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1 July 2013

Criminal appeal – one charge not clear – respondent acquitted on that charge – appeal allowed – amended charge to be heard at Magistrate's Court

Sentencing – offender's means should be considered before fine imposed – imprisonment for non-payment only when offender had the means but refused to pay

On 15 June 2013 the respondent was summoned to appear at the Nukunuku Magistrates' Court to face two charges: the first of being drunk in a public place contrary to section 3(j) of the Order in Public Places Act (Cap 37), the second of "obstruction" of a police officer, "contrary to section 113(b)(c) of the Criminal Offences Act (Cap 18)". On 18 June 2013 the respondent pleaded guilty to both charges. In respect of the first charge, the Magistrate fined the respondent $100 to be paid immediately in default imprisonment for one month; and in respect of the second charge the respondent was acquitted. The Magistrate held that "the summons was not good because the amended Act was not included in the summons". The police appealed the acquittal.

Held:

1. The court held that the second charge was defective. Both the police, before requesting the summons to be issued, and the Magistrate, before signing the summons, should have noticed that there was no such offence as section "113(b) (c)". Subsections (b) and (c) were distinct and different subsections of section 113; either subsection (b) should have been relied upon or subsection (c). To include both sub sections in one summons was a breach of section 15 of the Magistrates' Courts Act. It was evident from the facts that subsection (c) had no application to the case against the respondent and accordingly only subsection (b) should have been included in the summons.
2. The Magistrate gave as his reason for acquitting the respondent the fact that no reference to the amendment of the Act was made in the charge. The Criminal Offences Act (Cap 18) was amended by the Criminal Offences (Amendment) Act 2012 however section 113 was not affected by the amendments. There was no requirement for the amending Act to be

referred to in the charge and the Magistrate erred in dismissing the second charge on that ground.

3. The court considered three other matters which arose. The first was that the Magistrate made no enquiry into the respondent's means before imposing a penalty of $100. A Magistrate should never impose a financial penalty without at least making some enquiries to establish that the offender had the means to pay the fine. Secondly, the default period, one month, was the maximum allowed by section 28 of the Act, as amended, for fines up to $500. On the face of it a default period of one month for a fine of $100 seemed very high. Thirdly, no time was given to the respondent to pay the fine imposed, indeed the sentence specified that the fine was to be paid "now" i.e immediately. In fact, it was understood that the fine was paid and therefore no harm was done. It was better practice for the Magistrate to enquire whether the fine could be paid immediately and, if not, to allow a reasonable time for payment to be made. It was not good sentencing to impose a fine which had to be paid immediately, but, because the offender did not have enough money on his person, resulted in imprisonment instead. Offenders should not be sent to prison merely for non-payment of fines; imprisonment was only appropriate when an offender, who had the means to pay the fine within a reasonable period of time allowed to him, had nevertheless failed to pay.

4. The appeal was allowed. The matter was remitted to the Magistrates Court. The prosecution should be given an opportunity to correct the defects in the charge. The corrected charge should then be put to the respondent and his plea taken. The matter should then proceed to conclusion according to law.

Statutes considered:

Criminal Offences Act (Cap 18)
Magistrates' Courts Act (Cap 11)
Order in Public Places Act (Cap 37)

Counsel for the appellant : Mr 'A Kefu
The respondent appeared in person

Judgment

1. On 15 June 2013 the Respondent was summoned to appear at the Nukunuku Magistrates' Court to face two charges: the first of being drunk in a public place contrary to section 3 (j) of the Order in Public Places Act (Cap 37) (MC 135 of 2013), the second of "obstruction" of a police officer, contrary to section 113 of the Criminal Offences Act (Cap 18) (MC 136 of 2013).

2. According to the record of the proceedings before the Court on 18 June 2013 the Respondent pleaded guilty to both charges. After hearing the facts and the Respondent's mitigation the Magistrate delivered the following judgment:

"Charge 135/2013: Fine $100 to be paid now in default imprisonment for one month;

Charge 136/2013: the accused will be acquitted, the summons was not good because the amended Act was not included in the summons."

This is an appeal against that acquittal.

3. The grounds of appeal are:

"(i) The summons was correctly written out, the amended Act was not required to be written onto the summons as well;
(ii) The Court's decision to acquit is not right."

4. The material parts of the summons in question read as follows (translated):

"Complaint has been made to me that you on the 9th day of April 2013 at Ha'avakatolo, you assaulted and obstructed a police officer while on duty contrary to section 113 (b)(c) Criminal Offences Act Cap. 18 whereby you punched with your right hand the shoulder of Police Officer Vaha Taufa without his consent."

5. Section 14 of the Magistrates' Courts Act provides that every summons:

"shall state concisely the offence with which the defendant is charged...."

Section 15 specifies that:

"every summons shall be for one offence only..."

Section 16 (i) requires:

"Every summons before being issued for service shall be read by the magistrate who shall affix his signature and seal thereto."

6. Both the police, before requesting this summons to be issued and the Magistrate, before signing the summons should have noticed that there is no such offence as section "113(b) (c)". Subsections (b) and (c) are distinct and different subsections of section 113; either section (b) should have been relied upon or subsection (c). To include both sub sections in one summons was a breach of section 15 of the Act.

7. It is evident from the facts that sub-section 113 (c) has no application to the case against the Respondent and accordingly only subsection 113 (b) should have been included in the summons. Subsection 113 (b) reads as follows:

"Every person who assaults, obstructs or resists any police officer acting in the execution of his duty...is guilty of an offence and is liable on summary conviction to a fine not exceeding $500 and in default of payment thereof to imprisonment for any period not exceeding one year".

8. It will have been observed that three distinct types of conduct are referred to in subsection 113 (b):-

1. assaults;
2. obstructs;
3. resists;

When charging a breach of this subsection only one of these types of conduct should be included in a single charge, otherwise the charge will violate section 15.

9. The charge 136/2013 was defective:

(i) Because there is no such subsection as 113 (b) (c); and
(ii) Because the Respondent was charged with two types of conduct, namely "assaulted and obstructed", rather than one.

10. It is not every charge which is technically defective that will be held to be a nullity. Obviously if a person is charged with an offence that does not exist (eg because it has been repealed) then that charge will be a nullity. Where, however, the error is purely technical and the facts of the charge as pleaded clearly reveal the nature of the conduct complained of, a charge will not be bad. In the present case, after mistakenly referring to both "assaulted" and "obstructed", and mistakenly referring to "Section 113 (b) (c)" the wording of the charge was perfectly clear and can have left the Respondent in no doubt of the conduct alleged against him.

> "... you punched with your right hand the shoulder of Police Officer Vaha Taufa without his consent"

11. The Magistrate gave as his reason for acquitting the Respondent on this charge the fact that no reference to the amendment of the Act was made in the charge. The Criminal Offences Act (Cap 18) was amended by the Criminal Offences (Amendment) Act 2012 (Act 19 of 12) however section 113 was not affected by the amendments. There was no requirement for the amending Act to be referred to in the charge and the Magistrate erred in dismissing this charge on that ground.

12. As a general rule, any objection to the form of a charge should be taken before the plea is taken. If the error in the charge is slight then the prosecution must be given an opportunity to amend. If the defendant is placed in a difficulty by the amendment he may be granted an adjournment to consider his position. The overall aim must be justice both to the prosecution and the defence.

13. During the hearing of this appeal the Solicitor General told me that in some quarters a charge is regarded as defective if the maximum penalty is not specified; this is incorrect, a charge does not have to state the maximum penalty. A magistrate does, of course, have to satisfy himself that the maximum penalty for the offence does not take it beyond his jurisdiction.

14. I wish to refer to three other matters which arise in this appeal. The first is that, according to the record, the Magistrate made no enquiry into the Respondent's means before imposing a penalty of $100. This is incorrect; a Magistrate should never impose a financial penalty without at least making some enquiries to establish that the

offender has the means to pay the fine. Secondly, the default period, one month, is the maximum allowed by section 28 of the Act, as amended, for fines up to $500. On the face of it a default period of 1 month for a fine of $100 seems very high. Thirdly, no time was given to the Respondent to pay the fine imposed, indeed the sentence specified that the fine was to be paid "now" i.e immediately. In fact, it is understood that the fine has been paid and therefore no harm has been done. It is better practice for the Magistrate to enquire whether the fine can be paid immediately and, if not, to allow a reasonable time for payment to be made. It is not good sentencing to impose a fine which has to be paid immediately, but, because the offender has no, or not enough money on his person, results in imprisonment instead. Offenders should not be sent to prison merely for non-payment of fines; imprisonment is only appropriate when an offender, who had the means to pay the fine within a reasonable period of time allowed to him, has nevertheless failed to pay.

15. The appeal is allowed. The matter will be remitted to the Magistrates Court. The prosecution should be given an opportunity to correct the defects in the charge to which I have referred. The corrected charge should then be put to the Respondent and his plea taken. The matter should then proceed to conclusion according to law.

Tonga v Sikaleti

Land Court, Nuku'alofa
Scott P and Mr Assessor Blake
LA 21/2012

10 January 2014

Land law – vacant possession sought – more than 10 years had elapsed – limitation meant no jurisdiction – claim dismissed
Civil procedure – limitation defence not pleaded – court must still disclaim jurisdiction

The plaintiff became the registered holder of a town allotment in June 1988. The defendant went into possession of the land in about 1983 with the consent of the plaintiff's mother. The plaintiff asked the defendant to vacate the land in 2004 however the defendant refused on the grounds that he had built a house on the land and planted useful trees. The plaintiff again asked the defendant to vacate the land in November 2012 but again the defendant refused. The plaintiff sought an order for vacant possession of the allotment on 18 December 2012. The defendant was approached by the plaintiff's mother in 1982 and moved onto the land and constructed his house there after being assured that he could live on the land permanently and that eventually it would be registered in his son's name. The defendant sought an order to this effect (and therefore, by implication, dismissal of the plaintiff's claim).

Held:

1. Section 170 of the Land Act provided that no one could bring any action in court more than 10 years after the time at which the right to bring such action first accrued. The plaintiff acquired an apparently unfettered right to vacant possession of the land after it was registered in his name in 1988. The ten year period expired in 1998. Motive, such as a desire to keep the peace, was immaterial to the running of time.
2. Section 170 of the Act was not pleaded and it was accepted practice that a limitation defence should be pleaded. Where, however, this defence was overlooked it was immaterial whether the parties wish the court to try the action. The court must disclaim jurisdiction since to continue with the action would be contrary to law.
3. The loss of the plaintiff's rights as against the defendant did not have the inevitable consequence that the land became registered in the defendant's name, let alone in the name of his son. Without deciding the matter or hearing argument on the issue, it seemed that the effect of the operation of

section 170 would be that the land would revert, as if surrendered by the plaintiff, and would then become available for re grant.

4. The plaintiff's claim was dismissed with the defendant's costs to be taxed if not agreed.

Case considered:
Rothmans v Saudi Arabian Airlines [1980] 3 All ER 360

Statute considered:
Land Act (Cap 132)

Rules considered:
Supreme Court Rules 2007

Counsel for the plaintiff	:	T Fakahua
Counsel for the defendant	:	Ms M Manavahetau

Judgment

[1] The Plaintiff seeks an order for vacant possession of a town allotment at Popua Lot 7 Blk 3787 DG 277/42 of which he became the registered holder in June 1988.

[2] It is not in dispute that the Defendant went into possession of the land in about 1983 with the consent of the Plaintiff's mother.

[3] According to paragraph 10 of the Statement of Claim, the Plaintiff asked the Defendant to vacate the land in 2004 however the Defendant refused on the grounds that he had built a house on the land and planted useful trees.

[4] According to paragraph 11 of the Statement of Claim, the Plaintiff again asked the Defendant to vacate the land in November 2012 but again the Defendant refused. This action was commenced on 18 December 2012.

[5] The Statement of Defence asserts that the Defendant was approached by the Plaintiff's mother in 1982 and that he moved onto the land and constructed his house there after being assured that he could live on the land permanently and that eventually it would be registered in his son's name. The Defendant sought an order to this effect (and therefore, by implication, dismissal of the Plaintiff's claim).

[6] On 15 October 2013, the first day of the trial, Mr Fakahua opened the case for the Plaintiff. He told the Court that although the land had been "allocated" to the Plaintiff in 1983 he did not occupy it. It appears that he may have been living overseas. Without his permission, his mother agreed to let the Defendant into occupation. In 1988 the land was registered in the Plaintiff's name and he then "told the Defendant to go". By this time the Defendant had already built his house there. Between 1988 and 2004 the Plaintiff several times told the Defendant to go but he refused. In 2004 Mr Fakahua wrote to the Defendant (Exhibit P4) giving him 3 months notice to quit. On 19 November 2012 the Plaintiff sent another notice to the Defendant requiring him to

move in seven days. When he failed to comply with that request, the proceedings were commenced.

[7] After listening to Mr Fakahua's opening, I raised Section 170 of the Act. I explained to Mr Fakahua that the Plaintiff had acquired an apparently unfettered right to vacant possession of the land after it was registered in his name in 1988. Acting in recognition of this right he had told the Defendant to leave, however the Defendant had not done so. Mr Fakahua submitted that Section 170 did not apply, inter alia, because the Defendant was not a squatter. I asked counsel to file written submissions. Both did so and I am grateful for their assistance.

[8] In Mr Fakahua's submission the 10 year period should run from 2004, not 1988. Furthermore, even if it were held to run from 1988 then that could not have the result that the Defendant, or his son, would be granted the land; the Minister had not been joined and therefore could not be ordered to cancel the grant to the Plaintiff. Ms Manavahetau submitted that the Section applied and that the 10 year period commenced to run in 1988.

[9] It will have been noted from paragraph 5 above that S170 of the Act was not pleaded. Although RSC O.8 R 3(2) is rather terse, it is accepted practice that a limitation defence should be pleaded. Where, however, this defence is overlooked "it is immaterial whether the parties wish the Court to try the action. It must disclaim Jurisdiction since to continue with the action would be contrary to law" *(Rothmans v Saudi Arabian Airlines* [1980] 3 All ER 360, 364).

[10] Section 170 provides that:

> "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 ....".

In my view the Plaintiff's right accrued in 1988 and was lost in 1998. Motive, such as a desire to keep the peace, is in my view immaterial to the running of time.

[11] I agree with Mr Fakahua that the loss of the Plaintiff's rights as against the Defendant do not have the inevitable consequence that the land becomes registered in the Defendant's name, let alone in the name of his son. Without deciding the matter or hearing argument on the issue, it seems that the effect of the operation of Section 170 will be that the land will revert, as if surrendered by the Plaintiff, and will then become available for re grant.

Result:

The plaintiff's claim is dismissed with the defendant's costs to be taxed if not agreed.

Pohiva v Tu'ivakano anors

Supreme Court, Nuku'alofa
Scott CJ
AM 20/2013

17 January 2014

Criminal law – private prosecution brought – respondents discharged by Magistrate after committal hearing – no case to answer – appeal dismissed

On 19 April 2011 representatives of the Governments of the Kingdom of Tonga and the People's Republic of China signed a document which recorded that it had been agreed that the Government of the People's Republic would provide the Government of Tonga with "grant aid" amounting to USD$25,450,000 (the funds) "with a view to further developing the friendly relations and economic and technical cooperation between the two countries". According to affidavit evidence, the funds were received by the Government of Tonga on about 25 May 2011. On about 30 May TOP$11.56 million was paid to the Ministry of Revenue in respect of tax liabilities of the Third Defendant, Tongasat, "and its staff" while the whole of the balance remaining was paid to Tongasat. According to the appellant, the payment made to Tongasat in 2011 was not in accordance with an agreement earlier reached between Tongasat and the Government and was a misuse of public funds. On 12 February 2013 he appellant launched private criminal prosecutions against the four respondents in the Magistrates' Court. In view of the amount of money alleged to have been stolen or received, the maximum penalty for the alleged offences was seven years imprisonment and accordingly was beyond the jurisdiction of the Magistrates' Court. Committal proceedings were held on 26 April before a Magistrate. All four accused respondents were discharged by the Magistrate on the ground that no sufficient case had been made out to warrant putting the accused upon trial before the Supreme Court. The appellant appealed the orders of discharge.

Held:

1. The appellant's approach, while advanced in good faith, was misconceived. Committal proceedings were held to determine whether there was sufficient evidence to send the respondents for trial on the criminal charges laid against them. It was not the task of the Magistrate to determine guilt or innocence; it was to decide whether the defendant had a case to answer. The burden of satisfying this requirement rested entirely

on the prosecution; there was no duty imposed on a defendant to prove anything.

2. The power of a Magistrate to exercise enhanced jurisdiction was dependent on the consent both of the prosecution and the accused. There was no power to compel the Attorney General to undertake a prosecution against his will.
3. The ground of appeal that the Magistrate was biased, was a wholly unsubstantiated and deplorable slur on the integrity and reputation of a well-respected Magistrate and should not have been advanced.
4. Given the very wide ambit of section 197 of the Criminal Offences Act (Cap 18), "All prosecutions under this Act may be brought by the Attorney General or the person aggrieved", the court considered that all prosecutions, whether private or not, should be within the purview of the Attorney General in order to avoid prosecutions being commenced which clearly did not conform with the Crown's prosecution policy or which, for other good reason, were not in the public interest.
5. The court accepted that the appellant launched the prosecutions because of his genuine concern at the way the funds had been disbursed. However, the court found that there was no case to answer on any of the charges laid. The Magistrate arrived at the correct conclusion and therefore the appeal was dismissed.

Cases considered:

Practice Direction (submission of no case) [1962] 1 WLR 227
R v Comptroller General of Patents (1899) 1 QB 909
R v Moxon-Tritsh [1988] Crim LR 46

Statutes considered:

Criminal Offences Act (Cap 18)
Evidence Act (Cap 15)
Magistrates' Courts Act (Cap 11)
Magistrates' Courts (Amendment) Act 2012
Official Secrets Act (Cap 5)
Public Finance Management Act (27 of 2002)

The appellant appeared in person
Counsel for the first, third, and fourth respondents : SJ Stanton SC with WC Edwards
The second respondent appeared in person

Judgment

[1] For ease of reference all documents referred to will, if included in the Respondents' appeal book, be identified by the page at which they appear.

