[11] At around the same time, in 1985, the Minister of Lands, Baron Tuita, directed that an area of 10.9 perches, from one of the surrendered allotments that had been previously owned by one Sione Seteleki, would be allocated to the Water Committee. In a Savingram of 3 October 1985 he directed:

> Please survey and allocate a portion of the town allotment for the Komiti Vai [of Ha'asini].
>
> This allocation is 0a.0r.10.9p in size.

[12] There is evidence that at least the then Chairman of the Water Committee was aware of the Minister's decision. In a letter of 15 August 2001 to the Minister of Lands, Mr. Tonga Tekiteki, of the Mateaki'i Fonua of Ha'asini and Hamula Group, stated that he had spoken to the then Chairman of the Water Committee, Suli Lolohea, who

> … said yes, he was the one who went to the Minister of Lands in 1985 in the time of Baron Tuita to subdivide 10 perches for the Water Committee of Ha'asini and Hamula..

[13] In his submissions, Mr. Nui said that for fear that Hu'akavameiliku might take over the area of the well from the Water Committee the Town Officer of the time

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[118] See for instance *Tuita v Minister of Lands* (1926) II Tonga LR 18 and *Langa Fonua 'A Fefine Tonga anors v Manuofetoa anor* [2008] Tonga LR 215.

asked the Minister of Lands to survey and demarcate the area of the well as belonging to the Water Committee. That submission seems to me to run counter to the Water Committee's case that the land was understood to be a reserve. In any event I do not accept the submission as there was no direct evidence as to why the Minister decided at this time to allocate 10.9 perches of land to the Water Committee. It is reasonable to assume the Minister considered this was the area of land required for the purposes of the Water Committee and Mr. Semisi Moala, who gave evidence for the Minister, said that there was a policy direction at the time that the watershed area was to be subject to subdivision, reallocation and registration of allotments. I note also that in his letter of 15 August 2001, Mr. Tekiteki asserted that it was only the Chairperson of the Water Committee who wanted to subdivide the land without the knowledge of the other members of the Committee. Mr. Tekiteki clearly had no personal knowledge of that and it cannot be assumed that other members of the Water Committee were not aware of the Minister's decision.

[14] In July 1993, 'Oliveti Puamau applied for the grant of a town allotment from the balance of the surrendered allotment previously owned by 'Uaisele Puamau, who was his grandfather. On 23 July 1993, the Minister of Lands, Dr Ma'afu Tupou, directed that the land be registered to 'Oliveti Puamau but this decision was later revoked. There is a handwritten note of the Minister dated 3 August 1993 which records that he was informed by the Ha'asini Town Officer that the land upon which the village water tanks were situated had been granted by the King to Hu'akavameiliku. The note recorded "..no applications for an allotment will be accepted" and that "There is a tax allotment that is proposed to be subdivided in town of Ha'asini". This would appear to confirm that the King had purported to confer some rights over the land to Hu'akavameiliku. For present purposes, the practical consequence of that was that 'Oliveti Puamau's application for the grant of the land did not proceed. There was produced into evidence another handwritten note of 5 November 1993 signed by the then Minister reminding 'Paula' of the Ministry of Lands to cancel 'Oliveti Puamau's application.

[15] On 27 June 2000, Tonga Tekiteki wrote to the Minster of Lands with a complaint on behalf of residents of Ha'asini and Hamula to the allocation of land around the water source. The Minister was asked to stop the further subdivision of the land and to cancel allocations already carried out for reasons that included that it would cause contamination to the water resource and that in the 1960's there was an agreement between the Government and the people of the village to reallocate the six landholders "so that the land would be available and be cleaned so the underground water source can be established".

[16] On 5 July 2001 the Minister of Lands wrote to Tonga Tekiteki and in that letter the Minister confirmed that originally six allotments had been surrendered and exchanged for other land so that the land vacated could become the underground water source of Ha'asini, but then noted:

> The Minister of Lands, Baron Tuita directed on 3 October 1985, that only (10P) be allocated for the Water Committee…… it is believed there was an understanding and agreement between the Ministry of Lands and the Water Committee of Ha'asini and Hamula on that particular day. I have

> directed that this matter be investigated to be referred back to the Ministry of Health to assess the current state of the underground water source and to check whether it falls within the watershed area of Ha'asini and Hamula.

[17] On 15 August 2001, Sione Tekiteki wrote again to the Minister of Lands, copying the Prime Minister and the Ministry of Health. He asserted, on the basis of enquires that he had made, that there had been no mutual agreement (presumably he meant between the Ministry and the Water Committee) to allocate only 10 perches of the land to the Water Committee. On 21 May 2002, Mr. Tekiteki again wrote to the Minister of Lands advising that 10 months had passed and he was still waiting for a response and a final decision regarding the Ha'asini water catchment. There does not appear to have been any response to that letter and no further developments until around mid 2012. Needless to say, no steps were taken to cancel the allocations already made from the surrendered allotments. There was no evidence of any contamination of the water source.

[18] In mid 2012, the present Minster of Lands visited Ha'asini in connection with a dispute that had arisen in the village regarding the use of cemetery land. The details of the dispute are of no direct relevance to this case. In his evidence, Sione Foueti, who was called as a witness for FWC and was then the Town Officer and Chairman of the Water Committee, said that he had announced the meeting to everyone in the village and a lot of people attended including people who were then members of the Water Committee and people who have since become members of the Water Committee following the 2013 elections. At the conclusion of this meeting, the Secretary of FWC, Saipalesi Unu, asked the Minister whether FWC could have the land which is now in dispute and, after checking with his clerk that the land was available, the Minister said that FWC could apply for the land. No objections were raised to this by those at the meeting.

[19] On 8 October 2012, FWC applied for its lease. On 19 October 2012 Cabinet approved the FWC lease by Cabinet Decision No 887. Although there was some dispute about it, it is clear to me that FWC began construction of its residence very soon after learning that its application had been granted but well before any lease was registered. I understand from Mr. Niu that the relevance of this goes only to the issue of the further relief that should be granted in the event the Court cancels the lease.

[20] The evidence of Mr. Semisi Moala was that on 30 October 2012 a letter was sent by the Ministry of Lands to the Land Officer of FWC recording that an error had been made as to the location of the land that was to be subject to the lease. The application, as filed, related to land that had last belonged to one Sione Taungapeau, before it reverted back to the Crown upon his death in May 2005. Mr. Niu cross-examined Mr. Moala about this evidence. He challenged Mr. Moala's evidence that there had been an error in the first lease application. He put to Mr. Moala that FWC may have simply changed its mind as to the land that it wanted to lease. Mr. Moala accepted that was possible but also said that he was in no position to know what had been in the mind of FWC.

[21] I am satisfied that FWC made an error in its first lease application. FWC already had the use of the land previously owned by Sione Taungapeau. It wanted to build a

residence. It is unlikely it would choose to build a residence on the land that presently serves as the entrance to the Church when other land was available. There is also the fact that upon learning its application for lease was granted FWC immediately began building the residence on the land that had formerly belonged to 'Uaisele Puamau. That is a strong indication of its intention to lease that land. I consider that FWC always intended to apply for what remained of 'Uaisele Puamau's surrendered allotment and it made an error in its first application.

[22] FWC then made a second application for lease. I was not told the date that application was made. The second application for lease was produced but it is not dated. Clearly it was filed after 30 October 2012. No decision was made upon it until 19 April 2013.

[23] In the course of construction of the FWC residence the water pipe from the well to the main road was damaged. The water supply to the village was interrupted for a time while repairs were done. On 11 January 2013, Mr. O Pouono, a local lawyer, wrote to FWC. He stated in his letter that he was acting for the Water Committee and residents of Ha'asini and Hamula. He asked that FWC stop construction of the residence and enter into discussions with the people of the village. Mr. Pouono's letter was referred by the FWC Reverend for Ha'asini and Hamula, Mr. Musika Vailea, to the Ministry of Lands. He asked that the correspondence be "checked" by the Ministry.

[24] A letter was also sent by Mr. Loumaile Hakaumotu to the Director of Health on 16 January 2013. In that letter, Mr. Hakaumotu expressed concern about construction of the residence on "an area that has been over 40 years kept by the Water Committee for the entire village". He requested that the Director of Health "stop and cancel the construction of the residential house". His reasons were set out in a detailed fashion. They were, first, that the habitation of the area would cause contamination of the water table. Secondly, that the construction of the residence was sudden without any consultation with the village or Water Committee. Thirdly, that construction work had caused damage to the water pipe and interrupted the village water supply and that FWC had ordered that the water pipe be dug up and relocated which might not only cause problems to the distribution of water but would result in costs. He said that the Water Committee would need time to raise the money "and while that continues water will be disrupted". He also noted that no meeting of the Water Committee had been called about the matter with the implication being that this was because the then Chairperson of the Committee, Mr. Foueti, was supporting the construction of the residence by FWC while ignoring the wishes of the Water Committee.

[25] At the direction of the Minister of Lands the Ministry of Health was asked to assist to review the complaint and assess the heath and sanitation issues that arose from it. On 17 January 2013, representatives of the Ministry of Health undertook an inspection of the site including the FWC residence and the well. In a Savingram of 18 January 2013 Niu Fakakovikaetau reported to Dr Malakai 'Ake, the Chief Medical Officer at the Ministry of Health. In that Savingram Mr. Fakakovikaetau noted that for 20-30 years there had been a number of houses closer to the well than the FWC residence under construction "without any health risk concerning the location of residential houses and the water well". He also noted that testing of the water source

by the Ministry of Health had not found any contamination caused by septic tanks or toilets used by the residences. He concluded that it was not proved that the well would be affected by the construction of the new residence by FWC.

[26] Another letter of complaint was received by the Ministry of Health from Mr. Hakaumotu on 21 January 2013. This was reviewed by Mr. Niu Fakakovikaetau, who prepared an internal memo for Dr Malakai 'Ake on 23 January 2013. This responded to the three main points that were the basis for Mr. Hakaumotu's dissatisfaction with the construction of the FWC residence. The new piece of information contained in this report was that, in so far as there were concerns about the cost of re-routing the water pipes, FWC was prepared to assist with those expenses.

[27] On 30 January 2013 Dr Siale 'Akauola, the Director of Health, wrote to Mr. Hakaumotu stating:

> As Niu had explained, although there are dwelling houses closer to the water catchment than the new buildings constructed by the Wesleyans, it is mandatory for the Ministry of Health to always follow up and examine to confirm that the water catchment of your township is not contaminated, by anything including the dwelling houses close to it, in the future. It is believed that there will be a continuance of cooperation between the Ministry and the Water Committee of the township of Ha'asini and Hamula to always confirm there is clean and sufficient water for the people of these towns.

[28] The evidence of Mr. Semisi Moala was that having satisfied himself with the reports submitted by the Ministry of Health that the water had been and remained safe, the Minister of Lands proceeded with processing FWC's application for the lease. It was the submission of the Water Committee that Mr. Moala's evidence was that the Minister was aware of the letters of the people of the village but he chose not to see them or invite them to be heard and that the Minister just proceeded to direct that the lease be granted. I do not accept that submission. It does not reflect Mr. Moala's evidence or what occurred. Mr. Moala was asked if the Minister had looked at the complaints that had been made to him and the Ministry of Health. Mr. Moala's evidence was that he believed the Minister did consider the complaints and they were all forwarded to him. As will be clear from the events I have described, the Minister did not ignore the complaints made by Mr. Pouono, purporting to act for the Water Committee and the villagers of Ha'asini, or the complaints of Mr. Hakaumotu. To the contrary, the complaints were investigated before FWC was granted its lease. In so far as it is alleged the Minister chose not to see the villagers, there was no evidence of a request that he do so.

[29] On 19 April 2013 Cabinet rescinded Cabinet Decision No 887 and by Cabinet Decision No 355 consented to the grant of a lease to FWC of an area of 1r 24p for term of 50 years. The area was the balance of the surrendered allotment formerly owned by 'Uaisele Puamau. On 18 June 2013 the lease was registered in the name of FWC under lease No 8378.

[30] Before leaving the facts I should mention that at the request of Counsel a site visit was undertaken. It was a helpful exercise. As I noted earlier, the land that

remains vacant has clearly been used as a vegetable garden in recent times and animals are able and do graze upon the land. The well itself is very close to a number of residences that use septic tanks. The closest residence is within 30 metres of the well but it seemed much closer than that. As was reported by the Ministry of Health, there are a number of residences much closer to the well than the FWC residence and some of these are inland of the well. These would be the most likely to cause contamination if, as was suggested in the evidence, surface and underground water flows from elevated inland areas to the sea. The incomplete septic tank of the FWC residence is 96 meters from the well. The FWC residence is fenced and largely built but it is not yet completed. It remains unoccupied.

Other evidence

[31] The Water Committee called as witnesses Mr. Taniela Kula, from the Ministry of Lands, Environment, Climate Change and Natural Resources, and also Mr. Quddus Fielea of the Tonga Water Board. Mr. Kula had qualifications in Earth Science, Geology and Spatial Information Science and in 2013 had prepared a report headed "Brief Assessment of Ha'asini Groundwater Lens". The aim of his report was to "provide awareness of potential impacts of developments consisting of septic tanks within a close proximity of the existing village water production well field". Similarly Mr. Fiela, who trained as a Water Engineer, prepared a report in February 2013, the aim of which was "to provide awareness on potential risks and impacts of development within the vicinity of the production wells at Ha'asini".

[32] Mr. Kula and Mr. Fiela were called to produce their reports. No objection was taken to this but I consider that it will seldom be a satisfactory approach. Expert opinion evidence must be carefully prepared having regard to the role of an expert and their obligations to the Court. It appeared that neither expert had prepared their report on the basis that it would be their evidence in Court proceedings. Neither witness confirmed that he understood the role and duties of an expert witness. Furthermore, it was not clear upon what relevant point in issue arising in this case, requiring special skill and knowledge, they were being called to give evidence. Both witnesses noted significant information gaps about matters that they considered had a direct bearing on the risk of contamination to the water source which meant that, had I been required to do so, I would not have been prepared to draw any significant conclusions from their evidence. Mr. Kula noted a lack of information about present levels of water quality at the well, the level of the water table, the direction and rate of flow of water within the production field and data to determine the impact of pumping rates on contamination and salinity. Mr. Fiela noted that the geology of the area was not known and under cross-examination acknowledged that he had not considered the design of the septic tank originally intended for use by FWC. Without intending any disrespect to either witness, I can take very little from their evidence that is of relevance in this action.

[33] That said, I do accept that it should be recognised that further developments involving construction of new septic tank systems within close proximity to the production well has the potential to cause contamination.

Was the land reserved for public health purposes as a water catchment under section 138 Land Act?

[34] Section 138 of the Land Act relevantly provides:

> The Minister shall with the consent of the Cabinet reserve such portions of Crown Land as may from time to time be required for ….commons…playgrounds, public health purposes… or for other public purposes…

[35] For land to be reserved there must be both a Minister's decision as well as Cabinet's consent. These are invariably recorded in writing. Whether the Minister made such a decision and obtained Cabinet's consent are questions of fact. Mr. Niu recognised that the Water Committee cannot produce relevant decisions of the Minister or of Cabinet creating a reserve of the land. He asks the Court to infer that a reserve was validly created. As a matter of principle, in the absence of clear evidence I think the Court should be slow to draw such an inference. That would have the potential to create mischief by introducing unnecessary uncertainty into the operation of the Land Act.

[36] In support of the Water Committee's submission Mr. Niu notes the circumstances under which the six landholders were relocated which he says was so that their land could be surrendered to the Crown "to be reserved for water catchment". Mr. Niu relied upon the evidence in the written brief of evidence of Mr. Moala, who said at paragraph 4 that, "These surrendered allotments were reserved for the water catchment". The Water Committee takes too much from that evidence in my view. It does not follow from the fact that steps were taken to protect the water catchment that the land was also reserved for public purposes under section 138 of the Land Act. Mr. Moala said that there was no Cabinet decision to keep this land clear for the use or benefit of the village. He noted also that over time there was a change in policy so that the area became subject to subdivision and reallocation and registration as allotments.

[37] Under skillful cross-examination by Mr. Niu, Mr. Moala accepted that, being later in time, it was possible that the wording of Cabinet Decision No 134 might reflect the words of the Acting Minister of Land's Savingram of 18 January 1963 (Documents 1-2 of the Minister's bundle) and record that the land of the men of Ha'asini was to become the public well site. That Savingram related to the surrender of Sione Liongiloto's land and relevantly read:

> Cabinet has approved the above named person's request to the surrender of his tax allotment, so it can be divided into town allotments and to replace the town allotments of men of Ha'asini so that their allotments become the public well site…

[38] Resourceful though this approach is, it cannot be inferred that Cabinet Decision No 134 would follow the wording of an earlier Cabinet decision relating to different land. Furthermore, it does not follow from the existence of an intention to use the surrendered allotments as the public well site that the Minister also decide to declare

the land a reserve or that Cabinet would give consent to that course. In any event, the Savingram does not say that the surrendered allotments were made reserved land under section 138 for public health or any other purposes.

[39] A further point advanced by the Water Committee relates to the wording of section 54 of the Land Act. In its present iteration section 54 provides that, "Whenever the holder of a town or tax allotment desires to surrender such allotment or any part therefore .." he may do so with the consent of Cabinet. In 1963 the ability to surrender land was more restricted and the section read, "Whenever the holder of a town or a tax allotment by reason of old age, illness or infirmity desires to surrender such allotment…". Mr. Niu's submission was that Cabinet would not have allowed land to be surrendered in apparent breach of the Land Act other than for an important purpose, such as the preservation of public health. Even if there is some validity in this submission, the surrender of the land does not imply the reservation of the land under section 138. Furthermore, whilst it is certainly not determinative, it appears to me that had the intention been that the land in question would be reserved for public purposes it would simply have been acquired under section 141 of the Act rather than in the manner that occurred in this case.

[40] I agree with Mr. Kefu that it is implausible that the land was made reserve land under section 138. The Minister of Lands in 1963, when the six allotments were surrendered, was Baron Tuita. He was the same Minister who in 1976 directed that the former town allotment of 'Uaisele Puamau be subdivided into two town allotments for 'Ofa Puamau and Suliasi Puamau. It was the same Minister also who made other grants from the surrendered allotments from 1976 to 1985. I consider it must be accepted that it is highly unlikely that Baron Tuita would have acted in this manner had he arranged for the land to be reserved in 1963. There is also the fact that despite the grants made from the surrendered allotments, no objections were made to them until 2000. There was no complaint either to the Minister's decision in 1985 to grant an area of 10.9 perches to the Water Committee.

[41] I have not overlooked the fact that the Water Committee did contribute to the upkeep of this land but it certainly did not do so exclusively. It also did not occupy the land and it did not use the land exclusively as it was used for a range of village events unrelated to the Water Committee's activities.

[42] For these reasons I find that the surrendered allotments were never made reserved land under section 138 of the Land Act.

Was the land available to be leased?

[43] The Water Committee argues that the land leased to FWC was not available because it was reserved under section 138 of the Land Act. In his submissions Mr. Niu said, "If a reserve is shown to have been made by the Minister of Lands with the consent of Cabinet…it is land that is not available to be granted as an allotment or as a lease." In this sense the word 'available' can only be being used in its ordinary meaning and does not have any particular legal meaning. *Finau v Minister of Lands anor* [2012] Tonga LR 127, 133. As the Court of Appeal said in *Finau,* at paragraph [14] "... almost self evidently, something cannot be granted (or otherwise dealt with) unless it is available". The land that was leased to FWC was part of the Crown estate

and it was not reserved land. There being no other grounds advanced, I can see no basis for the argument that the land was not available to lease.

Did the Minister have an obligation to consult with the Water before granting the lease?

[44] The Water Committee argues that even if the land was not a reserve the Minister could not grant a lease to FWC without first consulting with the Water Committee and that in this case the grant of the lease was in breach of natural justice because he did not offer the Water Committee the opportunity to be heard. The Water Committee relies upon *To'a v Taumoepeau* (Unreported LA 10/15, 13 March 2015, Scott J) and *Manu v 'Aholelei & Minister of Lands* (Unreported LA 13/14, 17 April 2015, Paulsen P).

[45] In *To'a* Scott J observed, at paragraph [61], that it is beyond doubt that in making grants of land the Minister must make proper enquiries, comply with the rules of natural justice and avoid making obvious mistake before a decision is reached. *Hausia v Vaka'uta & Anor* [1974-1980] Tonga L.R 58, *Hakeai v Minister of Land & Ors* [1996] Tonga LR 142, *Cocker v Palavi & Minister of Lands* [1997] Tonga LR 203 and *Tafa v Viau* [2006] Tonga LR 287, 293. Similarly in *Manu* I recognised that the repository of administrative power, such as the Minister of Lands when granting interests in land, is to comply with the rules of natural justice before exercising that power, to make reasonable enquires and to consult with persons whose rights, interests or reasonable expectations are imperiled by some aspect of another's application. At paragraph [56] of the judgment in *Manu,* I noted that the requirements of natural justice will vary from case to case depending upon the circumstances of the case and the power being exercised.

[46] It must be said that despite the Water Committee's reliance upon it, *Manu* was a very different case from the present one. In *Manu* the grant of a lease by the Minister was invalid because of the failure by the Minister to inspect the land in question and to consult with a long term occupant who had built a substantial dwelling on the land. There was evidence given on behalf of the Minister that the land should have been inspected before the lease was granted and that the Minister had been misled that such inspection had in fact occurred. In those circumstances it could not be said that had the inspection been undertaken the lease would still have been granted. For that reason the grant was set aside for further consideration of the competing claims to the land.

[47] Mr. Niu argued that the Water Committee was "a person who would be adversely affected by the decision of the Minister to grant part of this land by way of lease to the first defendant". He advanced this argument on two bases. First, that the Minister was aware that the land had been cleared as a catchment area for the village water supply. Secondly, that the Water Committee "lawfully had charge of the catchment area".

[48] It makes more sense to deal first with the argument that the Water Committee was lawfully in charge of the catchment area. The Water Committee presented submissions to the effect that under by-laws to the Water Supply Regulations the

Water Committee had custody and control of the "waterworks" of the village which included "catchment areas". It argued that the catchment area of the village of Ha'asini included all the land between the well and the main road (as well as some land over the road) which includes the land subject to the FWC lease. This, it was said, gave rise to an obligation on the part of the Minister to consult with the Water Committee. I consider this argument is untenable. By regulation 7 the by-laws bind persons living in the village. They do not bind the Minister in the exercise of his powers under the Land Act. It would be quite unreasonable to expect the Minister to consult with local Water Committees when considering any grant of land which was possibly part of a water catchment area, the extent of which may be difficult or impossible to define. Furthermore, the meaning of the term "catchment areas" as used in the definition of "waterworks" in the by-laws is informed by the words that follow it and clearly refer to parts of the water supply system of the village that are "structures or appliances" only. Such an interpretation is consistent with the rest of the by-laws.

[49] As to the first argument advanced, it is the case that the land was cleared in 1963 to protect the water supply. It does not follow that the village Water Committee is adversely affected by the grant of a lease in a manner requiring the Minister to consult. The requirement that the Minister comply with the requirements of natural justice was stated in the following passage from the judgment of the Court of Appeal in *Hakeai v Minister of Lands & ors* [1996] TLR 142:

> It is clear law that a person whose rights, interests or legitimate expectations are imperilled 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.

[50] I can see no justification to impose on the Minister an obligation to consult when there is no competing claim to either the right to possess/occupy the land nor title to land. What the Water Committee is concerned with in this case is the risk of contamination of the village water source through the development of the land for residential purposes. Put simply it objects to an intended land use. To require the Minister to consult with it in those circumstances would be a major and quite unwarranted extension of the Minister's obligations for which no authority has been provided. The duty to ensure the supply and wholesomeness of water rests with the Ministry of Health under section 78 Public Health Act and not Water Committees. If an obligation to consult existed for the reasons advanced by the Water Committee then it must be an obligation to consult with the Ministry of Health. The Ministry of Health was consulted and had responded to the complaints about further allocations of the land.

[51] It must also be remembered that the surrendered allotments had already been, to a large degree, reallocated without objection and that in 1985 a decision was taken by the Minister to allocate just 10.9 perches of the land to the Water Committee. In those circumstances the Water Committee could not have had any reasonable expectation that it would be consulted about any further allocations from the surrendered allotments.

[52] For those reasons, I do not accept that the Minister was obliged to consult with the Water Committee but, if such an obligation did arise, then I agree with Mr. Kefu that sufficient consultation was undertaken. It is not the case that the Minister "chose not to see or invite [the Water Committee] to he heard" as the Water Committee submits. As I have set out in the chronology above, the Minister was aware from 2000 of the complaints that land should not be allocated from the surrendered allotments. In 2013, before the lease was granted, the Minister received further complaints on behalf of the village, including I understand persons who are now members of the Water Committee, and he did not ignore those complaints. They were referred to the Ministry of Health who undertook enquires, inspected the land and provided formal responses to every issue raised. It was considered that the complaints were unfounded whilst at the same time the Ministry of Heath acknowledged the obligation to monitor the situation closely. Whilst the Water Committee will argue that the Minister should have come to a different conclusion upon the complaints and not granted the lease, it has not been shown that the Minister acted unlawfully. In those circumstances it is not the function of this Court to substitute an alternative view for that of the Minister.

A final consideration

[53] It follows from what I have said that the Water Committee's claim must be dismissed. There may be some concern that the result of this decision pays insufficient regard to public health considerations and to the rights of the people of Ha'asini to have a safe water supply. The following points should be noted about this concern. First, the Ministry of Health has recognised that it is obligated by law to ensure that the water catchment is not contaminated. It must, and has, monitored the water catchment of the village. There was evidence from Mr. Kula that tests in 2013 and 2014 had shown that the water was safe. Secondly, in so far as the major concern is the possibility of contamination from septic tank leakage, in other proceedings the Supreme Court has issued a permanent injunction preventing the FWC from using its septic tank on the leased land. The decision of the Supreme Court was appealed to the Court of Appeal and that appeal was dismissed and so it must be regarded as beyond challenge.

Result

[54] I find that the lease was lawfully granted to FWC and the Water Committee's claim is dismissed.

[55] All parties sought costs in the event that they were successful. Costs should follow the event. The first and second defendants are entitled to their costs to be taxed if not agreed.

R v Tupou anor

Supreme Court, Nuku'alofa
Cato J
Cr 24-27/2015

24 September 2015

Criminal law – two accused – joint unlawful enterprise – convicted

The accused, Misima Tupou and Tau Ngaue, were charged with robbery, simple arson, and causing serious harm. The Crown alleged that the accused acted pursuant to a joint unlawful enterprise; that they shared a common purpose to cause harm to the complainant, and made it clear by their actions that was their common intention. Such an intention could be inferred from their conduct.

Held:

1. Both accused made admissions in writing of being involved in robbery and arson and they were ruled by the court to be voluntary. They gave evidence in court that they were not guilty but the court did not believe that.
2. The court considered it safe to act upon the admissions made by both accused and the associated documentation, although there was no other independent evidence implicating either accused.
3. The court found the accused both guilty of robbery, arson, and serious violence as charged in the indictment pursuant to a joint unlawful enterprise and they were both convicted of those crimes. They were both remanded in custody for sentence.

Cases considered:

R v Fa'aso [1996] TLR 36
R v Fakatava [2000] TLR 76

Statutes considered:

Criminal Offences Act (Cap 18)
Evidence Act (Cap 15)

Counsel for the prosecution : Mr Aho
Counsel for the defendants : Mr Corbett

Reasons and verdicts

[1] The accused Misima Tupou and Tau Ngaue were charged with one count of robbery contrary to section 154(1) and (2) of the Criminal Offences Act, simple arson contrary to section 177(1) Criminal Offences Act, and (4) of the Criminal Offences Act and causing serious harm contrary to section 107(1) (2) (b) and 4 of the Criminal Offences Act.

[2] The Crown in order to establish an accused committed robbery beyond a reasonable doubt must prove on the basis of the evidence admissible against that accused;

(1) That the accused was the person in involved in the acts at Longolongo on or about the 22nd November, 2014;
(2) Namely taking the property of the complainant as particularized in the indictment or part thereof with intention to permanently derive that person of this property;
(3) By using violence to the complainant Feng Sheng Pei the person lawfully in possession;
(4) So as to put him in fear and thereby overcoming his opposition to the taking of the said property.

[3] In order to establish arson, the Crown must prove on the evidence admissible against that accused;

(1) That the accused;
(2) at Folaha;
(3) willfully and without lawful excuse set fire to the vehicle (L14696);
(4) belonging to the complainant

[4] In order to establish the offence of serious bodily harm, the Crown must establish beyond a reasonable doubt;

(1) that the accused;
(2) willfully and without lawful justification
(3) caused serious bodily harm namely a fractured collarbone; and; or a fractured and displaced nasal bone, and, or a fracture of his left eye orbit to the victim;
(4) by punching him

Harm means –

(a) any injury which seriously or permanently injures health or is likely so to injure helth;
(b) any injury involving serious damage to any external or internal organ, member or sense short of permanent disablement; or
(c) any wound which is not severe; or
(d) any permanent disfigurement which is not of a serious nature.

[5] The Crown alleged that the accused acted pursuant to a joint unlawful enterprise; that is shared a common purpose to cause harm to the complainant, and made it clear

by their actions that was their common intention. Such an intention could be inferred from their conduct. Each party to the joint enterprise is equally liable for the consequences of acts done in pursuance thereof.

Ford J in *R v Fakatava* [2000] TLR 76

[6] I remind myself also that, although this is a joint trial, each accused must be Judged separately on the evidence admissible against him, and, in particular, declarations of an accused in a record of interview or in discussions with police in the absence of a co-accused are inadmissible against that co-accused.