[2] On 19 April 2011 representatives of the Governments of the Kingdom of Tonga and the People's Republic of China signed a document (page 111) which recorded that it had been agreed that the Government of the People's Republic would provide

the Government of Tonga with "grant aid" amounting to USD$25,450,000.00 (the funds) "with a view to further developing the friendly relations and economic and technical cooperation between the two countries".

[3] According to the affidavit evidence of Sunia Manu Fili sworn on 17 April 2013 paragraphs 10 and 15 (106) the funds were received by the Government of Tonga on about 25 May 2011. On about 30 May TOP$11.56 million was paid to the Ministry of Revenue in respect of tax liabilities of the Third Defendant, Tongasat, "and its staff" while the whole of the balance remaining was paid to Tongasat.

[4] The Appellant, Mr Pohiva, is the distinguished No.1 Peoples Representative for Tongatapu in the Legislative Assembly. He was first elected to Parliament in 1987. He is the leader of the Tonga Democratic Party. He recently received the 2013 award of Defender of Democracy from the NGO Parliamentarians for Global Action. According to his affidavit sworn on 17 April 2013 (102) between January 2000 and April 2013 he received various documents which together suggested to him that the payment made to Tongasat in 2011 was not in accordance with an agreement earlier reached between Tongasat and the Government and that it was a misuse of public funds.

[5] During September and October 2012 correspondence was exchanged between a colleague of Mr Pohiva, Mr 'Isileli Pulu and the Prime Minister, the First Respondent. Mr Pulu had been a Cabinet Minister between January 2011 and June 2012. He asked the Prime Minister various questions about the amount of money received under the agreement and about the authority to make the payment to Tongasat. The questions and answers are included in the Respondents' Appeal Book at pages 163 to 175. On 2 November 2012 a statement was released to the media in which the Government rejected the allegations of wrongdoing by the Appellant as "false and irresponsible". The statement is at page 161. A previous and rather more detailed Press Release dated 22 October 2012 is at pages 281 and 283 of the Appeal Book. Several of the questions raised by Mr. Pohiva appear to receive detailed answers in this document however it is not clear that it was before the Magistrate. In these circumstances, even though it does not seem to assist the Appellant, I propose to disregard it.

[6] The Appellant and his Parliamentary supporters did not accept the explanation offered by the Government. According to paragraph 26 of Mr. Pohiva's affidavit, in about October 2012 a motion of no confidence was tabled in the Legislative Assembly. A copy of a resolution no.1/2001 dated 9 May 2011 is in the Respondent's Appeal Book. Apparently the motion, after debate, was lost. Whether this is the motion referred to by Mr. Pohiva is not clear. Part of the difficulty in precisely following the sequence of the events arises from the fact that paragraphs 12 to 25 of the Appellant's affidavit were missing from the bundles of documents given to me. Although this was pointed out to the Appellant quite early during the hearing, the omission was not made good.

[7] Mr Pohiva told me that after the motion of no confidence was lost he decided to take the matter to Court as he had nowhere else to turn. On 12 February 2013 he launched private criminal prosecutions against the four Respondents in the Kolofo'ou Magistrates' Court. Copies of most of the charges may be found at pages 82 to 96.

Lord Tu'ivakano was charged:

(i) With theft of TOP$18.45 million on 20 May 2011, contrary to sections 143(a)(b) of the Criminal Offences Act, Cap 18 and contrary to Clause 19 of the Constitution; (82)
(ii) With being an accessory to the theft of TOP$18.45 million on 20 May 2011 contrary to sections 143(a) and (b) of Cap 18 and Clause 19 of the Constitution; (84) and
(iii) With "concurring" (conspiring?) with Tongasat to steal TOP$18.45 million on 20 May 2011 contrary to sections 143(a) (b) of Cap 18 and Clause 19 of the Constitution (86).

William Clive Edwards was charged:

(i) With abetting theft of TOP$18.45 million on 20 May 2011 contrary to sections 12 and 143 (a) and (b) of Cap 18 and Clause 19 of the Constitution; (88) and
(ii) With "agreeing" (conspiring?) with Lord Tu'ivakano on 20 May 2011 to commit theft of TOP$18.45 million by giving the money to Tongasat contrary to sections 15 and 145 (a) and (b) of Cap 18 (90).

Tongasat was, according to page 36 charged with two offences of conspiracy and receiving stolen goods contrary to sections 143 (a)(b) and sections 148 (1) and (5) of Cap 18, however copies of these charges were not included in the Appeal Book.

Princess Salote Pilolevu Tuita was charged:

(i) With agreeing (conspiring?) with Lord Tu'ivakano to steal TOP$18.45 million on 20 May 2011 contrary to sections 15 and 145 (a) and (b) of Cap 18 (92); and
(ii) With dishonestly receiving TOP$18.45 million on 20 May 2011 contrary to sections 148 (1) and (5) of Cap 18.

[8] In view of the amount of money alleged to have been stolen or received, the maximum penalty for these alleged offences was seven years imprisonment (Sections 145 (b) and 148 (1)) and accordingly were beyond the jurisdiction of the Magistrates' Court. Committal proceedings were held on 26 April before Magistrate Salesi Mafi. A transcript of the proceedings is at pages 65 to 73. An interim judgment was delivered on the same day (pages 26 to 29) and a final judgment, unfortunately undated, was probably delivered on or about 17 May (34 to 47). All four accused Respondents were discharged by the Magistrate on the ground that he was of the opinion that no sufficient case had been made out to warrant putting the accused upon trial before the Supreme Court (Cap 11- Sections 32 (4) (d)). This is an appeal against those orders of discharge.

[9] The committal proceedings were held according to the new procedure set out in section 9 of the Magistrates' Courts (Amendment) Act 2012. This new procedure is a slight variation of the committal procedures now typical throughout the Commonwealth and replaces the outmoded, cumbersome, costly and time wasting

procedure which was previously in place. It requires the prosecutor to lodge copies of the statements and other documents upon which reliance is placed with the Court five days before the hearing. On the day of the hearing, after considering the documents filed and any submissions, a decision is taken by the Magistrate whether or not to commit. No oral evidence is placed before the Court and no cross-examination takes place: these are reserved for the Supreme Court, should an accused be committed for trial.

[10] It was suggested by Mr Pohiva that the Amendment Act, when it received the Royal Assent, was not in the form in which it was actually approved by Parliament. Whether or not this was the case, the Act as published is in the form assented to. The Magistrate was correct to take the judicial notice of the Act as published (Evidence Act, section 36).

[11] Mr Pohiva filed a "Summary of Prosecution Case" in the Magistrates' Court (96-101) however it should be noted that pages 100 and 97 have been misnumbered. In clear reference to the wording of section 145 Mr Pohiva identified the four elements of which proof was required:

(a) Dishonest taking, and
(b) Without any colour of right; and
(c) With the intention permanently to deprive the owner (or?);
(d) With the intention of converting the thing taken to the use of another without the consent of the owner.

[12] On the first page of the Summary Mr Pohiva provided a list of prosecution witnesses whom he wished to call. Unfortunately, only the first three, Pohiva, Sunia Manu Fili and 'Isileli Pulu had provided statements in compliance with Section 32(3) of the Magistrates' Courts Act. In respect of the first element the evidence of Sunia Manu Fili was relied upon. This evidence is contained in his affidavit of 17 April (105 to 107) from which it may be gathered:

(a) that the sum of USD$25,450,000.00 referred to in the 19 April Agreement (III) was the second instalment of a total package agreed between Tonga and China in 2008;
(b) that it had then been agreed that the payments would be split 50/50 between Tongasat and the Tonga Government;
(c) that a request received from Tongasat on 18 April 2011 (158) was not consistent with this 50/50 agreement;
(d) that when the First Respondent, Lord Tu'ivakano was advised that this was the case, Fili, who was then Minister of Finance was instructed by the First Respondent to make payment to Tongasat as requested on 18 April;
(e) that Tongasat's request for payment (including payment of outstanding taxes owed) was met;
(f) that the associated waiver of tax penalties was agreed by the Second Respondent; and
(g) that no members of Cabinet were consulted apart from the First and Second Respondents and the affiant.

[13] Although the Summary stated (page 100) that 'Aisake Eke would also "be called to prove" the first element, as (as well as the Second and Third) no statement by Eke can be found in the appeal books.

[14] According to the Summary (page 100) the element of dishonesty was made out by it being proved that the payments to Tongasat and in respect of tax "did not follow the proper legal procedures set down by the law [and were made] without the knowledge of Cabinet and without the knowledge and approval of Parliament." No particulars of the breaches were given.

[15] In the second page of the Summary (page 100) it was stated that the second element would be satisfied by it being proved that the funds were public money which required, but had not received, compliance with the requirements of section 9 of the Public Finance Management Act (27 of 2002) before disbursement (in this case to Tongasat) was made. The evidence in support of this element was again to be that of Sunia Fili.

[16] This third element, permanent deprivation, would be proved by Sunia Fili while the fourth (alternative?) element, conversion, would be proved by 'Isileli Pulu "and MPs from Parliament".

[17] 'Isileli Pulu's affidavit is at pages 108 to 110. Mr Pulu was Minister of Tourism from January to August 2011. According to his evidence, Cabinet did not discuss the China/Tonga Technical Cooperation Agreement while he was a member. Paragraphs 7, 8, 9 and 10 are hearsay and inadmissible. Paragraphs 11 and 12 refer to a copy of an email (160) dated 25 May 2011 from one Paula P. Ma'u, then Secretary for Information and Communications, suggesting that the request from Tongasat (158) was not consistent with the Agreement reached in July 2008. After sighting this email, Pulu wrote to the First Respondent seeking an explanation. After an exchange of letters and other communications the First Respondent clarified his position: his predecessor, Lord Sevele, had agreed to vary the Agreement after receiving a request from the Fourth Respondent (112) on 16 November 2010. As for the terms of the full 2008 Agreement itself these related to grant aid from a foreign government and were, by virtue of "section 16.1 of the Freedom of Information Policy" (sic) confidential (see pages 171 and 174).

[18] [On 1 November 2013 (after the proceedings in the Magistrates Court had concluded and before the appeal was heard) Mr Pohiva filed a document in the Supreme Court purporting to be a notice of additional evidence, namely an undated and an unwitnessed affidavit by Mr Ma'u which he wished to have included in the appeal papers. Mr Stanton objected to this document being admitted. Mr Pohiva revealed that Mr Ma'u had been unwilling to provide evidence in the Magistrates' Court but had now changed his mind. After examining the document I allowed it to be admitted. In my view the affidavit does little more than repeat assertions and opinions already contained in the materials filed in the Magistrates' Court.

On 11 November 2013 Mr. Pohiva filed an application for leave to file a further affidavit by Deputy Auditor General Kolopeaua "out of time". Despite no order being made on this application (which in any event has no place in criminal proceedings) the affidavit, sworn on 31 October 2013, was included in the Appellant's appeal book.

This was improper and ignored the advice given earlier to Mr. Pohiva that as a general rule, evidence which was available, or could have been available, but was not produced in the lower Court was not admissible at the hearing of an appeal. The Auditor's evidence was that for "the last 10 months we have been attempting to obtain documents regarding Tongasat from the Prime Minister's Office but they have not been provided". In my view this evidence does not assist the Appellant.]

[19] After setting out the elements of the offences and the manner in which they were to be proved, the Summary continues (page 97) with "further witness summary". This consists of 14 paragraphs of assertions some unsupported by evidence and some repetitive. The summary concludes:

> "The payment of the whole proceeds of the 2011 Tonga-China Economic and Technical Cooperation Agreement to Tongasat was dishonestly made under a direction which was locked in by a previous agreement between HRH Princess Pilolevu Tuita and former Prime Minister, Dr Feleti Sevele in 2010. Of this Agreement, neither Sunia Fili, the Minister of Finance, nor the Cabinet, nor the Parliament of Tonga, nor the people of Tonga were aware".

[20] It will be seen from page 28 that the Magistrate took the view that:

> "All the charges come under the main offence of theft or is in relation to actions by Lord Tu'ivakano that he gave the second tranche of the grant aid from the Chinese Government to Tonga which was proven as being an agreement which is marked annexure A (111) ... the charges are all based on those actions which the prosecution alleges is unlawful because the money belong to the Government and the first Defendant had no legal right to give this money to the fourth Defendant."

The Magistrate (29) took the view that from the documents presented by the prosecution, and especially annexure B (112) "there was an agreement between Tongasat and Government, whether it was right or not, there is a colour of right to note here". The Magistrate arrived at the conclusion that there was an absence of evidence to show dishonesty and accordingly he discharged all four accused.

[21] In his second judgment, the Magistrate further explained his reasons for discharging the accused Respondents. At page 42 he wrote:

> "The defendants do not deny giving the money to Tongasat. At the same time the prosecution has submitted annex B (112) J (158) and T (288) which shows Tongasat's claim of right over this grant. The defence submits that this money was received by the Tongan Government as a trustee for Tongasat and it is not public funds in accordance with the definition of public funds [which] means all money other than trust money". The defendant submits through counsel that there was no dishonesty as the [First] Defendant acted in the knowledge or belief that Tongasat has an interest to have the money paid to it, according to Exhibits B and T of the prosecution's list of documents".

[22] Put very simply, the Magistrate took the view that for him to commit any of the accused Respondents on any of the charges that they faced he would have to be satisfied that there was a *prima facie* case that they had acted dishonestly, this being the central element common to all the charges. In view of the documentary evidence presented by the prosecution, the Magistrate took the view that the payment of the funds to Tongasat was apparently made pursuant to previous agreements and was not, therefore, dishonest. He accepted the defence submission that none of the accused had a case to answer.

[23] In *Practice Direction* (submission of no case) [1962] 1 WLR 227 Lord Chief Justice Parker explained that:

> "A submission that there is no case to answer may properly be made and upheld (a) when there has been no evidence to prove an essential element of the alleged offence; (b) when the evidence ..... is so manifestly unreliable that no reasonable tribunal could safely convict upon it".

It is clear, from his judgments, that Magistrate Mafi took the view that both limbs of this test had been satisfied.

[24] Before again examining the grounds of appeal, the evidence and arguments advanced by Mr Pohiva it is perhaps worth making two fundamental points:

(a) In a preliminary enquiry (also known as committal proceedings) it is not the task of the Magistrate to determine guilt or innocence; it is to decide whether the defendant has a case to answer;
(b) The burden of satisfying this requirement rests entirely on the prosecution; there is no duty imposed on a defendant to prove anything.

[25] The notice and grounds of appeal are at pages 1 to 25 of the Respondent's Appeal Book. The notice is in two parts, apparently drafted by two different persons. The grounds set out in the first part run to ten paragraphs while the grounds included in the second part run to no less than 58 paragraphs. Some of the grounds are repetitive, prolix, and not altogether easy to understand. It seems likely that they were not drafted by a qualified lawyer. In summary, the principal grounds seem to be as follows:

(a) The Magistrate wrongly applied the provisions of the Magistrates' Court Act as amended by the Magistrates' Courts (Amendment) Act 2012, in particular he dealt with the charges by way of committal rather than exercising the powers conferred on him to deal with matter summarily and refused the Appellant's request to call his witnesses.
(b) The Magistrate was biased and the proceedings were unfair;
(c) The Magistrate failed to require the Attorney General to conduct the prosecutions;
(d) The Magistrate should have committed the Defendants for trial in the Supreme Court which alone has jurisdiction in all

prosecutions brought under the provisions of the Official Secrets Act;

(e) The Magistrate, by failing to take into account that document 112 was not signed by the former Prime Minister, wrongly concluded that a claim of right had been established;

(f) The Magistrate failed to give sufficient weight to the fact that the funds were transferred to Tongasat "in secrecy and with the knowledge of only a few in government. This was done dishonestly because it did not follow proper legal procedures set down by the law without the knowledge of Cabinet and without the knowledge and approval of Parliament";

(g) The Magistrate erred in finding insufficient evidence of collaboration between the accused;

(h) The Magistrate failed to take into account the First Respondent's refusal to disclose the full terms of the agreement between the Tongan and Chinese Governments; and

(i) By refusing to admit all the evidence that the Appellant wished to place before the Court the Magistrate failed "to satisfy the curiosity and special interest of the people and Governments pertinent to the case.".

[26] On the day of the hearing of this appeal, the Appellant handed up a further written submission running to seven pages. A number of points raised were already covered in the grounds of appeal and need not be repeated. The submissions did however re-emphasise Mr Pohiva's belief that he should have been allowed to call his witnesses and that the first Respondent, in particular, had failed to provide either Parliament or the Auditor or the Court with such documentary evidence as he claimed to have available. Mr Pohiva submitted:

> "Lord Tu'ivakano has to be called to reply to the allegations raised against him ... all evidence must be allowed to be placed before this Honorable Court to decide the merits and legal validity of what the witnesses would say in Court in relation to the matter in question".

[27] In my view, Mr Pohiva's approach, while advanced in good faith, is misconceived. As already pointed out, these were committal proceedings, held to determine whether there was sufficient evidence to send the Respondents for trial on the criminal charges laid against them. Those proceedings do not provide for oral evidence to be heard. Had the Respondents been committed for trial then Mr Pohiva would have been free to call his witnesses. Even then, however, none of the Respondents could have been compelled to testify or to produce such documents as the prosecution wished to see. This was a *criminal* prosecution, not a court of enquiry or a motion for judicial review. Therefore, the burden was always on the prosecution to show that there was a case to answer. The prosecution could not call upon the Defendants to bolster their own case. Grounds (a), (c) and (d) are founded on a misunderstanding of the applicable statutory provisions: the power of a Magistrate to exercise enhanced jurisdiction is dependent on the consent both of the prosecution and the accused, in this case the latter was not forthcoming. There is no power to

compel the Attorney General to undertake a prosecution against his will. The Official Secrets Act has nothing at all to do with the charges filed by the Appellant. The Magistrate was fully entitled to taken into account document 288 when considering 111(2). Most fundamentally of all, however, it is simply not the case that secrecy or a failure to follow proper legal procedures, of themselves, are evidence of dishonesty. It must be borne in mind that the deliberations of Cabinet have traditionally, and for obvious reasons, been conducted on a confidential basis: even the most progressive Freedom of Information legislation does not allow instant untrammelled access to the inner workings of the executive. Furthermore, "proper legal procedures" frequently fail to be observed either from ignorance or inadvertence and in neither of these cases will dishonesty be disclosed.

[28] In my opinion, the Appellant's criminal cases against these four accused/respondents suffered from several fundamental flaws. First, no copy of the Satellite Agreement entered into between Tongasat and CECEC referred to in document 112 nor of the 14 July 2008 agreement (160A) nor the 30 April 2009 agreement (160) was produced. Since it is obvious from its contents that the agreement of 19 April 2011 (111) merely recorded a payment pursuant to a previous agreement containing all the agreement's essential terms and conditions, it is clear, in my opinion, that the Appellant failed to exclude the possibility, indeed the probability, that the payment to Tongasat was made pursuant to a perfectly valid inter-governmental agreement and was not, therefore, made "without color of right" or dishonestly.

[29] Secondly, it is far from clear to me that these monies were indeed public money as is claimed. If indeed, as was not excluded by the failure to produce the foundation agreements, the money was paid by the Chinese Government for a particular purpose, then it appears likely that these were moneys paid in trust: "money that belongs to or is due to any person and is collected by the Government under any agreement between the Government and that person" (Public Finance Management Act 2002-sections 2 and 9). In this context it has again to be emphasized that in criminal committal proceedings it is not for the accused to prove that they acted lawfully, rather it is for the prosecution to present a *prima facie* case that they did not. In discussion, Mr. Pohiva accepted that, as a matter of fact, a substantial portion of money spent by the Government of Tonga comes to Tonga in the form of overseas aid. Such grants in aid do not form part of the annual budget presented to Parliament for approval. It might well be argued that it would be highly desirable for the public to have greater knowledge of the sources and amounts of such aid and the way in which such aid is disbursed. It may well be that the obscure way in which these funds were handled (why, for example did Global Trading Company Ltd receive USD $500,000.00?) not unreasonably gave rise to concerns but criminal prosecution is not the correct way "to satisfy the curiosity and special interest of the people".

[30] The remaining ground of appeal, which is that the Magistrate was biased, is, in my opinion, a wholly unsubstantiated and deplorable slur on the integrity and reputation of a well respected Magistrate and should not have been advanced.

[31] Something must be said about the role of the Attorney General in relation to private prosecutions. The right to bring a private prosecution is protected by section

197 of the Criminal Offences Act (Cap 18). This section has been amended on several occasions (Act 18 of 2005; 8 of 1991; 20 of 2007) and currently reads as follows:

> "All prosecutions under this Act may be brought by the Attorney General or the person aggrieved".

Mr. Stanton suggested that Mr. Pohiva was not a "person aggrieved" however, in my opinion, a prominent member of Parliament wishing to bring a matter of obvious public concern to this Court should properly be regarded as such a person. At the same time, however, I am of the view that the present statutory position is unsatisfactory.

[32] In September 2008 Crown Law Office published its "Crown Law Prosecution Code". This code, which is of a type widely accepted internationally, provides guidance to prosecutors on when, and when not, to prosecute. The guidelines are designed to ensure that the very serious step which is the decision whether or not to prosecute is not taken without the most careful consideration. It is obviously wrong for persons to be prosecuted when there is no realistic chance of obtaining a conviction.

[33] At the very beginning of his appeal book, Mr. Pohiva included a copy of a letter dated 29 October 2013 in which he writes to the Attorney General. From that letter it is clear that Pohiva, Stanton and the Attorney General had debated whether the Attorney General should take over Mr. Pohiva's private prosecution. There is a further reference to this issue in paragraph 4 of page 7 of the Respondent's appeal book. I presume that it has arisen from Clause 31 A of the Constitution which provides that the Attorney General shall:

> "be in charge of all criminal proceedings on behalf of the Crown".

[34] In *Blackstone's Criminal Practice* 1993 paragraph D2.36, the main functions of the Attorney General in England and Wales are explained. These include instituting and conducting cases of exceptional gravity or complexity and the taking over of the conduct of private prosecutions. The Attorney General may also stop a prosecution without the need to provide any reason for doing so (*R v Comptroller General of Patents* (1899) 1 QB 909). One of the main reasons justifying the stay of a private prosecution is perceived abuse of process (see *R v Moxon-Tritsh* [1988] Crim. L.R. 46).

[35] I have already pointed out that Mr. Pohiva's impression that the Attorney General could be obliged to conduct his private prosecution is mistaken. Rather, it is the other way around: if the Attorney General is concerned that a private prosecution may violate the principles embodied in the Crown Prosecution Code then he should wish to consider whether he should take it over and discontinue it.

[36] As presently defined by Clause 31 A, the Attorney General's duties in this area seem to me to be somewhat unclear. Does the Clause mean that the Attorney General is in charge of all criminal proceedings, including private prosecutions, on behalf of the Crown, or does it mean that he is only in charge of criminal proceedings actually commenced by the Crown? If the latter, then there has been a constitutional departure

from the position explained in paragraph 34. Given the very wide ambit of section 197 I am of the opinion that all prosecutions, whether private or not, should be within the purview of the Attorney General in order to avoid prosecutions being commenced which clearly do not conform with the Crown's prosecution policy or which, for other good reason, are not in the public interest.

Result

While I accept that Mr. Pohiva launched these prosecutions because of his genuine concern at the way these funds had been disbursed I am satisfied that the evidence that he was able to present, taken at its highest, was not such that a jury properly directed could convict. In other words, there was no case to answer on any of the charges laid. The Magistrate arrived at the correct conclusion and therefore the appeal is dismissed.

Pohiva v Mafi anors

Supreme Court, Nuku'alofa
Scott CJ
CV 75/2014

17 October 2014

Constitutional law – operation of clause 65 of Constitution – could not be avoided – application dismissed

On about 26 April 2014 the second respondents applied to the Magistrate's Court for their costs of the unsuccessful private prosecution by the applicant (see *Pohiva v Tu'ivakano anors* [2014] Tonga LR 9). On about 16 July 2014 the Court found in their favour and on 10 September 2014 $22,000 was awarded to them. On 30 September the applicant filed an ex parte application for leave to move for judicial review of the award. He sought a declaration that the award was "unlawful and invalid" and certiorari to quash it. The application sought a stay of the Magistrate's Court award on the ground that the applicant, a prominent parliamentarian, wished to nominate as a candidate in the General Election. The closing date for nomination was 22 or 23 October which was before the hearing of the application for leave to move for judicial review of the costs award. Therefore the costs award would still be in place on nomination day. The basis of the application was that unless the order awarding costs was set aside, or at the very least stayed, prior to the close of nominations, the applicant would be prevented from standing for election according to the Constitution.

Held:

1. The application for leave was accompanied by a "memorandum of counsel for the Applicant" dated 29 September 2014. The court, on several occasions previously, had pointed out that the filing of memoranda by counsel addressed to the judge was improper, most particularly so in connection with an ex parte application. Direct communication by counsel with a judge whether orally, or by telephone, facsimile, letter or memorandum was unacceptable. In future, such communications would be returned unread to the sender.
2. The principal difficulties faced by the applicant were the plain wording of the clause in the Constitution and the consequences which would flow from its avoidance. Even though the court had jurisdiction to grant interim relief before leave had been granted, the court was of the firm view that it

should not. The merits of the orders which have not been complied with were not relevant to the operation of the clause at all.

3. The clause operated as a complete and final bar to a particular nomination. It contained no provision for its suspension pending review by the court followed by retrospective operation if the review failed. In other words, any candidate who owed money could apply for relief, obtain a stay, nominate, lose his appeal or review without his nomination being at risk of later being declared invalid.
4. Also, the clause was a constitutional provision enacted by Parliament of which the Applicant was 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.
5. The application was dismissed and it was declared that payment by the applicant of $22,000 to the Registrar of the Supreme Court by close of business on 21 October 2014 would be sufficient compliance with Clause 65 of the Constitution.

Case considered:
M v Home Office [1994] 1 AC 377

Statute considered:
Constitution of Tonga (Cap 2)

Rules considered:
Supreme Court Rules 2007

Applicant appeared in person
Counsel for the first respondent : A Kefu SC
Counsel for the second respondents : W Edwards

Decision

[1] On 12 February 2013 the Applicant commenced private criminal prosecutions against the Second Respondents in the Kolofo'ou Magistrate's Court. Details of the serious allegations of theft, conspiracy and receiving are set out in my judgment AM 20 of 2013 dated 17 January 2014.

[2] A preliminary enquiry was held in the Magistrate's Court. The first Respondent presided. On 26 April 2013 an interim judgment dismissing all the charges was delivered and this was followed in May by a more detailed judgment affirming the same result.

[3] On 19 July 2013 the Applicant appealed to the Supreme Court. That appeal was dismissed on 17 January 2014.

[4] On about 26 April 2014 the Second Respondents applied to the Magistrate's Court for their costs of the unsuccessful private prosecution. On about 16 July 2014 the

Court found in their favour and on 10 September 2014 TOP$22,000 was awarded to them.

[5] On 30 September the Applicant filed an ex parte application for leave to move for judicial review of the award. He sought a declaration that the award was "unlawful and invalid" and certiorari to quash it.

[6] The application for leave was accompanied by a "memorandum of counsel for the Applicant" dated 29 September 2014. I have on several occasions pointed out that the filing of memoranda by counsel addressed to the judge is improper, most particularly so in connection with an ex parte application. Direct communication by counsel with a judge whether orally, or by telephone, facsimile, letter or memorandum is unacceptable. In future, such communications will be returned unread to the sender.

[7] Given the subject matter of the application I set it down on 30 September for hearing inter partes on 7 November. On 9 October a second ex parte application, the present application, was filed. It was accompanied by yet another memorandum from counsel for the Applicant. This memorandum incorrectly stated in paragraph 1 that leave to move for judicial review had been granted. It then proceeded (as had the earlier memorandum) to advance submissions in support of the application. This method of placing submissions before the Court is unacceptable.

[8] The application seeks a stay of the Magistrate's Court award on the ground that the Applicant, a prominent parliamentarian, wishes to nominate as a candidate in the forthcoming General Election. The closing date for nomination is 22 or 23 October. This date is prior to the hearing of the application for leave to move for judicial review of the costs award which will therefore still be in place on nomination day.

[9] Clause 65 of the Constitution of Tonga relevantly states:

> "Qualification of Representatives
>
> Representatives of the people shall be chosen by ballot and any person who is qualified as an elector may nominate as a candidate and be chosen as a representative of the electoral constituency in which he is registered save that *no person may be chosen against whom any 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....*" (emphasis added)

[10] The basis of the application is that unless the order awarding costs is set aside, or at the very least stayed, prior to the close of nominations, the Applicant will be prevented from standing for election.

[11] At the hearing of the application on 15 and 16 October Mr. Pohiva was unrepresented. He relied on the memoranda filed by Mr. Harrison who has filed appearance on his behalf but who was not able to attend.

[12] Both Mr. Kefu and Mr. Edwards opposed. Mr. Kefu suggested that the judicial review application was itself procedurally suspect. He also submitted that the Applicant's wish to nominate was an unacceptable ground for staying the costs order.

[13] Mr. Edwards pointed out that Order 39 Rule (4) of the Supreme Court Rules upon which reliance was placed by Mr. Harrison in his memorandum of 8 October only came into play *after* leave had been granted, not as in this case before the application for leave had been dealt with. He questioned whether the Court had any jurisdiction to grant interim relief at this stage. He also suggested that the chances of the award being set aside were slim. It could not be right that private actions be allowed to proceed without there being at least some risk of liability in costs in the event of failure.

[14] In reply, Mr. Pohiva repeatedly affirmed his belief that the costs award was wrongly made. Therefore, he suggested, he was entitled to have it set aside. Furthermore, he was entitled to have it set aside before nomination day in order to exercise his right to stand in the election. In his own written submission filed on 16 October he suggested that the granting of interim relief would not have the effect of circumventing Clause 65. If he was not granted the relief he would suffer great injustice.

[15] The arguments advanced by counsel were helpful and valuable but in my opinion the principal difficulties faced by the Applicant are the plain wording of the Clause and the consequences which would flow from its avoidance. While I am inclined to the view that the Court has jurisdiction to grant interim relief even before leave has been granted (see *M v Home Office* [1994] 1 AC 377). I am of the firm view that in this case it should not.

[16] The Clause 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 appeal or review and which are therefore, at least in theory, still liable to be overturned 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, lose his appeal or review without 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 had 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.

[20] Mr. Edwards indicated that his clients would be content if the amount awarded were to be paid into Court before nomination day. For the avoidance of doubt I declare that such payment will bring the Applicant into conformity with the Clause.

Result:

(1) Application dismissed.
(2) It is declared that payment by the Applicant of TOP$22,000 to the Registrar of the Supreme Court by close of business on 21 October 2014 will be sufficient compliance with Clause 65 of the Constitution.
(3) Second Defendants costs to be taxed if not agreed.

Pacific Properties Ltd anors v K W Ltd

Supreme Court, Nuku'alofa
Scott CJ
CV 73/2013

14 February 2014

Liquidation – company unable to pay its debts – no liquidator named – company to be put into liquidation when name of liquidator provided

The petitioners sought the appointment of a liquidator (as yet unnamed) on the ground that the respondent company was unable to pay its debts. The respondent submitted that none of the events in the definition of "inability to pay debts" in section 296 of the Companies Act 1995 had occurred so therefore it was not shown that the respondent was unable to pay its debts. Also, no liquidator had been named.

Held:

1. Section 296 has been misread by the respondent. This was understandable since the marginal note was clearly misleading. Rather than exclusively describing the condition of inability to pay debts, the section lists the four circumstances in which such inability may be presumed "unless the contrary is proved".
2. While it was correct that no liquidator had actually been named, there was no reason why a suspended order could not be made under section 250(1) to take effect on the name of the proposed liquidator being supplied.
3. Substantial debts were admitted. Repayment was conditional on hoped for receipts from a possible sale of a car, of a boat and from a Ms Liz Sullivan. A disputed claim of TOP$100,000 for improvements was also adumbrated. The court considered that the respondent had not discharged the onus resting upon it to prove its viability. According, there was an order that the company be put into liquidation upon the name of the liquidator being provided to the court by the petitioners.

Cases considered:

Bank of Australia v Hall (1907) 4 CLR 1514
Hymix Concrete Pty Ltd v Garrity (1977) 13 ALR 321
Sutton v Sutton(1883) 22 Ch.D.511
Uddin & Associated Portland Cement Manufacturers Ltd [1965] 2 QB 582

Statute considered:
Companies Act 1995

Counsel for the petitioners	:	W Edwards
Counsel for the respondent	:	Mrs P Tupou

Judgment

[1] The Petitioners, pursuant to Sections 50 (2) (c) and (4) (a) of the Act, seek the appointment of a liquidator (as yet unnamed) on the ground that the Respondent company is unable to pay its debts.

[2] The brief history of the matter is as follows:

(i) Unsigned statutory demand for TOP$11,150 served on the Respondent (wrongly named as K.W. Int. Ltd) on 14 June 2013 on behalf of the First and Second Petitioners;

(ii) winding up petition and supporting affidavits of Kevin Vaifo'ou and John Paul Chapman filed on 30 September 2013 deposing that sums of TOP$5400.00, TOP$2875.00 and TOP$26,780.89 were owed to the First, Second and Third Petitioners respectively by the Respondent;

(iii) email received by the solicitors for the Respondents on 14 June 2013 apparently conceding a debt of TOP$58,400 to the Second Petitioner;

(iv) application to strike out the Petition filed by the Respondent together with supporting affidavit of Neil Jenkin, a director of the Respondent, given notice of a counterclaim amounting to TOP$100,000;

(v) affidavit of supporting creditor Westpac Bank filed on 12 November 2013 exhibiting statutory demand served on the Respondent on 24 June 2013 demanding payment of TOP$9946 owed by the Respondent, also exhibiting a letter from Neil Jenkin apparently acknowledging the debt and also averring that the debt had not been discharged;

(vi) affidavit of John Paul Chapman filed on 19 November 2013 rejecting the Respondent's counterclaim and describing the same as "a concoction";

(vii) affidavit of supporting creditor 'Atunaisa Tu'itupou Takau alleging an unpaid debt of TOP$7800 filed on 26 November 2013;

(viii) copy of judgment in the amount of TOP$41,464.00 entered against the Respondent on 15 November 2013 filed by Mr. Edwards on 26 November 2013;

(ix) written submissions filed by Mr. Edwards on 28 November 2013;

(x) affidavit of Neil Jenkin sworn and filed on 6 February 2014 acknowledging the Judgment debt and the debt to the Westpac Bank but denying owing anything to Mr. Takau;

(xi) written submissions filed by Mrs. Tupou on 7 February 2014.

[3] Mr. Edwards conceded that owing to the 30 day limitation imposed by Section 297 (1) of the Act the Petitioning creditors could not rely on the Respondent's failure to comply with the statutory demand served on 14 June 2013. Instead he relied on Section 297 (2) and submitted that it was plain on the evidence before the Court that the Respondent was unable to pay its debts.

[4] Mrs. Tupou, on the other hand, submitted that "inability to pay debts" is defined in Section 296 subsections (a) to (d). Since Section 297 (1) excluded (2) and it was not alleged that the events described in (b), (c) or (d) had occurred therefore it had not been shown that the Respondent was unable to pay its debts. She also relied on the fact that no liquidator had been named and on the counterclaim raised by Mr. Jenkin.

[5] With respect, it is my opinion that Section 296 has been misread by Mrs. Tupou. This is perhaps understandable since the marginal note is clearly misleading (as to which see e.g. *Sutton v Sutton* (1883) 22 Ch.D.511 and *Uddin & Associated Portland Cement Manufacturers Ltd* [1965] 2 QB 582. Rather than exclusively describing the condition of inability to pay debts, the section lists the four circumstances in which such inability may be *presumed* "unless the contrary is proved" i.e. under Section 297 (2).