Crown case

[7] The Crown alleged in its opening that, on or about the 21st November 2014, the accused drove to an area in Longolongo (Tu'atakilangi) known as Feng Sheng Pei's market garden. The next day the accused assaulted (punched) and robbed the accused of his van, and a sum of money, and various other items. The injuries alleged were a fractured collarbone, fractured and displaced nasal bone, and a fracture of the wall of his left eye orbit. They then drove the complainant in his vehicle, LI 4696, to an area in Veitongo where they left the complainant in a bush allotment, and travelled on to the Folaha area. They set fire to the accused's van and then called a third party Hosea Te'ekiu to pick them up from the Folaha area and he then took them into the Kolomotu'a area to Tupou's residence.

[8] Hosea Te'ekiu had also been charged in the present case with abetment to robbery, and simple arson, but on application, by his counsel Mr Tu'utafaiva, I ruled that he did not have a sufficient case to answer and he was acquitted and discharged. I have put his record of interview to one side.

Evidence

[9] The first witness was the complainant Feng, Sheng Pei, a very slightly built man, who gave evidence through a Chinese interpreter that he resided in Fasi and said he grew vegetables, at Longolongo. On about the 6th November, 2014, he said he was in his vehicle at his plantation at about 6am, when all of a sudden someone came and took some of his property money and also cigarettes. He said from what he could remember that he had his keys in his pocket and this person tried to force the key from him and he was assaulted. He said he had been standing outside the van and this person came from behind. He identified that person in the dock as Misima Tupou. He said he hit him from behind. He said after he was struck and he could not recall anything until he woke up in hospital. He said later that Tupou had his head in the vehicle asking for his keys when he was hit from behind by a forceful blow which knocked him out. He said there was there was enough light to see. He said he would have seen the man he was standing close to for about a minute and a half to two minutes. He was later recalled to give further evidence concerning photographs that had been produced of three scenes; the first being the market garden, the second being a bush allotment at Veitongo where he had been taken and left according to evidence given by SC Heimuli of a conversation and demonstration he had with the accused Tupou, and a third area at Folaha where he identified his car as the burnt out

car. He also confirmed that a blue shoe located at the scene was on had been wearing earlier that day and that a large spanner and keys belonged to him and had been in the car and not left by him in the grass where they were located and photographed.

[10] Sione Moala gave evidence that on the 22nd November, 2014 he was on his way to a fair. He lived in the Folaha area. He travelled on the Folaha Road and then to the Taufa'ahua Road and onto the fair. He returned home and saw a vehicle burning and there were people at the scene so he stopped the vehicle and got off. It was a minibus. He said he saw a white vehicle on the road about 15-20 metres from it. He did not know the number or model of the white car. Later in his evidence, he said he had seen the vehicles on his way to the fair. There was no cross-examination of him.

[11] Officer Tu'itavuki gave evidence of photographs taken of the area of the market garden at Longolong, the area at Veitongo where the complainant was located and the burnout car in the Folaha area. He also produced photographs of the accused in the condition he was when found and taken with both accused by Senior Constable Heimuli on different dates. He also produced sketch plans of the areas. Nothing was, however, produced that forensically linked either of the two accused with any of the three crime scenes.

[12] SC Heimuli gave evidence that he was with Cpl Vea when he participated in two records of interview with the accused Tupou, the first relating to the robbery on the 29th December 2014 and the second relating to the arson on the 18th January, 2015. He also produced a charge sheet and a voluntary statement from Mr Tupou, in accordance with Tongan practice. He also produced two records of interview and associated documents, charge sheet and statement from the accused Ngaue, one relating to the robbery, taken at 2100 hours dated the 25th January 2015, and a second relating to the arson at 2210 hours on the 25th January, 2015. Both accused challenged the admissibility of these records of interview, and ancillary statements, and in a separate ruling I found all to be voluntary and ruled that they were admissible. They constitute the only direct evidence against the accused of participation the robbery and arson.

[13] In his record of interview. Mr Tupou stated that he knew why he had been brought to the station. He was brought there as a result of a crime that we committed. When asked what the crime was that he committed, he said it was theft and robbery. It took place he said at Tu'atakilangi, on the roadside off bypass road in a vegetable garden belonging to a Chinese individual. When asked if it was you and who else committed that robbery, he said it was he, Tau and Poni. He said we went there by vehicle. It was a rental car white in colour and belonged to Tau. When asked how did you all commit the robbery, he replied, "I was driving Tou's car, Tou and Poni got out and committed the robbery of the Chinese individual." He said was forcibly grabbed and put at the back of the vehicle and beaten and taken to a bush allotment in Veitongo. At Veitongo, he said after Tau had beaten the Chinese individual he left him in a bush allotment in Veitongo and they took the bush road to Vaini whilst he went and waited from there. He was asked when Tou (Ngaue) and Poni (Ahohako) got to Vaini where did they go next? He said, "Poni phoned me to follow them behind and I followed them they telephoned me to keep on going and then turn back whilst they turn to a bush allotment and burn the vehicle." He was asked did you see where

the vehicle was set on fire? He replied, 'Yes under a mango tree on the side of the road, I do not know whose bush allotment it is." He said Poni was wearing a black singlet and shorts, whilst Tou was wearing a checkered blue hoodie and rugby shorts. We all went home after that. He said they took the road to Tokomololo from Ha'ateiho and got gas at a Petrol station in Tokomololo, and then they continued on the road to Liahona and then took the road to Sia'atoutai. We continued on the road to Liahona and then took the road to Sia'atoutai. We continued on the Eastern road and stopped off at Hofoa to throw away Tau's hoody leaving him shirtless and then we travelled through Sopu until we got to my place in Kolomotu'a. They all went to sleep in Kolomotu'a. It was between 9.00 hours to 10.00 hours. Later, he went with Tau and Poni to the market. He then went back to Kolomotu'a with Poni and Ate. Poni then went after we ate and I remained at our place. He admitted the complaint by Feng Sheng Pei aged 49 regarding an assault on him as well as a robbery at his vegetable garden in Tu'atakilangi was correct. He was then charged.

[14] The written statement of charges from recited to him the charge as assault with intent to rob under section 155 (1) (3) of the Criminal Offences (Amendment) Act whereby at about 6am on the 22nd November, 2014, he willfully and without legal justification punched Feng Sheng Pei and he robbed him of $90.00 in cash, van LI4696 valued at $1650000, chemical sprayer $500.00, mobile phone $70.00, chemical $60.00 total value of $17220.00 without his consent. When invited as to whether he wished to say anything and after being cautioned, he responded that it was true and he regretted the wrongdoing he committed. He said he had changed his life and apologized to the complainant. This procedure was carried out at 12.40 hours on the 29th December, 2014. Later under caution again, he said he made this statement of his own free will and acknowledged a caution. He stated that he felt remorseful for what he had done, and he could confirm that his was the last time anything like this would ever happen again. That was made on the same day at 12.50pm.

[15] On the 18th January 2015 at 6.12 hours, he was again interviewed. This was about the arson. He said he knew why he was brought here. It was burning the Chinese vehicle. He said it was the Chinese from Tu'atakilangi. It was burning a minibus vehicle that was set on fire. It was colour blue. It was burnt on the road to Folaha. He said it was myself Tau and Hosea. He said we went on the Folaha Road and Tau set the vehicle on fire. He said it was set on fire with a lighter. The tank and then the seats were set on fire. He said it was the seat at the front to the passenger's seat and the seat at the back insider the van. He said he stood and looked out to the road for a guy Hosea who came in Tau's car. After the vehicle had been set on fire, he ran with Tau and waited for the guy, Hosea who was coming in Tau's car. When they got to the road, Hosea was not there yet. Hosea came and they went into town. Hosea started to run and Tau changed with him and Tau drove. He said they returned and went to Tokomololo and filled up at the petrol station at Hofoa and then went into Hofoa. They then went to Kolomotu'a and slept. They arrived at 9am. He said two men came in a white car and we came in Tau's car and dropped Hosea to Hala'ovave and came into town and dropped me into the Talamahu market and Tau went in his car. He was then charged with arson.

[16] After he being charged with arson of the car belonging to Feng She Pei said to be worth $16500.00 LI 4696 colour blue model Toyota Noah, under caution he said, "it

is true and I regret the wrongdoing I committed." He said, "I have changed my life. I apologise to the complainant." That was signed at 18.35 hours on the 18th January.

[17] He also said in a voluntary statement made under caution about the same time that, "I feel remorseful for what I have done but I am hopeful that I will get another chance because I have changed my life and I wish to apologise to the victim."

[18] Later, this accused participated in a demonstration on the 6th February, 2015, whereby he showed police where the assault and robbery initially took place, where the complainant was taken to and dropped off in a bush area at Veitongo, and where the complainant's vehicle had been burned at Folaha. He also made further verbal admissions to SC Heimuli set out at para 21, which I considered to be important.

[19] The accused, Tau Ngaue, participated in a record of interview on the 25th January 2015. He said that he knew he was present because of a robbery at Tu'atakilangi which happened towards the end of the year but he did not remember the time. He said he, Misima and Hosea went with him to carry out the robbery. There was no one else who was concerned with it. He was told he would be charged with theft, assault, and robbery, and cautioned. He was charged with assault with intend to rob, the particulars being he punched Feng Sheng Pei and robbed him of cash, the van LI4696, chemical sprayer, mobile phone, chemical, total value of $17220. Under caution, he said 'the allegations are true." Shortly after, in a voluntary statement, he also stated the allegations were true, and, he apologised to the police of Tonga and the people of the land "for the offence I did affecting the country." That was at 22.36 hours.

[20] Later that same evening, he made a second statement stating he knew the reason he had been brought to the station was because of the arson of a vehicle belonging to the Chinese individual. He said it was a Minibus Toyota Noah. The burning took place on the road to Folaha. He said it was Misima who burnt the van we went together. After being charged, he said shortly afterwards, under caution, the allegations are false, I did not burn the vehicle. He said further, also under caution in his voluntary statement, I state that he allegation against me are wrong as it was not me that did the burning.

[21] SC Heimuli also gave evidence of carrying out a demonstration with Mr Tupou on the 6th February, 2015. Mr Ngaue had declined to participate in the demonstration and he was returned to the station. According to SC Heimuli, the accused, Mr Tupou, had told him that he and Mr Ngaue had entered the market gardens, and the accused's van was there. They had assaulted the accused and he mentioned Mr Ngaue also in that regard and had placed him in his van, whereby Tupou held him down whilst Ngaue drove to the area in Veitongo where Tupou demonstrated where the complainant had been left, the officer said about a hundred meters from the road. After that, they had, Tupou said, driven to an area in Folaha where the complainant's vehicle had been burned by them. He said Mr Ngaue had used some clothing and placed it inside the fuel tank and set the car alight. After that, Hosea Te'ekiu had picked them up in a vehicle he was driving. The defence did not challenge these admissions, in cross-examination.

[22] Officer Tu'itavuki was recalled to give evidence on aerial maps of the scenes and said the distance between the market garden and Veitongo was about 5 miles, and from there to where the vehicle was found along a track off the Folaha road, about 8 miles.

[23] Dr Aholelei gave evidence that the complainant had suffered serious but not permanent injuries and serious harm within the meaning of section 2(b) of the Criminal Offences Act, namely a broken clavicle or shoulder bone, a broken nose and broken bone in the eye socket. There was no challenge to her evidence.

[24] Officer Siale gave evidence of attending an area on the Folaha road where a blood stain had been located and where a witness had shown him where the complainant had been located.

[25] Both accused gave evidence. Mr Tupou said he had been drinking kava at a club at Ulutea when he had texted Mr Ngaue to take him to an area where a friend Poni 'Ahohako and a Sailosi Lau'i was drinking with others, after Poni had invited him to come for a drink. He said Tou came about 3 o'clock. He described this as a common area for drinking near the complainant's market garden. He said he was driven there and then Mr Ngaue left. He continued drinking there and in the later morning about 4-4.30 am he said he arrived home, had a meal and went to sleep. He said Poni had come around about two days later and told him that Sailosi had suggested they do a robbery. He denied being involved in any of the night's criminal activities. He said he had told the police lies concerning his records of interview because he had been induced to do so by the promise of an early release. He said he told them false stories because, if he had told the truth, they would not have believed him and would keep him in custody. He also said he had demonstrated to the police the various areas because he had been told where they were by Poni. As to where the burnt vehicle was he had simply been driven there by Police. He said that he had told Police when he was first arrested that he had been home asleep. This was not, however, put in cross-examination of Senior Constable Heimuli when he gave evidence, at trial.

[26] Mr Ngaue also denied involvement in criminal activity. He said he had been with Hosea Te'ekiu after spending some time at a night bar in town and then was at the car park at "the Billfish" later when he received a text from Misima Tupou, whom, he acknowledged, was his half brother and whom he was residing with at the time. He said that he went to pick him up and they left Tupou at the place near the vegetable garden at Tu'atakilangi where the drink up was going on. He went home after being out elsewhere with Mr Te'ekiu to find Tupou already asleep. He did not wake up for some hours. He denied being involved and said he had made false statements to the police concerning his involvement because he wanted to be released early. He also said he had been subject to threats, scolding and strangulation at Tu'atakilangi when he was taken on the demonstration. He said he told them he did not know anything. He admitted that he had been given a warning by the police officer before doing so. He said he was returned to the prison after the demonstration. He said he had told Cpl Vea that he had no involvement. He said that he had told the police lies deliberately. He said he thought Vea realized they were false. He said he had told the truth to police before and had not been released early even though the police had later offered

no evidence. He denied any involvement. He said that he had overheard Poni talking to Masima about the robbery and an assault.

[27] The final defence witness was Mr Poni 'Ahohako. He admitted to being a very good friend of Mr Tupou. He admitted to being a serving prisoner. He was aged 20. He said that Masima Tupou had arrived after he had texted him with Mr Ngaue early in the morning of the day of the robbery, but that both had left before he proceeded with a person he said was Sailosi to go to the market gardens. He said the Chinese man was assaulted by Sailosi, placed in the vehicle and he had driven the vehicle to Veitongo. During the course of the drive, Sailosi had further assaulted the complainant. He said he was dumped out of the car on the road at Veitongo. The vehicle was later burned. He was warned before giving his evidence that he was not obliged to answer questions concerning his involvement but elected to do so.

Submissions

[28] Mr Corbett submitted that the identification of Tupou was unsatisfactory and there was no identification of Mr Ngaue at all. He complained that the person who found the complainant on the road at Veitongo had not been called. The Crown explained that he was overseas. He said that both accused said their statements had been induced and could not be relied upon. He said both gave evidence that they were sleeping when the offences occurred. He said Masima was only able to participate in a demonstration because he had derived information from Poni as to where the crimes occurred. He complained that the complainant could not say who had robbed him, nor who had assaulted him. He submitted the charges had not been made out in relation to either accused beyond reasonable doubt.

[29] Mr Aho conceded that the Crown case against both men depended on my accepting that they had voluntarily made admissions that were reliable. He submitted they were. He said rightly credibility was for me but he submitted that the Crown case was established beyond a reasonable doubt in relation to both accused on all charges. He submitted that it was inconceivable that both men would make deliberately false confessions if the truth were both home in bed.

Rulings

[30] I did not believe the evidence given by either of the accused. Both accused made admissions in writing of being involved in robbery and arson to SC Heimuli and I have ruled these were voluntary. I do not consider that either of the records of interview were as penetrating as they could have been had more questions been asked, but they plainly contain damaging admissions both to robbery and arson, as do the associated documents with the exception of Mr Ngaue's assertions that he did not burn the car which I will deal with later. It is fair to say there is no independent forensic evidence that would link the evidence of the complainant and the dock identification of Tupou as the man standing near the car was an acceptable and reliable identification. Dock identifications have been generally discredited as unfair and unsafe, and alternative methods of a more representative process such as a parade or a photo montage should be adopted.

[31] I do not, however, accept either Mr Tupou or Mr Ngaue as honest and reliable witnesses. I reject as I have done on the voir dire any suggestion that their admissions were induced. I find fanciful their suggestions that the incriminating statements they made were induced and that, as a consequence, they deliberately proceeded, each separately, to make false admissions of involvement. Mr Ngaue admitted to a caution being given to him before he refused to participate in a demonstration with Tupou at the market garden in February, 2015. I find this inconsistent as the prosecutor suggested in cross-examination with his evidence that he was exposed to violence, bad language and scorn at that stage. Effectively, each raised an alibi, that is being present elsewhere at the time of the criminal incidents, without an alibi notice being served on the prosecution as is required under the Evidence Act. In my discretion, I allowed this alibi evidence to be raised late. No supporting witnesses were called, however, which would have caused me greater concern about the absence of an alibi notice. The fact that I do not believe the accused is not, however, an end to the matter. There is no onus on an accused to prove his or her innocence. The onus remains on the Crown to prove the essential elements of the charges beyond a reasonable doubt so I turn to the Crown case which, as I have said, depended essentially on the various records of interview and statements the accused had made.

[32] The question I address is whether, in these circumstances, it is safe to rely on the admissions to secure convictions. *R v Fa'aso* [1996] TLR 36 emphasises the importance of close scrutiny of the issue of the integrity of evidence derived from admissions of the accused where that is the only evidence that incriminates the accused of an offence. I see no difficulty, here. Neither of the accused is what you might describe as a young person, both are aged about 24, or a person under some kind of intellectual or mental disability, and thus potentially more easily led into admission. Neither struck me as shrinking violets. I have considered the issue of inducements and allegations of violence on the voir dire also and I do not consider the statements were anything but voluntary. For these reasons, I consider, it is safe to act upon the admissions made by both accused and the associated documentation, although there is no other independent evidence implicating either accused. As I have said, I am not prepared to rely on the complainant's dock identification of Mr Tupou as being present, in the market garden by the car.

[33] I did not believe that portion of the accused Tupou's record of interview of the 29th December, 2014 in which he implicates a person known as Poni as the person who assaulted the complainant with the accused Tau Ngaue, and not he. He did not make any mention of this person's involvement in his second record of interview of the 18th January 2014. Nor do I accept he was only, as he seems to assert, the driver. I accept the verbal admissions of Mr Tupou on the demonstration testified to by SC Heimuli, took place. These were not challenged by his counsel, and nor did Tupou appear to deny them, when giving evidence. I and nor did Tupou appear to deny them, when giving evidence. I accept also that they acted in concert and I infer a joint enterprise to rob. I accept also that Tupou said he had held the complainant down in the backseat, whilst Ngaue had driven first to Veitongo where the complainant had been dumped off the road, and they had driven on to Folaha where they burned the vehicle under a mango tree, before being picked up by Hosea Teekiu on the main road at Folaha. Mr Tupou did not put to SC Heimuli that he had said he was asleep at the time, he was arrested as he said he had in evidence.

[34] The inference I draw is that sometime around 6am on or about the 21st November, 2014 Mr Tupou and Mr Ngaue formed an intention to rob the complainant. Tupou was not present, I find, beyond reasonable doubt in the events that followed, merely as a disinterested spectator but as a willing participant in a robbery, and in its aftermath. There was, I have no doubt, a common plan to rob although when it had been conceived, is not established. I find beyond reasonable doubt that both accused early that morning got out of the car that took them to the market gardens and went inside and assaulted and robbed Mr Pei of the property alleged in the indictment, although he only mentioned some money, his keys and the car. The charge, assault with intent to rob details the property taken and were put to Mr Tupou who admitted his involvement in those events and apologised also for his actions. I consider that serious harm is always a possibility when a plan exists to steal which anticipates some violence as was the case here as the actions of the robbers demonstrates. Plainly, there was serious violence. The photographs taken before treatment, of the accused's face, the fact that he was knocked out at the gardens, soon after the two entered the garden area, and the injuries about which we heard evidence from the doctor all evidence serious harm. Whether they all occurred at Longolongo seems likely if, as the complainant says, he lost consciousness there and did not regain consciousness until hospital, but he may have incurred assaults later in the car and later in the area at Veitongo where he was located near an area of blood staining. The fact that Tupou admits to holding the accused down in the van as Ngaue drove to Veitongo suggests he may still have been conscious and assaulted again later to subdue him further. In any event, the fact that Mr Tupou admits doing this, in his verbal conversation with SC Heimuli at the demonstration, and driving first to abandon the complainant at Veitongo and later is present, also on his own admission, at the arson establishes just how closely he was involved with Mr Ngaue, that morning. He, on his own admission, to Heimuli was present when the car was burned the says by Ngaue in his record of interview, and in his verbal statements during the demonstration. I find beyond any reasonable doubt that he is guilty of robbery of the property particularized and put to him in the charge sheet and admitted to; and to which he referred in his voluntary statement. I find beyond any reasonable doubt also, as I have said, he was part of the follow up plan to callously take and abandon the complainant in Veitongo, far from his market garden and to then burn his vehicle at Folaha, in an area off the main road, much further away. The only motive I can infer is that both men wanted to conceal what they had done. It matters not, in my view, who was the more aggressive of the two, in so far as causing harm to the complainant is concerned or who actually set fire to the car, because I have no doubt that both were a party to a plan to rob, and to cover their tracks. I find, accordingly, beyond a reasonable doubt Mr Tupou guilty of causing serious harm to the complainant as part of their joint enterprise to rob the complainant of his property as particularized which involved violence and later arson of the vehicle.

[35] In relation to Mr Ngaue, I expressly put to one side the records of interview of Tupou or his verbal admissions implicating him. I look only at his verbal admissions implication him. I look only at his records of interview and the accompanying documents such as the charges and statements he made. Whether he was the principal perpetrator of the violence or of the arson matters not because I have no doubt he was present on his own admission as part of a plan Mr Tupou to rob, and later cover up

their actions. The information he supplied Police on the 25th January 2015, relating to the robbery and later his admission to being present at the arson, convinces me beyond a reasonable doubt that he was part of a plan to rob and later dispose of the vehicle. I draw the inference, although there is no direct evidence from him about taking the complainant in his vehicle to Veitongo or abandoning him there, as there is from Mr Tupou in his verbal admissions on the demonstration to SC Heimuli, that the complainant could not have got to the Veitongo area other than by being taken in his vehicle which was later set on fire on Mr Ngaue's admission in Folaha. Mr Ngaue was no innocent bystander coming upon a fracas in the market garden nor later an innocent bystander at the arson, but was I find very much a party to the robbery, violence and subsequent arson. He admitted to the former in his charge sheet, and statement to the robbery and apologized for it. He later stated that he disputed the allegation that he burned the car, which he blamed on Tupou, and was not guilty of this charge but he plainly admitted being present in circumstances that were obviously in furtherance of the joint enterprise to rob and conceal or cover up their involvement in a crime. I reject any submission that he was not involved in a common plan to rob and conceal with Mr Tupou, and I find also beyond a reasonable doubt that he was responsible, as a party to the joint enterprise for the serious harm that was caused to the complainant either by Tupou or he or both, acting in concert. Likewise, even if, as he asserts, Mr Tupou burned the car and not he, this was, I have no doubt, part of the common plan to rob, and later dispose first of the victim and then of his car. I see no other reason for taking the complainant and dumping him at Veitongo or getting rid of the car at Folaha other than to conceal their crime. I have heard no evidence to suggest that either accused at any time tried to intervene to withdraw from the robbery or subsequent events. Their defence is that they were not involved, at all.

[36] Finally, I did not believe Mr Poni 'Ahohako when he said it was out of remorse that he had come forwards to give evidence exculpating the accused. He admitted he had not told the police his trial version of events when they had asked him about his involvement. He was a close friend on his own admission of Mr Tupou, and Ngaue, who was living with Tupou, would also have known him well. I do not believe him when he said that neither Tupou nor Ngaue was present, at the robbery. On his own admission, he was a serving prisoner and awaiting a further sentence. He was not a person of good character and I did not find his account at all convincing. I do not, however, rule out completely that he was in some way involved in the events of that evening with Tupou and Ngaue because Tupou mentioned his involvement in his first record of interview. I do not accept however, his version of events. I am satisfied beyond reasonable doubt for reasons I have given that both accused made voluntary incriminating admissions, and that there were no inducements beyond any reasonable doubt also on the trial evidence I heard, and I reject their assertions that they told the police deliberate lies about their involvement. I find it disingenuous that persons with, as Mr Aho in cross-examination suggested to both accused, had innocent explanations should tell deliberate lies to the police and in some measure of detail incriminating themselves, in serious criminal activity.

[37] I accordingly, find the accused both guilty of robbery, arson, and serious violence as charged in the indictment pursuant to a joint unlawful enterprise and I convict them both of these crimes. They are both remanded in custody for sentence.

Fiu v General Manager and Tonga Broadcasting Commission

Supreme Court, Nuku'alofa
Paulsen CJ
CV 32/14

26, 27 August 2015; 7 October 2015

Employment law – wrongful dismissal claim – did not follow procedure – claim upheld

The plaintiff, Mr Fiu, was employed by the Tonga Broadcasting Commission (TBC) as an Accounting Officer from 1 September 2005. He took leave from his employment between 17 April 2013 and 26 April 2013 and then extended that leave from 29 April 2013 to 10 May 2013. He applied for a further extension of his leave from 15 May 2013 to 21 May 2013 but that request was refused by the Finance Manager due to short staffing. Despite the refusal Mr Fiu left the workplace and took leave. A letter dated 15 May 2013 signed by the General Manager was then delivered to Mr Fiu (which he received and acknowledged on 16 May 2013) suspending him from his employment. He was dismissed on 29 May 2013. The plaintiff claimed that he was wrongfully dismissed from his employment. The defendants denied that the dismissal was wrongful and say that Mr Fiu was dismissed summarily for serious misconduct in accordance with the procedures set out in his employment contract.

Held:

1. It was generally recognised that for an employee to be entitled to damages for wrongful dismissal the following conditions must be fulfilled namely: the employee must be dismissed before the expiration of the term of employment or without the requisite period of notice, as the case may be; and the dismissal was wrongful in the sense that it was without sufficient cause or was in breach of a contractual condition of observing a particular procedure.
2. The defendant could not suspend Mr Fiu under both section 1.13 and 1.16 as those powers were not co-extensive. When the General Manager advised Mr Fiu that he was being suspended under section 1.13 of the Staff Employment Regulations and Manual she imposed a penalty for his offence. She also conveyed to him that the offence had been resolved and affirmed Mr Fiu's employment contract. Therefore when the defendant then purported to dismiss Mr Fiu it made a substantive error and the dismissal was unlawful. The error was substantive because it was more

than a mere error of procedure and denied Mr Fiu of his right to continuing employment.

3. It was clear that Mr Fiu was not an ideal employee. The agreed statement of facts contained Mr Fiu's recorded misconduct as an employee and detailed a lengthy history of misconduct and poor performance including seven warnings. His decision to take leave when it had been refused to him was simply insubordination. Against the background of his employment history, the court considered that TBC was entitled to regard Mr Fiu as having been guilty of serious misconduct and, once it followed the procedures in section 1.16, one of the possible outcomes was dismissal. TBC did not deal with that matter that way. It followed that the decision of TBC to dismiss Mr Fiu was not one that was open to it and was unlawful.
4. The general rule was that an employee whose employment was wrongfully terminated could recover as damages the pecuniary loss resulting from the failure to terminate his employment in accordance with its terms. In the usual case, where the employment was terminable on reasonable notice the damages would include the remuneration lost during the period of notice. Mr Fiu sought no more than recovery of his remuneration for the contractual period of notice, which was two months.
5. The court found that Mr Fiu was wrongfully dismissed from his employment with TBC. Mr Fiu was awarded damages equivalent to two months' salary.

Cases considered:

Dietmann v Brent London Borough Council [1988] IRLR 299 (CA)
Gunton v Richmond-upon-Thames LBC [1981] Ch 448
Hanley v Pease & Partners Ltd [1915] 1 KB 698
Immer (No 145) Pty Ltd v The Uniting Church of Australia Property Trust (NSW) (1992) 182 CLR 6
Leiola Group Ltd v Moengangongo (AC26/2009, 14 July 2010 CA)
Pepper v Webb [1969] 2 All ER 216; [1969] 1 WLR 514 (CA)

Counsel for the plaintiff : Mr Pouono
Counsel for the defendants : Mrs Tupou

Ruling

[1] The issue in this case is whether the plaintiff (Mr. Fiu) was wrongfully dismissed from his employment as an Accounting Officer with the second defendant on 29 May 2013. The defendants deny that the dismissal was wrongful and say that Mr. Fiu was dismissed summarily for serious misconduct in accordance with the procedures set out in his employment contract.

Procedural matters

[2] I was asked to deal with this case on an agreed statement of facts but was also provided with bundles of documents to which Counsel referred and written and oral legal submissions.

[3] Although the General Manager of the Tonga Broadcasting Commission (TBC) was named as the first defendant no relief is sought against her.

The facts and Mr. Fiu's employment terms

[4] TBC is a public enterprise. Mr. Fiu was employed by TBC as an Accounting Officer from 1 September 2005, initially for a probationary period. He did not sign a written employment agreement until 10 July 2008. At that time he entered into a written employment agreement with TBC for three years commencing 1 July 2008. Upon the expiration of that agreement in 2011 he was presented with a new written employment agreement which he never signed. TBC argues that Mr. Fiu worked under the 2011 agreement and was bound by its terms. No objection was taken to that position by Mr. Fiu and I therefore proceed on the basis that it was the case.

[5] The 2011 agreement contained the following relevant clauses:

> 1.5 The Employee is bound by the terms of this Contract and the Staff Employment Regulations Manual, Administrative Instructions and Code of Ethics and Practice.
>
> *Termination of Your Employment*
>
> 7.1 Either party may terminate this Contract on two (2) months notice in writing. Both parties agree that this is reasonable notice.
>
> 7.2 The Employer reserves the right to terminate this Employment Contract without notice if the Employee commits an act of Serious Misconduct as set out in Part B of Schedule 2.
>
> 7.3 The things listed in Part A of Schedule 2 are Misconduct. Such conduct may result in a warning, either verbal or written. If a written warning is issued it shall state:
>
> (a) the thing complained of;
>
> (b) the improvement required and the time frame for such improvement;
>
> (c) the consequences of failure to improve within the time stated.

[6] Schedule 2 to the agreement defined 'misconduct' (Part A) and 'serious misconduct' (Part B). For present purposes it will suffice to note that misconduct is behaviour that could lead to a warning that the employee's employment was at risk and included failure to perform work to the required standard and failing to follow instructions. Serious misconduct is behaviour that may lead to dismissal or to instant dismissal in particularly serious cases and included frequent occurrences of misconduct. Schedule 2 also states:

> The TBC Rules and Regulations in the document Tonga Broadcasting Commission, Staff Employment Regulations Manual will be part of this schedule.

[7] To make sense of what follows I must now describe and set out portions of the TBC Staff Employment Regulations Manual. The TBC Staff Employment Regulations Manual is dated January 2008. It contains an example of the TBC individual employment agreement for employees as at 2008 (which varies in certain respects from the agreement provided to Mr. Fiu in 2011) and addresses in some detail and complexity the responsibilities, rights and powers of TBC and its employees, including the rights of TBC to dismiss employees and the procedures that must be followed to do so. To quote from *Leiola Group Ltd v Moengangongo* (AC26/2009, 14 July 2010 CA) at [31]; "The Manual has the appearance of a comprehensive employment code".

[8] Section 1.13 of the TBC Staff Employment Regulations Manual is headed 'Discipline'. There are three parts to this section with the subheadings 'Queries', 'Warning Letters' and 'Suspension'. This section relates to the disciplinary responses that are available to TBC in respect of employees' 'offences' which are not so serious that they may lead to dismissal. 'Queries' are written enquiries issued to employees requiring an explanation in writing for what are minor offences. For more serious offences, TBC might choose to issue to employees written warnings. For even more serious offences, TBC might temporarily suspend employees from their employment. The section contains examples of the offences that might justify the issue of a query or written warning or the suspension of an employee. For present purposes the provisions relating to suspension are most relevant and I set them out in full below.

Suspension

1. For the purposes of this Section, "Suspension" shall mean temporal removal of a Staff Member from the services of the Commission without pay during the period of suspension.
2. For Junior Staff Members, suspension shall be approved and carried out by the Manager after consultation with the Head of Section. For Senior and Management Staff, suspension shall be authorized by the General Manager.
3. The period of suspension shall range between one week to three months depending on the nature of the offence;
4. Offences for which a Staff Member may be suspended from duty without pay shall include, inter alia:-
   a) drunkenness on duty;
   b) fraud under investigation;
   c) unauthorized use or misuse of the Commission's property;
   d) after the issue of three warning letters;
   e) failing to carry out a job/assignment which has been assigned by a Superior Officers;
   f) abusive behaviour towards any member of the staff;
   g) any other offence which in the opinion of the General Manager, (in the case of Junior Officers) or the Board (in the case of Senior Staff Members) shall warrant the issue of suspension order.

5. Suspension letters shall be signed by the General Manager, acknowledged by the Staff Member concerned, and a copy kept on the Staff Member's file.
6. A Staff Member who goes on suspension on three separate occasions shall be liable to dismissal from the Commission.

[9] The next section is 1.14 which provides for a procedure by which employees who consider that an injustice has been done to them may request that the matter be referred to the General Manager and the Staff Sub-committee with rights of appeal to the TBC Board. It provides:

Section 1.14 – Grievances and Disputes

1. If a Staff Member shall feel that an injustice has been done to him as a result of an interpretation or application applied by a Section Head or Sub-Section, he may request that the matter be referred to the General Manager for reconsideration.
2. The General Manager to whom such a matter be referred shall use his superior knowledge, experience and maturity to examine the matter of objectively and logically before giving his judgment, interpretation or report, or he may refer the matter to the Board if he deems it necessary. The decisions of the Board on such a matter shall be final.

(Additional approved by the Board in December 2002)

That every complaint lodged by any staff member shall abide to the following procedures:-

1. That all complaints shall go to the Head of Division and then to the General Manager of TBC. The General Manager shall then convene a meeting of the Staff Sub-Committee to consider and make a decision on the merit of the complaint. The Staff Sub-Committee will then report to the Board.
2. A staff member has a right of appeal from the decision of the Staff Sub-Committee to the Board and the decision of the Board shall be final.
3. Any staff member who does not comply with this complaint procedure shall be dismissed.

[10] The next relevant section is 1.16 which deals with procedures that are to apply when serious charges are brought against an employee. It would appear that the term 'serious charge' is synonymous with 'serious misconduct' as in respect of these offences the employee may be subject to dismissal. Relevantly, under section 1.16(2) the General Manager in liaison with other Heads of Departments may recommend the suspension of an employee 'while further investigation takes place'. There is a process by which the employee charged with a serious offence is given an opportunity to respond to the charge and the facts (including any documents) relied upon by TBC. The General Manager is required to refer the case to the Staff Sub-committee for consideration and submission to the Board. Ultimately the Board must approve the penalty to be imposed if the serious charge is made out and these are listed in section

1.17(i) to (v) and range from a formal reprimand to dismissal. I set out sections 1.16 and 1.17 below.

Section 1.16 – Procedures for Serious Charges (Approved by the Board in Sept 2004)

When a serious charge is brought against an officer, the following procedures be adopted:

1. The Head of Department should forward the full facts of the case to the General Manager.
2. The General Manager is liaison with other Heads of Departments may be recommend suspension of the officer while further investigation takes place.
3. The General Manager should at the earliest opportunity sent a letter to the officer setting out clearly the following:
   (i) the charge (s)
   (ii) the facts including documents relied upon to support the charge
   (iii) invite the officer to submit any representation within the following time:
      - 14 days for officers in the Kingdom
      - 30 days for officers overseas.
4. The General Manager on receipt of the above, to provide detailed account of the case including representation made by the officer to the Staff Sub-Committee for consideration and submission to the Board.
5. The Board if it sees fit, may appoint a Committee of Enquiry to undertake further investigation.
6. During the suspension, the salary of the officer will also be suspended and will be repaid to the worker depending on the decision of the Board

Section 1.17 – Penalties (Approved by the Board in Sept 2004)

PENALTIES: The disciplinary penalties which are available for serious breaches of discipline or the repetition of minor breaches of discipline are listed below. In each case, one or more of these penalties may be imposed after consideration of the full facts by Board Sub-Committee, and with the subsequent approval of the Board.

(i) formal reprimand;
(ii) stoppage of pay, by way of restitution (in whole or in part) of loss or damage caused by the offender;
(iii) stoppage of a future increment or increments, drop of an increment or increments already granted as from the date of Board's Decision.
(iv) Demoting including removal from a post attracting pay or allowances;
(v) Dismissal.

[11] The final section I should mention is 1.20(3) which contains a statement of employees' rights as follows:

> *3. Employee's Right*
>
> 1. No employee shall be dismissed or suspended without a notice been given to the worker.
> 2. The notice should clearly state the reasons of his dismissal or suspension
> 3. The employee should be given 14 day to reply to the charge against him/her.

[12] Mr. Fiu took leave from his employment between 17 April 2013 and 26 April 2013 and then extended that leave from 29 April 2013 to 10 May 2013. He applied for a further extension of his leave from 15 May 2013 to 21 May 2013 but that request was refused by the Finance Manager due to short staffing. Despite the refusal Mr. Fiu left the workplace and took leave. The Finance Manager reported this to the Acting General Manager who in an email to the Finance Manager of 15 May 2013 wrote:

> This is a clear case of an insubordination which I cannot tolerate coming from a very senior member of the staff to his own Line Manager, the Manager of Finance & Marketing .....
>
> Please refer to the TBC Staff Employment Regulations Manual and Administration Instructions Section 1.13 on Discipline – Suspension on page 11.
>
> I shall make a submission for his immediate suspension to this afternoon Sub-committee meeting.

[13] A letter dated 15 May 2013 signed by the General Manager was then delivered to Mr. Fiu (which he received and acknowledged on 16 May 2013) suspending him from his employment. The letter referred not only to Mr. Fiu's conduct in leaving work without approval to take leave but also to his unsatisfactory employment history which included insubordination to the present and former Finance Managers, failure to carry out work required of him, frequent unauthorised absences from work, unauthorised and wrongful use of the Commission's vehicles whilst under the influence of alcohol, drunkenness, use of foul language and frequent lateness for which he had previously received warnings. Importantly for present purposes the final paragraph of the letter reads as follows:

> Therefore, as a result of the issues at numbers, 1, 2, 3 and 4 above, I hereby exercise my powers under the Employment Regulations Clause 1.13 regarding temporary suspension and Clause 1.20 (2) "the General Manager shall made the final decision on work related matters involving Junior and Senior Level, to issue this decision:

> 1. You are hereby temporarily suspended from work for two weeks, effective from today Wednesday 15/05/2013 ending on 29/05/2013;
> 2. During this period of suspension, you shall not receive any pay pursuant to Clause 1.13 (1 & 4) page 11;
> 3. Pursuant to the allegations appearing at numbers 1, 2, 3 and 4 above, you are liberty to respond within 14 days in according with a Clause 1.20 (3) – "the rights of the employee".

[14] Mr. Fiu promptly responded to the letter of suspension. In a letter dated 16 May 2013 he tendered explanations for his behaviour which included that the leave was required for his grandmother's funeral and for his preparation of a pola for a Church conference which was to start on 20 May 2015. He also said, in response to the decision to suspend him, that it was too severe. For reasons that were not explained, it appears that the General Manager did not receive Mr. Fiu's letter until it was tabled at a meeting of the TBC Staff Sub-committee on 28 May 2013.

[15] There was a meeting of the TBC Staff Sub-committee on Tuesday, 28 May 2013. The General Manager prepared a comprehensive report concerning Mr. Fiu and tabled it at the meeting. The opening paragraph states:

> The General Managers suspended 'Isileli Fiu, Accounting Officer, Finance Division on Wednesday 15/05/2013 for insubordination. The decision was made based on Section 1.13 of TBC Staff Employment Regulation Manual – Discipline,

[16] The report also noted:

> A summary of Mr. Fiu's history with TBC is attached in Appendix 1. This summary [*is*] plagued [*with*] queries and warnings for absences from duty, unauthorized use of TBC's vehicles to poor and unsatisfactory performance.
>
> Based on the severity of this case and Mr. Fiu's poor performance and history, Management proposes that the Sub-committee considers and recommend[*s*] to the Board that this Officer be dismissed from the service of TBC, effective from Wednesday 15/05/2013.

[17] The Appendix 1 referred to in the General Manager's report detailed Mr. Fiu's employment history with TBC. This included a large number of recorded instances of misconduct or poor performance on the part of Mr. Fiu. This was a far more comprehensive account of his failings as an employee than the rather generalised summary that the General Manager had included in her letter to Mr. Fiu of 15 May 2013 and to which he had responded.

[18] The minutes of the Staff Sub-committee meeting of 28 May 2013 recorded that:

> The General Manager briefly presented the case relating to Mr. 'Isileli Fiu, commencing with the list of issues queried to him and his warnings.

[19] The Staff Sub-committee resolved to recommend to the Board that Mr. Fiu be dismissed from the service of the TBC effective as from 15 May 2013. It was proposed that the decision be circulated to the Board of Directors for endorsement the following day.

[20] The TBC Board of Directors issued a Decision by Circular dated 29 May 2013. It noted, under the heading 'Suspension of Mr. Fiu':

> Due to Mr. Fiu's insubordination, he was suspended for 14 days from 15 – 29 May 2013 under the TBC Staff Employment Regulations Manual and Administrative Instructions, Section 1.13 on Discipline – Suspension (2) page 11."...For Senior and Management Staff, suspension shall be authorized by the General Manager

[21] The Board approved the Sub-committee's recommendation to dismiss Mr. Fiu, which was stated in these terms:

> Based on the above explanation on the insubordination, poor attitude, employment and performance record – among others - which sum up to Serious Misconduct of Mr. Isileli Fiu, Accounting Officer, the Management of TBC hereby seeks final approval of the TBC Board of Directors on the following recommendations:
>
> 1. That the decision of the TBC Board of Directors' Sub-committee on Development and Human Resources made on Tuesday, 28 May, 2013, to dismiss Mr. Isileli Fiu, Accounting Officer, effective as from Wednesday, 15th May 2013 be upheld.

[22] The General Manager wrote to Mr. Fiu advising him of his dismissal by letter dated 29 May 2013. The letter said that the decision was based on a number of factors of poor performance including insubordination in taking leave without permission and concluded:

> As mentioned above, all of the above grounds were taken from your work records with the Commission. Relevant clauses of the Commission Polices are Clause 1 – (Employment Contracts and General Regulations, Schedule 2(B) Serious Misconduct page 6) which include instant dismissal especially extremely serious cases. Including but limited to; (1) Repeated committing of insubordination, (3) taking of Commission's property without prior approval (5) unauthorized or [w]reckless use of Commission's vehicle.

Discussion

[23] A wrongful dismissal in breach of contract arises where an employee is not given sufficient notice to lawfully terminate the contract or has been summarily dismissed for misconduct in circumstances that do not warrant it or is constructively dismissed or where the employer fails to follow contractual procedures required prior to

dismissal. *Gunton v Richmond-upon-Thames LBC* [1981] Ch 448. *Dietmann v Brent London Borough Council* [1988] IRLR 299 (CA). It is generally recognised that for an employee to be entitled to damages for wrongful dismissal the following conditions must be fulfilled namely:

[23.1] The employee must be dismissed before the expiration of the term of employment or without the requisite period of notice, as the case may be; and

[23.2] The dismissal is wrongful in the sense that it is without sufficient cause or is in breach of a contractual condition of observing a particular procedure.

[24] TBC's case is that Mr. Fiu's contract of employment entitled TBC to terminate without notice for serious misconduct. Mrs Tupou referred to section 7.2 of his employment agreement and to Mr. Fiu's employment history and to the fact that serious misconduct included 'Frequent occurrences of misconduct'. She submitted that in cases of repeated poor performance even a minor act of insubordination may be the last straw justifying dismissal. *Pepper v Webb* [1969] 2 All ER 216; [1969] 1 WLR 514 (CA). Although a number of arguments were advanced for Mr. Fiu as to why his dismissal was wrongful the one that is particularly relevant, given what follows, is that having chosen to suspend Mr. Fiu it was not open to TBC to then dismiss him without notice because he was not told that TBC was considering dismissal and he had no opportunity to respond to an allegation that he was guilty of serious misconduct.

[25] In my analysis of this case it is convenient to start with the decision to suspend Mr. Fiu. There is no common law power to suspend an employee for misconduct. The powers of TBC to suspend Mr. Fiu arise as express terms of his contract of employment.

[26] In her submissions for TBC, Mrs Tupou submitted that the General Manager had used her powers under sections 1.13 (paragraph 4(g) under heading 'Suspension') and 1.16 to suspend Mr. Fiu and that the process adopted by TBC to deal with, and ultimately dismiss, Mr. Fiu was in accordance with the requirements of section 1.16 of the TBC Staff Employment Regulation Manual. I disagree with that submission. Specifically, I do not accept that the General Manager suspended Mr. Fiu under both sections 1.13 and 1.16.

[27] The letter suspending Mr. Fiu stated "I hereby exercise my powers under the Employment Regulations Clause 1.13 regarding Temporary Suspension...". The General Manager's report tabled to the TBC Staff Sub-committee stated "The General Manager suspended 'Isileli Fiu... The decision was made based on Section 1.13 of TBC Staff Employment Regulation Manual – Discipline". The Staff Sub-committee recommendation to dismiss Mr. Fiu, that was approved by the Board, noted; "Due to Mr. Fiu's insubordination, he was suspended for 14 days from 15 – 29 May 2013 under the TBC Staff Employment Regulations Manual and Administrative Instructions, Section 1.13 on Discipline – Suspension (2) page 11." It is therefore quite clear that the General Manager expressly suspended Mr. Fiu under section 1.13 and not section 1.16 and that this fact was communicated to Mr. Fiu.

[28] I should note that if the General Manager had intended to rely on section 1.16 then her letter of 15 May 2013 suspending Mr. Fiu was misleading. It made no mention of section 1.16 or that the suspension was part of an on-going investigation that might result in his dismissal. It is a reasonable inference from the content of his letter of 16 May 2013 that Mr. Fiu did not contemplate the possibility of dismissal. The letter did not even put Mr. Fiu on notice that TBC considered his behaviour to be serious misconduct but did state that Mr. Fiu was 'at liberty' to respond under section 1.20(3) thereby obfuscating further the jeopardy that Mr. Fiu actually faced. Importantly the General Manager quoted from section 1.20(2) that "the General Manager shall make the final decision on work related matters.." implying that the suspension was her final decision on the matter. Furthermore, as the letter contained no more than a general description of the matters that TBC was relying upon, and not the detailed information presented by the General Manager as an Appendix to her report to the TBC Staff Sub-committee, I consider the letter failed to comply with the requirements of clause 3 (ii) of section 1.16.

[29] TBC's powers to suspend an employee in a disciplinary context under sections 1.13 and 1.16 of the TBC Staff Employment Regulation Manual are not co-extensive. Under section 1.13 suspension is imposed as a penalty for misconduct. It is also an election to affirm the employment contract between TBC and the employee because it conveys to the employee that the offence has been resolved and that any right of dismissal that the employer may have will not be exercised. The power under section 1.16 is of quite a different nature. Under section 1.16 the suspension allows for the removal of the employee from the workplace pending further investigation of a serious charge but it is not in the nature of an election and operates to reserve the employer's right to terminate pending the completion of that investigation. This all reflects that misconduct warranting dismissal gives the employer an election whether to treat the employment contract as continuing (and claim damages for breach or impose some other penalty that may be provided for by the contract) or terminate the contract by dismissal. *Hanley v Pease & Partners Ltd* [1915] 1 KB 698. Once a decision to affirm the employment contract has been communicated to an employee the employer's right to terminate a contract of employment is lost irrevocably and both the employer and employee are bound by its terms.

[30] Applying these principles to this case, TBC could not suspend Mr. Fiu under both section 1.13 and 1.16 as those powers are not co-extensive. *Immer (No 145) Pty Ltd v The Uniting Church of Australia Property Trust (NSW)* (1992) 182 CLR 6. When the General Manager advised Mr. Fiu that he was being suspended under section 1.13 of the TBC Staff Employment Regulations and Manual she imposed a penalty for his offence. She also conveyed to him that the offence had been resolved and affirmed Mr. Fiu's employment contract. It follows that when TBC then purported to dismiss Mr. Fiu it made a substantive error and the dismissal was unlawful. I say that the error was substantive because it was more than a mere error of procedure and denied Mr. Fiu of his right to continuing employment.

[31] It is clear that Mr. Fiu was not an ideal employee. The agreed statement of facts contains Mr. Fiu's recorded misconduct as an employee of TBC and details a lengthy history of misconduct and poor performance including seven warnings. His decision to take leave when it had been refused to him was simply insubordination. Against

the background of his employment history I consider that TBC was entitled to regard Mr. Fiu as having been guilty of serious misconduct and, once it followed the procedures in section 1.16, one of the possible outcomes was dismissal. It is also clear to me, for the reasons I have given, that TBC did not deal with that matter that way. It follows that the decision of TBC to dismiss Mr. Fiu was not one that was open to it and was unlawful.

Damages

[32] The general rule is that an employee whose employment is wrongfully terminated can recover as damages the pecuniary loss resulting from the failure to terminate his employment in accordance with its terms. In the usual case, where the employment is terminable on reasonable notice the damages will include the remuneration lost during the period of notice. In this case Mr. Pouono advised me that Mr. Fiu seeks no more than recovery of his remuneration for the contractual period of notice, which was two months. I consider he is entitled to that but as the exact amount of his salary is not known to me the parties must calculate what is owing under this ruling.

The result

[33] I find that Mr. Fiu was wrongfully dismissed from his employment with TBC. Mr. Fiu is awarded damages equivalent to two months' salary. In the event that the parties are unable to agree on the amount payable under this ruling I reserve them leave to refer back to me within 21 days.

[34] Mr. Fiu is entitled to costs. As the amount Mr. Fiu will recover under this ruling is within the jurisdiction of the Magistrate's Court, costs are awarded to him but at the rates applicable in that Court. If the parties cannot agree on the quantum of costs they will be taxed in the usual way.

Leiola Group Limited v 'Aho

Supreme Court, Nuku'alofa
Paulsen CJ
CV 56/15

6 October 2015; 8 October 2015

Tort – passing off – ownership of goodwill not proved – claim failed
Civil procedure – discharge of interim injunction sought – plaintiff's case not strong, defendant acted in good faith, harm could be compensated by damages – discharge granted

On 23 September 2015 the plaintiff was granted ex parte interim orders which included an order restraining the defendant, her agents, servants and employees from taking custody of, printing, manufacturing, importing, distributing, advertising, selling or otherwise parting with possession or dealing with in any way whatsoever, any counterfeit or copied goods or apparel that uses or has printed on it the Tonga Rugby Football Union logo, the Kukri brand name and/or the IRB mark. The defendant was granted leave to apply to discharge the Orders on 48 hours notice. The defendant did so apply. The defendant challenged the plaintiff's right to bring the action and argued that the apparel in issue was manufactured and was being sold pursuant to a partnership agreement between the Tonga Rugby Football Union and one Angus Naupoto, trading as Ultimate Traders, pursuant to which Ultimate Traders had been appointed as the Tonga Rugby Football Union's merchandising provider for the remainder of 2015.

Held:

1. In order to secure an interim injunction a plaintiff must show that there was a serious question to be tried (in the sense that the plaintiff has made out a prima facie case) and that the balance of convenience favoured the granting of the injunction. The Court would look at the impact on the parties of the granting or the refusal of an order. Finally, an assessment of the overall justice of the case was required. If it could be shown that a plaintiff would be adequately compensated in damages and suffer no irreparable injury if the injunction was not granted that was an important factor against the making of an order. However, the grant of an interim injunction involved the exercise of a discretion not a rigid or mechanical approach.

2. The law of passing off provided a compromise between the conflicting objectives of the public interest in free competition and the rights of trader against unfair competition by others.
3. The true basis of the tort of passing off was that the passing off injured the plaintiff's right of property being specifically the goodwill attaching to his business. For that reason the first thing a plaintiff must prove was ownership of relevant goodwill. The plaintiff's claim faltered at the very first hurdle.
4. The court considered that overall justice favoured making an order discharging the interim injunction. The plaintiff's case was not strong. It appeared that the defendant acted throughout in good faith. The harm the plaintiff would suffer was not significant (reflected in lost sales only) and it could be fully compensated in damages.
5. The interim injunctive orders made on 23 September 2015 were discharged. If the plaintiff wished to have it dealt with on an urgent basis, it should apply to have the case called for urgent directions.

Cases considered:

American Cyanamid Co v Ethicon Ltd [1975] AC 396
Dawnay Day v Cantor Fitzgerald [2000] R.P.C. 669
Dental Manufacturing Co v de Trey [1912] 2 K.B. 76
Dominion Rent A Car v Budget Rent A Car [1987] 2 NZLR 395
Friendly Islands Satellite Communications Limited v Pohiva anors [2015] Tonga LR 451 (CA)
J. H Coles Pty Limited v Need [1934] AC 82
Manus v Fullwood & Bland (1949) 66 R.P.C 71 (CA)
Richards v Butcher [1891] 2 Ch 522
Roberts v Davis (1935) 53 R.P.C 79
Starbucks (HK) Limited and anor v British Sky Broadcasting Group PLC and ors [2015] UKSC 31
Thai World Import & Export Co Limited v Shuey Shing Pty Limited [1989] FCA 490

Counsel for the plaintiff : Mr Edwards
Counsel for the defendant : Ms Tonga

Ruling

[1] On 23 September 2015 I granted the plaintiff ex parte interim orders which included an order restraining the defendant, her agents, servants and employees from taking custody of, printing, manufacturing, importing, distributing, advertising, selling or otherwise parting with possession or dealing with in any way whatsoever, any counterfeit or copied goods or apparel that uses or has printed on it the Tonga Rugby Football Union logo, the Kukri brand name and/or the IRB mark. I granted the defendant leave to apply to discharge the Orders on 48 hours notice. The defendant did so apply and the matter came before me for hearing on an urgent basis on 6 October 2015.

[2] With the benefit of further evidence from the plaintiff, evidence from the defendant and legal submissions of Counsel I have formed the clear view that the interim orders must be discharged. I now set out my reasons but given the urgency of the matter from the parties' perspective and their desire for an immediate decision this ruling is necessarily brief.

The facts

[3] The plaintiff is an importer, retailer and wholesaler in the duty free market but also with one major retail store in central Nuku'alofa. The plaintiff's case has developed since the interim orders were made but its single cause of action against defendant was then and remains the tort of passing off.

[4] The plaintiff alleges that pursuant to a written agreement dated 30 August 2011 it was granted an exclusive license by the Tonga Rugby Football Union Inc to be its agent in Tonga to sell its goods and apparel including the uniform worn by the Tongan National Rugby Team at the 2015 Rugby World Cup but also other items designed by its current and former contracted manufacturers. Whilst the term of the agreement was initially until 30 June 2014 the plaintiff says that it has been extended by agreement with the Tonga Rugby Football Union Inc as contemplated by clause 2.4 of the agreement.

[5] The plaintiff became aware from the Facebook page of one of the defendant's employees that the defendant was intending to sell Tonga Rugby Football Union apparel to mark the World Cup. Two employees of the plaintiff were sent to the defendant's premises to investigate on 9 September 2015 and although there was no Tonga Rugby Football Union apparel on display they were told that a large shipment was arriving later that week for sale. Based on photos that appeared on Facebook, the information obtained by its employees and enquiries that it made of the Tonga Rugby Football Union the plaintiff filed these proceedings seeking an ex parte injunction in the first instance, alleging that the defendant was passing off her goods as genuine Kukri and authorised Tonga Rugby Football Union apparel, when it was not. I understand that Kukri is presently the official manufacturer of the Tonga Rugby Football Union jerseys although in the recent past there have been other manufacturers and jerseys have been made under the Kooga and Aoniu brands.

[6] The plaintiff pleaded in its statement of claim that the defendant was not entitled to utilize the Tonga Rugby Football Union logo, the brand name Kukri, the IRB and associated World Cup marks nor was she entitled to pass off her goods and apparel as authentic Tonga Rugby Football Union apparel for a profit. It was further alleged that as a result of the defendant's actions the plaintiff had and would continue to suffer loss; such loss represented by a loss of sales of official Tonga Rugby Football Union rugby apparel from its stores. It was said that this would also impact upon royalty payments to the Tonga Rugby Football Union.

[7] In applying to set aside the injunctive orders of 23 September 2015 the defendant challenged the plaintiff's right to bring this action and also argued that the apparel in issue was manufactured and was being sold pursuant to a partnership agreement between the Tonga Rugby Football Union and one Angus Naupoto, trading as

Ultimate Traders, pursuant to which Ultimate Traders had been appointed as the Tonga Rugby Football Union's merchandising provider for the remainder of 2015.

[8] In an affidavit of Hailame Minoneti, an employee of Ultimate Traders, it was stated that the design, pattern and logos shown on the jerseys sold by Ultimate Traders to the defendant were approved by the Tonga Rugby Football Union. He said "That ….the design, pattern and logos as shown on the jerseys imported by the [defendant] was approved by TRU." He annexed to his affidavit a letter of 28 August 2015 from the Tonga Rugby Football Union signed by the Interim CEO, Talanoa Fuka Kitekei'aho, which states, "It is advised that TRU has entered into partnership with Ultimate Traders as merchandising provider for our kit for rest of 2015".

[9] For completeness, I should add at this point that none of the apparel that the defendant has sold or wishes to sell bears the Kukri brand. However, the plaintiff alleges that the apparel is still counterfeit as copying the Kukri design. This now appears to be its main argument. In her second affidavit of 6 October 2015 Ms Lucy Tonga put the plaintiff's case this way, at paragraphs [16] and [24]:

> [16] The point of these proceedings is that Ultimate Traders has admitted the import of jerseys, which are misleading and deceptive and effectively copies of the Kukri design worn by the Tongan National Team at the 2015 World Cup. They are passing off to the public that these are authentic Tonga Rugby Union apparel being worn at the Rugby World Cup when in fact they are not being worn at the 2015 World Cup.
>
> [24] I say that the rights to the uniform is becoming a major issue in these proceedings. However, it is our case that the Defendant has no right to sell counterfeit apparel, which has been copied from the authentic Kukri jersey being worn by the Tonga National Team at the 2015 Rugby World Cup.

Passing off

[11] Most recently in *Starbucks (HK) Limited and anor v British Sky Broadcasting Group PLC and ors* [2015] UKSC 31 Lord Neuberger noted the three things that a plaintiff must establish to succeed in a passing off action as follows:

> 15. As Lord Oliver of Aylmerton explained in Reckitt & Colman Products Ltd v Borden Inc [1990] 1 WLR 491, "[t]he law of passing off can be summarised in one short general proposition – no man may pass off his goods as those of another". As he immediately went on to say, a claimant, or a plaintiff as it was then, has to establish three elements in order to succeed in a passing off action:
>
> > "First, he must establish a goodwill or reputation attached to the goods or services which he supplies in the mind of the purchasing public by association with the identifying 'get-up' (whether it consists simply of a brand name or a trade description, or the individual features of labeling or

> packaging) under which his particular goods or services are offered to the public, such that the get-up is recognised by the public as distinctive specifically of the plaintiff's goods or services. Secondly, he must demonstrate a misrepresentation by the defendant to the public (whether or not intentional) leading or likely to lead the public to believe that goods or services offered by him are the goods or services of the plaintiff. Whether the public is aware of the plaintiff's identity as the manufacturer or supplier of the goods or services is immaterial, as long as they are identified with a particular source which is in fact the plaintiff ... Thirdly, he must demonstrate that he suffers or ... that he is likely to suffer, damage by reason of the erroneous belief engendered by the defendant's misrepresentation that the source of the defendant's goods or services is the same as the source of those offered by the plaintiff."