[6] While it is correct that no liquidator has actually been named, I see no objection to an order being made under Section 250 (1) suspended but to take effect on the name of the proposed liquidator being supplied.

[7] The alleged counterclaim (not really a "counterclaim" in law since no action has been commenced against the company) raises the question of what it is that the Petitioners are required to prove under Section 297 (2).

[8] In a Decision dated 15 November 2013 (CV69 of 2013) I stated that in these circumstances the company, when faced with the evidence of debts, had to prove that it was able to pay the statutory minimum of TOP$1000 specified by the Companies Liquidation Regulations 1999. I now accept that this statement of the law was incorrect. As explained in "Principles of Corporation Law" Ford & Austin 7th Edn para 20.610 the basic question is whether the company's business is viable: "a company may have an excess of assets over liabilities but its assets may not be readily realizable payment of debts as they fall due". "The Court's task is to decided whether the company is suffering from a temporary lack of liquidity in which case it is not insolvent *(Bank of Australia v Hall* (1907) 4 CLR 1514) or an endemic shortage of working capital *(Hymix Concrete Pty Ltd v Garrity* (1977) 13 ALR 321 or 328").

[9] In the present case substantial debts are admitted. Repayment is conditional on hoped for receipts from a possible sale of a car, of a boat and from a Ms Liz Sullivan. A disputed claim of TOP$100,000 for improvements is also adumbrated. In my opinion the Respondent has not discharged the onus resting upon it to prove its viability. According, there will be an order that the company be put into liquidation upon the name of the liquidator being provided to the Court by the Petitioners.

[10] I will hear counsel as to costs.

Fiva anors v Free Wesleyan Church of Tonga

Supreme Court, Nuku'alofa
Scott CJ
CV 8/2013

14 February 2014

Use of land – risk to public health and water supply if septic tank used – residence built – permanent injunction against use of septic tank

Ha'asini and Hamula were contiguous villages on the coast road at the South Eastern end of Tongatapu with a combined population of about 800. Each village had a water well. The one at Hamula had been out of service for some years. The integrity of the water well at Ha'asini was at issue. The supply of domestic water was governed by Part 5 of the Public Health Act 2008 which imposed upon the Minister the duty to determine which sources of water in Tonga were suitable for public water supply; and regularly to take such steps as may be necessary for ascertaining the sufficiency and wholesomeness of the water supplies. There had been a water committee for many years in Ha'asini and Hamula. The first plaintiff was the current Town Officer and the Chairman of the Committee. Several of the other plaintiffs were present or former members of the Committee. In about 1963 there was an outbreak of typhoid in the villages. After an investigation by an officer of the WHO, the Minister of Lands ordered about 6 or 7 families then living on that area now known as the water field, to relocate. They moved their houses elsewhere and the water field was left unoccupied save for the two buildings, the shop and the residence. In about 2012 the defendant decided that it wished to build a new residence for the local church minister. At a fonu (a village meeting) on 6 June 2012 where the Minister of Lands was present, the Town Officer sought permission for the construction. The Minister agreed subject to a survey; the lease was approved two weeks later. The six plaintiffs sought an interim injunction to prevent the completion of the partly constructed dwelling on the grounds that it represented a risk to the water supply. The court granted an interim injunction preventing the use of the septic tank attached to the partially constructed residence and, on 20 February 2013 the court allowed the defendant to complete the construction of the residence but granted an indefinite order to prevent the use of the septic tank. The fundamental issue between the parties was whether the defendant, having lawfully obtained a lease of the land for the purpose of building its house there should be allowed to enjoy the use of the land and house or whether, in the interests of public health, the house should be removed, or, at the very least, be prevented from discharging waste, including effluent, from its septic tank onto a portion of what, for the last 50 years, has been accepted as the village's water field.

Held:

1. Given the money that has been spent on the construction of the house by the defendant, a charitable organisation, a decision to prevent its use would only be reached with considerable reluctance. However, the court was satisfied that the use of the house was incompatible with continued integrity of the water field and the continued supply of potable water to the neighboring communities.
2. The court accepted that the defendant's lease was unassailable but could not accept that all proper preliminaries were complied with before permission to use the land for residential purposes was granted. The lease was applied for, almost as an afterthought, during "any other business" at the conclusion of the Fono without any proper notice or consultations beforehand. The Minister was not advised, as he should have been, that the area was sensitive and had been the subject of Ministerial intervention before. The Natural Resources division of the Ministry was not consulted, as it should have been. The on-going water supply problems at Ha'asini and Hamula could have benefitted from a rather more pro-active approach by the Ministry of Health.
3. The plaintiffs had several other concerns including the relocation of the water rates shed, the erection of a new water tower close to the road and the pipe running under the house. Those matters did not need to be dealt with by an order of the court: the shed could be relocated elsewhere on the water field; the new tower could be erected south-west of the new residence; the pipe could again be diverted. This action was decided on the basis of a real risk to public health.
4. A permanent injunction was granted preventing the use of the septic tank in its present location or any other location within the boundaries of the water field. The granting of a permanent injunction preventing the use of the septic tank in its present location did not mean that the new house had to be removed. Whether demolition should take place was for the defendant to decide.

Statutes considered:

Land Act (Cap 132)
Public Health Act 2008

Regulations considered:

Water Supply Regulations 1963

Counsel for the plaintiffs : 'O Pouono
Counsel for the defendant : T Fakahua

Judgment

[1] Ha'asini and Hamula are contiguous villages on the coast road at the South Eastern end of Tongatapu with a combined population of about 800. A helpful location map, apparently derived from an aerial photograph was produced by consent

as Exhibit P-G, page 2. This map illustrates the location of two water wells, one in Ha'asini and the other at Hamula. It is the integrity of the former which is at issue in this action, it not being in dispute that the latter has been out of service for some years.

[2] On page 3 of the same exhibit there is another photograph showing the location of the production well in greater detail. From this photograph it can be seen that the well is located towards the Eastern boundary of an open area of land described in the report as a "well field" and referred to throughout the trial as the "water field".

[3] A map of the water field was produced at the trial by consent and a copy is attached to this judgment (Annexure A). The top of the map is West and the bottom East. At the top of the page towards the right is a square box labeled "R-T & Westpac" which I was advised was a cooperative store and a bank, both there for many years (with septic tank attached, but not marked). Towards the bottom left hand side there is a residence and an adjacent square marked "SPT" which is the abbreviation for septic tank. The map indicates the location of the present (new) water source and a water tank (tower). Prior to November 2012 these were the only permanent structures on the water field. A pipe ran underground from the water tower to the main road passing, as it reached the road, four concrete stumps which had once been the foundations of a later-removed water tower and a wooden shed which was the water rates office.

[4] The supply of domestic water is governed by Part 5 of the Public Health Act 2008 which imposes upon the Minister the duty:

> (a) to determine which sources of water in Tonga are suitable for public water supply; and
> (b) regularly to take such steps as may be necessary for ascertaining the sufficiency and wholesomeness of the water supplies.

Section 61 of the Act specifies that "the Minister shall advise the village water committee on all measures required to ensure that the water used in its area is safe for drinking and remains so".

[5] The water committee is the creation of the Water Supply Regulations 1963 made pursuant to the Public Health Act. Regulation 2 requires:

> "the town officer of every village in the Kingdom [to] take steps to organize and form a committee by popular vote of all Tongans over the age of 21 years in the village for the purpose of assisting the village water scheme and to carry out all the necessary work to provide water, particularly for the functions and activities in relation to the health of the people of the village and the village schools".

[6] I heard evidence which I accept that there has been a water committee for many years in Ha'asini and Hamula. The First Plaintiff is the current Town Officer and the Chairman of the Committee. Several of the other Plaintiffs are present or former members of the Committee. I also was told, and accept as proved, that in about 1963 there was an outbreak of typhoid in the villages. After an investigation by an officer

of the WHO, Mr Adams, the then Minister of Lands HRH Prince Tu'ipelehake ordered about 6 or 7 families then living on that area now known as the water field, to relocate. They moved their houses elsewhere and the water field was left unoccupied save for the two buildings, the shop and the residence, referred to in paragraph 3 above.

[7] The reason for evacuating the water field in 1963 is as follows. According to Exhibit P-G (which was not disputed) the water field is elevated to an approximate height of 45m above sea level. The freshwater water table (or Ghyben-Herzberg water lens) is approximately 42.56 metres below the ground surface. The freshwater lens is replenished by rain water falling on the ground and gradually permeating through. It will be obvious that if toxic liquids are discharged onto the land there is a danger that these liquids will also seep down and pollute the lens. It was not in dispute that the greater the discharge of toxic liquids, the greater the risk of pollution. Neither was it in dispute that the closer the discharge is to the well, the more likely it is that the well source will become contaminated. It was also accepted that rain (and other liquids) falling onto the ground has a tendency to run downhill.

[8] In most of the South Pacific Islands, sewage disposal is not reticulated and most households rely on septic tanks. Mr Seventeen Toumo'ua, an expert on their construction, explained to the Court how a septic tank works. Put very simply, untreated waste from a toilet is flushed into the septic tank which is invariably a sealed concrete box located underground and adjacent to the dwelling house. By bacterial, gravitational and chemical processes the waste separates into two parts. The first is a sludge which settles at the bottom of the tank and never leaves the tank until, having gradually built up, it is physically removed and taken away for safe disposal. The other part of the waste (in a septic tank which is working properly) is discharged as a clear liquid from an overflow pipe which itself disperses the liquid over the adjoining area. This liquid, although toxic if consumed, is acceptably clean for gradual introduction into the soil.

[9] It appears that from 1963 to 2012 the evacuated water field was left undisturbed. It came to be regarded as an amenity open space for the village and a place where children played, sports were organized and village fairs located. I understand that responsibility for its upkeep was assumed by the water committee. In about 2012, however, the Defendant decided that it wished to build a new residence for the local church minister.

[10] Viliami Teli Tiseni, is a graduate of the Australia National University. He is a former civil servant and was born and brought up in Ha'asini. The water field is on the other side of the road from his home. From July 2010 until his return to New Zealand in 2012 he was the auditor for the water committee. Tiseni told the Court that on 6 June 2012 a village meeting, or Fono, was held, the purpose of this meeting being to discuss matters connected with the Catholic cemetery. The Minister of Lands was present. Also present was DW2 Sione Foueti who at the time was the Town Officer, the chairman of the water committee and also the Chief Steward of the local Free Wesleyan Church. Also present were one or more of the Plaintiffs. After the main agenda items had been dealt with those present were asked whether there was any other business. At this point Sione Foueti raised the possibility of a piece of

vacant land being granted to the Defendant on which to construct a new residence for the local Church Minister. According to Tiseni, the Minister of Lands immediately agreed, subject to the land being surveyed. The question of the suitability of the construction of this residence on the water field was not raised. Two weeks later the Ministry of Lands advised that a lease had been approved. A copy of a 50 year Crown lease to the Defendant dated 13 June 2013 was produced as Exhibit D-1. The portion of land leased includes the "New FWC Residence and SPT" marked on Annexure A, at the Western end of the water field, close to the main road. It will be seen from this Annex that the water pipe from the water tower to the main road formerly ran under this piece of land and that the water rates office and the old water tower stumps were also located within its boundaries.

[11] When, following the Fono and the grant of the lease, it became more widely known in the village that approval had been granted for the construction of a new residence (and associated septic tank) on part of the water field, a serious dispute arose. There was a substantial body of opinion that approval should never have been granted. In October 2012 there were resignations from the water committee. In November 2012 preparations were made for the construction of the new residence and building began in December. On 5 February 2013 these proceedings were commenced. In affidavits filed in support of an interim injunction preventing the completion of the partly constructed dwelling, the six Plaintiffs, claiming to be present or past members of the water committee complained that the development of the water field by the construction of the residence had proceeded against their wishes and the wishes of many other inhabitants of the villages and represented a health risk to the water supply. The fifth Plaintiff exhibited a petition containing 155 signatories asking for further work on the construction of the residence to be halted. After considering the contents of three affidavits filed in response, I granted an interim injunction preventing the use of the septic tank attached to the partially constructed residence. On 20 February 2013 I allowed the Defendant to complete the construction of the residence but granted an indefinite order, which remains in place, preventing the use of the septic tank. My reasons for granting that order are set out in my written decision of 20 February 2013. On 3 May 2013 the Court travelled to Hamula and Ha'asini and inspected the water field and the developments upon it.

[12] [On 6 May 2013 34 residents of Ha'asini commenced a separate legal action (CV36/2013) claiming that they had been disconnected by the Plaintiffs herein as a consequence of siding with the Water committee and opposing the plan of the FWC. After granting injunctive relief in that matter it was agreed that no further steps would be taken until the outcome of these proceedings was known].

[13] On 18 February 2013 an amended Statement of Claim was filed. The focus of the Plaintiff's case was that the Defendant had constructed its house on the water field despite it being necessary that this area be kept free of development to prevent a further outbreak of typhoid resulting from the release of effluent from the associated septic tank. The Plaintiffs sought the removal of the new house.

[14] A Defence to the amended Statement of Claim was filed on 15 March 2013. The Defendant submitted first, that the Defendant had a perfectly valid lease over the land occupied by new house and that they had obtained the same after complying with

"The Building Code Process, that is the Ministry of Lands and Survey and Natural Resources, Fire Department, Ministry of Health, Ministry of Infrastructure and they approved the situation of the same prior to the construction of the Defendant's residence". Secondly, the Defendant suggested that the Plaintiffs had no locus standi to bring the proceedings. Thirdly, it was argued that the proceedings were brought in the wrong court and should have been brought in the Land Court. Finally, it was submitted that (as may be seen from Annexure A) there were other residences adjacent to the water field which were closer to the well than the new house. Since these posed no risk, how could it be argued that the new residence was a danger to health?

[15] The trial took place on 24 & 25 September 2013 and on 14 & 15 January 2014. Following the hearing, written submissions were filed by counsel for which I am grateful. As will be seen from these submissions, the fundamental issue between the parties is whether the Defendant, having lawfully obtained a lease of the land for the purpose of building its house there should be allowed to enjoy the use of the land and house or whether, in the interests of public health, the house should be removed, or, at the very least, be prevented from discharging waste, including effluent, from its septic tank onto a portion of what, for the last 50 years, has been accepted as the village's water field.

[16] Given the money that has been spent on the construction of the house by the Defendant, a charitable organization, a decision to prevent its use would only be reached with considerable reluctance. I am satisfied however that the use of the house is incompatible with continued integrity of the water field and the continued supply of potable water to the neighboring communities.

[17] I accept that the Defendant's lease is unassailable but I cannot accept that all proper preliminaries were complied with before permission to use the land for residential purposes was granted.

[18] According to PW2 Semisi Moala who referred to Exhibit P-F, there is no doubt that the intention in 1985 was to give the water committee 10 perches of land under the provisions of section 138 (1) of the Land Act. There was also supposed to be an enquiry by the Ministry of Health into the matter but it appears that nothing took place.

[19] PW5 Quddus Fielea, a Planning Engineer with the Tonga Water Board produced a report dated 19 February 2012 in which he expressed the view that "toilets pose a significant threat to local ground water supply systems in Ha'asini.....almost all of the septic tanks are of concrete block construction and they leak.....it is important to identify toilets with the potential to contaminate the water supply well at Ha'asini *especially from the up-gradient side of the well* (emphasis added). Mr. Fielea recommended that:

> "Any additional development works within the vicinity of the reserved area shall not be allowed without any hard evidence that it won't increase the risk of contaminating the ground water supplies".

[20] PW6 Taniela Kula, the Deputy Secretary at the Natural Resources Division of the Ministry of Lands prepared the excellent report Exhibit P-G already referred to. In his opinion, construction of new dwellings with septic tanks within 100 metres of the water supply should not be approved. He accepted that the Ministry had approved the grant of the lease to the Defendant but stated that this approval had been granted without prior reference to and clearance by, his Division. While being cross-examined, Mr. Kula asked: "Is it reasonable to carry on construction in the hope that there will be no contamination or is it better to stop when the risk arises?"

[21] The last witness called by the Plaintiffs was Dr. Siale 'Akauola, the Director of Health. Dr. 'Akauola told the Court that he had not himself carried out an assessment of the situation. He relied on the Senior Inspector of Health Mr. Niu Fakakovikaetau who, on 17 January 2013 had visited the water field and produced a report (Exhibit P-H). This report concluded that:

> "The present situation does not confirm it will affect the water supply from the new construction because the dwelling houses which previously stood and their nearness to the water supply in respect of the new construction and also for some years in its existence.

Answering questions from the Court, the Director admitted that he did not know whether the output from the well had been monitored and he did not know how the land lay, whether, in other words, the new dwelling was on the *up-gradient side of the well*.

[22] The last witness was Sela Fa'u who produced the report prepared by Niu Fakakovikaetau. She told the Court that she did not go to Ha'asini with Niu. In her opinion it was safe to allow the Defendant's new house to be occupied as there were other dwellings already closer to the well. In response to a request by the Court she obtained records (Exhibit D-9) which showed that the well had been tested on 27 & 30 September 2013. These tests revealed a very wide variation of Coliform and E-Coli presence, between 72.7mpn and 574.8mpn and between less than 1mpn and 554.8mpn at tap number 2 on the two dates. She did not know, in January 2014, whether further testing had occurred. When high levels of impurities were found in the water, chlorine was added however she did not know when this had last been done.

[23] With the greatest respect, I do not find that the Ministries of Land and Health have dealt with this matter very satisfactorily at all. I think that it is a pity that the lease was applied for, almost as an afterthought, during "any other business" at the conclusion of the Fono without any proper notice or consultations beforehand. The Minister was apparently not advised, as he should have been, that the area was sensitive and had been the subject of Ministerial intervention before. The Natural Resources division of the Ministry was not consulted, as it should have been. The on-going water supply problems at Ha'asini and Hamula could, in my view, have benefitted from a rather more pro-active approach by the Ministry of Health. The argument that "some houses are already closer therefore it is safe to build another" is plainly illogical: there were already so many straws on the camel's back that one more would not matter. It also overlooks the undisputed fact that the new development is

on the up-gradient side of the well, and therefore effluent would tend to flow towards it.