[12] For the purposes of this application I accept this as a correct statement of principle.

Interim injunctions

[13] The principles to be applied by the Court in deciding whether to issue or refuse an interim injunction were set out in *American Cyanamid Co v Ethicon Ltd* [1975] AC 396 and applied in New Zealand in *Klissers Farmhouse Bakeries Ltd v Harvest Bakeries Ltd* [1985] 2 NZLR 140 (CA) and in Tonga most recently in *Friendly Islands Satellite Communications Limited v Pohiva and ors* (AC 14 of 2015, 16 September 2015 CA). [**Editor's note**: reported at [2015] Tonga LR 451 (CA)]

[14] In order to secure an injunction a plaintiff must show that there is a serious question to be tried (in the sense that the plaintiff has made out a prima facie case) and that the balance of convenience favours the granting of the injunction. The Court will look at the impact on the parties of the granting or the refusal of an order. Finally, an assessment of the overall justice of the case is required. If it can be shown that a plaintiff will be adequately compensated in damages and will suffer no irreparable injury if the injunction is not granted that is an important factor against the making of an order. However, the grant of an interim injunction involves the exercise of a discretion not a rigid or mechanical approach.

Is there a serious question to be tried.

[15] As the quotation from the *Starbuck's* case, to which I have referred above, makes clear the true basis of the tort of passing off is that the passing off injures the plaintiff's right of property being specifically the goodwill attaching to his business. For that reason the first thing a plaintiff must prove is ownership of relevant goodwill. In my view the plaintiff's claim falters at this very first hurdle.

[16] In *Dominion Rent A Car v Budget Rent A Car* [1987] 2 NZLR 395, 420 Somers J said:

> One important limitation on the right of a trader to restrain another is that he must show an invasion of that tangible right of property compendiously described as goodwill ... The existence of a trading reputation is not by itself sufficient – there can be no damage other than to a right of property…

[17] The main argument advanced by the plaintiff was that the apparel sold by the defendant is counterfeit because it is a copy of a Kukri design thereby infringing Kukri's copyright. If this is so it is Kukri and not the plaintiff that has a right of action. In his affidavit for the plaintiff at paragraph [12] Mr. John Chapman states that the design of the apparel that the defendant wishes to sell "infringes the copyright of Kukri". The plaintiff has no proprietary interest in Kukri's copyright and in fact no relationship with Kukri other than as a purchaser of its goods for resale. It has no goodwill derived from Kukri's copyright nor a right to sue on Kukri's behalf. Similarly, the plaintiff has no proprietary interest in the logos of the IRB or the Rugby World Cup.

[18] The plaintiff also says it is an exclusive licensee of the Tonga Rugby Football Union under the agreement of 30 August 2011 which agreement has been extended. Assuming for present purposes that the agreement has been extended (and the evidence before me was less than convincing on that point) the agreement creates no property rights enforceable by the plaintiff. Under the agreement all the Tonga Rugby Football Union granted the plaintiff was a license to use the Ikale Tahi logo for the purpose of "producing, importing, promoting and selling rugby associated clothing lines and accessories containing the logo which are approved by TRUA beforehand". I note that in this case there is no suggestion that the plaintiff exercised any such rights other to import and sell clothing.

[19] The question that arises is how do the terms of the agreement confer on the plaintiff a property right in the goodwill attached to the Ikale Tahi logo entitling it to restrain the defendant from selling its goods? I cannot see that it does. The purpose of the agreement is to license to the plaintiff the right to use the distinctive Ikale Tahi logo in relation to the sale of sports apparel. The use of the Ikale Tahi logo by the plaintiff without the Tonga Rugby Football Union's permission would otherwise be actionable at the suit of the Tonga Rugby Football Union as a passing off. In the absence of agreement to the contrary or other supervening factors (that are not applicable here) the goodwill of a business carried on by a licensee will accrue to the licensor rather than the licensee. The licensee will acquire no interest in the licensor's name or mark or brand and must cease using it on termination of the license. See *Roberts v Davis* (1935) 53 R.P.C 79, *Manus v Fullwood & Bland* (1949) 66 R.P.C 71 (CA) and *Dawnay Day v Cantor Fitzgerald* [2000] R.P.C. 669. It follows that the agreement between the Tonga Rugby Football Union and the plaintiff created no more than contractual rights and obligations between those parties. It did not transfer to the plaintiff any goodwill in the Ikale Tahi logo to the plaintiff. This is made clear by the terms of the agreement itself which provide at clause 3.3 "By entering this Agreement, Leiola does not attain any interest in the Logo". The goodwill associated

with the Ikale Tahi logo clearly remains the property of the Tonga Rugby Football Union and not the plaintiff. See in this regard *Thai World Import & Export Co Limited v Shuey Shing Pty Limited* [1989] FCA 490; *Richards v Butcher* [1891] 2 Ch 522, *Dental Manufacturing Co v de Trey* [1912] 2 K.B. 76 and *J. H Coles Pty Limited v Need* [1934] AC 82.

[20] I do note that clause 6.1 of the agreement contemplates that the plaintiff may bring claims based on "any unauthorized attempt by any person to use the Logo". One can contemplate a number of ways in which this power may be exercised but it does not create a right to bring an action for passing off, which is the only claim made, because to found such a claim the plaintiff must first establish ownership of goodwill attaching to the use of the Logo and the plaintiff has none. It may be that the Tonga Rugby Football Union, Kukri or the IRB do have rights of action against the defendant or Ultimate Traders. That is a matter upon which I offer no comment. But in the context of this suit where injunctive relief is sought this claim lacks the proper plaintiff.

[21] The plaintiff having failed to establish a relevant property right upon which to base its action in passing off it cannot establish the second and third requirements of the cause of action referred to in the *Starbuck's* case. Had I been required to decide the point I would hold that based on what is before me, in no sense can it be said that the defendant has misrepresented to the public that the apparel it is offering for sale are the goods of the plaintiff.

Balance of convenience

[22] In case I am wrong in my findings above I turn now to consider the balance of convenience. I find the balance of convenience favours the defendant.

[23] The only harm that the plaintiff has suggested that it will suffer should the defendant not be restrained from selling its apparel is from lost sales. It argues that it is unable to compete with the prices at which the defendant offers its apparel for sale because it has had to purchase its goods from Kukri whereas the defendant's product was manufactured in China at much less cost. I have been referred to the fact that the plaintiff has purchased many more rugby jerseys than the defendant (1,315 vs. 55) and has a far greater investment in its product (around $100,000) and accordingly greater risk. Whilst at first glance this argument has some attraction, on further consideration I do not find it compelling. The plaintiff's worst case scenario is that for every sale the defendant makes it will lose a sale. But the defendant has very few jerseys to sell (it has just 32 in its possession) and so the sale of those jerseys will have little impact on the plaintiff's ability to clear its stock. Furthermore, it appears to me that the plaintiff and the defendant are selling to different markets. Whilst I accept that the plaintiff has a retail outlet in Nuku'alofa its principal business is in the sale of duty free goods to travelers. By comparison the defendant is selling its less expensive goods from its premises at Ma'ufanga and is clearly targeting the local market.

[24] The plaintiff also argues that it had provided finance to the Tonga Rugby Football Union in excess of $30,000 "on the understanding that we would formalize key agreements relating to Leiola being an exclusive distributor of Tonga Rugby Union affiliated clothing…" and "in exchange for further formalizing agreements

towards an extension of the exclusive agreements" (see paragraph 7 of Mr John Chapman's affidavit.) I do not consider this takes matters very far as it appears that if debt was forgiven it occurred in 2013 and well before the events that gave rise to this proceeding. This is not a loss the plaintiff will suffer should I refuse to restrain the defendant. Furthermore, Mr Chapman produced an email between himself and what I understand are members of the Tonga Rugby Football Union proposing that members of the PFIL Group of companies (and not just the plaintiff) would forgive debt owed by the Tonga Rugby Football Union in return for the plaintiff to be the exclusive supplier of Kukri gear. The apparel the defendant is selling was not manufactured by Kukri and does not carry that brand. The terms Mr Chapman was proposing required that Kukri approve the plaintiff's exclusive agency in Tonga, which clearly never happened.

[25] Another matter that influences me is that as what the plaintiff is concerned about is lost sales, damages will clearly be a sufficient remedy and given the relatively small number of jerseys that the defendant has to sell there should be no question that she will be unable to pay damages should the plaintiff pursue its action to a successful conclusion.

[26] A further factor is that both the plaintiff and the defendant seek to take advantage of the Rugby World Cup to sell their product. Unfortunately the window of opportunity to do so is very small given Tonga's failure to qualify for the next round of the World Cup and to restrain the defendant will effectively settle this action. I do not think it appropriate to restrain the defendant in those circumstances, rather if the plaintiff wishes it I would accommodate its interests by ordering a speedy trial.

[27] Both parties sought to persuade me that there are public interest concerns that I should take into account. For the plaintiff Mr. Edwards suggested that the Court should make it clear that trading in counterfeit goods will be treated harshly by the Courts. Ms Tonga argued that I should be concerned for free enterprise and the public's right to buy goods of its choosing at the lowest possible cost and to enjoy and support the national rugby team. I have not been moved by these arguments. These considerations are already reflected in the law of passing off which, as was noted by Somers J the *Dominion Rent a Car* case at page 116, provides a compromise between the conflicting objectives of the public interest in free competition and the rights of trader against unfair competition by others.

The overall justice of the case

[28] Standing back and looking at the matter as a whole I consider the overall justice favours me making an order discharging the interim injunction. The plaintiff's case is not strong. It appears that the defendant has acted throughout in good faith. Based on the information that is before me the harm the plaintiff will suffer is not significant (reflected in lost sales only) and it can be fully compensated in damages.

The result

[29] The interim injunctive orders made by this Court on 23 September 2015 are discharged.

[30] The parties are to file memoranda as to costs on this application within 21 days.

[31] If the plaintiff wishes to have this case dealt with on an urgent basis it should apply to have the case called for urgent directions.

R v 'Unga

Supreme Court, Nuku'alofa
Cato J
Cr 84/2014

5 November 2015

Sentencing – manslaughter conviction – previous murder conviction in New Zealand – sentence imposed of 12 ½ years with final 18 months suspended

Early in the morning of 12 April 2014, the prisoner had been working as a night watchman for a business Dataline in the central area of Nuku'alofa. He had in the late evening gone outside to a park area known as Digicel Park around 2am where he had consumed some alcohol from a bottle of spirits he had. A group of youth approached him and asked to borrow his phone and he gave them it. He also shared some alcohol with them. Later, he asked for his phone back. It seems that, by this time, most of the youths had left aside from the deceased and possibly one other. He was not given back his phone which he had requested be returned. Instead, a fight broke out during which the prisoner used a large torch to hit the deceased about the head. As a consequence, there was bleeding into the cranial cavity and the deceased, who had been taken to hospital, died soon after. The deceased remained where the fight had taken place until police arrived and later provided his version of events, in a record of interview. The prisoner was convicted of manslaughter after a jury trial on 19 June 2015. After the trial the court learned that the prisoner had been convicted of murder in New Zealand where he had lived and worked as an overstayer for some time in his early twenties. He was sentenced to life imprisonment aged 27 on 11 July 2003. No minimum period was sought by the Crown. He was deported to Tonga in December 2013 and lived with his family. He appeared for sentencing.

Held:

1. Manslaughter carried a maximum sentence of 25 years. The court considered that there had been some provocation which resulted in the accused using the torch as a weapon, but it was moderate provocation.
2. The offending in New Zealand had obvious similarities to the homicide and was a very relevant matter to be considered on sentence. The fact that it occurred in New Zealand was irrelevant. The offending whether it occurred in Tonga or elsewhere was a part of the prisoner's history which was required to be considered on sentence in the public interest, because it demonstrated that he had a dangerous propensity to kill when exposed to

frustration of even mild provocation and, hence, he represented a serious danger to society. A more severe starting point was required for these reasons and the court adopted the starting point of 14 years.

3. The court believed the prisoner's expression of remorse and noted that he and his family apologized and gave some money to the family and their apology was accepted. The sentence imposed was 12 years and six months imprisonment backdated to the date of his remand in custody. The final 18 months of the sentence were suspended with conditions.

Cases considered:

Kofutu'a v R [2010] Tonga LR 120
R v Hala'ufia, CR 35 and 36 of 2013
Tu'itavake v R [2005] Tonga LR 348
Veen v The Queen (No 2) [1987-88] 164 CLR 465

Statute considered:

Criminal Offences Act (Cap 18)

Counsel for the prosecution	:	Mr Aho
Counsel for the defendant	:	Mrs Taufateau

Sentence

[1] The Prisoner, Patric 'Unga, was convicted of manslaughter after a trial before Judge and Jury on the 19th June, 2015. Sentencing was delayed because I ordered further information be obtained from New Zealand as to a previous murder conviction and also that a report be obtained from Dr Puloka, a forensic psychiatrist, before his sentencing. The prisoner was transferred to the secure unit at Vaiola hospital for some months whilst Dr Puloka was able to examine him. A report was received, recently.

[2] He had been charged with murder under section 87(1)(b) of the Criminal Offences Act which provides that it is murder;

> "if the offender intended to cause the person killed any bodily injury which the offender knew was likely to cause death and was reckless whether death ensured or not."

The particulars relied on by the prosecution were;

> "On or about the 12th April 2014 at Nuku'alofa, he did cause the death of Sitanilei Sime when he intended to cause him bodily injury when he struck his head repeatedly with a metallic torch to his head, and he knew those injuries were likely to cause death and he was reckless as to whether those injuries would result in death or not."

[3] The evidence was in a very narrow compass. It was proven that early, in the morning of the 12th April 2014, the prisoner had been working as a night watchman for a business Dataline in the central area of Nuku'alofa. He had in the late evening

gone outside to a park area known as Digicel Park around 2am where he had consumed some alcohol from a bottle of spirits he had. A group of youth approached him and asked to borrow his phone and he gave them it. He also shared some alcohol with them. Later, he asked for his phone back. It seems that, by this time, most of the youths had left aside from the deceased and possibly one other. He was not given back his phone which he had requested be returned. Instead, a fight broke out during which the prisoner used a large torch to hit the deceased about the head. The prisoner said, in his record of interview, that he hit the deceased twice on the head. Medical evidence from the pathologist suggested that here had been three or four blows to the back of the head causing a large comminuted depressed fracture of the left parietal bone and hemorrhage into the soft tissues of the scalp. There was a fracture of the sphenoid bone around the eye also at the base of the scalp. As a consequence, there was bleeding into the cranial cavity and the deceased, who had been taken to hospital, died soon after. The deceased remained where the fight had taken place until police arrived and later provided his version of events, in a record of interview.

[4] There was no eye witness account of how the fight commenced. A security officer, however, gave evidence that, later in the morning, he heard a scream for help and he took about 15 seconds to get to the area where the accused was hunched over the deceased who was lying sideways and he had a torch in his hand. He said that the accused was saying do not swear at me when I talk to you when he was beating him. He also said that from about the shoulder he brought the torch down on his head once or twice and another delivered another blow to the body. He told him to stop or he might die. He gave evidence to the deceased bleeding from the head and having trouble breathing.

[5] In his record of interview, the accused admitted his involvement. He said that he had got angry when his phone had not been returned to him by the youths who had wanted it they said to listen to music. He said he had consumed one 500 litre bottle of alcohol. He said two youths were left and, when he asked for his phone, the deceased lunged at him. He said he punched him on the mouth. He said he came at him again and he hit him with the torch on the head. The deceased was still trying to tackle him so he hit him with the torch and punched him until he fell to the ground. He said that he then sat down and had a rest. He did not touch the deceased again. He said he did not check on him. He said he was pissed off and angry. He said no one had tried to stop him whilst he was beating the man up. He said it had occurred around 3 or 4 am. He said that he did not care about the man afterwards anymore. After I beat him, he said that he sat down to catch his breath. He was sitting there for ten minutes until the police arrived. The deceased was no longer moving when the police arrived. He said he began to feel sorry for him and regretted getting angry. He said he wished he were still alive. When asked whilst he was angry and beating the guy, what was he thinking? He replied "I didn't know anymore, I was too angry." He said, however, that he was not angry any more after he beat the deceased with the torch. He admitted he did not care about him when he was angry. He said he was not sure whether the beating would cause him to die. He later said he deeply regretted what had happened. He said for the rest of his life he would keep away from committing the same crime in future.

[6] The Prisoner defended both murder and manslaughter charges. His defence, however, was principally aimed at resisting the murder verdict, namely whether in beating the deceased, he knew that death was a likely consequence. On this question, intoxication was raised and I gave a direction on this, although little was made of this by the defence and the accused did not given evidence. In my view, the jury resolved the matter by giving the prisoner the benefit of doubt on the central issue of whether, when he inflicted the lethal blows, the prisoner knew that death was a likely consequence. I, accordingly, proceed to sentence on the basis that although he must have known that there was a serious risk that hitting a man with what was a large and rather heavy torch on two occasions could cause serious injury, he did not appreciate that his actions were likely to result death, as the Tongan legislation requires. In cases of this kind, there is a fine line between murder and manslaughter. Plainly, in cases of this kind involving blows with weapons to the head, a severe penalty is called for on a manslaughter conviction. The fact that the prisoner has caused the death of another by his unlawful act is the principal sentencing criterion.

[7] Manslaughter carries a maximum sentence of 25 years. As the cases have said manslaughter is a crime where the circumstances vary considerably, as do the sentences that have been imposed. The principal cases cited to me by the Crown were *Tu'itavake v R* [2005] TLR 348 and *Kofutu'a v R* [2010] TLR 120 which involve very different factual situations from these. The guidelines from English sentencing practice referred to in *Tu'itavake* at p 352 would suggest that where some provocation but serious or great brutality a starting point is would be between 10 and 12 years. Mr Kefu who did not appear on sentence, advanced a memorandum submitting a 14 year starting point was appropriate in this case. He seemed to have arrived at this conclusion from the case of *Kofutu'a v R* [2010] TLR 120 where the sentencing judge had imposed a starting point of 15 years for an unprovoked series of assaults (punching) of a woman with the assaults being in the area of the chest and stomach. Although not interfering with the starting point, the Court of Appeal reduced the sentence to 13 years because consideration had not been given to the fact that apology and some restitution had been given to the victim's family, and also because of his youth and co-operation with police in making his statement. The Court said that where serious brutality was involved without provocation a starting point could exceed 12 years.

[8] In this case, I consider there had been some provocation which resulted in the accused using the torch as a weapon, but it was moderate provocation. However, in my view hitting a man over the head with a heavy torch on at least two occasions is great brutality and I approach this sentencing on that basis. In *R v Hala'ufia* CR 35 and 36 of 2013, I adopted a starting point of 13 years imprisonment where the prisoner, an inspector, had fractured the skull of the deceased and strangled him in custody. I took the view that the assault was aggravated by the fact that it took place in custody and the inspector was the officer in charge of the arrest. In the case of another officer, Maile, who had shortly after stomped on his head rendering him unconscious as he was led to the cells, a starting point of 11 years was imposed. In that case, I rejected any claim to provocation because although the deceased had resisted police and been abusive, that was conduct police were trained and expected to be able to deal with without resorting to excessive violence.

[9] After the trial, I learned that the prisoner had been convicted of murder in New Zealand where he had lived and worked as an overstayer for some time in his early twenties. During this time, he killed his fiancée by hitting her over the head with a dumbbell which was nearby after she, so the prisoner considered, had suggested their relationship was over. He hit her over the head three times twice after she had fallen back into a nearby arm chair. He gave himself up to police shortly after. The relationship had involved previously serious incidents of violence. He was sentenced to life imprisonment aged 27 on the 11th July 2003. No minimum period was sought by the Crown. He was deported to Tonga in, December 2013 and lived with his family until committing this homicide in April 2014, when he was aged about 38.

[10] I was concerned about this prior conviction and requested a report from New Zealand police as to the circumstances of the offending. All I had before me, at the date of verdict, was information that he had been convicted of murder. The sentencing was adjourned for this to be provided. After I had received this information, I requested the prisoner be examined by Dr Puloka who obtained further information on the prisoner.

[11] In his thorough report, Dr Puloka describe the prisoner as having a vulnerable personality type or trait, the characteristics being "introversion, intuition, feeling judging" personality type according to one of the Myers – Briggs personality types. He quoted characteristics of these people, known as INFJs, as warm as they are complex. INFJs hold a special place in the heart of people who they are close to, who are able to see their special gifts and depths of caring. INFJs are concerned for peoples' feelings, and try to avoid hurting anyone. They are very sensitive to conflict and cannot tolerate it well. Situations which are charged with conflict, he explained, may draw the normally peaceful INFJ into a state of agitation or charged anger.

[12] This personality trait, he said, was not an abnormality. The prisoner had an adjustment disorder with mixed disturbances of emotions and conduct. There was no plan by the prisoner to harm or kill the deceased but, during the time of the commission of the offence, the prisoner's mind was in rage. The violent anger had over ruled the prisoner's good decision making. He said that there was no need for medication but there should be psychological intervention, and total abstinence from alcohol and other illegal drugs should also be part of the treatment. Alcohol was related to the commission of the offence but the main problem was his adjustment disorder. He said that the prisoner had decided not to take alcohol or drugs for the rest of his life. He recommended that he be sent to the Psychiatric unit of Vaiola hospital for at least 6 months for him to receive further psychological treatment regarding his coping mechanism, especially anger when provoked. He also suggested that the Salvation Army was another service that could give him assistance in anger management and substance related disorder. He observed that the prisoner's act of homicide in New Zealand and the current homicide here in Tonga were examples of the marked distress in him that is out of proportion to the severity or intensity of the stressor. He was of the opinion that psychological treatment in order for Mr 'Unga to reform his life should be one of the main purposes of the expected sentencing in order for him not to harm others or to commit homicide again in the future. He also noted that, whilst as a prisoner in New Zealand, he took sessions in psychological intervention for anger management for about six months.

[13] The prisoner, because of his previous offending and the nature of it and his disordered personality, plainly could be a serious danger to the public in the future. In cases of mental abnormality which is not the case here, offenders can receive discounts for their offending which is plainly related to their disorder. The prisoner, here does not suffer, however, from a mental disorder, but not extreme according to Dr Puloka as to be regarded as an abnormality.

[14] Dr Puloka mentioned frustration with phone not being returned and, at the same time, his being provoked that led to a heightened physiological arousal and killing. I note that, in the New Zealand case, the killing seemed to arise from his partner's apparent desire to end their relationship. In that case, also, his reaction was intense and unplanned. He gave himself up to police. At his sentencing, Harrison J noted that the history of violence in the relationship, which he describe as very dysfunctional, was one that suffered from passion and violence. He observed that his sister had said, as a sister here to his probation officer, that he was by nature; shy, loving and a loyal person. Harrison J accepted that what he did was out of character. The reaction, which he described as savage and ferocious, was motivated, the Judge said, by mixture of blind passion, jealousy, and possessiveness. He accepted he was genuinely remorseful.

[15] The probation report, in this case, also speaks of his sister describing him as being a gentle and silent character. She said he was a happy person with friendly attitude but was dangerous when he was angry and could not control his temper. The probation report mentions that he had an average Tongan education, before he went to NZ and overstayed. He was 21 at the time. He commenced taking marijuana in New Zealand and appears to have informed his probation officer that he had lost control over the killing of his partner.

[16] In the context of this sentencing, the New Zealand homicide is important. He had only been released a few months when he killed, again in Tonga. When dealing with a case where an offender had also exhibited a dangerous propensity, being also involved in two homicides and receiving a life sentence for diminished responsibility, the High Court of Australia (Manson CJ, Brenna, Dawson and TooheyJJ) said in *Veen v The Queen* (No 2) [1987-88] 164 CLR 465, at 477;

> "There are two subsidiary principles which should be mention. The first is that the antecedent criminal history of an offender is a factor which may be taken into account in determining the sentence to be imposed, but it cannot be given such weight as to lead to the imposition of a penalty which is disproportionate to the gravity of the instant offence. To do so would be to impose a fresh penalty for past offences;……. The antecedent criminal history is relevant, however, to show whether the instant offence is an uncharacteristic aberration or whether the offender has manifested in his commission of the instant offence a continuing disobedience to the law. In the latter case, retribution, deterrence and protection of society may all indicate that a more severe penalty is warranted. It is legitimate to take account of the antecedent criminal history when it illuminates the moral culpability of the offender in the instant case, or shows his dangerous propensity or shows a need to

impose condign punishment to deter the offender, and other offenders from further offences of like kind. Counsel for the applicant submitted that antecedent criminal history was relevant to a prisoner's claim for leniency. That is not and has never been the approach of the courts in this country and it would be at odds with the community's understanding of what is relevant to the assessment of criminal penalties."

[17] In my view, the offending in New Zealand has obvious similarities to the homicide here and is a very relevant matter to be considered on sentence. The fact that it occurred in New Zealand is irrelevant, and should not mean that the Court puts it to one side because the offence did not occur in Tonga. The offending whether it occurred in Tonga or elsewhere is a part of the prisoner's history which requires to be considered on sentence in the public interest, because it demonstrates that he has a dangerous propensity to kill when exposed to frustration of even mild provocation and, hence, he represents a serious danger to society. He has shown, in my view, a continuing and callous disregard for human life when exposed even to mild provocation and consequently a continuing disregard of the law. In my view, a more severe starting point is required for these reasons, though not one that is disproportionate to the offending. Mr Kefu submitted that a 14 year starting point, in this case, was appropriate. I agree that this is an appropriate starting point for the offending, although for reasons which may differ in approach from Mr Kefu (who was probably influenced by the Court of Appeal in *Kofutu'a v R*). I adopt the approach in *Veen*, to arrive at a 14 year starting point. I consider the seriousness of his offending must be viewed in a different light from an offender who has not exhibited a history of homicidal offending. The fact that he well understood the seriousness of his previous offending and indeed took psychological counseling whilst in prison in New Zealand for it, means that his failure to exercise self control on a second occasion is worse. It justifies a more severe response. However, that aside, as Mr Kefu submitted, a very significant starting point, in any event, is appropriate on ordinary principles when death results from hitting a person about the head with a heavy weapon, which is inherently a brutal act.

[18] I have considered his probation report, and note that the accused was co-operative with police, and did not attempt to run away after the incident. In being co-operative and making a statement to the effect that he was unsure what would happen when he hit the deceased, he probably assisted his cause and avoided a murder verdict. In a case like this, as I have said, the difference between murder and manslaughter is a fine line. I believe his expression of remorse and I note also that he and his family have apologized and given some money to the family and their apology has been accepted. In these circumstances, the sentence I impose is 12 years and six months imprisonment backdated to the date of his remand in custody for this offending.

[19] In these circumstances, I have considered whether I should suspend any part of this sentence. At first, I considered I should not. On further reflection, I consider that I should. He has expressed remorse, has apologised for causing the death, and has been co-operative with police. His family speaks of his otherwise gentle character. I also consider that a further reason for suspending the final 18 months imprisonment is to ensure in the public interest that there is proper and orderly supervision of his

release into the community and his rehabilitation. He has attended Dr Puloka for a lengthy period of examination in Tonga and I consider, as the Doctor recommends in his report, that there should be further opportunity given early in his sentence for him to resume psychological counseling. I have noted that the present offending occurred after previous counseling for anger management had been undertaken in prison in New Zealand. Hopefully, under Dr Puloka's care and with this added experience, the prisoner will appreciate that he has a very serious problem which requires correction before he can safely return to society. He has, obviously, a long standing personality trait which I am satisfied is a major cause of his offending and alcohol, in combination, is likely another factor. That said, I consider it also necessary for the protection of society that his release is monitored and on conditions, rather than be an unsupervised release 28 months later, as was the case when he returned from New Zealand to Tonga in December, 2013. By the time he is released for the present offending, he will have spent almost two decades of his adult life in custody. Re-integration into society after such a long period of institutionalized life requires support.

[20] I suspend the final 18 months of the sentence on the following conditions;

a. He is not to commit an offence punishable by imprisonment for a period of three years;
b. He is to be placed on probation for 18 months with the following conditions;
   i. He is to live where directed by his probation officer;
   ii. He is not to consume drugs or alcohol during the period of his probation;
   iii. He is to be forthwith placed under the care of a qualified psychiatrist for appropriate follow up counseling;
   iv. He is to undergo further counseling with the Salvation Army on drug or alcohol abuse on his release.

[21] He is warned that a failure to abide by any of these conditions could see him being recalled to serve the remainder of this sentence, in custody.

[22] I recommend to the Commissioner of Prisons that very early in his sentence he be transferred to the secure wing of Vaiola Hospital for such reasonable period as Dr Puloka considers is required for him to further his psychological treatment, and that before his release, he be given additional follow up psychological counseling to prepare him for release into the community.

[23] I make a similar recommendation that during this period at Vaiola he undertake counseling also for alcohol and drug abuse, and anger management.

[24] I direct that the report of Dr Puloka, dated 15th October, 2015 and a copy of the sentencing notes of Justice Harrison, relating to his New Zealand murder conviction, and the memorandum of Jim McCully (Interpol) in relation to his New Zealand offending be retained with his prison file. A copy of this judgment and the Crown submissions on his sentence should also be retained on his prison life.

[25] A copy of this judgment is to be sent to Dr Puloka. I have found his report, analysis and suggestions most instructive.