[24] Rather than prevent the use of this new house outright I asked the expert Seventeen Toumo'ua whether the septic tank could be relocated outside the water field boundary. In view of the distance, about 35 metres, and the need for the outflow to run downhill, he doubted whether this would be feasible. In my judgment it would be unacceptably unsafe to allow the septic tank in its present location to be used. Unless it can be relocated to a place of safe operation the new building should remain unused as a dwelling place.

[25] The Plaintiffs had several other concerns including the relocation of the water rates shed, the erection of a new water tower close to the road and the pipe running under the house. In my view those matters do not need to be dealt with by an order of the Court: the shed can be relocated elsewhere on the water field; the new tower can be erected South-West of the new residence; the pipe can again be diverted. This action has been decided on the basis of what I find to be a real risk to public health. The granting of a permanent injunction preventing the use of the septic tank in its present location does not necessarily mean that the new house has to be removed. Whether demolition should take place is for the Defendant to decide.

Result:

1. Judgment of the Plaintiffs.
2. A permanent injunction is granted preventing the use of the septic tank in its present location or any other location within the boundaries of the water field.
3. I will hear counsel as to costs.

Free Weslyan Church of Tonga v Fiva anors

Court of Appeal, Nuku'alofa
Salmon, Handley, Hansen, and Tupou JJ
AC 11/2014

23 October 2014; 31 October 2014

Civil appeal – prevention of potential nuisance – use of land – not within jurisdiction of Land Court – appeal dismissed

For the full facts, see *Fiva anors v Free Wesleyan Church of Tonga* [2014] Tonga LR 29.

On 14 February 2014 the Lord Chief Justice granted a permanent injunction preventing the use of a septic tank on property of the appellant. The injunction prevented use of the tank in its present location or any other location within the boundaries of the water field supporting the well from which the communities of Ha'asini and Hamula draw their water. The Church appealed that decision.

Held:

1. The court considered that every resident supplied with water from the well would have standing to bring these proceedings. They were all directly affected.
2. The court was satisfied that the proceedings which were brought to prevent a potential nuisance were properly brought in the Supreme Court. The action was one in tort and was not within the jurisdiction of the Land Court.
3. For the reasons clearly enunciated in the judgment of the Chief Justice (at page 29) the injunction was rightly issued. The appeal was dismissed. The respondents were entitled to costs to be fixed if necessary by the Registrar.

Statute considered:

Land Act (Cap 132)

Counsel for the appellant	:	Mr Fakahua
Counsel for the respondents	:	Mr Pouono

Judgment

[1] On the 14th February 2014 the Lord Chief Justice granted a permanent injunction preventing the use of a septic tank on property of the appellant. The injunction

prevented use of the tank in its present location or any other location within the boundaries of the water field supporting the well from which the communities of Ha'asini and Hamula draw their water.

[2] The Church has appealed that decision.

[3] The facts of the case are set out clearly in the decision of the Chief Justice and it is unnecessary to repeat them in detail in this judgment. Suffice to say that in about 1963 there was an outbreak of typhoid in the villages and after an investigation by an officer of the World Health Organisation 6 or 7 families then living on the area now known as the water field were required to relocate. The reason for this was that the communities in the village use septic tanks systems to treat and discharge their sewage and relocation of those villagers removed the risk of contamination of the water table and the well from their septic tanks. There remained in the water field a shop and a residence which, although they had septic tanks, were so located that they were not thought to be a problem. This was the situation from 1963 to 2012 when the appellant decided it wished to build a new residence for its local minister.

[4] The Church persuaded the Minister of Lands to make Crown land at the higher end of the water field available for the residence and the church began the construction of the house. Local residents and members of water committee set up to administer the management of water supply became concerned that the septic tank proposed for the house would contaminate the water supply. In February 2013 proceedings were commenced seeking an interim injunction preventing the completion of the partly constructed building. The Chief Justice granted an interim injunction preventing the use of the by now constructed septic tank. Later the same month the Judge allowed the appellant to complete the construction of the house but granted an indefinite order preventing use of the tank.

[5] The respondent's statement of claim, after pleading the basic facts, sought removal of the house. Trial of the case took place in September 2013 and January 2014.

[6] Expert evidence was called by each side. The respondents (plaintiffs in the Court below) called evidence from a planning engineer with the Tonga Water Board and the Deputy Secretary at the Natural Resources Division of the Ministry of Lands both of whom expressed concern that the septic tank, if used, had the potential to contaminate the water supply. The respondents also called the Director of Health who relied on a report by a Senior Inspector of Health who had concluded that the situation of the tank "does not confirm it will affect water supply...". The appellant called evidence from an engineer who described how the tank had been built and gave his opinion that it would not leak.

[7] The Judge preferred the evidence of the experts from the Water Board and the Natural Resources Division and concluded that "... it would be unacceptably unsafe to allow the septic tank in its present location to be used." A permanent injunction in the terms set out above was granted.

[8] For the sake of completeness we mention that proceedings have been commenced in the Land Court seeking orders relating to the land.

The appellant's arguments

[9] First Mr Fakahua argued that the respondents did not have standing to bring the proceedings and that there was no resolution of the Water Committee to bring the claim. This argument cannot succeed. The appellants are all residents of the villages and some are members of the Water Committee. In our view every resident supplied with water from the well would have standing to bring these proceedings. They are all directly affected.

[10] Secondly, relying on s.138 of the Land Act, Mr Fakahua argued that the proceedings should be in the Land Court and that the committee should request the Minister to reserve the water area for Public Health purposes. We are satisfied that the proceedings which were brought to prevent a potential nuisance were properly brought in the Supreme Court. The action was one in tort and was not within the jurisdiction of the Land Court.

[11] We are satisfied for the reasons clearly enunciated in the judgment of the Chief Justice that the injunction was rightly issued. The appeal is dismissed. The respondents are entitled to costs to be fixed if necessary by the Registrar.

Rex v Lauka anor

Supreme Court, Nuku'alofa
Cato J
CR 119-120/2013

17 March 2014

Sentencing – passport offences – guilty plea to attempt

The prisoners appeared for sentence on different charges but charges arising out of the same transaction. Mr Tu'itupou pleaded guilty to one count of attempted conversion by a government servant. He attempted to convert to the use of others two blank passports worth $172.40 from the Immigration Division of the Ministry of Foreign Affairs and Trade, which had been entrusted to him by virtue of his employment as an Immigration officer. Ms Laukau pleaded guilty to a single charge of attempted forgery of those passports. Both pleaded guilty at the earliest opportunity to the charges.

Held:

1. The paramount sentencing consideration was that corrupt scams went to the heart of and impugned the integrity and security of Tonga's passport regime and machinery of border control. Further, if those passports had been falsely issued then they could have been used for illicit purposes overseas. Offending of this kind had the potential to bring into disrepute Tonga in the eyes of foreign countries whose border controls and security depends today very much on the integrity of passports. It was very damaging and serious offending against Tongan interest, both internally and externally as it related to foreign countries.
2. Deterrence and denunciation of Mr Tu'itupou's activity and the protection of the integrity of the Tongan passport regime must be the principal sentencing considerations. The starting point was fixed at 4 years and three months imprisonment. The mitigating factors were his early guilty plea, the fact he was remorseful understandably for the role he played and the fact he was a first offender. The sentence was reduced by 12 months to three years three months imprisonment. The final nine months of his three year three month period of imprisonment was suspended on condition he was not to commit any further crime punishable by imprisonment for a period of two years.
3. The court viewed Ms Laukau's role as similarly serious and her sentence must act as a deterrent to others minded to enter into passport scams. The

court considered a starting point of three years was appropriate. The sentence was reduced by 12 months for her early guilty plea, expression of contrition and previous good character. The final nine months of her sentence was suspended on the condition that she commited no further offences punishable by imprisonment for two years.

4. The court noted that, in both cases, the prisoners pleaded guilty to attempts only. Where, however, persons were charged with completed offences, and their actions led to false passports being issued, passport offending by persons in trust and those complicit with them may well in appropriate cases attract higher penalties than those imposed here.

Statute considered:
Criminal Offences Act (Cap 18)

Counsel for the Crown : Mr Sisifa
The first defendant was unrepresented
Counsel for the second defendant : Mr Pouono

Sentence

[1] The prisoners appear for sentence on different charges but charges arising out of the same transaction. Mr Tu'itupou pleaded guilty to one count of attempted conversion by a government servant contrary to section 53 (1) (3) (a) of the Criminal Offences Act. The particulars were that he did attempt to convert to the use of others two blank passports worth $172.40 from the Immigration Division of the Ministry of Foreign Affairs and Trade, which had been entrusted to him by virtue of his employment as an Immigration officer. Ms Laukau pleaded guilty to a single charge of attempted forgery of those passports contrary to section 170 (1) and (3) of the Criminal Offences Act.

[2] Both pleaded guilty at the earliest opportunity to the charges. Both have expressed contrition, and both have no previous convictions. These are important considerations in mitigation of sentence.

[3] However, in my view, the circumstances of the offending were serious. Mr Tu'itupou was a reasonably senior officer and employee of the Immigration section of the Ministry. Whist there, he was involved in a joint unlawful enterprise with Ms Laukau and possibly others to obtain false passports. He obtained and gave the uncompleted passports to Ms Laukau whose role was to arrange with a third party to insert photographs details of Chinese nationals into the passports. Ms Laukau gave the photographs to the third party promising her between $5000 - $10,000 for her part in the scam, acted as a whistle blower and informed the police. Mr. Tu'itupou said that Ms Laukau would get $1500 for her role in securing the false passports. Ms Laukau appears, so she says, to have been co-opted into the scheme by a person with whom she had formed an association since returning to Tonga from United States in 2006, and for whom she had worked. I do not know how much Mr Tu'itupou expected to gain for his role in this corrupt scheme, or for that matter Ms Laukau but I

infer that for a government employee of reasonably senior rank to become involved it must have been reasonably substantial.

[4] Like Ms Laukau, on being confronted by police with his role, he admitted to it. Indeed, it seems he would have had little other choice because, when arrested, Ms Laukau handed over her mobile phone which recorded text messages she had exchanged with Mr Tu'itupou over the transaction.

[5] The offending as I say is serious. I was informed by Mr Sisifa that this may be the first case for sentence involving an attempt by a government officer to secure a false passport. Mr Tu'itupou was charged only with attempt, perhaps generously, because it seems he did secure and hand over the incomplete passports which would appear to have completed the offence of conversion, they being intended to become eventually the property of the Chinese nationals, once they had been forged with false identities. Although the corrupt object was exposed and frustrated, Mr Tu'itupou's role in it was complete. The effect of his pleading guilty to attempt, however, is that he is exposed to a maximum sentence for the offence of half of the maximum for the completed offence being in his case five years only, as opposed to 10 years imprisonment. For her role also categorized in her case correctly as an attempt, the maximum penalty Ms Laukau is exposed to is three and half years and not 7 years as would be the case for a complete rather than inchoate offence.

[6] I consider in the case of both prisoners, the offending merits starting points near to the maximum available for the attempts. The paramount sentencing consideration in my view is that corrupt scams of this kind go to the heart of and impugn the integrity and security of Tonga's passport regime and machinery of border control. Further, if those passports had been falsely issued then they could have been used for illicit purposes overseas. Offending of this kind has the potential to bring into disrepute Tonga in the eyes of foreign countries whose border controls and security depends today very much on the integrity of passports. It is very damaging and serious offending against Tongan interest, both internally and externally as it relates to foreign countries.

[7] It is made worse in Mr Tu'itupou's case by the fact that he had been an immigration officer for many years, a position he now justifiably has lost. He has been involved in a very serious breach of trust. Deterrence and denunciation of his activity and the protection of the integrity of the Tongan passport regime must be the principal sentencing considerations. The starting point I fix at 4 years and three months imprisonment.

[8] The mitigating factors are his early guilty plea, the fact he is remorseful understandably for the role he played and the fact he is a first offender. I have considered all the other individual factors. He seems to have had a good career up until this point, and he is a parent of a number of children. Fortunately for his family, I am informed his wife holds a senior employment position in Tonga and will be able to support the children whilst he is in a prison and into the future. He has lost his source of income which is an incident of his offending, but not a matter I can give any regard to by way of mitigation. For all these factors, I reduce his sentence of four years three months imprisonment, by 12 months to three years three months imprisonment.

[9] I now, in his case, come to consider whether I should suspend any part of his sentence. I consider it unlikely he will reoffend. Counsel advises me that he has already embarked upon a course of study. I accept he is contrite, he has pleaded guilty, and is a person likely to achieve rehabilitation. However, the serious nature of his offending and breach of trust requires me to temper the period of suspension. I suspend the final nine months of his three year three month period of imprisonment on condition he is not to commit any further crime punishable by imprisonment for a period of two years.

[10] In so far as Ms Laukau is concerned, I view her participation in this corrupt scheme as also very serious. Although she may, as she said on sentence and in remarks to her probation officer, have been seduced into committing this offending by an associate who is not before the Court, I do not accept for one moment her explanation that she really did not appreciate how serious the offending was. She was prepared to offer substantial sums of money to the person who she had asked to fraudulently complete the passports, and she cannot have believed, in those circumstances, that what she was doing did not carry risk and was other than serious offending. Like Mr Tu'itupou she would seem to have succumbed to the prospect of earning easy money and that corrupted and turned her from a formerly law abiding citizen of mature years into corrupt criminal. Like Mr Tu'itupou this has been a significant fall from grace. I view her role in this corrupt enterprise as similarly serious and her sentence must act as a deterrent to others minded to enter into passport scams. I consider a starting point of three years is appropriate in her case.

[11] I also for her early guilty plea, expression of contrition and previous good character discount the three year starting point by 12 months making her sentence two years imprisonment.

[12] I have also considered the remarks concerning her background in the probation report, the fact she spent many years in America before settling back in Tongan in 2006, her former good character and the fact she has recently married, and associated references but the objectively serious factors in my mind negate any further discount. She was prepared on her own admission to offer large sums of money for the corrupt scam to be completed, and thereby corrupt a third party which is a serious matter. But for the honesty of the third party who should be commended for her integrity, and who informed the police, two false Tongan passports would likely have found their ways into the hands of underserving people.

[13] In her case, I have considered the question of suspension also. Like Mr Tu'itupou, she has pleaded guilty, shown remorse, and I consider is worthy or rehabilitation, but the period of suspension must be tempered also by the seriousness of her actions. The final nine months of her sentence is suspended on the condition also that she commits no further offences punishable by imprisonment for two years.

[14] I also note that, in both cases, the prisoners pleaded guilty to attempts only. Where, however, persons are charged with completed offences, and their actions lead to false passports being issued, passport offending by persons in trust and those complicit with them may well in appropriate cases attract higher penalties than those imposed here.

[15] I, accordingly, sentence Mr Tu'itupou to three years and three months imprisonment and I suspend the final 9 months imprisonment on condition that he commit no further offences punishable by imprisonment for a period of two years.

170 [16] I sentence Ms Laukau to two years imprisonment and I suspend the final 9 months imprisonment on condition that she commits no further offences punishable by imprisonment for a period of two years.

Penitani v Police

Supreme Court, Nuku'alofa
Cato J
AM 34/2013

24 March 2014

Sentencing – appeal on grounds of excessive compensation order – compensation order merited - varied to give appellant more time to pay

The appellant, at the time of the offence of theft, was a serving police officer. He had been convicted of stealing a memory card out of the complainant's phone. She was a fellow police officer. Initially, the appellant denied having done so but eventually he admitted he had done so. He returned the phone and later the card. Although he gave the complainant back the card in the meantime he had distributed to other police officers very personal material that she had stored in the memory. The appellant pleaded guilty to the offence and the Magistrate sentenced him to pay compensation of $500 to the complainant within two weeks and in default of payment serve three months imprisonment. Also, he was placed on probation for good behaviour for three months. The appellant appealed against sentence on the grounds that the compensation order was manifestly excessive.

Held:

1. Although the value of the card was only $20, the value was of much less importance than the other factors. The dissemination of private personal material to other members of the force considerably aggravated his offending. Without the theft, he would not have had access to this very private material. The compensation order was entirely merited and very appropriate.
2. The order of the Magistrate was varied from two weeks to three months to enable the appellant to pay the order of $500 compensation because he was not in gainful employment at the moment. In default of payment within three months he was sentenced in default to one month imprisonment. This was varied because in 2012 the maximum amount of compensation was increased from $500 to $5000, whilst at the same time the maximum default period was reduced from 12 months to three months only. The court amended the default period so that it would bear a reasonable relationship with the quantum of compensation ordered.
3. The court allowed the appeal but only to the extent of varying the Magistrates' order to give the appellant three months to pay the

compensation of $500, and in lieu of three months imprisonment in default, one month imprisonment was substituted in default.

Statute considered:

Criminal Offences Amendment Act 2012

Counsel for the appellant	:	Mr Pouono
Counsel for the respondent	:	Ms Moa

Judgment

1. This appeal was against sentence. The appellant, at the time of the offence of theft, was a serving police officer. He had been convicted of stealing a memory card out of the complainant's phone. She was a fellow police officer. Initially, the appellant denied having done so but eventually he admitted he had done so. He returned the phone and later the card. Although he gave the complainant back the card in the meantime he had distributed to other police officers very personal material that she had stored in the memory. The appellant pleaded guilty to the offence and Magistrate Mafi sentenced him to pay compensation of $500.00 to the complainant within 2 weeks and in default of payment serve three months imprisonment. Also, he was placed on probation for good behavior for three months.

2. The grounds for the appeal against sentence was that because the card had been returned and was worth only $20.00 the compensation order was manifestly excessive. Mr Pouono raised before the Magistrate that the appellant was looking after his elderly parents and was the breadwinner for the family. He had been suspended from the police force.

3. I do not consider that the Learned Magistrate erred in the sentence he imposed in principle; but in two lesser respects I vary the sentence imposed for the reasons given below.

4. Quite aside from the fact that his was a serving police officer committing an offence of dishonesty in a professional setting, the dissemination of very private and personal material to other members of the force would be very distressing, if not humiliating, for the complainant. Although the value of the card was only $20.00, in the circumstances of this case, I agree with the Magistrate that the value was of much less importance than the other factors I have mentioned. The dissemination of private personal material to other members of the force considerably aggravated, in my view, his offending. Without the theft, he would not have had access to this very private material. I consider the compensation order was entirely merited and very appropriate.

5. I have ascertained from Mr Pouono this morning that the appellant's wife is in gainful employment and he should be well able to pay the compensation to the complainant, in my view. I vary the order of the Magistrate from two weeks to three months, however to enable him to pay the order of $500.00 compensation because he is not in gainful employment, it seems, at the moment. In default of payment within three months as the Magistrate ordered, he is sentenced in default to one month

imprisonment. I vary the period in default because under the 2012 amendment, Parliament saw first to increase the maximum amount of compensation from $500.00 to $5000.00, whilst at the same time reducing the default period from 12 months to three months only. (sections 2 and 3, Criminal Offences Amendment Act 2012) It seems to me that three months default should apply to higher awards of compensation than the $500.00 compensation ordered here. In other words, the default period should bear a reasonable relationship with the quantum of compensation ordered.

6. Mr Pouono did not seriously contend that ordering him to be on probation for good behaviour for 12 months was wrong, in the circumstances, either.

7. For these reasons, I allow the appeal but only to the extent of varying the Magistrates' order to give the appellant three months to pay the compensation of $500.00, and in lieu of three months imprisonment in default, I substitute one month imprisonment in default.

Food4Less (Tonga) Ltd v 'Ake anors

Land Court, Nuku'alofa
Scott P and Mrs Assessor Kavaliku
LA 10/2013

31 March 2014

Land law – application for specific enforcement of lease – rent information in form submitted to Cabinet was false – contrary to public policy to enforce agreement

The plaintiff operated a chain of supermarkets in Tonga. Its managing director was Mr Prasad. The plaintiff was associated with Food4less (Fiji) Limited of which Mr Prasad was also the managing director. Mr Prasad wished to acquire a piece of land in order to enable him to expand his operations in Tonga and manage them more efficiently. It came to his attention that 'Ake's land might be suitable. He made enquiries and met with both 'Ake (who lived in Fiji) and Dr Malakai who held a limited power of attorney. On 23 May 2013 the plaintiff commenced proceedings and sought (a) specific performance of the "agreement for lease made on 6 February 2013 between the plaintiff and the first defendant and the lease approved by Cabinet on 1 March 2013" and (b) an order restraining the defendants from dealing in any way with the land approved for lease and from applying for the cancellation of Cabinet's approval. The parties agreed in principle that the plaintiff would lease a portion of the first defendant's land. Such an agreement could not be legally effected without an application being made in the manner prescribed by the Act. Both Prasad and 'Ake signed Form 9 which was the essential first step towards obtaining the lease. When the proposal was placed before Cabinet, the rent information as provided was known to be false. Unless detected, the result of this falsehood would have been that the Minister of Lands would only have collected 10% of $500 ($50 under Section 57(3) each year) whereas, if the true rental had been included the Minister would have been entitled annually to collect 10% of $2500 ($250 per annum).

Held:

1. It might be suggested that the amounts involved in the deception were relatively small. However it was not the amounts which were of primary importance, it was rather the fact that the plaintiff and the first defendant knowingly provided false information to the Minister and to Cabinet knowing that the false information, if acted upon, would not only result in the lease being granted but in the Ministry being defrauded of the rental deductions properly due to it.

2. 'Ake admitted signing the Form knowing that it was to be submittted in due course for approval. It was plainly to Prasad's advantage to have lease approved and, if it could be arranged for 'Ake to receive hidden benefits then he would clearly be more ready to enter into the agreement. The parties to the agreement acted unlawfully in concealing the true position from the Minister and from Cabinet. It was contrary to public policy and the long standing policy of the Courts to enforce the agreement in any way. Accordingly the plaintiff's action failed.
3. The plaintiff and 'Ake had agreed in principle that the land would be cleared, even if the remaining terms of the agreement were unclear. In all the circumstances of the case it was not just to award the sum claimed by the first defendant. The counterclaim also failed and was dismissed.

Cases considered:

Brown v Dunsmuir [1994] 3 NZLR 485
EuroDiam Ltd v Bathurst [1990] 1 QB 1

Statute considered:

Land Act (Cap 132)

Counsel for the plaintiff	:	Lord T Tupou KC
Counsel for the first defendant	:	Mrs P Tupou
Counsel for the second and third defendants	:	Mr 'A Kefu SC

Judgment

[1] The First Defendant ('Ake) is the registered holder of a tax allotment at Haveluloto with an area of 8 acres, 0 Roods and 14.8 perches. 'Ake is a marine engineer who lives at Soa Village in Ra, Fiji. His father was the former registered owner of the land. His parents separated when he was quite young and since that time he has lived with his mother in Fiji where he was born. He has joint Tongan/Fijian citizenship but had not visited Tonga or seen his land until the present dispute arose. Upon his father's death he inherited the land. His interests in Fiji were looked after by his uncle Dr. Malakai 'Ake (Dr Malakai) in whose favour he executed a limited power of attorney in November 2009. [During the preparation of this judgment the sad news was received that Dr Malakai had passed away].

[2] The Plaintiff operates a chain of supermarkets in Tonga. Its Managing director is Mr Rudra Prasad (Prasad). The Plaintiff is associated with Food4less (Fiji) Limited of which Prasad is also the Managing director.

[3] It is not disputed that Prasad wished to acquire a piece of land in order to enable him to expand his operations in Tonga and manage them more efficiently. It came to his attention that 'Ake's land might be suitable. He made enquiries.

[4] Dr Malakai produced without objection an affidavit sworn by him on 12 June 2013. In paragraphs 10 to 18 of the affidavit he described how he had met Prasad in Nuku'alofa in late 2011. Prasad explained that he was interested in leasing part of the land. Although there was a measure of agreement about the amount of the premium

and rent to be paid for three acres of the land, Prasad thought that the amounts requested were too high and said he wanted "to think about it". Shortly after, an employee of Prasad contacted Dr Malakai asking him for 'Ake's telephone number. He was given the number of someone who would know how to reach him.

[5] Prasad told the Court that in March 2011 he travelled to Soa village where he first met 'Ake. There was a general discussion about a 30 year lease over the tax allotment. 'Ake then referred Prasad to his cousin Elini and this is turn led to renewed discussions with Dr Malakai. These did not, however, succeed as the amount being asked by Dr Malakai was still too high.

[6] Towards the end of 2012 Prasad again approached 'Ake and this time he invited him to visit his office at Rodwell Road, Suva. It seems two meetings took place in Suva, on 1st and 6th February. On 1st February Prasad gave 'Ake $1000. A receipt for that amount P-12 was produced endorsed on a plan of the allotment. On the same day Prasad presented a Memorandum of Understanding (P35-38) which was signed by 'Ake on 6 February and witnessed but which, according to Prasad was not signed by him until after he had returned to Tonga.

[7] On 6 February 'Ake also signed Lands Department Form 9 (copy produced as P-27) which is the official Form which is to be completed when an application is made for the grant of a lease. As will be seen from the Form it was received by the Ministry of Lands on 20 February 2013. It is signed by Prasad as well as by 'Ake. It seeks approval for the lease, for a term of 20 years of 3 acres 1 Rood 2.87 perches of the allotment at an annual rental of TOP$500.00.

[8] On 8 March 2013 the Secretary for Lands advised the Plaintiff that on 1 March 2013 Cabinet had approved the application "effective – date of registration". The Plaintiff was advised in the penultimate paragraph of the letter that "the Ministry will execute all relevant survey requirements on this lease application before registration". A copy of the advice is Exhibit P-34. It is not in dispute that Section 126 of the Land Act provides that:

> "No lease, sub-lease, transfer or permit until registered in the manner hereinafter prescribed shall be effectual to pass or affect any interest in land: [proviso not applicable]".

[9] PW2 Dharmendra Prasad told the Court that he is the General Manager of Moapa Enterprises, a company associated with the Plaintiff. Upon receipt of the 8 March letter from the Secretary of Lands he went to the Lands Office. After returning from the office a bulldozer was sent in and 'Ake's land was cleared. According to a certificate supplied by the Ministry of Agriculture, Food, Forestry and Fisheries (copy D-25) a substantial number of productive trees including coconuts, ivi, breadfruit and light lychees were uprooted totalling in value altogether TOP$172,237.05.

[10] Dr Malakai, who had grown up on the land, was very distressed to see what had been done to it. He got in touch with his nephew 'Ake and with his solicitor, Mrs Tupou. On 11 April 2013 Mrs Tupou wrote to the Minister of Lands seeking cancellation of Cabinet approval to the grant of the lease.

[11] On 23 May 2013 the Plaintiff commenced these proceedings. Principally, the Plaintiff sought (a) specific performance of the "agreement for lease made on 6 February 2013 between the Plaintiff and the First Defendant and the lease approved by Cabinet on 1 March 2013" and (b) an order restraining the Defendants from dealing in any way with the land approved for lease and from applying for the cancellation of Cabinet's approval.

[12] On 14 June 2013 no orders were made on the injunction application after undertakings by the Third Defendant not to process the grant of the lease further and by the Plaintiff not to enter the land, pending disposal of the action, were accepted. On 12 July 2013 I allowed an application by the then Second Defendant, Dr Malakai, to be dismissed from the suit.

[13] On 28 August 2013 a further amended Statement of Claim was filed by consent. A Defence ("Reply") was filed on 9 October by 'Ake. No Defence has been filed by the present Second and Third Defendants who, with the agreement of the other parties, undertook to abide by the result of the action.

[14] The trial took place on 28 and 29 January 2014. Following the conclusion of the trial both counsel filed helpful written submissions for which I am grateful.

[15] Much of the evidence at the trial was directed at the terms of the agreement which the Plaintiff asserted had been reached and which the First Defendant denied. As has already been noted the original Statement of Claim propounded an agreement (entitled Memorandum of Understanding) signed by 'Ake on 6 February 2013 (Exhibit P-35). Prasad however told the Court that the parties had in fact entered into a second agreement and that this agreement, a copy of which was produced as Exhibit A, was signed on 9 April 2013, after the land had been cleared. The second agreement is relied on in paragraph 5 of the further Amended Statement of Claim as well as an additional oral agreement between the Plaintiff and 'Ake said to have been reached in February 2013 in Suva. Prasad sought specific performance of the agreements while 'Ake who claimed that the first Memorandum did not represent a concluded agreement but merely outlined some areas of general agreement, that the second agreement was a forgery and that the oral terms of the agreement were not those alleged by the Plaintiff, counterclaimed for the value of the productive trees uprooted from his land.

[16] It was not however, the evidence directed at the parties' principal contentions which ended up being the primary concern of the Court; rather it was the undisputed fact that Prasad and 'Ake when completing and submitting Form 9 to the Minister of Lands for presentation to Cabinet for its approval did not state the truth.

[17] The first agreement (paragraph 5) states that the annual rental for the land was to be $500 and the figure is the same in the second agreement. But in paragraph 5 of the further Amended Statement of Claim the Plaintiff pleads that it was orally agreed that an additional sum of $2000.00 would in fact be paid. To questions from the Court Prasad gave the following answers:

> "We did not record the oral terms in the written agreement because the First Defendant only wanted [a premium] of $75,000 to be shown to the

> Lands Department in Tonga. He wanted the balance paid in Fiji. He said he had no bank account in Tonga and wanted to be paid in Fiji. He was to be paid in Fiji dollars. At paragraph 5 [the agreement] says $500. I agree that the Lands Department was getting less than it was entitled to under Section 57(3) of the Land Act. When the $500 was disclosed in Form 9 it was false. I knew that when Form 9 was submitted. I knew when I received [Document P-34] that Cabinet had acted on the false information provided".

In answer to questions by Lord Tupou, Prasad stated:

> "We mutually agreed to Form 9 being filled out in this way. We both agreed".

[18] When 'Ake gave evidence he told the Court:

> "When I read the first MOU I understood from it that he would lease 3 acres at $75,000 for each acre for 20 years. Rudra said that in our MOU we will note down $75,000 for three acres but in our mutual agreement it would be $75,000 for each acre. He said more money would be taken away if everything we discussed was put on paper.
>
> We agreed on $2500 rent but Lands would take tax and the rest would be given to me in Fiji.
>
> He said he knows how the law works in Tonga. He said write $500 and the rest I take in Fiji".

Later, shown Form 9 (Document P-27) he stated:

> "I see P-27. I recognise it. The only things that were filled in [when I last saw it] was 2 acres for 20 years at $500 per annum, Tongatapu, Fielakepa and the number on the side".

[19] After all the evidence had been heard and it was agreed that written submissions would be filed I raised my concerns. While the parties did not agree on the precise terms of the agreement reached, it was not in issue that they did agree in principle that the Plaintiff would lease of portion of the First Defendant's land. Such an agreement could not be legally effected without an application being made in the manner prescribed by Section 124 and Schedule IX of the Act. Both Prasad and 'Ake signed Form 9 which was the essential first step towards obtaining the lease. When the proposal was placed before Cabinet, the rent information as provided was known to be false. Unless detected, the result of this falsehood would have been that the Minister of Lands would only have collected 10% of $500 i.e. $50 under Section 57(3) each year whereas, if the true rental had been included the Minister would have been entitled annually to collect 10% of $2500 i.e. $250 per annum.

[20] It might be suggested that the amounts involved in this deception were relatively small. In my view however it is not the amounts which are of primary importance, it

is rather the fact that the Plaintiff and the First Defendant knowingly provided false information to the Minister and to Cabinet knowing that the false information, if acted upon, would not only result in the lease being granted but in the Ministry being defrauded of the rental deductions properly due to it.

[21] Both counsel in their written submissions argued that their clients should not suffer any detriment by reason of the falsehood perpetrated. Mrs Tupou suggested that 'Ake did not know that Form 9 had actually been submitted to the Ministry while Lord Tupou suggested that the only person to benefit from the deception was 'Ake since it was he who was receiving the rent. I cannot accept either of these arguments. 'Ake admitted signing the Form knowing that it was to be submittted in due course for approval. It was plainly to Prasad's advantage to have lease approved and, if it could be arranged for 'Ake to receive hidden benefits then he would clearly be more ready to enter into the agreement. In my opinion, the parties to the agreement acted unlawfully in concealing the true position from the Minister and from Cabinet. It my opinion it would be contrary to public policy and the long standing policy of the Courts to enforce this agreement in any way; *ex turpi causa non oritur actio* (see eg *EuroDiam Ltd v Bathurst* [1990] 1 QB 1; *Brown v Dunsmuir* [1994] 3 NZLR 485. Accordingly the Plaintiff's action fails.

[22] There remains the counterclaim. As pointed out by Lord Tupou the Crop Compensation Act 2007 which was advanced as providing the statutory basis upon which the value of the uprooted trees was based, appears not to exist. Neither counsel was able to locate a copy and no such Act appears in the 2011 Revised List of Legislation prepared by the Attorney General or in the collection of 2007 Acts held by the Supreme Court. Without this alleged statutory basis, the values attributed to the trees appear to be arbitrary. Furthermore, there was no evidence that the trees which were uprooted were in fact used by 'Ake for income-generating purposes. It seems likely that this valuable piece of land will in due course be used for commercial purposes; the clearing of the land will in all likelihood have enhanced its value. As already pointed out, the Plaintiff and 'Ake had agreed in principle that the land would be cleared, even if the remaining terms of the agreement were unclear. In my opinion in all the circumstances of this case it would not be just to award the sum claimed by the First Defendant. The counterclaim also fails and is dismissed.

Result:

Both the claim and the counterclaim are dismissed. There will be no order as to costs.

Huang v Police

Supreme Court, Nuku'alofa
Cato J
AM 39/13

1 April 2014

Criminal procedure – appellant denied due process – Tongan not native language – conviction quashed and retrial ordered

The appellant pleaded not guilty to reckless driving causing bodily injury. He was convicted after a short trial in which the complainant and two other witnesses were called by the prosecution. He did not cross-examine any of the witnesses and nor did he give evidence or call evidence. Compensation was ordered of $3000 to be paid within one month or to serve in default three months imprisonment. The appellant was unrepresented at the trial and was Chinese and did not understand Tongan very well. The appellant claimed he was denied due process because the Magistrate had not explained to the defendant in Chinese, before the trial, the procedure for trial that would take place; he had not explained to the defendant that he was entitled to cross-examine prosecution witnesses and given an opportunity to do so; he could elect to give evidence and call evidence or remain silent or make an unsworn statement, at the end of the prosecution case; and he had not asked whether the defendant consented to a doctor's report being admitted into evidence before it was admitted; nor did he asked whether he wanted to challenge any aspect of it.

Held:

1. If these procedures were not carried out then a trial could not be said to be a fair trial. Where a legal aid scheme was not in existence, as was the case in Tonga, many defendants had no basic knowledge of trial procedure if they could not afford a lawyer. It was, accordingly, incumbent on Magistrates to ensure that these procedures were clearly explained and that the defendant understood before a trial commenced. This also meant that in trial where the defendant was not Tongan that the Magistrate should be satisfied that the defendant sufficiently understood Tongan so as to be able to meaningfully engage in his or her trial before the trial commenced. Otherwise, that trial should be adjourned until an appropriate interpreter was available.
2. The court held that the defendant was not afforded any or sufficient explanation, and so the trial miscarried. The conviction was quashed and the matter was remitted for a new trial to be held the Magistrate's Court.

Statute considered:
Traffic Act (Cap 156)

Counsel for the appellant : Mr Pouono
Counsel for the respondent : Ms Moa

Judgment

[1] The appellant pleaded not guilty to reckless driving causing bodily injury contrary to section 25(1) of the Traffic Act, 1988. He was convicted after a short trial in which the complainant and two other witnesses were called by the prosecution. He did not cross-examine any of the witnesses and nor did he give evidence or call evidence. Compensation was ordered of $3000 to be paid within one month or to serve in default three months imprisonment.