Maama v Ma'afu anors

Land Court, Nuku'alofa
Paulsen, President
LA 4/2014

8 and 9 October 2015; 10 November 2015

Land law – Minister made insufficient enquiries – breach of natural justice – decision set aside – referred back to Minister for reconsideration

The family of the plaintiff, Mr Maama, has been occupying land at Kolonga since around 1926. This family land was an area of approximately 3R.07P. On around 18 November 2009 the Minister of Lands made a decision to grant to the fourth defendant a town allotment consisting of 1R.00P and being Lot 9 Registered Plan 2997 in the township of Kolonga ('the town allotment'). Mr Maama sought to set aside the Minister's decision. The town allotment was previously granted to his father, the second defendant, although never registered. For that reason Mr Maama, who was the second defendant's eldest son and heir, said that the town allotment was not available for grant to the fourth defendant. He also argued that the Minister's decision was otherwise unlawful, unreasonable and unjust. Mr Maama sought a declaration that the Minister's decision was invalid and sought an order directing the Minister to register the town allotment to the second defendant. He no longer sought an order directing the Minister to register him as the owner of the town allotment. The Minister and the fifth defendant ('Noble Nuku'), who was the estate holder, have defended the claim. Unusually, the other defendants, including the fourth defendant whose grant was challenged, did not do so. The Minister and Noble Nuku did not dispute that the town allotment was granted to the second defendant but said that registration was never completed. Furthermore, they said that in July 2009 the second defendant withdrew his application for the town allotment so that it became available for grant to the fourth defendant.

Held:

1. There was a question as to whether Mr Maama had locus standi to bring proceedings. Mr Maama was not a busybody unaffected by the Minister's decision to grant the land to the fourth defendant. His interests were clearly at stake. He clearly pleaded the basis for his entitlement to the town allotment. He challenged the grant of the town allotment to the fourth defendant because such grant would deprive him of rights to succeed to the land as his father's heir in circumstances where his father had not withdrawn his application for the land and was not in a position to bring a

claim himself. Not only that, he also challenged the grant to the fourth defendant because it was made without due consideration to the circumstances of his, albeit disputed, occupation and possession of the town allotment and the expense of over $200,000 to develop the land. Mr Maama has locus standi on that basis.

2. The requirements of natural justice varied from case to case and were dependent upon the nature of the inquiry that was being conducted and the decision-making power being exercised. The court found that the Minister failed to handle the grant of the town allotment to the fourth defendant lawfully and in accordance with the requirements of natural justice in the following respects: the decision to grant the land to the fourth defendant was made without sufficient enquiry; and when the Minister received the fourth defendant's application for the town allotment he was aware of Mr Maama's competing claim to the land – he should have given Mr Maama an opportunity to argue that the land should not be granted to the fourth defendant, and to apply for the town allotment himself.

3. The decision granting the town allotment to the fourth defendant was set aside because of the successive errors of the Minister. The matter was referred back to the Minister, who must make proper enquires of the second defendant. Should it be the case that the second defendant made no claim to the town allotment then the land should not be granted without first giving consideration to any contentions or competing application for the land by Mr Maama.

Cases considered:

Church of Jesus Christ of Latter Day Saints in Tonga Trust v Fepale [2009] Tonga LR 258
Cocker v Palavi anor [1997] Tonga LR 203
Fakafanua v Fakafanua [2008] Tonga LR 120
Finau v Minister of Lands anor [2012] Tonga LR 127 (CA)
Hakeai v Minister of Lands anors [1996] Tonga LR 142
Hausia v Vaka'uta anor [1974–1980] Tonga LR 58
Lisiate anor v 'Eli anors [2012] Tonga LR 30 (CA)
Manu v 'Aholelei and anor [2015] Tonga LR 135
Mesui Moala v Tu'i'afitu and Foueti Halalilo [1923-1962] Vol II Tonga LR 104
Ongolea v Finau [2003] Tonga LR 147
Skeen v Sovaleni [2005] Tonga LR 298
Tafa v Viau anors [2006] Tonga LR 287 (CA)
To'a v Taumoepeau and anor [2015] Tonga LR 62
Vai v 'Uliafu [1989] Tonga LR 56

Statute considered:

Land Act (Cap 132)

Counsel for the plaintiff : Mr Clive Edwards SC
Counsel for the first defendant : Mr S Sisifa
Counsel for the fifth defendant : Mrs P Tupou
No appearances for the second, third and fourth defendants

Ruling

The nature of the dispute

[1] On around 18 November 2009 the Minister of Lands made a decision to grant to the fourth defendant a town allotment consisting of 1R.00P and being Lot 9 Registered Plan 2997 in the township of Kolonga ('the town allotment').

[2] The plaintiff ('Mr. Maama') seeks to set aside the Minister's decision. The town allotment was previously granted to his father, the second defendant, although never registered. For that reason Mr. Maama, who is the second defendant's eldest son and heir, says that the town allotment was not available for grant to the fourth defendant. He also argues that the Minister's decision was otherwise unlawful, unreasonable and unjust.

[3] Mr. Maama seeks a declaration that the Minister's decision is invalid and for an order directing the Minister to register the town allotment to the second defendant. He no longer seeks an order directing the Minister to register him as the owner of the town allotment.

[4] The Minister and the fifth defendant ('Noble Nuku'), who is the estate holder, have defended the claim. Unusually, the other defendants, including the fourth defendant whose grant is challenged, have not done so. The Minister and Noble Nuku do not dispute that the town allotment was granted to the second defendant but say that registration was never completed. Furthermore, they say that in July 2009 the second defendant withdrew his application for the town allotment so that it became available for grant to the fourth defendant.

The facts

[5] The facts were substantially uncontested and I find them to be as follows.

[6] Mr. Maama is the fourth of six children of the marriage between the second defendant, 'Isileli Maama, and his wife Ma'ata Laota. They were married in January 1945. Mr. Maama is the eldest son of the marriage. He has three older sisters, a younger sister and a younger brother. The eldest child of the marriage between 'Isileli Maama and Ma'ata Laota is 'Ilaisaane Taumoeha'apai (nee Maama) who is the mother of the fourth defendant. The third defendant is the second child of the marriage and it is the rift in the relationship between her and Mr. Maama that was the major cause of this litigation.

[7] Mr. Maama's family has been occupying land at Kolonga since around 1926. This family land was an area of approximately 3R.07P. In 1975 steps were taken to subdivide the land into three lots. The town allotment was to be registered to the second defendant. An adjacent lot was promised to Mr. Maama.

[8] Mr. Maama built a Tongan fale on his land and lived there between 1977 and 1982. In 1982 he moved to the United States, leaving his wife and two children remaining on the land. They joined him in the following year. He has lived in the United States ever since but has made a number of visits to Tonga, has provided money for his family here and has taken an active interest in the family land including building a house on the town allotment.

[9] Mr. Maama intended to return to Tonga to build on his land. During 2004 he sent container loads of building materials to Tonga, only to discover that in his absence his land had been registered in the name of Raymond Maama. Raymond Maama is the illegitimate son of the third defendant. Mr. Maama was very disappointed at this turn of events but was told by his father that he could build his new house on the town allotment as he was the heir and would inherit that land. The third defendant was supportive of this proposal.

[10] Whilst there would have been no doubt in the parties' minds as to the second defendant's ownership of the town allotment and of Mr. Maama's right to take the land as heir in due course, the second defendant was still not registered as the owner of the town allotment. This was despite the fact that the second defendant had applied for a grant of the town allotment on 8 July 1975. He paid the poll tax and survey fee on 13 December 1976 and 10 November 1977 respectively and produced his birth certificate to the satisfaction of the Ministry. On 14 November 1977 the Minister issued a direction that the town allotment was to be surveyed and registered in the name of the second defendant and a survey was subsequently completed. For reasons that are not entirely clear no deed of grant was prepared. However, it was accepted by Counsel for the Minister, Mr. Sisifa, that the second defendant had done everything required of him to obtain registration of the town allotment save physically collecting a deed of grant and paying a nominal registration fee at the time of doing so.

[11] In May 2004, Mr. Maama began building a substantial two storey dwelling on the town allotment. He left Tonga to return to the United States in around September 2004, by which time the foundation work was completed. He gave the third defendant money to pay labour costs associated with the ongoing building work. Unfortunately matters did not progress smoothly from this point on. The uncontested evidence was that the third defendant took the money and removed building materials in an effort to stop the work. In 2006, Mr. Maama sent further containers of building materials and returned to Tonga to carry on the work. He erected the framework, the first storey and the roof. He then had to stop work to raise further funds. In 2007, Mr. Maama returned to Tonga but the third defendant again interfered and stopped the work and told him that he would never inherit or live on the town allotment. Mr. Maama said that this was because she was "very bitter because she was not getting any money from me" and "She was jealous because she believed that I was giving money to people I was dealing with and she was not getting anything".

[12] By 2009 Mr. Maama had expended over $200,000 on the dwelling. A considerable quantity of his materials had been stolen by his family and builders. Because they had caused deliberate damage to the dwelling Mr. Maama commenced proceedings against the third defendant and his younger sister, Kamela Soakai, in the Supreme Court. He obtained orders restraining them from entering, interfering with

or damaging the dwelling and holding them to keep the peace. They subsequently ignored those orders and proceedings to have them imprisoned for contempt were taken but withdrawn in August 2009 on the sisters' undertaking not to commit further acts in breach of the peace and the payment of costs.

[13] Possibly as a result of a visit that Mr. Maama and his lawyer made to the Lands Office on 4 May 2009 to check on the status of the town allotment, the Minister of Lands issued a Savingram on 7 May 2009 to the Secretary of Lands directing him to issue a deed of grant to the second defendant. The Savingram was headed "Re: Survey of the Town Allotment of 'Isileli Ultimo of Kolonga, Estate of Nuke" which reads:

> Please survey the town allotment of the above named in accordance with the plan submitted with this letter.
>
> This allotment was granted by the estate holder to the above named on the 08/07/1975 and he has already paid the survey fees under rec. 948504 – 10/11/1977 - $17.50. Once you have completed the survey, prepare the map (Deed of Grant) and register.

[14] Also on 7 May 2009 Mr. Maama wrote to the Minister of Lands. In his letter Mr. Maama noted that he had been advised by Fataua at the Ministry that a deed of grant was to be prepared in favor of the second defendant for the Minister's signature. He also advised the Minister that he had built a two storey dwelling on the town allotment. Importantly also, he advised the Minister that his father was 86 years old and was being ill-treated by his sisters and being forced "to come to the office to do what she wants done with the land". He also wrote:

> There is real concern and I am asking for the registration of the town allotment in the name of [the second defendant] in accordance with the law in order to enable the law of succession to apply. I am fearful that my sisters, Latai and Kamela, will force the old man to register the allotment in someone else's name.

[15] As a result of this correspondence the Land Registrar prepared an internal memorandum to the Minister of Lands dated 29 May 2009. This memorandum notes that work had already been done to register the second defendant as owner of the town allotment. Foreshadowing the position the Minister and Estate Holder have taken in this proceeding, the memorandum states:

> The registration of this allotment upon the completion of work to it, is based on the time Isileli thinks he will come and register it, and that will be the time Fukofuka Maama becomes heir….
>
> Because I am aware this father and son are in conflict and I do not believe Fukofuka has anything to do with forcing his father to register this allotment. The only time Fukofuka will be associated is if 'Isileli surrenders this allotment upon it being registered.

[16] For completeness I should add that there was no evidence of any conflict between Mr. Maama and his father.

[17] On 15 May 2009 Noble Nuku wrote to Kuli Fehoko, who Mr. Maama had appointed to look after the dwelling, forbidding him to enter onto or carry out any work at the town allotment. As the Noble Nuku did not give evidence I do not know what prompted him to intervene in this way. There followed correspondence from Mr. Maama's lawyer, Clive Edwards, to Noble Nuku of 19 May 2009 in which Mr. Edwards advised Noble Nuku of the circumstances surrounding the building of the dwelling on the town allotment, the dispute between Mr. Maama and his sisters and the fact that Mr. Maama had authorised Mr. Kuli to look after and protect his property. Mr. Edwards stated "... if you have authority to prohibit Kuli and Fukofuka Maama from entering the place, please arrange for the service of an order from the Court". On 5 June 2009 Mrs. Tupou, acting for Noble Nuku, responded to Mr. Edward's letter of 19 May 2009. She asserted that as the town allotment was not registered in anyone's name "my client is the one who will have authority over such land" and "My client does not dispute that the house belongs to your client but that certainly does not give him the right to the land."

[18] On 5 June 2009, Dr Halatuituia, who I understand is the Secretary of Lands, responded to Mr. Maama's letter of 7 May 2009 and confirmed that the Minister had directed for the town allotment to be registered to the second defendant, as follows:

> Work has already been conducted for 'Isileli Maama's application for an allotment and is in the mapping division to prepare the map for registration.
>
> The registration of this allotment will be upon completion of the work to it is a matter entirely up to 'Isileli Maama.

[19] The evidence was that a deed of grant was prepared in favour of the second defendant but that was never signed by the Minister nor was the second defendant's name ever entered in the Register of Town Allotments.

[20] On 7 July 2009 the Ministry received a letter which purported to be from the second defendant cancelling his application for the town allotment. Authorship of the letter is disputed but for convenience I will refer to this as 'the second defendant's letter'. No reason was given for the second defendant wishing to cancel his application. Mr. Maama, in his evidence, said that his father had been compelled by the third defendant to cancel his application so that the town allotment could be granted to the fourth defendant. He also gave what appears to be contradictory evidence that the second defendant's letter was a forgery. He pointed to what he considered to be irregularities in the letter to support his position. For reasons that will become apparent, I am not required to make a finding as to whether the letter was a forgery.

[21] There is an absence of evidence as to what then happened. There is a notation, signed by the Minister, on the second defendant's letter and dated 9 July 2009 asking the Acting Secretary of Lands to "Please check". There is then a further notation by

some unidentified person requesting the Land Management Division to action the Minster's instruction. There is then a further entry which reads as follows:

> "Fataua
>
> As directed
>
> Signed
>
> 28/7"

[22] All of this is most unsatisfactory. There is no evidence of what the Minister was asking the Acting Secretary of Land to 'check' or what enquires were in fact made or what those enquires revealed. There is no written record either that the Minister accepted the request to cancel the second defendant's application for the town allotment.

[23] On 13 August 2009, the fourth defendant made an application for the grant of the town allotment. It appears that Mr. Maama was aware that the Ministry had received what purported to be a letter from his father cancelling his application for the town allotment but he was not aware that the fourth defendant had applied for the grant of that land. There was no evidence that anyone at the Ministry of Lands drew that application to his attention.

[24] There followed some correspondence from Mr. Maama's lawyer, Mr. Clive Edwards, to the Minister. On 21 August 2009 Mr. Edwards wrote:

> The work for the building on the town allotment was authorised and permitted by the old man ('Isileli Maama) who is the father of Fukofuka. Because of the rift and differences between Fukofuka and his two sisters, it has caused the two sisters to compel their father to surrender the land and not complete the registration of the allotment in order that the construction carried out by Fukofuka may end up useless and of no value. The situation is becoming increasingly bad.
>
> On Monday, 17/8/2009 Noble Nuku advised that the old man 'Isileli Maama has surrendered the allotment to him because it was never registered. This will enable the son of Latai Tau, the older daughter of 'Isileli Maama and sister of Fukofuka Maama to complete the arrangement.
>
> I advised Nuku that what he is doing is wrong because this allotment was granted by his predecessor in office on 8/7/1975 for 'Isileli Maama to register. Also, the survey was carried out but the registration has not being carried out by your department and this should be corrected.
>
> Request is hereby made to register the allotment and allow the dispute with the sisters to run its course.

[25] There was no response to that letter. There was no response either to a subsequent letter to the Minister of 27 November 2009 in which Mr. Edwards wrote:

> I am writing this letter because you Ministry has not registered the town allotment of 'Isileli Maama….
>
> When I came with the heir to talk to your department, it became apparent that 'Isileli Maama and his daughter Latai Tau came and tried to change the registration to the eldest son of Latai Tau and not the heir Fukofuka Maama…
>
> The old man advised his son Fukofuka Maama that he is not agreeable to what his daughter, Latai Tau, is attempting to change or transfer the town allotment to her eldest son but he is afraid of Latai and Kamela because they beat him up.

[26] The Ministry's file reveals that on 19 November 2009 the Minister and the Noble Nuku met to discuss the fourth defendants' application. There is a note, made following that meeting, written on the fourth defendant's application as follows:

> Appointment: 11:15am: 18/11/2009 – Nuku and Minister
>
> Decision of the Minister of Lands today to proceed with this application and let the Court case follow later if they wish to proceed to Court because the Estate Holder agrees.

[27] This decision was not conveyed to Mr. Maama. He said that he was not aware of the decision to grant the allotment to the fourth defendant until just before this proceeding was commenced, which was in early 2014.

[28] The Ministry has not issued a deed of grant to the fourth defendant whilst this dispute is unresolved.

[29] There was no explanation as to why it took Mr. Maama until 2014 to issue his proceeding but nothing appears to turn on that.

The arguments advanced for Mr. Maama

[30] Mr. Edwards presented written and oral submissions. His submissions focused on what he said were the gross negligence and improper conduct of Noble Nuku and the Minister.

[31] As far as Noble Nuku is concerned, Mr. Edwards submitted that he was aware of Mr. Maama's family connection to the town allotment, that Mr. Maama had an agent looking after the land for him and of his development of the town allotment. He argued that in those circumstances Noble Nuku acted improperly in consenting to the fourth defendant's application and in declaring wrongly on the fourth defendant's application form that there was no impediment to the grant. He submitted that it was

"abundantly clear to Noble Nuku that the land was not available … because it was occupied by the plaintiff".

[32] As far as the Minister is concerned, Mr. Edwards submitted that the Minister was in serious breach of duty in failing to register the town allotment in the name of the second defendant for over 34 years and that his decision to grant the town allotment to the fourth defendant when he was fully apprised of the fact of possession, the history of the town allotment and of Mr. Maama's development of it was not only in breach of section 50 of the Land Act but also unreasonable and unjust.

[33] Mr. Edwards referred me to two cases on the issue of whether land is available for grant, which he argued were on point, namely *Tafa v Viau & Anor* [2006] Tonga LR 287 and *Mesui Moala v Tu'i'afitu and Foueti Halalilo* [1923-1962] Vol II Tonga LR 104.

[34] Mr. Edwards also submitted that there was no evidence that his father was the author of the second defendant's letter. He referred to the unchallenged evidence of Mr. Maama and two other witnesses, Finau 'Ofahulu and Kilisitina Manu, to support a submission that the second defendant would not have written such a letter and wanted Mr. Maama to succeed to the town allotment. He noted also that the third and fourth defendants and Noble Nuku had not called any evidence to support the alleged cancellation of the second defendant's application for the town allotment.

The Minister's position

[35] In his statement of defence the Minister pleads that Mr. Maama's claim is inconsequential because the town allotment has not been granted or registered in the name of the fourth defendant or anyone else. Although this argument was not developed at the hearing I understand what is being advanced is that the claim is premature.

[36] In helpful oral submissions Mr. Sisifa submitted that the second defendant was never the owner of the town allotment and that his registration was subject to the requirements of section 43(2) of the Land Act and the payment of the prescribed registration fee. Mr. Sisifa sought to persuade me that I need not follow cases which have held that registration of land is not the test of ownership, such as *Lisiate v 'Eli* [2012] Tonga LR 30, 37, as those cases had not considered section 43(2) of the Land Act.

[37] Mr. Sisifa argued that it followed that the second defendant never had anything more than a license to occupy the town allotment which was invalidated when he withdrew his application for the land. Mr. Sisifa accepted that whilst the second defendant's application for the land was extant the town allotment was not available for grant. However, he submitted that once the second defendant's license to occupy the town allotment terminated the land became available for grant and that Mr. Maama had no claim to it as his father's heir. He also submitted that Mr. Maama had no independent claim to the town allotment as he had never been in occupation of it so as to render it unavailable for grant as Mr. Maama was a resident of the United States and had been for over 30 years.

The Estate Holder's position

[38] Mrs. Tupou also presented helpful written submissions for Noble Nuku. In reliance upon an extract from *Halsbury's Laws of England* Vol 37 para 211 (which I note was referred to in *Fakafanua v Fakafanua* [2008] Tonga LR 120) Mrs. Tupou argued that Mr. Maama does not have *locus standi* to bring this claim. She sought to persuade me that in an action for recovery of land the proper plaintiff is the person in whom the legal estate is vested. In this case, she submitted, that the legal estate in the town allotment is vested in the estate holder, Noble Nuku, as the land is not presently registered to anyone.

[39] Mrs. Tupou also argued that only the second defendant (and not Mr. Mamaa) can bring an action to have the land registered in this name but said that the second defendant had given up his claim to the town allotment and was not able to make a second application for the land because of section 44(1) of the Land Act.

[40] Mrs. Tupou maintained that the town allotment was available for grant to the fourth defendant when the second defendant had withdrawn his application for it and that there was no substance in the allegations made by Mr. Maama that the Noble Nuku had acted improperly in consenting to the grant. She distinguished the cases relied upon by Mr. Edwards, in support of the submission that the land was not available for grant, on their facts.

Discussion

Locus standi

[41] I do not accept that Mr. Maama does not have *locus standi* to bring this claim. The position that may prevail in England in relation to actions for the recovery of land, referred to by Mrs. Tupou in her submissions, is not apposite given Tonga's unique system of ownership and succession to land.

[42] In *Skeen v Sovaleni* [2005] Tonga LR 298 an application was made by a defendant to strike out a claim by the plaintiff seeking cancellation of a deed of grant on the grounds that the plaintiff lacked *locus standi*. Ford J said, at page 300, that it was 'axiomatic' that before a plaintiff can challenge registration of any deed of grant he must have *locus standi* and that the "Land Court was not established as a forum for just any busybody". He also said:

> Before any challenge can be made to registration of a deed of grant, a plaintiff must be able to establish proper standing before the Court. Where, as in the present case, a plaintiff claims entitlement to the land in question then the basis for his alleged entitlement must be apparent from the pleadings. Once that threshold is established then and only then do the pleaded grounds for setting aside the deed of grant become a relevant consideration.

[43] Mr. Maama is not a busybody unaffected by the Minister's decision to grant the land to the fourth defendant. His interests are clearly at stake. *Church of Jesus Christ*

of Latter Day Saints in Tonga Trust v Fepale [2009] Tonga LR 258. He has clearly pleaded the basis for his entitlement to the town allotment. He is challenging the grant of the town allotment to the fourth defendant because such grant will be deprive him of rights to succeed to the land as his father's heir in circumstances where, he says, his father has not withdrawn his application for the land and is not in a position to bring a claim himself. Not only that, he also challenges the grant to the fourth defendant because he says it was made without due consideration to the circumstances of his, albeit disputed, occupation and possession of the town allotment and the expense of over $200,000 to develop the land. Mr. Edwards submitted that Mr. Maama was "compelled to issue these proceedings to protect his interest and his rights to his home and the land which he will inherit in the future" (paragraph 3.1 of closing submissions). I consider that Mr. Maama has *locus standi* on that basis.

Is the claim premature?

[44] I also reject the argument that the claim is premature. There is no dispute that the Minister has made a decision to grant the town allotment to the fourth defendant. There can be no question that, but for Mr. Maama's opposition to the grant, registration will be completed. There is no reason why Mr. Maama should have to wait for the formality of registration to challenge the Minister's decision to grant the land to the fourth defendant.

The Minister's decision to grant the land to the fourth defendant

[45] The parties' submissions focused on the question of whether the land was available for grant to the fourth defendant. There will have been an expectation that the Court would resolve that issue. In previous cases the Courts have expressed a view that there will be an impediment to the making of a grant if land is not 'available' because, save in the case of trespassers, the land was in fact occupied. *Ongolea v Finau* [2003] Tonga LR 147 and *Vai v 'Uliafu* [1989] Tonga LR 56. But the Court of Appeal in *Finau v Minister of Lands & Anor* [2012] Tonga LR 127 at paragraph [16], left for determination in another case:

> ….whether the Act entrusts to the Minister the determination of the question of whether land is "available" as a matter of fact …. or whether "available" has a legal meaning to be determined by a 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.

[46] In *To'a v Taumoepeau and anor* [2015] Tonga LR 62 when referring to *Finau* Scott J said, at paragraph [60], that in light of the Court of Appeal's observations for the Land Court to attempt to arrive at a conclusion as to when the requirement that land be available had been satisfied was not a satisfactory approach. I agree, and like Scott J in *To'a* I do not feel that I am required to reach any conclusion on the issue to decide this case.

[47] Scott J further observed in *To'a*, at paragraph [61]:

> While the responsibility for determining availability may not be clear what is beyond doubt is the responsibility of the Ministry to make proper enquiries to comply with the rules of natural justice and to avoid obvious mistakes *before* a decision is reached.

[48] As I have said in other cases (see for instance *Manu v 'Aholelei and anor* [2015] Tonga LR 135 the Courts have recognised the application of traditional legal grounds of judicial review to the administrative decisions of the Minister to make grants under the Land Act. The Minister must adopt a reasonable and fair process before he exercises that power. This includes the duty to take reasonable steps to ascertain the facts relevant to the exercise of the power. In *Tafa v Viau* [2006] Tonga LR 287, the Court of Appeal at paragraph [12] said:

> Two aspects of the Minister's functions and duties, in a case such as this, 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. In the first place, he cannot properly sign the 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 enquiry 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 enquiries 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.

[49] 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. In *Tafa*, at paragraph [13], the Court said:

> Where the 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.

[50] In *Finau* the Court of Appeal considered, at paragraph [15], 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 L.R. 58; *Hakeai v Minister of Lands and ors* [1996] Tonga. L.R 142; *Cocker v Palavi and anor* [1997] Tonga L.R 203 and *Tafa.*

[51] In *Hakeai v Minister of Lands & Ors* [1996] Tonga LR 142, 143-144 the Court of Appeal said:

> 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…
>
> Whenever the Minister has competing claims for the same land, he should be careful to ensure that both sides get a hearing - not of course as a court, but an opportunity to put each point of view before a decision is made.

[52] The requirements of natural justice will vary from case to case and are dependent upon the nature of the inquiry that is being conducted and the decision making power that is being exercised. In this case I have formed the very clear view that the Minister failed to handle the grant of the town allotment to the fourth defendant lawfully and in accordance with the requirements of natural justice in the following respects.

[53] First, I understand that the Minister and Noble Nuku accept that while the second defendant's application for the town allotment was extant the town allotment was not available for grant to the fourth defendant. They maintain that the town allotment became available for grant when the second defendant cancelled his application for the town allotment. The second defendant's letter was dated 10 June 2009 but not received by the Ministry until 7 July 2009 and was seen by the Minister by 9 July 2009. The Minister was already on notice as a result of Mr. Maama's letter to him of 7 May 2009 of all of the following:

- [53.1] That Mr. Maama was the second defendant's heir who expected and wished to inherit the town allotment.
- [53.2] That Mr. Maama had since 2004, with the consent of the second defendant, built a two storey dwelling on the town allotment.
- [53.3] That the second defendant was elderly and that it was alleged he was being ill-treated by the third defendant.
- [53.4] That Mr. Maama was in dispute with the third defendant and another sister.
- [53.5] That the second defendant was being forced by the third defendant to take steps to have the town allotment registered in the name of some other person other than the second defendant or Mr. Maama.

[54] On 21 August 2009, the Minister received a further letter from Mr. Maama's lawyer in which it was alleged that Mr. Maama's sisters had compelled the second defendant "to surrender the land and not complete the registration of the allotment in order that the construction carried out by Fukofuka may end up useless and of no value". The letter went on and advised that cancellation of the second defendant's application for the land would "enable the son of Latai Tau, the older daughter of 'Isilelei Maama and sister of Fukofuka Maama to complete this arrangement".

Although not known to Mr. Maama, an application for the town allotment had, on 13 August 2009, been made by the illegitimate son of Mr. Maama's eldest sister.

[55] In the circumstances I have described, before making any decision to grant the town allotment to the fourth defendant the Minister was obliged to make reasonable enquires as to the circumstances under which the second defendant wished to cancel his application for the land. He should have sought confirmation that the second defendant's expressed intention of doing so was freely made. The Minister did not give evidence and no other witness was called by or for the Minister to state what, if any, enquires were made. As I have noted, there is a notation written by the Minister on the second defendant's letter asking the Acting Secretary for Land to "Please check", but I cannot infer from this that proper enquires were made or what they revealed. In the absence of such evidence I must find that the decision to grant the land to the fourth defendant was made without sufficient enquiry.

[56] That is not the only reason, in my view, why the Minister's decision to grant the town allotment to the fourth defendant was made in breach of the principles of natural justice. When the Minister received the fourth defendant's application for the town allotment he was aware of Mr. Maama's competing claim to the land. He should have given Mr. Maama an opportunity to argue that the land should not be granted to the fourth defendant, and in my view also, to apply for the town allotment himself. *Hekeai v Minister of Lands*. There was no explanation for the Minister's failure to do so and, indeed, no explanation for what on the face of it appears to be a capricious decision to grant the land to the fourth defendant and force Mr. Maama into Court. There was nothing to suggest that the Minister undertook any assessment of the merits of the claims of Mr. Maama and the fourth defendant and it would appear that the Minister was of the view that if Mr. Maama could not claim the land as heir there was no need to consider his position at all. That in my view was quite wrong.

[57] The successive errors of the Minister must lead to the result that the decision granting the town allotment to the fourth defendant is set aside. The matter must be referred back to the Minister, who in accordance with this judgment, must make proper enquires of the second defendant. Should it be the case that the second defendant makes no claim to the town allotment then the land should not be granted without first giving consideration to any contentions or competing application for the land by Mr. Maama.

[58] I do not intend to make the order that Mr. Maama seeks that the Minister be directed to register the town allotment in the name of the second defendant. Whether it is appropriate that the second defendant be registered as the owner of the town allotment will depend on the outcome of the Minister's enquiries.

[59] For the avoidance of doubt, nothing in this judgment can be taken to imply that Mr. Maama must receive a grant of the town allotment. The finding of the Court is only that in the circumstances of this case the decision of the Minister to grant the town allotment to the fourth defendant was vitiated by breach of the requirements of natural justice. Should it be necessary for the Minister to determine competing applications for the town allotment as between Mr. Maama and the fourth defendant then those applications must, of course, be decided upon their respective merits.

The result

[60] The decision of the Minister to grant the town allotment, being Lot 9 Registered
570 Plan 2997, to the fourth defendant is set aside. The matter is referred back to the Honorable Minister of Lands for further consideration.

[61] I will receive any written submissions on costs within 21 days if there is no agreement.

R v Kalavi

Supreme Court, Nuku'alofa
Cato J
Cr 8/15

25 November 2015

Sentencing – manslaughter during robbery – considered recidivism as well as his youth – 14 years with last year suspended

On 20 February 2014 the prisoner robbed a Chinese convenience store and in the process assaulted the owner with a piece of wood. After taking the owner to the rear of the store, the prisoner left the store. The owner remained conscious for some time because, shortly after, he attempted to serve a customer but was plainly confused and disoriented. He was seen to place his head on a box and bang his hand on it. Later, he was found by relatives on his bed. He had vomited and was taken to hospital. He died from a severe head injury attributable to multiple blows delivered according to the pathologist with considerable force causing multiple fractures and severe bleeding. The prisoner was acquitted of murder arising from the robbery. He had earlier pleaded guilty to manslaughter and appeared for sentencing. The prisoner, after some months, had turned himself in to the police and he had given a voluntary record of interview.

Held:

1. The court considered the sentence in the light of the previous offending for which he was serving effectively a five years and nine months total sentence for an earlier robbery and breach of a suspension. The fact he had been involved in two robberies in such a short space of time with the second arising within three months of the manslaughter was significant. The combined sentence should reflect his recidivism and propensity for violent criminal offending however, it should also be one that was not disproportionate to his overall offending or crushing in its length, considering his youth. The court considered that he should be required to serve a further 8 years and 3 months of the 12 years imposed for the manslaughter conviction. In all, the overall combined sentence was 14 years imprisonment.
2. The final year of the accused's combined sentence of 14 years imprisonment was suspended on conditions. The suspension was because he was a young offender, he gave himself up to police and co-operated with them in his record of interview and pleaded guilty to manslaughter,

and, thirdly, although his expressions of remorse were of limited value in the light of his subsequent offending, there was a glimmer of a prospect of rehabilitation expressed in his current probation report. With maturation, rehabilitation may occur.

Case considered:
R v 'Unga [2015] Tonga LR 519

Statute considered:
Criminal Offences Act (Cap 18)

Counsel for the prosecution : Ms Fineanganofo and Mr Finau

The accused was unrepresented

Verdict and reasons

[1] The Prisoner appears before me for sentence on manslaughter arising from a robbery of a convenience shop for murder but, in a Judge alone verdict, I found him not guilty of murder which had been laid under section 87(1)(b) of the Criminal Offences Act. He had earlier pleaded guilty to manslaughter and I now convict him of that.

[2] The victim was a Chinese owner of the business. On the 20th February 2014, at around 10am, the prisoner had travelled to the bypass Road. He got off near the Chinese store and went to a pig's pen located to the rear of the store. This afforded him a good view of the back door. The prisoner remained there for some time intending to enter the store and commit a robbery. Later in the morning, he entered the rear door with a piece of wood. He hid behind the back of a refrigerator in the rear of the store. The deceased, after serving a customer, went to the rear of the store and sat on a chair and was talking on his telephone. The prisoner then assaulted the deceased by hitting him over the head with the piece of wood, I found a couple of times, after the deceased, who had ducked a punch then proceeded to lunge at him. The piece of wood broke into two parts. I find that there was no provocation to justify the accused's actions. After taking the deceased to the rear of the store, the prisoner left the store. The deceased remained conscious for some time because, shortly after, he attempted to serve a customer but was plainly confused and disoriented. He was seen to place his head on a box and bang his hand on it. Later, he was found by relatives on his bed. He had vomited and was taken to hospital. He died from a severe head injury attributable to multiple blows delivered according to the pathologist with considerable force causing multiple fractures and severe bleeding. There was evidence that the prisoner, after leaving the shop had returned and asked the deceased whether he was all right. There was no response and the prisoner left.

[3] Plainly, the distinction between murder and manslaughter in a case of this kind is a fine line. Because there had been no questioning of the prisoner by police on his state of mind namely as to whether he considered the death of the victim was likely under section 87(1)(b) and also because he had returned to the scene to inquire

whether the deceased was all right, I gave him the benefit of the doubt and acquitted him of murder. However, this plainly is a very serious case of manslaughter involving very serious and premeditated violence with no provocation to perfect a robbery. In these circumstances, a starting point of 14 years as the Crown submitted in my view was appropriate. I have reviewed and considered the authorities in the recent case of *R v 'Unga* [2015] Tonga LR 519.

[4] I turn now to the mitigating factors. I was informed by the Crown that the prisoner, after some months, had turned himself in to the police and he had given a voluntary record of interview. He had expressed some regret for what he had done but for reasons, which I mention in para 5, I cannot place much weight on this. He was aged 19 and has previous relevant convictions. His record indicates that he had been convicted of 2 counts of housebreaking on 15th March 2010, and sentenced to 6 months imprisonment on each count cumulatively, the sentences being totally suspended on condition he commit no further offences for a period of three years. On the 17th October, 2011, he was convicted of a series of housebreakings and thefts and sentenced to five years imprisonment with the final two years being suspended for three years. During the course of this sentencing, and because it had been mentioned in his probation report, I was reminded that he had been before me in July, 2014 and then sentenced to 4 years and nine months imprisonment for armed robbery cumulative upon a partially reactivated sentence of 12 months for re-offending within a previous period of suspension. He was also sentenced to 2 years imprisonment for housebreaking and 2 years imprisonment for causing simple bodily harm these latter counts were to be served concurrently with the armed robbery. His overall sentence was one of 5 years and nine months imprisonment.

[5] The armed robbery offence also involved a robbery of a Chinese shop. Further, it occurred on the 4th April 2014 that is only about two months after the present incident. This meant he had learned nothing from what he had done during the previous robbery. The April robbery involved a woman. She had closed her shop for the day. The facts, which the prisoner acknowledged, recorded that she went to sleep in her bedroom and felt somebody strangling her neck. The accused punched her demanding cash. He then pointed a knife towards her chest. He threatened to kill her if she did not give him money. She pleaded with him and took out bundles of cash in the sum of $2000.00. He demanded more and threatened again to kill her. She pleaded with him not to kill her and offered him cartons of cigarettes. She gave him 15 cartons of cigarettes which he accepted and left. He locked her inside. She suffered a mouth injury as a consequence of the assault.

[6] When I sentenced the accused, on the 25th July, 2014 I applied the totality principle. My sentence for robbery would have been higher had it not been for the partly reactivated sentence for the earlier offending which I considered was justified as one year imprisonment. There is, in Tonga, a serious problem particularly amongst young offenders who in a rather cowardly way target small business shop owners, many of whom are Chinese. Particularly concerning, was the fact that this young man had been in two robberies of Chinese owned stores, especially when, at the time he carried out the second in April, 2014, he must have been aware that he had killed the deceased in the earlier robbery.

[7] As well, his probation report indicates he had low education attainment and had been involved in drug and alcohol abuse from an early age. He dropped out of school at form 3 in 2011 when sentenced to prison. He recommenced offending shortly after his release from prison in 2013. The probation report suggests he has come to realize that he needed to change his life, and he has been receiving religious instruction. Whether, with maturation and through religion, he does so remains to be seen but, at present, I consider him to be a very high risk recidivist, one who has a propensity for violence and is a demonstrable danger to society.

[8] In mitigation, the fact that he gave himself up to the police, is of relevance. I was not informed how that came about, but I accept that he did and the Crown confirmed this was the case. It was several months before the police charged anybody in relation to this offending. Also relevant to mitigation is his early guilty plea and his youth I consider, as I have said, that there was no provocation in this case, however, and his actions were premeditated, ruthless, and involved serious brutality with the resultant death of the victim. It was a fine line in this case between murder and manslaughter, as I have said. Denunciation, deterrence and the protection of society require the imposition of a condign sentence, notwithstanding the youth of the prisoner for offending such as this. As I have said I consider a starting point of 14 years imprisonment to be appropriate. I have allowed him 2 years discount in mitigation. He is sentenced to 12 years discount in mitigation. He is sentenced to 12 years imprisonment for manslaughter arising out of this robbery.

[9] I now consider the sentence in the light of the previous offending for which he is serving effectively a 5 years and nine months total sentence for an earlier robbery and breach of a suspension on CR 82/2014. The fact he has been involved in two robberies in such a short space of time with the second arising within three months of this offending is significant. The combined sentence I now impose must reflect his recidivism and propensity for violent criminal offending, however, accepting this, it must also be one that is not disproportionate to his overall offending or crushing in its length, considering his youth. I consider that in addition to or cumulative upon the sentence he received from me on the 25th July, 2014, of five years and 9 months imprisonment, he should be required to serve a further 8 years and 3 months of the 12 years imposed for this manslaughter conviction on CR 8/2015. In all, the overall combined sentence (CR82/2014 and CR 8/2015) will be 14 years imprisonment.

[10] I consider that the final year of the accused's combined sentence of 14 years imprisonment should be suspended on the following conditions;

1. He should commit no offence punishable by imprisonment for two years;
2. He is placed on probation for 12 months;
   a. To live where directed by his probation officer;
   b. To undertake a life sills course, and a course on alcohol and drugs under the direction of the appropriate agency and probation.

[11] I explain why I consider that part of his sentence should be suspended. First, he is still a young offender; secondly, he gave himself up to police and co-operated with them in his record of interview and pleaded guilty to manslaughter, and, thirdly,

although I consider his expressions of remorse are of limited value in the light of his subsequent offending, there is a glimmer of a prospect of rehabilitation expressed in his current probation report in that he has expressed some desire to reform and has been involved in religious instruction. With maturation, this may occur. I also consider that, after a lengthy sentence of imprisonment, he should be released under supervision. This was not the case when he was released from prison in late 2013 and soon after, in February 2014, committed manslaughter during the course of this robbery. I consider, however, the least restrictive period of imprisonment consistent with the public interest in punishment for the extent of your offending, is 13 years imprisonment.

He is warned that a failure to abide by the conditions of his suspension may result in his being recalled to prison to complete the balance of his sentence.

[12] Finally, a copy of this judgment is to be retained on his file with the Commissioner of Prisons so the requirements for his release on suspension under supervisions are put in place before his release. I would not want to see this man involved in any further offending of this kind.

Fusitu'a anor v Tei

Supreme Court, Nuku'alofa
Scott J
CV 65/15

3 December 2015

Civil procedure – application to set aside interim injunction – onus on party that wanted injunction to continue – onus not discharged – injunction set aside

In December 2013 the second plaintiff was re-appointed as a director of the Tonga Broadcasting Commission (TBC) for a period of 3 years. In May 2014 the first plaintiff was reappointed as director and chairperson of TBC, also for a period of 3 years. In 2015 the Government decided to review its "National Strategic Development Framework" and in June 2015 it decided to re-organise the TBC which is one of the public enterprises subject to the provisions of the Public Enterprises Act 2002. The directors were invited voluntarily to relinquish their appointments and to accept financial compensation. The plaintiffs declined to accept this invitation. On 29 September 2015 the Ministry advised the plaintiffs that if they continued to refuse to resign, their contracts would probably be terminated. On the same day the plaintiffs again rejected the invitation to resign. Lengthy negotiations took place between the parties. On 16 October 2015 the defendant wrote to the plaintiffs informing them that their appointments were terminated. On 20 October 2015 Cato ACJ, on application made ex parte, granted an order restraining the defendant "from terminating the plaintiffs' position as Directors of Tonga Broadcasting Commission according to a Cabinet decision dated 16 October 2015", until further order of the Court. The matter was then adjourned for mention before the Lord Chief Justice on 6 November 2015. On 6 November, after the Plaintiffs proposed Statement of Claim had been filed, leave to move for judicial review of the decision to terminate the Plaintiffs was granted. Leave was also granted to apply for an order restraining the defendant from terminating the plaintiffs from their appointments as Directors of the Tonga Broadcasting Commission. The defendant applied to set aside the interim injunction. A notice of opposition to the interim injunction was also filed.

Held:

1. When an interim injunction was granted "the matter should be adjourned for no longer than a day or so". A defendant must promptly be given an opportunity of being heard. When the matter came back into the list it was not for the defendant to establish why the injunction should be dissolved. It carried no onus. Instead the plaintiff had the task of persuading the court

that the circumstances of the case were such as to require the injunction to continue.

2. The court was satisfied that the plaintiffs had an arguable case. If successful, the result would probably be that the court would declare that their dismissals were void, entitling them to claim unpaid salary for the unexpired period of their contracts. The second question however, was whether on the balance of convenience the defendant should be restrained from preventing them from discharging their duties as directors pending the hearing of the action.

3. The court was not satisfied that the plaintiffs discharged the onus resting upon them to show that the injunctions granted on 20 October should be continued. On the contrary, the court was satisfied that on the balance of convenience they should cease to have effect. The plaintiffs did not dispute the defendant's contention that he personally should not have been named as a party. The defendant was renamed "Minister of Public Enterprises for and on behalf of the Kingdom of Tonga".

Cases considered:

American Cyanamid Co. v Ethicon Ltd [1975] AC 396; [1975] l All ER 504
Westpac Banking Corporation v Prasad [1998] FJCA 38

Statute considered:

Public Enterprises Act 2002

Counsel for the plaintiffs/respondents : W Edwards
Counsel for the defendant/applicant : 'A Kefu SC (Acting AG)

Decision

[1] In December 2013 the Second Plaintiff was re-appointed as a director of the Tonga Broadcasting Commission (TBC) for a period of 3 years. In May 2014 the First Plaintiff was reappointed as director and chairperson of TBC, also for a period of 3 years.

[2] In 2015 the Government decided to review its "National Strategic Development Framework" and in June 2015 it decided to re-organise the TBC which is one of the public enterprises subject to the provisions of the Public Enterprises Act 2002. (The Act).

[3] In May, June and July 2015 the proposed reforms were explained to the chairpersons and directors of the 15 public enterprises under review. In order to implement the proposed reforms it was deemed necessary to replace the existing boards of directors. The directors were invited voluntarily to relinquish their appointments and to accept financial compensation. The Plaintiffs declined to accept this invitation.

[4] In August 2015 the Plaintiffs and the Ministry appeared before the Commissioner for Public Relations and as a result the compensation package was improved. The Plaintiffs did not accept the improved compensation and refused to resign.

[5] In September 2015 Cabinet decided that those directors (apparently only the Plaintiffs) of TBC who refused to accept the package would be terminated by the application of Sections 14(6) and/or 14(7) of the Act.

[6] On 29 September 2015 the Ministry advised the Plaintiffs that if they continued to refuse to resign, their contracts would probably be terminated.

[7] On the same day the Plaintiffs again rejected the invitation to resign.

[8] On 16 October 2015 the Defendant wrote to the First Plaintiff. Paragraph 2 of the letter is as follows:

> "After careful and thorough consideration of your response to my letter of and (sic) the relevant documentations. I regret to advise that I have decided with the consent of Cabinet to terminate your appointment as a Director and the Chairperson of the Board of Directors of the Tonga Broadcasting Commission, with effect from 4.30pm on Monday 19 October 2015".

[9] The Defendant also wrote to the Second Plaintiff in like terms and explained to both that the grounds for his decision were his determination that the Plaintiffs were in breach of Sections 14(6) and (7) of the Act.

[10] On 20 October 2015 Cato ACJ, on application made ex parte, granted an order restraining the Defendant "from terminating the Plaintiffs' position as Directors of Tonga Broadcasting Commission according to a Cabinet decision dated 16 October 2015", until further order of the Court. The matter was then adjourned for mention before the Lord Chief Justice on 6 November 2015.

[11] On 6 November, after the Plaintiffs proposed Statement of Claim had been filed, leave to move for judicial review of the decision to terminate the Plaintiffs was granted. Leave was also granted:

> "to apply for an order restraining the Defendant from terminating the Plaintiffs from their appointments as Directors of the Tonga Broadcasting Commission".

[12] This is an application by the Defendant to set aside the interim injunction. A notice of opposition to the interim injunction was also filed.

[13] Both Counsel filed helpful written submissions for which I am grateful. Mr Stanton's submissions, adopted by Mr Edwards, put very briefly, were that there was a serious issue to be tried and that the balance of convenience suggested that the injunctions be continued. He stressed the Plaintiffs' claim to have been unfairly treated and the "grave and serious" allegations made against them.

[14] In an affidavit dated 21 October the Solicitor General Mr Sione Sisifa described the circumstances in which the order of 20 October 2015 was made. Although the Attorney General's Office was served with notice of the application it appears that no details of the time and place at which the application was to be heard were given. The copy notice on the file also omits these important details.

[15] According to Mr Sisifa, the hearing of the application had already begun when he appeared on the morning of 20 October. He advised the Court that the application was opposed and that papers in opposition where currently being prepared. He also pointed out that the notice of termination served on the Plaintiffs, 4.30pm on 19 October had expired. Mr Sisifa's evidence then continues:

> "Justice Cato then stated that he is not ready to deal with the application for injunction because he is hearing a murder trial and therefore prefer for the application to be dealt with by the Lord Chief Justice when he returns from overseas.
>
> Justice Cato then stated he is going to make an interim order granting the application and that the Defendant can apply to rescind or vary the order in due course".

[16] As appears from the Lord Chief Justice's order of 6 November no application to extend the order of 20 October has been heard by the Court prior to the hearing on 20 November. It is also plain that the 20 October order was intended to do no more than preserve the status quo on an interim basis. The merits of continuing the injunction beyond a very short period were not taken into consideration.

[17] When an interim injunction is granted "the matter should be adjourned for no longer than a day or so". A Defendant must promptly be given an opportunity of being heard. "When the matter comes back into the list it will not be for the Defendant to establish why the injunction should be dissolved. It carries no onus. Instead the Plaintiff has the task of persuading the Court that the circumstances of the case are such as to require the injunction to continue" (see *Westpac Banking Corporation v Prasad* [1998] FJCA 38).

[18] Having considered the papers before me I am satisfied that the Plaintiffs have an arguable case. If successful, the result will probably be that the Court will declare that their dismissals were void, entitling them to claim unpaid salary for the unexpired period of their contracts. The second question however, is whether on the balance of convenience the Defendant should be restrained from preventing them from discharging their duties as directors pending the hearing of the action.

[19] In deciding this question, the first consideration is whether damages (or in this case payment of remuneration owed) would be a sufficient remedy. The second is whether more harm will be done by refusing or granting the injunction (see generally *American Cyanamid Co. v Ethicon Ltd* [1975] AC 396; [1975] l All E.R. 504).

[20] In Part B of his written Submissions, Mr Kefu argued that the balance of convenience strongly favoured the Defendant. Following the voluntary resignation of the other directors TBC is left without a functioning Board. Government is unable to proceed with its reform of Tonga's public enterprises. If the injunction were to be continued then this situation would be likely to last for at least another 5 months. To continue the injunction would, in other words, be severely detrimental to good administration.

[21] Mr Kefu also suggests that when the injunction was granted on 20 October the Plaintiffs' contracts had already been terminated by the period of notice having expired at 4.30pm the previous day. Mr Stanton characterizes this argument as "nonsense". I do not agree and it is not clear to me that the precise terms of the letters of 16 October were drawn to the Judge's attention (see paragraph 27 of the supporting affidavits) when the interim injunction was granted. Where an interim injunction is applied for all the facts must be laid before the Court and nothing suppressed otherwise the order may be set aside without regard to the merits.

[22] It is clear from the papers filed that lengthy negotiations took place between the parties before the letters of 16 October were sent. I have already referred to the letter of 29 September. In their letter of 2 October 2015 the Plaintiffs warned that "we reserve our rights to again notify you that we will seek ex parte injunctive relief if you move to terminate our positions". In my opinion the circumstances were not such as to justify applying ex parte at all: the Plaintiffs had more than enough time to make application inter partes in the normal manner.

Result:

I am not satisfied that the Plaintiffs have discharged the onus resting upon them to show that the injunctions granted on 20 October should be continued. On the contrary I am satisfied that on the balance of convenience they should cease to have effect forthwith.

The Plaintiffs did not dispute the Defendant's contention that he personally should not have been named as a party. I agree. The Defendant will be renamed "Minister of Public Enterprises for and on behalf of the Kingdom of Tonga".

R v Helu

Supreme Court, Nuku'alofa
Cato J
Cr 109/2014

4 December 2015

Sentencing – manslaughter – starting point 13 years – three and a half years mitigation – rehabilitation prospect – final two years suspended

On 10 May 2014, at around 5pm the prisoner had begun drinking with his brothers at Fasi. Later, they went to a bar in town. The prisoner dropped them off home and returned to the bar. He parked his car and went for drink, emerging after a short time to find the deceased inside his vehicle. The deceased had removed speakers and his radio in an attempt to steal them. In a rage, the prisoner punched him inside the vehicle. He then held on to him in the vehicle and drove him to another area. There he pulled him out of the vehicle and continuously punched him and kicked him whilst he was lying on the ground. He then drove off. A few hours later he was discovered and taken to hospital where he later he was discovered and taken to hospital where he later died. He was aged 19, at the time of his death. The prisoner was aged 32 and had a conviction for assault and possession of arms without a licence. He surrendered himself to police and was co-operative. The prisoner, Mr Helu, appeared for sentence on one count of manslaughter.

Held:

1. The maximum sentence for manslaughter was 25 years. Where serious brutality was involved, without provocation, a starting point could exceed 12 years. The deceased, was caught in the act of stealing by the prisoner but, during the period between seeing him interfering with his car, driving him away some distance before beating him up, the prisoner had ample time to calm down and either take him to the police station or call the police. He, having assaulted this young man, then chose to leave him which demonstrates a callous disregard for his welfare. The court considered an appropriate starting point was 13 years imprisonment.
2. Mr Helu pleaded guilty and cooperated with the police, as well as sought assistance for his drinking. By doing so he accepted responsibility for his actions. Further, he made an apology to the family of the deceased which was accepted. This was important in Tongan culture. In small nations where communities live closely together the acceptance of apology and

remorse were important features in sentencing. The court allowed him three and a half years mitigation.

3. The court considered that he had a very reasonable prospect of rehabilitation. Consequently, the final two years of his sentence were suspended subject to conditions.

Cases considered:

Kofutu'a v R [2010] TLR 120
R v Kalavi [2015] Tonga LR 542
R v 'Unga [2015] Tonga LR 519

Counsel for the Crown	:	Mr Finau
Counsel for the defendant	:	Mr Pouono

Sentence

[1] Mr Helu appears for sentence today, on one count of manslaughter. I delivered sentence orally but said that I intended later to deliver a written judgment so that there was an accessible record of what I had said, not only for the benefit of the prisoner, but for prison authorities, probation, the wider Tongan community and as a sentencing precedent for lawyers. Manslaughter involving violence is not uncommon, in Tonga and as I mention below can raise some difficult sentencing problems. There is some revision of the text and expression but not the substance of what I have said, the principles applied or the sentence itself.

[2] The summary of facts records that, on or about 10th May 2014, at around 5pm the prisoner had begun drinking with his brothers at Fasi. Later, they went to a bar in town. The prisoner dropped them off home and returned to the bar. He parked his car and went for drink, emerging after a short time to find the deceased inside his vehicle. The deceased had removed speakers and his radio in an attempt to steal them. In a rage, the prisoner punched him inside the vehicle. He then held on to him in the vehicle and drove him to another area. There he pulled him out of the vehicle and continuously punched him and kicked him whilst he was lying on the ground. He then drove off. A few hours later he was discovered and taken to hospital where he later he was discovered and taken to hospital where he later died. He died from Bilateral Pneumothorax secondary to blunt force chest trauma. He has suffered multiple rib fractures, resulting in bleeding and lung complications from which he died. He was aged 19, at the time of his death. The prisoner was aged 32 and had a conviction for assault and possession of arms without a licence. He surrendered himself to police and was co-operative. I did not find either of his two previous convictions of any real relevance on this sentencing.

[3] Manslaughter varies greatly based as it is on death by an unlawful act and accordingly, the sentences imposed, the maximum being 25 years imprisonment, also vary considerable. This is a serious case of manslaughter involving the death of a young man apprehended during the course of breaking into the prisoner's motor vehicle and attempting to steal items from it. His death was attributable to a severe assault involving punching and kicking to the chest area. I have said, in other cases,

involving violence that kicking during an assault can be as dangerous as using a weapon, a view which has been expressed in a number of English cases. During the course of what was a severe attack on the deceased, five ribs were broken leading to internal bleeding, complications of the lungs and suffocation.

[4] The killing of a human being is the most important sentencing consideration here. The Court must impose a sentence which properly reflects the circumstances and the action of the prisoner in killing the deceased. The law denounces the death of this young man as a consequence of this kind of conduct. Deterrence is also another consideration so that other members of the community are deterred from effecting retribution for unlawful acts, and adoption vigilante reprisal. The police have the responsibility for commencing a prosecution, bringing offenders before the courts and having the matter resolved in an appropriate way.

[5] I raised with counsel at the outset of this sentencing what should be the appropriate starting point for this offending. In recent weeks, I have had a number of cases of manslaughter for sentence before me. In *Patric Unga*, CR84/2014, 5th November, 2015 which the Crown cited in its memorandum in this case, several of the leading cases on manslaughter sentences were considered. In summary, where there is provocation and there has been a seriously violent response, an appropriate starting point is 10 to 12 years; less, where the provocation may be said to be considerable and the response involves lesser violence. Where there is no provocation and serious violence results in death, starting points may exceed 12 years. In a recent case *Kalavi*, CR 8/2015 for example where there was no provocation, and the prisoner hit a Chinese store owner to the head on, at least, two occasions killing him during the course of a robbery, I considered the starting point should be 14 years. Kalavi was a young man of 19 with previous relevant convictions. One of the authorities referred to by the Crown in *Unga*, *Kofutu'a v R* [2010] TLR 120 involved a repeated punching of a woman in the stomach, involving several episodes, that caused her death. The Court of Appeal interfered with the sentence on the ground that the sentencing Judge had not been informed about an apology and restitution being made by the deceased's family. The Court reduced the period of imprisonment from 15 years to 13 years imprisonment with the final three years suspended, but did not interfere with the starting point of 15 years. The Court observed that where serious brutality was involved, without provocation, a starting point could exceed 12 years.

[6] I do not accept here, as Mr. Pouono submits, that there was any real provocation, in this case. The deceased, was caught in the act of stealing by the prisoner but, during the period between seeing him interfering with his car, driving him away some distance before beating him up, the prisoner had ample time to calm down and either take him to the police station or call the police. He, having assaulted this young man, then chose to leave him which demonstrates a callous disregard for his welfare. I consider an appropriate starting point is 13 years imprisonment.

[7] I have read the probation report on Mr. Helu and the statement from his wife which I find informative. I have read a reference about him from his boxing association and other references, also. I have found a reference from Captain Phillipa Serevi of the Salvation Army who is responsible for the drug and alcohol course, useful. She confirmed he had undergone a course involving 26 sessions of

counselling and had been able to stop his drinking and his use of cannabis. The prisoner's judgment was plainly affected by the amount of alcohol he had consumed that evening, but that in itself is not a factor I can take into account in mitigation.

[8] I have no doubt that Mr. Helu had severe drinking problem which his wife, in her statement said, had greatly affected his life for some years. However, the fact that he has recognized this, and has now sought assistance for this is a factor I can consider in mitigation.

[9] To his credit, he has pleaded guilty and cooperated with the police, as well as sought assistance for his drinking. By doing so he has accepted responsibility for his actions. I am also told (and it has been confirmed in writing by the deceased's father) that he has made an apology to the family of the deceased which has been accepted. In Tongan culture, this carries importance. In small nations where communities live closely together the acceptance of apology and remorse are important features in sentencing. Taking all those factors by way of mitigation including the fact that he is a family man, I allow him three and a half years mitigation. That means the sentence for manslaughter is 9 and half years imprisonment backdated to the period he has spent on remand in custody.

[10] The factors that I have referred to earlier such as his voluntary decision to give up drinking and his approach for assistance in that regard, the resultant course he underwent successfully for alcohol abuse, his guilty plea and co-operation with authority, and his acknowledgement of responsibility means that I consider he has a very reasonable prospect of rehabilitation. Consequently, I suspend the final two years of his sentence on the following conditions;

1. He commits no further offences punishable by imprisonment for a period of three years.
2. He is placed on probation as a condition of his suspension for a period of 12 months.
3. During the term of probation he is not to drink alcohol or take drugs.
4. He is directed to undergo a follow up course of drugs and alcohol abuse under the direction of his probation officer and the Salvation Army.
5. He is to undergo an anger management course under the direction of the appropriate agency as directed by his probation officer.

These conditions are imposed as part of his suspension so that when he is released from prison he is under supervision and will be assisted to continue on with his rehabilitation. Should he commit other crimes or breach the terms of suspension, he may be recalled to serve the suspended part of his sentence. A copy of this judgment should be sent for retention on his file with Corrections so that it is able to be acted upon, on his release.