[2] The evidence briefly was that the appellant had been driving along the Taufa'ahau road north when, according to the complainant, who was an elderly man was riding a bicycle, the appellant turned to the left in front of him into Vaha'akolo Road. According to the complainant, he was hit and forced off his bike. He was taken to hospital where he had remained he said till the hearing. He was unable to stand or now go to the bush. The appellant, in a record of interview, had said to the police that he denied doing any wrong. He had said he had stopped to allow a car moving south to turn right into Vaha'akolo road and had done so because he was headed to Pahu. He then saw, in the mirror, that a man had fallen on the road so he turned and stopped on the roadside. He said the man, when he had passed him, was on the road side not on the crossroad.

[3] I was informed the appellant, who was unrepresented at trial, is Chinese and does not understand Tonga very well. There was I am advised, however by Mr Pouono, a Chinese interpreter available in Court. His objection to the conviction is that the appellant was denied due process. Mr. Pouono submitted that;

i. the Magistrate had not explained to the defendant in Chinese, before the trial, the procedure for trial that would take place.
ii. he had not explained to the defendant that he was entitled to cross-examine prosecution witnesses and given an opportunity to do so.
iii. he could elect to give evidence and call evidence or remain silent or make an unsworn statement, at the end of the prosecution case.
iv. he had not asked whether the defendant consented to a doctor's report being admitted into evidence before it was admitted; nor did he asked whether he wanted to challenge any aspect of it.

[4] Mr Pouono contended that these were all important matters that should have been explained to an unrepresented defendant. Ms Moa for the Crown in her submissions accepted essentially that these submissions were correct.

[5] I have examined the record and there is no indication from the translation that any of the matters referred to by Mr Pouono were explained to the defendant. The only

question asked of the complainant was one by the Magistrate himself as to whether the complainant had been hit by the defendant to which he had replied "it hit me because I overtook him, and I fell down as he passed away from me. He came and apologised for what he had done." This seems at variance with what the defendant had said in his record of interview, but it formed part of the reasoning of the Magistrate that the driver had turned left and collided with the bicycle that the complainant was riding causing him to fall down.

[6] It is fundamental importance to a fair trial that unrepresented defendants are given explanations to the following;

i. The procedure of trial;
ii. The opportunity to cross-examine prosecution witnesses;
iii. The election to testify or not on oath and call witnesses, and or give an unsworn statement.
iv. Whether evidence that would otherwise be a hearsay document could be admitted by consent, or whether there is anything that the defendant wishes to challenge in the document. It follows that any document the defendant does not understand would have to be translated for the defendant's understanding before it could be admitted into evidence.

[7] If these procedures are not carried out, as appeared to be the case here, then a trial cannot be said to be a fair trial. Where a legal aid scheme is not in existence, as is the case in Tonga, many defendants have no basic knowledge of trial procedure if they cannot afford a lawyer. It is, accordingly, incumbent on Magistrates to ensure that these procedures are clearly explained and that the defendant understands before a trial commences. This must mean also mean that in trial where the defendant is not Tongan that the Magistrate is satisfied that the defendant sufficiently understands Tongan so as to be able to meaningfully engage in his or her trial before the trial commences. Otherwise, that trial should be adjourned until an appropriate interpreter is available.

[8] In this case, having read the transcript, I consider that the defendant was not afforded any or sufficient explanation, and so the trial miscarried. I accordingly quash the conviction and remit the matter for a new trial to be held the Magistrate's Court.

[9] I also note that the Magistrate imposed compensation of $3000.00. Both counsel agreed that under section 34 of the Traffic Act, the maximum that could be ordered by way of compensation for an offence under section 24 and 25 of the Traffic Act was $500.00.

Meli v Tonga

Supreme Court, Nuku'alofa
Cato J
AM 38/13

1 April 2014

Trespass – not appropriate for possession for lengthy period – equitable right to stay in house – action dismissed

The Magistrate ruled that there was no case to answer in relation to a private prosecution brought by the appellant in relation to the respondent as defendant on a charge of trespass. The respondent had lived on the property possibly since her birth 40 years ago, and had asserted a right to continue to live there. She had maintained that right in Land Court proceedings which both the appellant (the widow of the previously registered owner) and Michael (the registered owner on the death of his father) had discontinued. The Magistrate reasoned that the defendant had maintained a lawful excuse (which he described as a colour of right) to remain there, and said she had lived on the land where her mother and father had built a house. He then dismissed the proceedings. The appellant appealed the dismissal.

Held:

1. The court considered that the Magistrate was correct. The precise nature of the right the respondent was relying on was an estoppel to maintain her presence in the house and on the property. She lived in the house with her family for so many years, without interruption, and, even when after there were indications from the appellant and Michael that her presence was no longer welcome, the subsequent action for possession was discontinued and could not now be reinstated, meant at the very least there was some evidence of her belief that she had a lawful excuse to remain. There was nothing aside from the fact of legal or registered ownership to negative this belief on the respondent's case, and on this basis, the court upheld the reasoning of the Magistrate. The Magistrate was ill-equipped to delve deeper and decide the legal merits of any such claim which have posed problems in cases of this kind for judges of the Land Court.
2. The court also considered that the section relating to criminal trespass itself was not intended to apply to instances where an occupier had enjoyed possession for a lengthy period, and the proceedings were commenced for the purpose essentially of evicting her. It was plainly intended to operate against those more occasional trespassers who enter

another's land without permission, and perhaps cause damage there. It did not apply to those who have been on premises for long periods with apparent consent or acquiescence for much of that time.

3. The reason the private criminal prosecution was commenced was because there was no possibility now to reinstate proceedings in the Land Court because of the expiration of the limitation period. Assuming further proceedings for possession were statute-barred, under section 170 of the Land Act it would be wrong to proceed with a private criminal prosecution with the object of attempting to secure the respondent's eviction.
4. The appeal was dismissed and costs were ordered in the sum of $500 be paid to the respondent by the appellant within 14 days.

Cases considered:

Attorney-General v Till [1910] AC 50
Fasi v Fifita [1996] Tonga Law Rep 68
William v Spautze (1992) 174 CLR 509
Wills v Thorp (1875) LR 10 QB 383

Statutes considered:

Criminal Offences Act (Cap 18)
Land Act (Cap 132)

Counsel for the appellant : Mrs Tupou
Counsel for the respondent : Ms Tonga

Judgment

[1] This was an appeal against the decision of Magistrate Soakimi ruling that there was no case to answer in relation to a private prosecution brought by the appellant in relation to the respondent as defendant on a charge of trespass under section 188 (1) of the Criminal Offences Act which reads:

> "Every person who without lawful excuse enters upon the tax allotment, plantation, garden or other land belonging to or in possession of another person shall be liable at the prosecution of the owner or occupier to a fine not exceeding $50.00 of which half shall be paid to such owner or occupier and the other half to the Government."

[2] The appellant, as a widow, had taken by transfer an allotment that had been previously registered in the name of her husband on the 8th December 1994. Her husband had died in July 2000. It appeared that the respondent's parents built the house on the allotment and they had looked after the respondent's mother and the parents of one Sosaia Meli who was a brother of the respondent's mother. Although there was some dispute about this, the respondent contended she had been born in the house and had lived there very since, that is over forty years. The first time the appellant had ever resided on the allotment was in 1997 when she returned from overseas with her husband until two years later they built a house in Fasi. From time

of registration of the allotment in 1994, the appellants' late husband had never taken any steps to vacate the respondent from the allotment.

[3] From the period in 2000 when the appellant took over the title after the death of her husband until 2010, the appellant did not issue any court proceedings against the respondent to vacate, although in 2001, there was correspondence between the appellant and the respondent as to the basis upon which rental derived from a leased business and operated on the adjacent allotment should be paid, the appellant being connected with that business. That is not relevant to these proceedings but it does show some conflict between the present parties emerging about this time. There was a further letter from the appellant requesting the respondent to leave the property in 14th August, 2006. However, nothing happened. There was a suggestion, in that letter, that the house in question had been built on both the appellant and Michael's adjacent property.

[4] Sosaia Meli had formerly been the registered owner of the adjacent allotment. Shortly before the limitation period was to expire, the appellant and Michael Sosaia Meli, the son of Sosaia and registered owner on the death of his father, commenced proceedings to eject the respondent from both allotments. This case was later the subject of discontinuance by the plaintiffs, the reason it was said by the appellant was that Michael did not want to take his cousin to court. Mrs Tupou explained also, although she was not counsel at the time, that the plaintiffs had anticipated a settlement of the matter with the respondent. If this were so it would seem strange that the proceedings had been discontinued before settlement had been effected, particularly since the limitation on actions of this kind was limited to 10 years.

[5] The dispute, after discontinuance, had been resurrected first by correspondence by Mr Fakahua in 26th April 2013, seeking that the appellant return the land, then by Mrs. Tupou on behalf of the appellant in 13th June 2013. There was a response to this letter by the appellant in which she requested proof of certain documentation. In that letter, she had maintained that she had also advised on an unknown date but before the Land Court proceedings had been commenced. After those proceedings had been discontinued, she said she had thought the matter had been resolved until the letter from Mr. Fakahua was received. This correspondence and some oral evidence from the plaintiff proving her registration was all the evidence that was led before the Magistrate.

[6] Mrs Tonga for the respondent, at the conclusion of the evidence, had submitted that the trespass proceedings were misconceived. She contended that the provision for trespass, that is section 188 (1) of the Criminal Offences Act related not to situations like this where a person had been living in the premises for many years, with the consent or acquiescence of a landowner, but was a provision aimed at trespassers who entered upon property without any prior permission. In this case, her client had maintained she had lived on the property possibly since her birth 40 years ago, and had asserted a right to continue to live there. She had maintained that right in the Land Court proceedings which both the appellant and Michael had discontinued. The fact that an action for possession had been discontinued was a matter of record.

[7] The Magistrate, in a short judgment, appeared to reason, in answer to these submissions, that the defendant had maintained a lawful excuse which he described as

a colour of right to remain there, and said she had lived on the land where her mother and father had built a house. He then dismissed the proceedings. He must have considered on the Crown case that the prosecution had not produced sufficient evidence to prima facie resist Mrs Tonga submission that, albeit the appellant was the registered owner, the defendant had an honest belief she was entitle to remain. The Magistrate had also indicated earlier his concern that the police court was not the right forum to commence these proceedings to recover land, and that proceedings for this purpose belonged in the Land Court.

[8] I consider that the Magistrate is correct, although Mrs Tupou contended that once the appellant had established she was the legal owner that meant, without more, that the respondent was a trespasser. Although it is not spelt out clearly in the documentation the precise nature of the right the respondent was relying on an estoppel to maintain her presence in the house and on the property, (see for example, *Fasi v Fifita* [1996] Tonga Law Rep 68 and the cases mentioned therein) the fact that the respondent lived in the house with her family for so many years, without interruption, and the fact that, even when after there were indications from the appellant and Michael, that her presence was no longer welcome, the subsequent action for possession was discontinued and could not now be reinstated, meant at the very least there was some evidence of her belief that she had a lawful excuse to remain. There was nothing aside from the fact of legal or registered ownership to negative this belief on the informant's case, and on this basis, I uphold the reasoning of the Magistrate. The Magistrate was ill equipped to delve deeper and decide the legal merits of any such claim which, as the cases illustrate, have posed problems in cases of this kind for judges of the Land Court.

[9] I also, however, consider that the central submission advanced by Mrs Tonga has substantial merit, that is the section relating to criminal trespass itself is not intended to apply to instances, as here, as here, where an occupier has enjoyed possession for a lengthy period, and the proceedings are commenced for the purpose essentially of evicting her. To my mind, it is plainly intended to operate against those more occasional trespassers who enter another's land without permission, and perhaps cause damage there. It does not in my view apply to those who have been on premises for, as here, long periods with apparent consent or acquiescence for much of that time. The Land Act give remedies to landowners seeking to assert their rights and eject other occupiers. Since penal legislation must be construed strictly and, in the case of uncertainty or ambiguity, given an interpretation which most favours a defendant, I also decline to apply the provision in the way Mrs Tupou contends. See Craies on Statute Law, 1971, at p 530. As Lord Loreburn said in *Att-Gen v Till* [1910] AC 50, at 51;

> "unless penalties are imposed in clear terms they are not enforceable. Also where various interpretations of a section are admissible it is a strong reason against adopting a particular interpretation if it shall appear that the result would be unconscionable or oppressive."

In *Wills v Thorp* (1875) LR 10 QB 383, at 386 Blackburn J said;

> "when the legislature imposes a penalty, the words imposing it must be clear and distinct."

[10] Finally, I had the strong suspicion, which was not to my mind dispelled by Mrs Tupou, that the reason this private criminal prosecution was commenced was because there was no possibility now to reinstate proceedings in the Land Court because of the expiration of the limitation period. Assuming further proceedings for possession to be statute barred, under section 170 Land Act as they would appear to be, in my view it would be wrong for collateral reasons to proceed with a private criminal prosecution with the object of attempting to secure the respondent's eviction. I refer to *William v Spautze* (1992) 174 CLR 509, where a stay application was successful where a lecturer had initiated a prosecution against the university in order to primarily secure reinstatement. In my view, the Magistrate was right to question whether a criminal court was the appropriate venue for these kinds of case. Parliament has chosen the appropriate forum where legal issues relating to ownership, tenure and possession of land in Tonga are to be determined and that is the Land Court. The criminal law is an imperfect vehicle for determining these issues and to commence prosecutions of this kind for the purpose of obtaining possession is in my view to proceed counter to the limitations on such actions imposed by the Land Act. Mrs. Tupou contended that because the respondent had chosen in effect to defend the proceedings she had submitted to the jurisdiction of the criminal court. I do not see the respondent as having any alternative but to answer the summons and I do not view this as any impediment to Mrs Tonga taking the points she did.

The parties agreed $500.00 would be appropriate for costs.

[11] I accordingly dismiss the appeal, and I order costs in the sum of the $500.00 be paid to the respondent by the appellant within 14 days of this judgment.

Vaomotou v Rex

Court of Appeal, Nuku'alofa
Salmon, Blanchard, and Ward JJ
AC 5/2014

31 March 2014; 9 April 2014

Appeal against sentence – manslaughter – sentenced to 16 years imprisonment – appeal allowed and replaced with sentence of 10 years with final 2 years suspended

The appellant and his wife had a stormy relationship and had separated. It appears that she had formed an association with another man. Under the stress of the situation the appellant went to the place where his wife was living carrying with him a cooking knife which he had sharpened. He entered the bedroom where his wife was sleeping in the early hours of the morning and stabbed her 23 times causing her death. He then went almost immediately to the police and admitted what he had done. The jury acquitted him on a charge of murder. He had pleaded guilty to manslaughter and his successful defence to the murder charge relied upon provocation by his wife. He was sentenced to imprisonment of 16 years and was granted leave to appeal out of time against the sentence.

Held:

1. The appellant was a first offender. He had 2 small children then aged 6 and 4. For the purposes of sentence he was assessed by a psychiatrist as having suffered from Adjustment Disorder at the time of the offending but as being fully in remission when the assessment was carried out. A further mitigating factor was that the jury must have found that the appellant's attack on the victim was provoked by her conduct.
2. The court considered that the combination of extreme violence (the use of the knife some 23 times on a sleeping woman) and the absence of provocative behaviour at the actual time of the attack required a starting point of 14 years imprisonment.
3. Substantial credit must be given for the early confession and guilty plea, the appellant's remorse, his disordered state of mind and the fact that he was a first offender. The court considered that an appropriate sentence was 10 years imprisonment.
4. The appeal was therefore allowed. The sentence of 16 years imprisonment was quashed and replaced with a sentence of 10 years imprisonment with the final 2 years suspended for 2 years.

Cases considered:
R v Edwards (NZCA, CA 371/04, 13 April 2005)
Tu'itavake v R [2005] Tonga LR 348

Counsel for the appellant : Mr O Pouono
Counsel for the respondent : Mr S F Sisifa

Judgment

[1] The appellant was granted leave to appeal out of time against a sentence imposed by Shuster J of imprisonment for 16 years (with the last 2 years suspended) for the manslaughter of his wife. The jury acquitted him on a charge of murder. He had pleaded guilty to manslaughter and his successful defence to the murder charge relied upon provocation by his wife.

[2] Although submitting that this was a bad case involving brutal violence, the Crown realistically accepts that the sentence was manifestly excessive.

[3] The appellant and his wife had a stormy relationship and had separated. It appears that she had formed an association with another man. Under the stress of the situation the appellant went to the place where his wife was living carrying with him a cooking knife which he had sharpened. He entered the bedroom where his wife was sleeping in the early hours of the morning and stabbed her 23 times causing her death. He then went almost immediately to the police and admitted what he had done. On these facts he seems to have been fortunate in the verdict of the jury.

[4] The appellant was a first offender. He had 2 small children then aged 6 and 4. For the purposes of sentence he was assessed by a psychiatrist as having suffered from Adjustment Disorder at the time of the offending but as being fully in remission when the assessment was carried out. A further mitigating factor was that the jury must have found that the appellant's attack on the victim was provoked by her conduct.

[5] A case of this kind involving extreme violence presents a difficult sentencing exercise. Indeed this Court remarked more generally in *Tu'itavake v R* [2005] Tonga LR 348 at [12] that sentencing in provocation cases presents a special problem. There can be no set tariffs. Culpability must be assessed in the particular circumstances of the case. A trial judge has a broad discretion. However, as will appear, in this case the Judge's sentence was entirely insupportable and must be corrected.

[6] In *Tu'itavake*, the Court of Appeal found helpful a review conducted by the New Zealand Court of Appeal in *R v Edwards* (NZCA, CA 371/04, 13 April 2005) arriving at sentencing ranges for a provoked killing where particular features existed. Relevant to the present offending is a suggested sentencing range of 10 – 12 years after a contested trial where the accused has been found guilty of manslaughter committed when he or she had been carrying a knife and used great brutality in response to provocation.

[7] In the present case we consider that the combination of extreme violence (the use of the knife some 23 times on a sleeping woman) and the absence of provocative behaviour at the actual time of the attack require a higher starting point (before

mitigating features are taken into account) beyond the 10 – 12 years range. The starting point, in our view, should be 14 years imprisonment.

[8] But substantial credit must be given for the early confession and guilty plea, the appellant's remorse, his disordered state of mind and the fact that he was a first offender. In light of these matters we are of the view that an appropriate sentence is 10 years imprisonment.