Aleamotu'a v Fielakepa

Land Court, Nuku'alofa
Scott J and Mrs Assessor Kavaliku
LA 15/2015

4 December 2015

Land law – law of succession – question as to legitimacy – marriage led to presumption of legitimacy

In 1964 the title "Fielakepa" was inherited by Longolongo who married Tunakaimanu in 1959 and had three sons. When he died in 1997 the title was inherited by his oldest son, Aleamotu'a. The second oldest son, Taulupe, married in June 1991 and his wife gave birth to the plaintiff on October 1991, and then went on to have seven other children, including six sons. Taulupe died in 2007 and Aleamotu'a died in 2013 with no children. On 18 April 2013 the King appointed Tupou (the defendant), the youngest son of Longolongo, as trustee of the Fielakepa estate. On 10 April 2015 he was recognised by His Majesty as the lawful successor to the title Fielakepa. Notice of the succession was published in the Gazette shortly thereafter. The plaintiff claimed that he, not the defendant, was the lawful successor to the title and estate and sought declarations to that effect. He also sought repayment to him of all moneys received by the defendant in his capacity as trustee and holder of the title since 2013. The defendant asserted that the plaintiff's father was not Taulupe but one 'Atunaisa Fetokai. In these circumstances, His Majesty was not bound to recognise the plaintiff as the lawful successor to the title and had the power, instead, to confer it on the last holder's younger brother, the defendant.

Held:

1. The effect of the law of succession to hereditary estates and titles was not disputed. It was known as the law of primogeniture. The oldest legitimate son had the right to inherit the whole estate. This was in preference to any elder but illegitimate sons, to younger sons or other collateral relatives. An oldest legitimate son of a deceased elder brother inherits before a living younger brother by right of substitution. A female was only eligible to inherit if there was no male heir.
2. If the plaintiff was found to be the legitimate son of Taulupe then his claim to have inherited the title upon the death of his uncle Aleamotu'a was unassailable.
3. The Evidence Act provided that a child born in wedlock was conclusively presumed to be the son of the man who was his mother's husband at the time of his birth unless there was evidence, other than from his mother and

her husband, that during the period of time that the child must have been conceived the wife's husband could not have had physical access to her. The party who sought to rebut the presumption of legitimacy had the burden of so doing beyond all reasonable doubt.

4. The defendant failed to offer any evidence capable of rebutting the presumption that the plaintiff was the legitimate son of Taulupe. Therefore it was presumed that he was the legitimate son.
5. The plaintiff, Tupou Tongaliuaki Filo'aulo Aleamotu'a, was declared to be the lawful holder of the title Fielakepa.
6. Further declarations were made that the appointment of the defendant as trustee of the Fielakepa estate was null and void; the publication in the Gazette of the defendant's name as holder of the title Fielakepa was made in error; and the plaintiff was entitled to the publication of his name in the Gazette as the holder of the title Fielakepa. There were no orders made at this stage in respect of the repayment of the moneys received by the defendant as trustee. Leave was granted to restore these matters for further hearing.

Cases considered:

Finau v Tu'ivakano Vol II TLR 13
Gordon v Gordon [1903] P 141
Tu'ipulotu v Hon. Niukapu [1995] Tonga LR 79
Tu'ipulotu v Kingdom of Tonga [1997] Tonga LR 258
Tukuafu v Latu & Anr (Appeal 5/2005)
Uluilakepa v Fulivai Vol II Tonga LR 10
Veikune v Ha'ateiho [2008] Tonga LR 295

Statutes considered:

Constitution of Tonga (Cap 2)
Evidence Act (Cap 15)
Land Act (Cap 132)
Legitimacy Act (Cap 32)

Counsel for the plaintiff : L M Niu SC
Counsel for the defendant : S T Tu'utafaiva with S Taione

Judgment

Introduction

[1] It will not be disputed that the title "Fielakepa" is of ancient origin and is held in high esteem. The substantial hereditary estate is located at Havelu.

[2] In 1964 the title was inherited by Paula Longolongo'atumai Aleamotu'a ("Longolongo") who had married Tunakaimanu in 1959. They had three sons:

(a) Siosaia Tupou Aleamotu'a, born 1961 ("Aleamotu'a")

(b) Mosese Tangaki Taulupe Ki Folaha Aleamotu'a, born 1965 ("Taulupe"); and
(c) Tupou Tongapo'uli Aleamotu'a, born 1966 ("the Defendant")

[3] Longolongo died in 1997. The title was inherited by his oldest son, Aleamotu'a (Baron Fielakepa).

[4] In June 1991 Taulupe married Mele Simiki Aleamotu'a ("Miki"). The Plaintiff was born in October 1991. Following the marriage Taulupe and Miki had seven other children, including six sons.

[5] Taulupe died in 2007 and Aleamotu'a died in 2013, without issue.

[6] On 18 April 2013 His Majesty the King appointed the Defendant as trustee of the Fielakepa estate (Document P-6-14 & 15). On 10 April 2015 he was recognised by His Majesty as the lawful successor to the title Fielakepa. It appears that notice of the succession was published in the Gazette shortly thereafter.

[7] The Plaintiff claims that he, not Taulupe, is the lawful successor to the title and estate and seeks declarations to that effect. He also seeks repayment to him of all moneys received by the Defendant in his capacity as trustee and holder of the title since 2013.

The applicable law

[8] The law of succession to hereditary estates and titles is set out in Clauses 111 and 112 of the Constitution supplemented by section 30 and Division II of Part III of the Land Act (Cap 132).

[9] The effect of this law is not disputed. It is known as the law of primogeniture. The oldest legitimate son has the right to inherit the whole estate. He has this right in preference to any elder but illegitimate sons, to younger sons or other collateral relatives. An oldest legitimate son of a deceased elder brother inherits before a living younger brother by right of substitution. A female is only eligible to inherit if there is no male heir.

[10] By virtue of Section 41 of the Land Act the term "legitimate" must be confined to sons actually born in wedlock. It does not extend to sons subsequently legitimated pursuant to the Legitimacy Act (Cap 32). Section 41 however explains that:

> "Provided marriage precedes the birth of a child such child is legitimate and capable of succeeding no matter how short the interval between the parents marriage and the birth".

[11] Section 44 of the Evidence Act must also be noted. It provides, as relevant, that:

> "where a person is proved to have been born during the continuance of a valid marriage between his mother and any man ... the Court shall presume conclusively that he is the legitimate son of that man unless it is shown by evidence, other than that of the parties to the marriage, that

such parties had no access to each other at any time when he could have been begotten".

[12] The Plaintiff says that during Aleamotu'a's lifetime his father Taulupe was the heir presumptive. He says that following his father's death he himself became the heir presumptive and that following Aleamotu'a's death he succeeded to the title by operation of law.

[13] The Plaintiff contends that His Majesty (a) failed to comply with the provisions of section 40 (1) of the Land Act when he appointed the Defendant as trustee of the Fielakepa estate since the Plaintiff had already attained the age of 21 when the appointment was made and (b) that His Majesty erred when causing the section 38 (1) notice to issue because, by virtue of Clause 111 of the Constitution it was the Plaintiff, not the Defendant whose name should have been published.

[14] The Defendant makes two principal submissions. The first, apparently grounded in Clause 44 of the Constitution is that the King alone has the prerogative to confer titles. The second is the assertion that the Plaintiff's father was not Taulupe but one 'Atunaisa Fetokai. In these circumstances, it is argued, His Majesty was not bound to recognise the Plaintiff as the lawful successor to the title and had the power, instead, to confer it on the last holder's younger brother, the Defendant.

[15] At the conclusion of the trial a third argument, alluded to in paragraph 12 of the Statement of Defence, was advanced. Mr Tu'utafaiva submitted that the Defendant had merely accepted the appointment as trustee and the subsequent recognition of his entitlement to inherit the title. It was not the Defendant's requests or decisions that led to these developments. Mr Tu'utafaiva suggested that these were decisions which lay within the exclusive prerogative of the King. But the King had not been joined as a party and it would therefore be wrong to make orders or declarations in respect of those decisions without having given His Majesty an opportunity to explain and defend his actions.

Consideration of the issues

A – His Majesty the King as a party

[16] The file reveals that when the writ was filed on 3 June 2015 the King was named as Second Defendant. The President referred counsel to *Tu'ipulotu v Kingdom of Tonga* [1997] Tonga LR 258. On 15 June after counsel had also referred to *Tukuafu v Latu & Anr* (Appeal 5/2005) the President invited Mr Niu to submit amended documents. On 19 June an amended Writ and Statement of Claim were filed omitting a Second Defendant altogether.

[17] On 3 July the matter again came before the President when it was agreed that the action should proceed to trial. Paragraph [3] of the Ruling delivered that day is as follows:

> "I am advised by Counsel that no orders for discovery are required and neither party intends to make any interlocutory applications. The case can be set down for hearing in those circumstances".

[18] Among the "interlocutory applications" which counsel, including Mr Tu'utafaiva, might have made is an application for leave to issue a Third Party Notice.

[19] RSC O.10 Rule 1 (c) provides that:

> "When a defendant who has filed a defence ... (c) requires that any issue arising in the action be determined also as it affects such person; that defendant may apply for leave to issue a third party notice".

[20] In my opinion the correct stage at which a third party application or assertion should be made is prior to the close of pleadings, not in the closing stages of a trial. But even had leave been sought at the appropriate time, I am of the view that it would have failed.

[21] A distinction must, in my view, be drawn between the exercise by His Majesty of unfettered royal prerogatives retained by him under the Constitution, such as the power to confer titles (Clause 44) and the exercise by him either upon the advice of a body or person, of the powers specified in the relevant statute (e.g Clause 50 A (1) or Clause 50 B).

[22] In *Tu'ipulotu v Kingdom of Tonga* (above) Hampton CJ held that in Tonga, as in England, the King in person (subject only to Clause 49) is immune from all actions at law whether civil or criminal:

> "No proceedings are maintainable against the King in person. The Courts are the King's court and the Courts have no jurisdiction over him".

While the decision relates to Judicial review proceedings in the Supreme Court in my view the principle is equally applicable to the Land Court.

[23] A second distinction must also be drawn between the powers exercised by His Majesty in relation to estates themselves (e.g. Land Act, Section 36 (2) proviso) and in relation to the titles appurtenant to those estates. The former powers are concerned with land whereas the latter only relate to titles. In my view while the Minister of Lands has an obvious interest in the former, the latter may not involve land at all. As is well known, His Late Majesty King George Tupou V created several life peerages which did not also involve grants of landed estates. In the present case the central question is the right of the Plaintiff to inherit the title previously held by his uncle Aleamotu'a. Although the estate follows the title the issues before the Court are not, in my view, those to which the Minister of Lands would want to become a party.

[24] It is a well established principle that a decision maker should not hear an appeal against his own decision. The principle is exemplified in Clause 94 of the Constitution. In my view Clause 50 (2) is relevant. An appeal from a Land Court determination relating to hereditary estates and titles is to the King in Privy Council. As I see it, it would therefore be anomalous for His Majesty to be a party to the action in the Land Court.

[25] In my opinion the powers and duties given to the King by Sections 40 (1) and 38 (1) are personal and not subject to direction by the Court. It follows that there is no basis for the King to be joined as a party when breaches of these sections are alleged.

[26] To say however that decisions made by the King pursuant to sections 40 (1) 38 (1) are not subject to order is not to say that they are not justiciable at all. The Court retains the right and indeed the duty to analyse the actions taken and, when it is of the view that the parameters within which the royal prerogative must be exercised have been exceeded it may, in its discretion, declare that to be the case.

[27] Most of the previous cases dealing with the issue of contested hereditary titles may be found in Volume II, Tonga Law Reports. Some of those will be referred to later on in this judgment. In none of them, so far as can be seen from the report, was the Sovereign joined as a party. In my view the matters now before this Court for decision may be satisfactorily and comprehensively be dealt with without the need for any second defendant or third party to be joined.

B - Hereditary titles

[28] In *Tu'ipulotu v Hon. Niukapu* [1995] Tonga LR 79, 83. The Privy Council quoted from the address to Parliament by H. M. King George Tupou I in 1875.

> "After referring to past practice by which, he said "my rule was absolute and … I could please myself to create Chiefs and alter titles" he proclaimed: "I have made up my mind absolutely not to alter names or nominate Chiefs so that the estate shall go with the title and the succession shall be from father to son forever. The law of succession is stated in the Constitution … Should there be a dispute it shall be tried by the Justices of the Court in accordance with the usage of civilised Governments. You Chiefs of Tonga all of you who have titled estates when the Constitution came into force: I now affirm to you the right of yourself and your children by marriage to hold and possess your titles and estates for ever, as stated in the Constitution".

[29] These two important principles, namely the inheritance of hereditary titles and estates according to the provisions of the Constitution and the duty of the Land Court to elucidate those provisions, remain.

[30] It must be emphasised that the creation of an entirely new title under Clause 44 is quite separate from the process which takes place under Clause 111 which governs succession to already existing titles. While both provisions are constitutional and the former appears to grant His Majesty an unfettered right to create such titles, the second part of the clause reads:

> "but it shall not be lawful for [The King] to deprive anyone who has a hereditary title of his title … except in cases of treason"

Where, as in this case, there is no suggestion of treason, hereditary titles are inherited in the manner provided in Clause 111 the effect of which I have already described in paragraph [9] above.

[31] In *Molitoni F. Finau v Tu'ivakano* Vol II TLR 13, 17 Scott J said:

> "It has been urged for the Plaintiff's claim that the appointment of Manoa having been made by the King his heirs should succeed. Manoa was appointed since the Constitution and I have held in this Court before that so long as there are heirs to succeed in accordance with the [111th] section of the Constitution … no appointment is necessary by the King of the Country. The heirs should inherit immediately. They inherit by descent and not by any appointment".

The difference between acquisition of a title by appointment (Clause 44) and acquisition of a title by succession (Clause 111) is further highlighted by these remarks.

[32] In the present case the title of Fielakepa was lawfully held by Aleamotu'a until his death. It was not suggested by the Defendant that he died without heir. In these circumstances it was not possible to create a second title of Fielakepa in order to deprive the heir of the same title; the only question that had to be answered was "who is the person entitled to inherit?" In answering that question His Majesty was bound by Clause 111. While there was no objection to an entirely new title being conferred on the Defendant, the title Fielakepa and the associated estates were already the entitlement of Aleamotu'a's lawful successor.

C - Who was Aleamotu'a's heir?

[33] As will be seen from the pleadings, the Defendant did not attempt to suggest that Clause 111 of the Constitution operated to entitle him to inherit the title Fielakepa following Aleamotu'as death. Rather, he claimed that the Plaintiff could not succeed since he was not Taulupe's son. As pointed out by Mr Niu however, even if this argument succeeded, it could not have the effect of doing more than disinherit the Plaintiff. Given the fact that the Plaintiff has six younger brothers, none alleged to be illegitimate, the mere disinheritance of the Plaintiff could not avail the Defendant at all.

[34] In the absence of any dispute as to the meaning and effect of Clause 111 it may be concluded that, if the Plaintiff is found by this Court to be the legitimate son of Taulupe then his claim to have inherited the title upon the death of his uncle Aleamotu'a is unassailable.

D - The Evidence Act – Section 44

[35] The relevant wording of section 44 of the Evidence Act has already been set out in paragraph [11] above. Its meaning is perfectly plain: a child born in wedlock shall conclusively be presumed to be the son of the man who is his mother's husband at the time of his birth unless there is evidence, other than from his mother and her husband, that during the period of time that the child must have been conceived the wife's husband could not have had physical access to her.

[36] In *Veikune v Ha'ateiho* [2008] Tonga LR 295 the Land Court, at paragraph [18] held that a party seeking to rebut the presumption of legitimacy had the burden of so doing beyond all reasonable doubt. I respectfully agree.

[37] The Court also clarified, adopting certain observations in *Gordon v Gordon* [1903] P 141, that the question to be asked is *not* whether the mother of the child might, or even had been proved to, have had sexual intercourse with a man other than the man who was her husband at the time that the birth occurred but *whether it had been proved that she could not have conceived by her husband* because he could not have had physical access to her at the time the child must have been conceived.

[38] Mr Tu'utafaiva ingeniously suggested that this test did not operate if, at the time the child must have been conceived, the mother was not yet married to the man who became her husband prior to the birth. While it is true that the words quoted from *Gordon v Gordon* (above) presuppose that the husband and wife were already married at the time the conception took place I find nothing in the clear wording of the section to warrant the gloss which Mr Tu'utafaiva sought to put upon them. Furthermore, the authorities are against him. The learned authors of Phipson on Evidence (14th Edn. Paragraph 5-06) state:

> "the presumption applies although the birth occurred so soon after marriage that the child must have been begotten before it (*R v Luffe* (1807) 8 East. 198; *Turncock v Turncock* (1867) 16 L.T. 611; *Re Parsons* (1868) 18 L.T. 704; *Gardner v Gardner* (1877) 2 App. Cas. 723, 728".

Section 41 of the Legitimacy Act already quoted in paragraph [10] is also relevant.

[39] In the present case, Miki's evidence was that she had sexual intercourse both with Taulupe and with another man, 'Atunaisa Fetokai, in November or December 1990. As has been noted, the Plaintiff was born on 1 October 1991. As there was nothing to suggest that he was born prematurely or after term, judicial notice may be taken of the fact that he was conceived approximately 9 months earlier, in about late January or early February 1991. Miki was not asked when her relationship with Fetokai ceased but in cross-examination Fetokai said that the relationship lasted "7 or 8 months". According to Miki "I know when I slept with Taulupe and became pregnant in February 1991. I know whom I got pregnant by. I missed my period in February".

[40] The main problem about this evidence is that it does not even begin to answer the central question which is whether it has been shown that during the period January to February 1991 *Taulupe could not have had physical access to Miki at all*. In fact, the admissible evidence suggests that the opposite. Fetokai accepted that he knew that Taulupe and Miki had been lovers for a considerable time before he began his relationship with Miki, that indeed she had already borne him a child, Sela. He also admitted that he did not know how Miki spent her time when he was not actually with her on the ten or so occasions when they were together. He also knew, of course, that Miki and Taulupe were married after his relationship with her came to an end.

[41] The third witness for the Defendant was Kalolaine Fusikaunanga Lolohea who had sworn an affidavit in June 2015 which exhibited copies of emails exchanged

between Miki and Fetokai in 2008 and 2009. These were said to show that they "had an intimate relationship 3 to 6 months prior to [Miki's] wedding with Taulupe". I hope it will be clear from the foregoing that I did not find this somewhat distasteful evidence to be relevant to the issue before the Court.

[42] The remaining matter which must be dealt with in connection with the Plaintiff's paternity is the suggestion, advanced by Mr Tu'utafaiva, that DNA testing would put the matter beyond doubt. He pointed out that while the Plaintiff had agreed to provide a sample, his mother had not. He suggested that an inference could be drawn favourable to the Defendant.

[43] This matter was also considered in *Veikune v Ha'ateiho* (above). The Court took the view, with which I agree, that in the absence of statutory authority the Court has no power to order such tests. Neither can I accept that Miki's refusal has any bearing on the matter before me: the fact that she is the Plaintiff's natural mother is not in doubt. Very great care has to be taken before DNA testing is authorised. The wholly unforeseen consequences which may flow from such a test have been highlighted in the Pringle Baronetcy case currently pending in the Supreme Court of England and Wales.

[44] I am satisfied that the Defendant has failed to offer any evidence capable of rebutting the presumption that the Plaintiff is the legitimate son of Taulupe. Accordingly this is conclusively presumed to be the case.

E - The Trustee Appointment

[45] A copy of the appointment is P6 – 14 & 15. A number of difficulties are immediately apparent. The appointment is said to be "in accordance with the powers conferred upon [His Majesty] by the Law and Constitution of Tonga". As has been seen, the power to appoint a trustee of an estate is to be found in section 40 (1) of the Land Act. Although the instrument of appointment purports to appoint a trustee not only of the estate but *also of the title*, I can find no power to appoint a trustee of a title. As is clear from the section the purpose of the appointment is to "protect, preserve and manage the estate" appurtenant to the title during the minority of the title holder. There is no scope for appointing a trustee of the title since, as already explained, the title holder inherits the title upon the death of his predecessor, by operation of law.

[46] Secondly, the appointment states that the Plaintiff is the "lawful heir to the hereditary title Fielakepa". In the absence of any suggestion that the material circumstances changed between April 2013 and the appointment of the Defendant to the title in April 2015, it is difficult to see how the two appointments can be reconciled.

[47] Thirdly, the undisputed evidence of the Plaintiff is that he attained the age of 21 on 1 October 2012 and accordingly section 40(1) had no application.

[48] Fourthly, only a person who himself is not the heir may be appointed as trustee of the estate during the heir's minority. The appointment of the Defendant as trustee,

in the absence of a material change in circumstances, is not compatible with his later recognition as the heir.

F – Notification of appointment of the defendant as lawful successor

[49] Although the gazetting of the Defendant as Fielakepa was admitted in paragraph 12 of the Statement of Defence, a copy of the notice was not produced. In view however of my interpretation of Clause 111 and Section 38 (1) I find that there is no power under Clause 111 to appoint a successor to an hereditary title. The section only imposes a duty upon His Majesty to publish the name of the lawful successor as determined by the correct application of Clause 111. I conclude that the purported appointment of the Defendant breached both Clause 111 and Section 38 (1).

G - The plaintiff's money claim

[50] In paragraphs 9, 10 and 11 of the Statement of Claim the Plaintiff claimed payment to him by the Defendant of all moneys paid to the Defendant following his appointments as trustee of the estate and to the title Fielakepa. No particulars of these alleged payments were provided in the pleadings. The claims were disputed in the Statement of Defence.

[51] The evidence in support of the claims came from Makeleta Siliva, Deputy Secretary at the Treasury. She produced document P-7 which set out all the official payments made to the Defendant after receiving official notification of his appointments from the Palace Office. In total the Defendant had received TOP$56546.92 from June 2013 to 6 November 2015.

[52] The Defendant admitted receiving the payments but told the Court that 80% of the sums received had been spent by him on the official and customary duties appertaining to the title; the recent coronation involved exceptionally heavy outgoings. The balance of 20% he conceded had been treated as part of his own personal emoluments but had resulted in a liability to pay income tax at a higher rate than had previously been the case when he only had one source of remuneration.

[53] Unfortunately, these financial matters were not clarified in any detail by Counsel and at the close of the case I was not clear how much exactly the Plaintiff was seeking.

[54] In my view this aspect of the Plaintiff's claim faces three further problems. The first is that the payments made to the Defendant were made following advice received from the Palace Office. If found to have been paid in error to the Defendant rather than the Plaintiff, then it seems to me that the Plaintiff's claim should properly be made to the Treasury, rather than the Defendant. There is nothing to show that the Defendant knew that he had been wrongly appointed as the trustee or as the title holder. Secondly, there is nothing to contradict the Defendant's evidence that 80% of what was received was applied customarily or officially in his capacity as *de facto* title holder. In my view therefore, even had the Plaintiff immediately been recognised as the lawful successor to his uncle upon his death, these expenses would still have been incurred, resulting in the amount claimable being reduced to 20% of the amount paid. Thirdly, although the Plaintiffs claim is founded on an erroneous appointment in

April 2013, the writ was not issued until June 2015 during which period there is no evidence that representations were made to the Treasury that the payments should be suspended.

[55] In these circumstances and in the absence of a proper account I am not minded to order the repayments sought in whole or in part at this stage. If the Plaintiff intends to pursue this part of his claim then further enquiry and discovery may have to be made and leave given to the Treasury to intervene.

Summary

[56] The Court has the highest respect for His Majesty and the constitutional decisions taken by him. In the words, however, of the Privy Council in *Tukuafu v Latu & Anr* (above). "In terms of the Constitution the Court must apply the Constitution and the law and in doing so in this case the Court means no disrespect to His Majesty the King .... but the Court is sure that the proper application of the Constitution and the law will also be the wish of His Majesty who, it appears may have been misinformed.

Some further words of the Land Court spoken in 1924 (*Tevita Uluilakepa v Fulivai* Vol II To. L.R 10) may perhaps also be quoted:

> "Although a Noble's title has been conferred and the defendant was given an official letter of appointment from Her Majesty and it will be assumed that there is no need for Her Majesty to appoint another Noble while the present Noble is still alive and is a legitimate heir of the former holder of the title yet it is not right for Her Majesty to confer titles on nobles without a thorough research being made to ascertain the lawful heirs to such titles. That is why cases of this nature are brought before the Court and it is the duty of this Court to decide. With all due respect to Her Majesty I am satisfied that no letter of appointment of the nature of the matter in question will hinder this Court from acting in accordance with the Constitution and the Law of Tonga. When a title is for the first time conferred, the same title with all estates pertaining thereto will be inherited in accordance with the Constitution and the law. Any new appointment will not waive the law of succession and this Court would rather see justice done than honour what is now known as a new appointment".

Result:

1. It is declared that the Plaintiff, Tupou Tongaliuaki Filo'aulo Aleamotu'a is the lawful holder of the title Fielakepa;
2. It is declared that the appointment of the Defendant as trustee of the Fielakepa estate was null and void;
3. It is declared that the publication in the Gazette of the Defendant's name as holder of the title Fielakepa was made in error;

4. It is declared that the Plaintiff is entitled to the publication of his name in the Gazette as the holder of the title Fielakepa;
5. There will be no orders at this stage in respect of paragraphs (e) or (f) of the prayer of the Statement of Claim. Leave will be granted to restore these matters for further hearing.

Attorney General v Tapueluelu

Supreme Court, Nuku'alofa
Paulsen CJ
CV 45/15

12 November 2015; 11 December 2015

Electoral law – application of clause 65 of Constitution where order was outstanding at time of nomination – declarations sought that nomination was unlawful and invalid – declarations made

At the date of Mr Tapueluelu's nomination for election, 23 October 2014, there remained outstanding a judgment of the Magistrate's Court of 27 June 2011 that Mr Tapueluelu pay Mr William Clive Edwards Senior $10,000 in damages and $4,500 in costs. On 30 August 2012 the Court of Appeal allowed an application to appeal and granted a stay of execution of the judgment of the Magistrate's Court. There the litigation was to rest for some time. The Attorney General sought declarations that Mr Tapueluelu's nomination, registration for election, election, taking of the oath of office and holding of office as a People's Representative for the Tongatapu 4 Electoral Constituency were all unlawful and invalid. The issue was whether the election of Mr Tapueluelu in the General Elections of 27 November 2014 was unlawful and invalid in breach of clause 65 of the Constitution. Mr Tapueluelu submitted that, as far as he was concerned, the stay of execution of the Magistrate's Court's judgment had the effect that his candidacy and election did not contravene clause 65 of the Constitution. He said that the clearances obtained from the Supreme Court and the Magistrate's Court were consistent with his belief and reliance on the stay of execution of the judgment as sufficient to address any issues raised in relation to clause 65.

Held:

1. A Court judgment or order for the payment of a specific sum of money, the operation of which was subject to a stay of execution, did impose a payment obligation which remained outstanding within the meaning of clause 65 of the Constitution. On the date that Mr Tapueluelu was nominated for election in the 2014 General Election the judgment obtained against him by Mr Edwards in the Magistrate's Court on 27 June 2011 remained outstanding in that it was both payable and unpaid. Mr Tapueluelu was as a consequence a person who was disqualified by clause 65 of the Constitution from being chosen by ballot as a People's Representative in the 2014 General Election.

2 Sections 25-27 of the Electoral Act did not provide an exclusive means of challenging an election outcome where such challenge was based on a lack of constitutional qualifications of an elected candidate under clause 65.

3 The Attorney General had standing to bring an action for a declaration that the nomination, registration and election of a People's Representative to the Legislative Assembly was unlawful and invalid due to a lack of constitutional qualification under clause 65.

4 There were no grounds which would justify the Court exercising a discretion to decline to grant the declaratory relief that was sought by the Attorney General.

5. The declarations sought by the Attorney General were made.

Cases considered:

Alam v Quest Enterprises [2006] NSWSC 752

Attorney-General v Fuko [2002] Tonga LR 184

Attorney General v Tupouniua and 'Ilavalu [1999] Tonga LR 21

Australian Beverage Distributors Pty Ltd v Tate Premium Wines Pty Ltd [2007] NSWCA 57

Brent Hughes, Re; Ex Parte Westpac Banking Corp [1997] FCA 1324

Clifton Securities Ltd v Huntley and Ors [1948] 2 K.B.D 283

Darcoum Borough Council v Horne [2000] EWCA Civ 178 (CA)

Fuko v Vaikona [1990] Tonga LR 148

Parker Flowerbulbs Pty Ltd v Coulter [2004] FCA 1486

Pohiva v Mafi and Ors (Unreported, CV 75 of 2014, 17 October 2014, Scott J)

Pollack v Commissioner of Taxation (1991) 32 FCR 40

Scope Data Systems Ltd Pty Ltd v BDO Nelson Parkhill [2003] ALR 56

Supervisor of Elections v Tupouniua (Unreported, AC 32 of 2014, Court of Appeal)

Touliki Trading Anor. v Fakafanua & Kingdom of Tonga (No.2) [1996] Tonga LR 145

Vaikona v Fuko (No 2) [1990] Tonga LR 68

Victoria v Commonwealth (1937) 58 CLR 618

Statutes considered:

Constitution of Tonga (Cap 2)

Constitution of Tonga (Amendment) Act 2010

Electoral Act 1989

Electoral (Amendment Act) 2010

Counsel for the plaintiff : Mr Kefu

Counsel for the defendant : Mr Pouono

Ruling

Introduction

[1] At issue in this action is whether the election of Mr. Mateni Tapueluelu as the People's Representative for the Tongatapu 4 Electoral Constituency in the General Elections of 27 November 2014 was unlawful and invalid in breach of clause 65 of the Constitution.

[2] The Attorney General asserts that at the date of his nomination for election (and incidentally when he was registered, elected and took his oath of office) there remained outstanding a judgment of the Magistrate's Court of 27 June 2011 that Mr. Tapueluelu pay Mr. William Clive Edwards Senior $10,000 in damages and $4,500 in costs. The Attorney General is seeking declarations that Mr. Tapueluelu's nomination, registration for election, election, taking of the oath of office and holding of office as a People's Representative for the Tongatapu 4 Electoral Constituency are all unlawful and invalid. The Attorney General had also applied for a declaration that Mr. Tapueluelu return to the Crown all salary and remuneration benefits received as a People's Representative since 27 November 2014, but this is no longer pursued.

The facts

[3] Mr. William Clive Edwards Senior commenced a civil action in the Magistrate's Court against Mr. Tapueluelu, Ms Laucala Pohiva and the Ko e Kele'a newspaper alleging that they had defamed him. On 17 June 2011, Mr. Edwards obtained judgment against Mr. Tapueluelu and his co-defendants for $10,000 in damages and $4,500 in costs.

[4] Mr. Tapueluelu and his co-defendants filed an appeal from the judgment of the Magistrate's Court to the Supreme Court. On 10 February 2012, Mr. Edwards applied to strike out the appeal. On 5 June 2012, Lord Chief Justice Scott did strike out the appeal on the ground that there had been inordinate and inexcusable delay in the prosecution of the appeal.

[5] On 27 June 2012, Mr. Tapueluelu and his co-defendants applied to the Supreme Court for leave to set aside the ruling of the Lord Chief Justice of 5 June 2012 and for a stay of execution of the Magistrate's Court's judgment of 17 June 2011. On 3 August 2012 Lord Chief Justice Scott dismissed those applications.

[6] On 7 August 2012, Mr. Tapueluelu and his co-defendants filed an ex parte application for leave to appeal to the Court of Appeal against the Lord Chief Justice's ruling and a further application for a stay of execution of the judgment of the Magistrate's Court. On 30 August 2012, Lord Chief Justice Scott, sitting as a member of the Court of Appeal, allowed the application to appeal and granted a stay of execution of the judgment of the Magistrate's Court. There the litigation was to rest for some time.

[7] 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. The Supervisor of Elections published notice that the nominations of candidates would be received on 23 and 24 October 2014.

[8] On 23 October 2014, Mr. Tapueluelu submitted his nomination as a candidate for election as a People's Representative for the Tongatapu 4 Electoral Constituency and he was registered as a candidate that same day. In support of his nomination Mr. Tapueluelu submitted letters of clearance from the Supreme Court and Magistrate's Court, dated 29 September 2014 and 1 October 2014 respectively, as required by section 9(4) of the Electoral Act.

[9] As will be apparent from the preceding paragraphs, on the day that Mr. Tapueluelu was nominated and registered as a candidate for election he did have a judgment of the Magistrate's Court entered against him. The judgment was unpaid but subject to a stay of execution ordered by the Lord Chief Justice on 30 August 2012.

[10] On 27 November 2014, Mr. Tapueluelu was elected as the People's Representative for the Tongatapu 4 Electoral Constituency. He took his oath before the Legislative Assembly on 19 January 2015 and he has served as the People's Representative for that constituency to the present time.

[11] In late March 2015, the Court of Appeal heard Mr. Tapueluelu's appeal. On 31 March 2015 the Court of Appeal ruled that the appeal from the Magistrate's Court's judgment was, subject to conditions, remitted back to the Supreme Court to be heard on its merits. The conditions included that Mr. Tapueluelu and his co-appellants pay Mr. Edwards the amount of the judgment, costs and interest upon Mr Edward's written undertaking to repay the money (with interest) if the appeal was successful. The conditions imposed by the Court of Appeal were not satisfied and as a result on 24 June 2015 the Court of Appeal ordered that the appeal was dismissed with costs to Mr. Edwards.

Mr. Tapueluelu's affidavit

[12] Mr. Tapueluelu has filed an affidavit. He does not deny the facts as I have set them out above.

[13] Mr. Tapueluelu says that as far as he was concerned the stay of execution of the Magistrate's Court's judgment had the effect that his candidacy and election did not contravene clause 65 of the Constitution. He says that the clearances obtained from the Supreme Court and the Magistrate's Court were consistent with his belief and reliance on the stay of execution of the judgment as sufficient to address any issues raised in relation to clause 65.

[14] In relation to the conditions imposed by the Court of Appeal, Mr. Tapueluelu says that his wife's mother required hospitalization and major medical treatment in Auckland and that he was not in a position to both fund her medical treatment and to make payment as ordered by the Court of Appeal in the time available.

[15] Mr. Tapueluelu notes that the Magistrate's Court's judgment was public knowledge and that no one filed an election petition seeking to challenge his election. Although Mr. Tapueluelu alleged that the judgment was "certainly known to the

Attorney General" his Counsel, Mr. Pouono, accepted for the purposes of this proceeding that this was not the case.

The issues

[16] I have received helpful written submissions for both parties. From those submissions it is evident that the issues that arise are the following:

[16.1] Whether, a Court judgment (or order) for the payment of a specific sum of money, the operation of which is stayed, imposes a payment obligation which remains 'outstanding' within the meaning of clause 65 of the Constitution.

[16.2] Whether sections 25-27 of the Electoral Act provide an exclusive means of challenging an election outcome, including any challenge based on a lack of constitutional qualifications of an elected candidate.

[16.3] Whether the Attorney General has standing to bring this proceeding.

[16.4] Whether the Court should decline to grant the declaratory relief that is sought in the exercise of its discretion.

Breach of clause 65 of the constitution

[17] Clause 65 was re-enacted in its present form by the Act of Constitution of Tonga (Amendment) Act 2010. The words in issue in this proceeding were not changed at the time. Clause 65 of the Constitution relevantly provides as follows:

> 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 ….on the day on which such person submits his nomination paper to the Returning Officer…..

[18] Mr. Tapueluelu's case is that an order of the Court for the payment of money which is subject to a stay of execution does not impose a payment obligation which remains outstanding because the judgment creditor cannot take steps to enforce it. He also argues that consistent with the purpose of the proviso to clause 65, the words 'remains outstanding' can and should be interpreted as applying only to a Court order which continues in full force and effect at the material time.

[19] The parties submitted to me that no decided case on clause 65 has been concerned with the precise issue which arises in this case. I now turn to consider the most directly relevant decided cases which guide my consideration of the issues between these parties.

[20] In *Vaikona v Fuko (No 2)*,[119] Webster J. considered the meaning of the words 'remains outstanding' in clause 65 and said at page 73:

> As already stated, the words of clause 65 are clear and precise: "remains outstanding" means in the dictionary "remains unsettled, unpaid, unresolved or owing, payable." It would be almost impossible for the Court to give a wider meaning to the words, even if other factors pointed that way. The words "the whole or any part of which" shows that the provision was meant to apply strictly, leaving no scope for a candidate qualifying if he had paid most but not all of the sum due; even if $10 remained unpaid he would still be disqualified.

[21] And at pages 76-77 Webster J. said:

> If it is said that this is a harsh result for what the Respondent says is merely an oversight rather than inability to pay, the Court must make it clear that its task is to interpret the law; it is the Legislative Assembly which makes the laws. ….
>
> Where the meaning of words is plain and unambiguous it is not for the Court to invent fancied ambiguities as an excuse for failing to give effect to the plain meaning of the words because the judge may consider that the result would be harsh or unjust or unsuitable.

[22] The decision of Webster J. was appealed. The Court of Appeal upheld his ruling in *Fuko v Vaikona.*[120] The Court of Appeal's decision is notable for its rejection of the argument that it should not adopt a literal interpretation of clause 65 because it could result in injustice, and for the Court's conclusion that it is the fact of simple indebtedness rather than insolvency which is the bar to nomination under clause 65. At pages 149-150 the Court said:

> It follows that the bar to nomination for election was, until the present clause 65, insolvency rather than simple indebtedness.
>
> We see no way in which we can import into clause 65 the notion that the failure to pay a sum of money ordered by the Court, and unpaid, was only a bar to election if the candidate did not have the means to pay. In the present case the Appellant did in fact pay the costs before the election but not before he submitted his nomination paper to the Returning Officer as required by clause 65.
>
> There is no ambiguity in the wording of the clause, no obscurity, and simply no room for holding that the clause does not mean exactly what it says in clear terms. The Appellant fell fairly and squarely within its terms.

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[119] [1990] Tonga LR 68.
[120] [1990] Tonga LR 148.

[23] In *Attorney General v Tupouniua and 'Ilavalu,*[121] the respondent argued that a judgment debt was not outstanding as a warrant of distress had been issued and a computer seized which, she contended, had a value greater than the judgment debt. Ward CJ rejected that argument holding, at page 23, that even where a judgment debtor knows that goods seized pursuant to a warrant of distress will be sold for more than the total debt, he is still indebted to the judgment debtor until the sum has been paid.

[24] Mr. Tapueluelu placed special reliance upon the decision of the Court of Appeal in *Attorney-General v Fuko.*[122] The facts were that the respondents, who were candidates as People's Representatives, had reached agreement with judgment creditors to pay the judgment debts by instalments. The instalments had been paid up to date when the respondents were nominated for election. The issue in the case was said by the Court to be, at [2]:

> ...whether the whole or any part of an order for payment of a specific sum of money 'remains outstanding' in a case where an order has been made by a Court for the payment of a sum of money and agreement has been reached for payment of the sum by instalments, all of which that are then due for payment have been made at the nomination day.

[25] The Court of Appeal held, at [9], that the respondent candidates were not in breach of the proviso to clause 65, in that "no part of the sum ordered to be paid was 'outstanding' because, by the agreement [to pay by instalments], no part was payable on the day of nomination". I take no issue with the Court of Appeal's decision and set out below paragraph [7] of the judgment which encapsulates the Court's view:

> [7] In our opinion, the context of Clause 65, also requires that it be understood as referring to an order for payment that is "outstanding" in the sense that it stands unpaid, though payable.

[26] Finally, I should mention *Pohiva v Mafi and Ors,*[123] in which the Supreme Court had to consider the implications of granting a stay of execution of a Court order for the purposes of clause 65. Mr. Pohiva sought a stay of a substantial costs award made against him in the Magistrate's Court on the ground that the costs award would prevent him from nominating as a candidate in the 2014 General Election. Lord Chief Justice Scott refused to grant a stay and was of the view that nothing but satisfaction of the costs order was required before there could be said to be compliance with clause 65. It is useful that I set out his reasons, with which I agree, at paragraphs [16] – [19], as follows:

> [16] ...[*Clause 65*] does not differentiate between orders of the Court which have been appealed but upheld or which have not been appealed on the one hand and orders which are still, or may be still, the subject of

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[121] [1999] Tonga LR 21.
[122] [2002] Tonga LR 184.
[123] (Unreported, CV 75 of 2014, 17 October 2014, Scott J).

appeal or review and which are therefore, at least in theory, still liable to be overruled or modified. The Clause does not differentiate between orders which are highly likely or likely or somewhat likely or not at all likely to be successfully appealed. The merits of the orders which have not been complied with are not, in my opinion, relevant to the operation of the Clause at all.

[17] Secondly the Clause operates as a complete and final bar to a particular nomination. It contains no provision for its suspension pending review by the Court followed by retrospective operation if the review fails. In other words, any candidate who owed money could apply for relief, obtain a stay, nominate, lost his appeal or review with his nomination being at risk of later being declared invalid.

[18] Thirdly, it must be borne in mind that this is a constitutional provision enacted by Parliament of which the Applicant is a prominent member. The Supreme Court should be very careful not to interfere in the processes which Parliament has laid down to govern election to its membership.

[19] In my opinion this application is an attempt to circumvent the effect of clause 65. However fervently the Applicant believes he has been wronged cannot, in my opinion, affect the plain meaning of the Clause. Despite everything that has been urged upon me I find it clear beyond doubt that there is an order of the Court which has not been satisfied and therefore until the order has been complied with, Clause 65 applies.

[27] Much in this case rests upon whether Mr. Tapueluelu is correct that the Magistrate's Court's judgment did not impose a payment obligation which was outstanding because of the stay of execution that had been granted in relation to it. Despite the importance of this issue his submission was unsupported by any authority. It is necessary that I now consider the nature of a stay of execution.

[28] In *Clifton Securities Ltd v Huntley and Ors*,[124] the lessor plaintiffs obtained judgment for possession of leased premises. Execution of the judgment was stayed pending the hearing of an appeal. In his judgment the Judge said that even if the notice to quit that the plaintiff's had relied upon was invalid the plaintiffs were in a position to give a further notice at any time in order to meet the possibility that that the original notice might be declared invalid on appeal. This the plaintiffs did, and upon the expiry of that notice they cut services to the premises and barricaded the right of way to prevent the defendants having access. The plaintiffs were held to be entitled to take this action notwithstanding the stay. In describing the effect of a stay Lord Denning said:

[124] [1948] 2 K.B.D 283, 284.

> A stay of execution only prevents the plaintiffs from putting into operation the machinery of law – the legal processes of warrants of execution and so forth – in order to regain possession. It does not take away any other rights which they have. It does not prevent their exercising any right or remedy which they have apart from the process of the Court. In this case, there was no reason why the plaintiffs should not regain possession if they could.

[29] *Clifton Securities Ltd* has been followed on many occasions.[125] In *Pollack v Commissioner of Taxation*,[126] it was held by the majority of Pincus and Gummow JJ. (Beaumont J dissenting) that a stay did not, of itself, deprive a judgment debt of its character as an obligation payable immediately. Pincus J. said at page 51:

> Counsel for the Commissioner argued that the debt was payable immediately ... He said that if there was a stay of enforcement of the judgment, the debt nevertheless remained payable. That appears to me to be correct. I have found no authority in support of the proposition that a stay of enforcement of a judgment produces the result that the debt ceases to be payable; surely the judgment creditor could, despite the stay of enforcement, plead the debt as a common law set-off.

[30] In the same case, Gummow J. at page 56 said:

> Enforcement is 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, whereby the creditor receives satisfaction in whole or part of the outstanding obligation represented by the judgment debt. The debt may be payable by the debtor although the means of enforcement are denied to the creditor.

[31] It is therefore not the case, as Mr. Tapueluelu contends, that "...in the event of a stay the judgment creditor (or other beneficiary of a Court order) cannot take steps to enforce it, and the judgment debtor is under no present obligation to pay it." 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). Applied to this case, 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. The judgment debt

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[125] *Re Brent Hughes; Ex Parte Westpac Banking Corp* [1997] FCA 1324 (28 November 1997), *Australian Beverage Distributors Pty Ltd v Tate Premium Wines Pty Ltd* [2007] NSWCA 57 (22 March 2007), *Scope Data Systems Ltd Pty Ltd v BDO Nelson Parkhill* (2003) ALR 56, *Alam v Quest Enterprises* [2006] NSWSC 752, *Darcoum Borough Council v Horne* [2000] EWCA Civ 178 (CA) and *Parker Flowerbulbs Pty Ltd v Coulter* [2004] FCA 1486.
[126] (1991) 32 FCR 40.

remained both unpaid and payable on the day Mr. Tapueluelu nominated as a candidate in the General Election.

[32] Mr. Tapueluelu advances the further argument that as a matter of construction the Court should interpret clause 65 as applying only to a Court order which is "in full force and effect" at the material time. He submitted that the purpose of the proviso to clause 65 "must be to ensure that only solvent (and perhaps, fiscally responsible) candidates stand for election". That submission is not correct. As the Court of Appeal made clear in *Fuko v Vaikona,* it is the simple fact of indebtedness pursuant to a Court order and not insolvency that is the bar to nomination. I agree with Mr. Kefu that clause 65 is concerned with ensuring that those who stand for election are persons who understand the importance of and respect the rule of law.

[33] It was then submitted for Mr. Tapueluelu that the interpretation of clause 65 must be approached as having occurred against the background of two significant features of the Tonga legal system. The first feature is said to be, the Electoral Act 1989, and in particular Part III of that Act, dealing with elections and nomination of candidates, and Part V dealing with election petitions. It was suggested that the Electoral (Amendment Act) 2010, which introduced the section 9(4) written clearance procedure, was particularly important and that the obvious legislative intent was that clause 65, as re-enacted in 2010, and the existing Electoral Act provisions should 'peacefully co-exist'. That submission was not developed. It was not explained why the interpretation of clause 65, for which the Attorney General contends here, does not co-exist peacefully with the Electoral Act provisions and I cannot see anything to suggest that is the case. Although mention was made of section 9(4) I see nothing there that supports Mr. Tapueluelu's submission. As the Court of Appeal said in *Supervisor of Elections v Tupouniua*[127] section 9(4) does not seek to replicate the requirements of clause 65 and it is "simply an attempt to give practical effect to clause 65 and to minimize the risk of mischief arising from a false or mistaken declaration of compliance".

[34] The second feature was said to be the system of appeals, and discretionary stays of execution pending appeal, in place in relation to appeals. The 'absolute' approach of the Attorney General to clause 65 would, it was argued, disapply this entire area of civil law - effectively rendering rights of appeal nugatory for candidates for election and was to be avoided if at all possible. For reasons I have already given, this submission is based on a mistaken view that a stay of execution releases the judgment debtor from the obligation to pay. The approach contended for by the Attorney General does not disapply this area of the civil law but is entirely consistent with it.

[35] A further submission for Mr. Tapueluelu was that the Attorney General's approach to the interpretation of clause 65 was unsatisfactory because it meant, in effect, that the moment a judgment (or any other Court order) for the payment of money was given, no matter how unjustified or substantial the judgment (or order) and even if the judgment or order in question was stayed or ultimately overturned on appeal, the recipient is debarred from standing for election. What that submission

[127] (Unreported, AC 32 of 2014, Court of Appeal).

overlooks is that the recipient is only debarred from election if the judgment or order remains outstanding. The recipient may pay the judgment or enter into a binding arrangement with the judgment creditor to compromise the debt. Furthermore, the case law makes clear, clause 65 is not concerned with whether a judgment (or order) is justified or unjustified, whether it is substantial or paltry or whether it has been appealed or is beyond challenge. It does not matter either that it is ultimately successfully appealed or set aside. *Pohiva v Mafi* at [16].

[36] For the reasons I have given I consider that Mr. Tapueluelu fell within the disqualification imposed by clause 65. At the date of his nomination there was a judgment of the Magistrate's Court against him for the payment of a specific sum of money that remained outstanding. He was, as a consequence, ineligible for election in the 2014 General Elections.

Sections 25-27 of the Electoral Act

[37] Section 25 of the Electoral Act provides that no election shall be questioned except by an election petition "complaining of an unlawful election or unlawful declaration" presented in accordance with Part V of the Electoral Act. Section 26(1) provides that the only persons who may present an election petition are, a person who voted or had the right to vote at the election, a person claiming to have had the right to be elected or returned at the election and a person alleging himself to have been a candidate at the election. Section 27(1) provides that an election petition shall be presented within 28 days after the day on which the result of the poll has been declared.

[38] Mr. Tapueluelu submits that the Constitution provides for the franchise and for elections of both Peoples' Representatives and Nobles' Representatives, in only the most general of terms and must contemplate that the detail of how elections are to be conducted and disputes concerning their conduct resolved should be regulated by statute. It was further submitted that sections 25 – 27 of the Electoral Act require that allegations of a lack of qualification of the successful candidate (or electoral misconduct) be brought before the Court promptly and by utilizing the electoral petition process only and that this procedure is not inconsistent with the proviso to clause 65 or its proper ambit and purpose.

[39] I do not accept Mr. Tapueluelu's submission that sections 25-27 provide an exclusive means for the challenge of election outcomes in the Kingdom. Challenges to an election result may be made other than by electoral petition. Clause 66 of the Constitution provides that if it is proved to the satisfaction of the Assembly that any person elected as a representative has used threats or offered bribes "for the purpose of persuading any person to vote for him" that person may be unseated by the Assembly. This process is as much a challenge to an election result as the filing of a petition under the Electoral Act. However, my principal objection to Mr. Tapueluelu's submission is at a deeper level and is that sections 25-27 are inconsistent with the Constitution.

[40] The Constitution is the supreme law of Tonga and by clause 82, if any other law is "inconsistent with this Constitution" that other law shall to the extent of the

inconsistency be void. In *Touliki Trading Anor. v Fakafanua & Kingdom of Tonga (No.2)*[128] the Court of Appeal said at page 152:

> It is accordingly not in doubt that an Act of the legislature (or an Order in Council) may be declared invalid by the Supreme Court, or by this Court on appeal if it be found to infringe the Constitution: *Fuko v Vaikona* [1990] Tonga LR 148 at 150-151, citing *Minister of Lands v Pangia* (Scott J, unreported, 1932); *Fotofili v Siale* (Privy Council, unreported, 3 August 1987). In the last case the Privy Council stated the law:
>
> > It follows that in England the validity of Acts of Parliament is not open to challenge on the ground that its passage through the House was attended by any irregularity. The same is not true in Tonga where there is a written Constitution. If, on a true construction of the Constitution some event or circumstance is made a condition of the authentic expression of the will of legislature, or otherwise of the validity of a supposed law, it follows that the question whether the event or circumstance has been met is examinable in the Court ...

[41] As to what is meant by 'inconsistent', in my view, to say an Act of the Legislature is inconsistent with the Constitution means that it interferes with the ambit of the Constitution in some respect that the Constitution did not intend. In *Victoria v Commonwealth,*[129] Dixon J said in relation to inconsistency between Commonwealth and State laws in Australia:

> When a State law, if valid, would alter, impair or detract from the operation of a law of the Commonwealth Parliament, then to that extent it is invalid. Moreover, if it appears from the terms, the nature or the subject matter of a Federal enactment that it was intended as a complete statement of the law governing a particular matter or set of rights and duties, then for a State law to regulate or apply to the same matter or relation is regarded as a detraction from the full operation of the Commonwealth law and so as inconsistent.

[42] I have to consider whether on a true construction of clause 65 it was intended that it would be subject to regulation at the will of the Legislature. I do not think there was any such intention. Whilst I accept that the Constitution was not intended to be a complete statement of the law governing elections and that a requirement that a challenge to an election result be made in a timely manner is intended to provide a safeguard against political uncertainty and instability, clause 65 is proscriptive and absolute in its terms (*Fuko v Vaikona*). Where it is applicable, the effect that clause 65 has on the candidacy of a person nominated for election is simply that that person shall not be chosen by ballot to be a People's Representative (*Attorney General v*

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[128] [1996] Tonga LR 145.
[129] (1937) 58 CLR 618.

Tupouniua at page 25). The disqualification applies without exceptions and regardless of circumstances. There is nothing in clause 65 to suggest that on its true construction its application was to be circumscribed by Act of the Legislature.

[43] If sections 25-27 are regarded as a code and an exclusive means for challenge of election outcomes in the Kingdom that would certainly 'alter, impair and detract' from the operation of clause 65. The right to bring a challenge to a successful candidate's election in reliance upon clause 65 would be limited to those few persons referred to in section 26(1) of the Electoral Act and would exclude, for instance, the possibility of a challenge by the Attorney General. It would also limit the time within which a challenge could be made to an election in reliance on clause 65 to just 28 days after the result of the election was declared, even in circumstances where a successful candidate's disqualification from election was not and could not have been known. There would appear to be no right to obtain an extension of time for filing a petition regardless of circumstances (*Supervisor of Elections v Tupouniua*).[130]

[44] It would mean also that should no person eligible to file an election petition have the knowledge, means or inclination to do so, then a candidate, if elected in breach of clause 65, would be immune from challenge and could take their place in the Legislative Assembly for the Parliamentary term in disobedience of the Constitution. The facts of this present case provide evidence that such a circumstance can arise. The observance of the Constitution is far too important to be left to chance in this way.

[45] For those reasons I find that sections 25-27 do not provide an exclusive means of challenging an election outcome where such challenge is based on a lack of constitutional qualifications of an elected candidate under clause 65.

Whether the Attorney General has standing to bring this proceeding.

[46] It was argued that nothing in section 31A of the Constitution empowers the Attorney General to take proceedings to enforce the Constitution contrary to a statutory prohibition and scheme such at that set out in the Electoral Act. Related to this, it was also submitted that it is entirely inappropriate for the Attorney-General to indirectly attack statutory provisions enacted by the Government which he serves, in the manner being undertaken in this case. Again no authority was quoted to me.

[47] The roles of the Attorney General include upholding the integrity of the justice system and the Constitution and he is to be heard in important matters before the Courts affecting the public interest. He has complete discretion to exercise his legal powers and his right to do so is free from interference of any nature. The Supreme Court is the guardian of the Constitution and most regularly it is the Attorney General who is its champion. It has been the Attorney General who has for the last 15 years regularly taken proceedings to enforce clause 65. His right to do so has never before been challenged or subject to criticism or adverse comment as far as I am aware.

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[130] (Unreported AC 32 of 2014, Court of Appeal).

(*Attorney General v Tupouniua*, *Namoa v Attorney General*, *Attorney General v Fuko* and *Attorney General v Helu*). There is nothing in Mr. Tapueluelu's objection.

Should the Court decline declaratory relief

[48] By clause 103A of the Constitution the remedy for breach of the Constitution is declaratory relief. Mr. Tapueluelu submitted that the Court should refuse to grant any of the relief sought (declaratory or otherwise) on the grounds of delay, and on the further ground that the grant of relief sought would be entirely disproportionate to the Constitutional breach established.

[49] As far as delay is concerned, it was submitted that it has been a year since the registration of the defendant as a candidate (on 23 October 2014) and his election as a People's Representative (on 27 November 2014). I do not see anything in this point. It was conceded that the Attorney General was not aware that Mr. Tapueluelu had an outstanding judgment at the time that he was nominated and once he became aware of that fact these proceedings were pursued immediately and given urgency. There is no suggestion that Mr. Tapueluelu has been prejudiced by such delay as has occurred.

[50] It was further submitted that Mr. Tapueluelu has acted throughout in good faith by applying for and obtaining a stay of execution of the appeal and by complying with the obligation under clause 9(4) of the Electoral Act to submit written clearances at the time he submitted his nomination. In light of these matters it is argued that the Constitutional breach involved can be sufficiently recognised by a bare finding that the proviso to clause 65 was engaged without the need for going further to declare the election of Mr. Tapueluelu as a People's Representative unlawful or invalid.

[51] Whilst I can readily accept that Mr. Tapueluelu believed that the stay dealt with any issues concerning clause 65 and I have sympathy for the position in which he now finds himself, it is plainly not the case that he sought the stay to comply with clause 65 and there is nothing to suggest he made any enquiry to confirm his eligibility for election. Had he done so he may well have become aware of the decision in *Pohiva v Mafi* which would have put him on notice that the position was not as he thought.

[52] I am not prepared to create an exception to the application of clause 65 based on the existence of good faith. That would be contrary to the spirit of the Constitution, it would introduce uncertainty into the law and encourage non-compliance with the Constitution. It would also be contrary to precedent as the Courts have never refused to enforce clause 65 on this ground even though the bona fides of the candidate or member has been raised (*Vaikona v Fuko* and *Helu v Attorney General*).

[53] A further submission advanced for Mr. Tapueluelu was that a declaration of invalidity as to his election would leave his constituency unrepresented in Parliament. This was because, it was said, that there does not appear to be any provision in the Electoral Act (or the Constitution) for the calling of by-elections in circumstances where a member's election is declared invalid. It was submitted that it was a better course to permit Mr. Tapueluelu to continue as the People's Representative for his constituency. The short answer to this is that any lacuna in the legislation can, and no doubt would, be quickly filled allowing for a by-election to be called.

[54] For those reasons I see nothing that suggests to me that it would be appropriate in the exercise of my discretion to refuse the Attorney General declaratory relief.

Summary of conclusions

[55] I summarise my findings on the issues that arise in this action as follows:

[55.1] A Court judgment or order for the payment of a specific sum of money, the operation of which is subject to a stay of execution, does impose a payment obligation which remains outstanding within the meaning of clause 65 of the Constitution. On the date that Mr. Tapueluelu was nominated for election in the 2014 General Election the judgment obtained against him by Mr. Edwards in the Magistrate's Court on 27 June 2011 remained outstanding in that it was both payable and unpaid. Mr. Tapueluelu was as a consequence a person who was disqualified by clause 65 of the Constitution from being chosen by ballot as a People's Representative in the 2014 General Election.

[55.2] Sections 25-27 of the Electoral Act do not provide an exclusive means of challenging an election outcome where such challenge is based on a lack of constitutional qualifications of an elected candidate under clause 65.

[55.3] The Attorney General has standing to bring an action for a declaration that the nomination, registration and election of a People's Representative to the Legislative Assembly was unlawful and invalid due to a lack of constitutional qualification under clause 65.

[55.4] There are no grounds in this case which would justify the Court exercising a discretion to decline to grant the declaratory relief that is sought by the Attorney General.

The result

[56] I make declarations as sought by the Attorney General in the following terms:

[56.1] A declaration that the nomination of Mr. Mateni Tapueluelu on 23 October 2014 as a candidate for election as a People's Representative of the Tongatapu 4 Electoral Constituency was in breach of clause 65 of the Constitution and it is unlawful and invalid.

[56.2] A declaration that the registration of Mr. Mateni Tapueluelu on 23 October 2014 as a candidate for election as a People's Representative of the Tongatapu 4 Electoral Constituency was in breach of clause 65 of the Constitution and it is unlawful and invalid.

[56.3] A declaration that the election of Mr. Mateni Tapueluelu 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 it is unlawful and invalid.

[56.4] A declaration that the declaration of Mr. Mateni Tapueluelu on 9 December 2014 in the return of the writ of elections to His Majesty the King as the People's Representative of the Tongatapu 4 Electoral Constituency was in breach of clause 65 of the Constitution and it is unlawful and invalid.

[56.5] A declaration that the taking of the oath by Mr. Mateni Tapueluelu on 19 January 2015 as the People's Representative of the Tongatapu 4 electoral constituency was in breach of clause 65 of the Constitution and it is unlawful and invalid.

[56.6] A declaration that the holding by Mr. Mateni Tapueluelu of the office of the People's Representative of the Tongatapu 4 Electoral Constituency since 27 November 2014 was in breach of clause 65 of the Constitution and it is unlawful and invalid.

[57] In relation to costs, I know of no reason why the Attorney General would not be entitled to costs but if there is any disagreement about that I will receive submissions by memoranda within 28 days.