[9] The appellant's prospects of rehabilitation seem to be good. He is most unlikely to find himself in circumstances where there is a risk of similar or indeed any other offending. He has 2 children who will still need his care on release. This is a proper case for some suspension of the sentence.

[10] The appeal is therefore allowed. The sentence of 16 years imprisonment is quashed. We impose in its place a sentence of 10 years imprisonment with the final 2 years suspended for 2 years.

Tuputupu v Rex

Court of Appeal, Nuku'alofa
Salmon, Blanchard, and Ward JJ
AC 19/2013

31 March 2014; 9 April 2014

Criminal appeal – causing death while driving under the influence of alcohol and manslaughter by negligence – charge did not disclose an offence – also evidence of breath test questioned – conviction quashed

The appellant was tried by judge and jury in the Supreme Court on an indictment containing alternative counts stated to be causing death while driving under the influence of alcohol and manslaughter by negligence. He was found guilty on the first count and sentenced to imprisonment for one year and ten months of which the final twelve months were to be suspended. No verdict was taken on the second count. He appealed against conviction and sentence. The three grounds for appeal were:

1. the count in the indictment upon which the appellant was convicted by the jury was defective and did not disclose any offence under the law, despite submissions to the trial judge, the count was left to the jury.
2. One of the two certificates of breath test produced in evidence bore a different date and time to that at which the test had been administered and the trial judge erred in directing the jury to accept it as valid.
3. The trial judge erred in holding and directing the jury that the prosecution did not have to prove that the appellant's driving was the sole cause of the accident, or even a substantial or major cause and that it was sufficient if it was a material cause and not one that was inconsequential.

Held:

1. Any person charged with an offence had the right to know precisely what charge he faced. The charge in the indictment made no mention whatsoever of the ingredients of the offence under that section and fell into further error by adopting the incorrect terminology from the heading.
2. The verdict of guilty to count one could be seen as suggesting the jury accepted the evidence of the breath tests. However, the judge also directed them that, in reaching a verdict on the first count, they should also consider such issues as speed and the failure to avoid the back hoe in order

to determine whether the appellant was under the influence of alcohol. Such matters were irrelevant to a determination of guilt under section 26A and the direction resulted in a guilty verdict to a charge which disclosed no offence. This was a serious misdirection which was sufficient to allow the appeal.

3. With respect to the second ground of appeal, offences created by statute which required the application of procedures by which an accused person must provide evidence which might incriminate himself or herself must be strictly applied. A failure to follow such statutory procedures may be fatal to the prosecution and, had the proper offence under section 26A been charged, it could have been the basis of a successful submission of no case.
4. The third ground of appeal failed. Authorities support the trial judge's direction to the jury that the prosecution did not have to prove beyond a reasonable doubt that the accused's driving was the sole cause of the accident or even a substantial or major one. It was sufficient if it was a cause and that cause was a material cause and not one that was inconsequential.
5. The appeal against conviction was allowed on both the first and second grounds and the conviction quashed. The court considered that the inability of the prosecution to provide the results of two accurate breath tests would be fatal to the prosecution case and could not be corrected. The verdict and sentence were quashed and no further order was made.

Cases considered:

R v Hennigan [1971] 3 All ER133 (CA)
R v Vi [2005] Tonga LR 276

Statutes considered:

Traffic Act (Cap 156)
Traffic (Amendment) Act 2010

Counsel for the appellant	:	Mr Niu SC
Counsel for the respondent	:	Mr Sisifa

Judgment

[1] The appellant was tried by judge and jury in the Supreme Court on an indictment containing alternative counts stated to be causing death while driving under the influence of alcohol and manslaughter by negligence. He was found guilty on the first count and sentenced to imprisonment for one year and ten months of which the final twelve months were to be suspended. No verdict was taken on the second count. He appeals against conviction and sentence.

[2] The brief facts of the prosecution case were that the accused was driving his vehicle having consumed a number of alcoholic drinks earlier in the day. It was dark and he struck a road making machine which, it was accepted, had been parked on the left side of the road well out towards the centre line and without any lights or other

signs to give advance warning of the obstruction to other road users. The crash resulted in the death of the lady sitting on the left of the rear seat. There was evidence from witnesses that the appellant was driving at a speed noticeably above the 40 kph limit imposed on that stretch of road. After the accident, he accompanied the victim to hospital from where he was invited by the police to accompany them to the police station. Two evidentiary breath tests were then administered to him and gave readings of alcohol nearly double the permissible level.

[3] The appeal against the conviction is on three grounds which, in summary, are:

1. The count in the indictment upon which the appellant was convicted by the jury was defective and did not disclose any offence under the law. Despite submissions to the trial judge, the count was left to the jury.
2. One of the two certificates of breath test produced in evidence bore a different date and time to that at which the test had been administered and the trial judge erred in directing the jury to accept it as valid.
3. The trial judge erred in holding and directing the jury that the prosecution does not have to prove that the appellant's driving was the sole cause of the accident, or even a substantial or major cause and that it is sufficient if it is a material cause and not one that is inconsequential.

Ground One

[4] The first count in the indictment was stated to be:

> *STATEMENT OF OFFENCE*
>
> *(Count 1)*
>
> ***CAUSING DEATH WHILE DRIVING UNDER INFLUENCE OF ALCOHOL**, contrary to section 26A(1) & (2) of the Traffic Act (Cap 156)*
>
> *PARTICULARS OF OFFENCE*
>
> ***Vatulele Tuputupu of Niutoua,** on or about 1 August 2011, at Lapaha, you did drive motor vehicle registration number P1513 whilst under the influence of alcohol and you hit a parked backhoe loader on the side of the road causing the death of 'Ana Toki.*

The second count was a charge of manslaughter by negligence about which there is no challenge and to which no verdict was taken.

[5] Before the judge summed up the case, Mr Niu, for the defendant, submitted that the first count was defective. The judge rejected the submission. It is unfortunate that the typed transcript of the judge's ruling in the appeal book has clearly never been checked and has so many typographical errors as to be largely incomprehensible. It would be helpful to know the basis of his decision at that stage of the trial but,

fortunately, the record of his summing up to the jury is generally properly transcribed and we will rely on his directions as reflecting his ruling.

[6] Mr Niu submits that the wording of the first count on the indictment does not reveal any offence known to the law. Although there is reference to section 26A (1) & (2) of the Traffic Act, the details of the charge in both the Statement and Particulars of Offence bear no relationship to the offence created by that section.

[7] Counsel points out that causing the death of another when driving under the influence of alcohol is not an offence. The Traffic (Amendment) Act 2010, which added the present section 26A, also repealed the previous sections 25(2)(b) and 26 of the Traffic Act which had made it an offence to drive, attempt to drive or to be in charge of a motor vehicle "*while under the influence of drink ... to such an extent as to be incapable of having proper control of the vehicle*". The present sections 26 and 26A create offences respectively of being in charge and of driving when the level of alcohol in the driver, as ascertained by a breath test, is over the prescribed limit. Unfortunately, the new offences have, in the heading to the sections, retained the reference, from the repealed sections, to being under the influence of alcohol.

[8] The present section 26A(1), under the heading; "Causing bodily injury or death while driving under the influence of alcohol" provides:

> (1) Any person who drives a motor vehicle and causes bodily injury or death of a person while the proportion of alcohol in such person, as ascertained by breath test subsequently undergone by that person under section 25B, exceeds 250 micrograms of alcohol per litre of breath, commits an offence...

Subsection (2) deals with the court's power to order disqualification following conviction.

[9] Despite the heading, it is clear the offence is driving with an alcohol level above the limit. It is not necessary to prove the effect of that alcohol level on the driver neither, apart from the heading, is there any reference to being under its influence. Any person charged with an offence has the right to know precisely what charge he faces. The charge in the indictment in the present case, despite being identified as section 26A (1), makes no mention whatsoever of the ingredients of the offence under that section and falls into further error by adopting the incorrect terminology from the heading.

[10] In his summing up, the learned judge continued to refer to the offence as causing death by driving whilst under the influence of alcohol and tried to define the meaning of that phrase. He explained to the jury:

> "For the purposes of the prosecution, driving whilst under the influence of alcohol, this means that the accused drove the vehicle while the proportion of alcohol in him ascertained by breath test subsequently undergone by the accused exceeds 250 micrograms of alcohol per litre of breath. That's what the prosecution has to prove beyond a reasonable doubt."

[11] This reliance on the results of the breath tests to prove the appellant was under the influence of alcohol was a repeated theme in the summing up. As we have said, the offence under section 26A is made out if the prosecution proves the driver is above the limit prescribed under the Act. The indictment failed to mention anything of the sort and the judge continued the error by directing the jury to determine, from the evidence as a whole, whether the appellant, when driving, was under the influence of alcohol.

[12] Clearly, the verdict of guilty to count one could be seen as suggesting the jury accepted the evidence of the breath tests. However, the judge also directed them that, in reaching a verdict on the first count, they should also consider such issues as speed and the failure to avoid the back hoe in order to determine whether the appellant was under the influence of alcohol. Such matters are irrelevant to a determination of guilt under section 26A and the direction resulted in a guilty verdict to a charge which disclosed no offence. This was a serious misdirection.

[13] That, in itself, is sufficient to allow the appeal. However we consider it may be instructive still to deal with the other two grounds.

Ground Two

[14] It is clear that, if there had been a properly worded charge under section 26A, it would have required satisfactory evidence of the details of the breath tests. As has been stated, the appellant was taken, under section 25B(1)(c), from the hospital to the police station without a breath screening test having been taken.

[15] Once at the police station, two evidential breath tests were administered in accordance with the procedure prescribed in paragraph 9 of the Traffic (Alcohol Breath Tests) Notice, 2010. That provision requires two tests to be taken, each on a different testing machine and allows for a variation in the two readings of up to 20% of the higher figure. The figures on the printouts presented by the police officer showed figures of 420 and 450 - a variation well within the permissible range.

[16] Those printouts are capable, in themselves, of proving the level of alcohol in the driver's breath and the results of the two tests were exhibited. However, a difficulty, noticed by the prosecutor at the trial and brought to the attention of the court, was that, whilst the printout from the device with a figure of 450 correctly showed the date and time for the test as 1 August 2011, 22.37, the other was recorded as having been taken on 26 July 2011 at 20.25.

[17] We were advised from the bar table that the officer's explanation in the trial was that the machine had been calibrated incorrectly but, in a case under section 26A, the evidence of the sequence of events and the procedures applied in order to obtain evidence of the amount of alcohol in the driver's breath must be strictly proved. The result was that the jury only had one reading and the appellant was deprived of the safeguards provided under paragraph 9 of the Notice.

[18] The learned judge correctly advised the jury to examine the evidence with care. "You need" he explained, "to be careful that the evidence really does lead to the conclusion, beyond reasonable doubt that the prosecution invites you to reach." As

has been stated, the judge then repeatedly applied his directions to an offence of causing death while driving under the influence of alcohol:

> "The Crown has to prove the following elements, one: the accused did drive a motor vehicle P1513 on or about 1st August 2011 at Lapaha, and secondly he did cause the death of 'Ana Toki by colliding with the parked back motor or plough as we know it parked on the side of the road, and thirdly did so whilst he was under the influence of alcohol. For the purposes of this prosecution driving whilst under the influence of alcohol, this means that the accused drove the vehicle whilst the proportion of alcohol in him ascertained by a breath test subsequently undergone by the accused exceeds 250 micrograms of alcohol per litre of breath. That is what the prosecution has to prove beyond a reasonable doubt."

[19] Dealing with the defence case, he directed the jury:

> "Mr Niu submits accurate calibration is required. It is not accurate as to date and time and you should reject that evidence consequently and does not establish beyond reasonable doubt that in fact Mr Tuputupu was under the influence meaning he had in excess of 250 micrograms per litre of blood[sic]. In other words he says the calibration being wrong as the date is something material something which you should look at as casting real doubt on the reliability of what happened at the police station that night."

[20] Passing to the prosecution case, he stated:

> "So Mr. Sisifa submitted contrary to Mr Niu's submission that reading was reliable and was a safe basis for you to find that not only was driving the material cause of the accident and consequent death but also he was beyond any reasonable doubt over the legal limit of 250 micrograms per one litre of breath"

[21] Having summarised the defence and prosecution cases on this issue, the learned judge gave no further directions on the importance of the statutory procedures or the significance of the incorrect printout. Offences created by statute which require the application of procedures by which an accused person must provide evidence which might incriminate himself or herself must be strictly applied. A failure to follow such statutory procedures may be fatal to the prosecution and, had the proper offence under section 26A been charged, it could have been the basis of a successful submission of no case.

Ground Three

[22] The learned judge gave the following direction on the issue of causing death:

> "Now I must direct you in relation to [the first] count, causing the death of 'Ana Toki means this, that his driving was the cause of the accident by which she died. The prosecution does not have to prove beyond

> reasonable doubt that his driving was the sole cause of the accident or even a substantial or major cause. It is sufficient if it is a cause and that cause is a material cause and not one that is inconsequential. I will repeat that again. Causing the death of 'Ana Toki means that his driving was the cause of the accident from which she died. The prosecution does not have to prove beyond a reasonable doubt that it was the sole cause of the accident or even a substantial or major one. It is sufficient if it is a cause and that cause is a material cause and not one that is inconsequential."

[23] Mr Niu submits that was an incorrect statement of the law. It was necessary, he submits, to satisfy the jury that the appellant's driving was the sole cause of 'Ana Toki's death. That submission ignores the authorities, in particular the case of *R v Vi* [2005] Tonga LR 276 in which Webster J accepted and applied the dictum in *R v Hennigan* [1971] 3 All ER 133 (CA):

> "As a matter of law an accused is still criminally liable if he hit a blow which was a cause of death – meaning something more than a minor cause; the incident need not be the sole cause of death, nor even a substantial cause but it must be one of the causes and something more than de minimis."

[24] That correctly states the law and this ground of appeal fails.

Conclusion

The appeal against conviction must be allowed on both the first and second grounds and the conviction quashed. We have considered the question of a retrial but, even if he was to be tried on a properly drafted charge under section 26A, the inability of the prosecution to provide the results of two accurate breath tests would be fatal to the prosecution case and cannot, at this stage, be corrected. We therefore quash the verdict and sentence and make no further order.

Makafilia v Rex

Court of Appeal, Nuku'alofa
Salmon, Blanchard, and Ward JJ
AC 4/2014

31 March 2014; 9 April 2014

Appeal against sentence – conspiracy to commit armed robbery, armed robbery and housebreaking – 15 years imprisonment – appeal allowed – replaced with imprisonment for seven years

On 8 March 2012 the appellant pleaded guilty conspiracy to commit armed robbery, armed robbery and housebreaking. On 23 March 2012 he was sentenced to concurrent sentences of 6 years on the conspiracy charge, 15 years on the robbery charge and 5 years for housebreaking. The court took 20 years as his starting point for sentencing and reduced that by 5 years for the appellant's plea of guilty. The court suspended the last 2 years of the 15 year sentence. The appellant appealed against the sentence. The appellant submitted that the starting point of 20 years was in fact the maximum sentence for the most serious of the offences. He submitted that 8 years was an appropriate sentence with the last 2 years suspended.

Held:

1. The aggravating features were the carrying of a firearm, the planning and premeditation, holding the victims hostage at gun point and the absconding to Fiji. The mitigating features were the plea of guilty, his remorse expressed in a letter he wrote to the Court and his relative youth at the time of offending. He was younger than the two co-offenders.
2 The court considered that the aggravating and mitigating feature balanced each other and accordingly the appropriate term of imprisonment was seven years.
3. The appeal was allowed. The sentence of 15 years for robbery was quashed and replaced with a sentence of seven years imprisonment. The other sentences remained in place and were to be served concurrently.

Case considered:
Mo'unga v R [1998] Tonga LR 154

Counsel for the appellant : Mr 'O Pouono
Counsel for the respondent : Mr S Sisifa

Judgment

[1] The appellant pleaded guilty on the 8th March 2012 to counts of conspiracy to commit armed robbery, armed robbery and housebreaking.

[2] On the 23rd March 2012 he was sentenced by Shuster J to concurrent sentences of 6 years on the conspiracy charge, 15 years on the robbery charge and 5 years for housebreaking. The judge suspended the last 2 years of the 15 year sentence.

[3] In January 2014 leave was sought to appeal out of time against the above sentences on the ground that the total sentence was manifestly excessive. Leave to appeal was granted by the President of this Court.

Summary of facts

[4] In March 2008 the appellant and 3 co-accused made plans to rob a house at Tofoa. Around midnight they broke into the house with their faces covered and wearing hoods. The appellant and one other participant carried rifles. They cut the phone lines to the house and gathered the occupants, including 6 children, in one room. The appellant stood guard threatening to injure them, while the others stole a number of items of a total value of $15640. They put the goods in the householder's vehicle and drove off, later leaving the vehicle at Halaliku.

[5] The appellant was arrested and bailed. He breached bail and fled to Fiji. Almost 4 years later he was deported back to Tonga and arrested. Upon arraignment on the charges he promptly pleaded guilty.

The Judge took 20 years as his starting point for sentencing and reduced that by 5 years for the appellant's plea of guilty.

[6] The appellant was 21 years of age at the time of the offending. He had one minor and one more serious previous conviction.

Discussion

[7] The Crown agreed that the sentence was manifestly excessive particularly in relation to the sentences imposed on two of the co-offenders, one who was carrying the other firearm, was sentenced to 10 years in prison. He had a more extensive record of previous offending. He was also sentenced to 6 months imprisonment relating to a previous suspended sentence. Another co-offender (the appellant's brother) was sentenced to 5 years imprisonment.

[8] Counsel for the appellant pointed out that the starting point of 20 years was in fact the maximum sentence for the most serious of the offences. He submitted that 8 years was an appropriate sentence with the last 2 years suspended.

[9] For the Crown Mr Sisifa referred to the sentences imposed on co-offenders and to other comparable sentences and submitted that the final appropriate sentence was in the range of 6 – 7 years.

[10] The aggravating features of this offending are the carrying of a firearm, the planning and premeditation, holding the victims hostage at gun point and the absconding to Fiji.

[11] Mitigating features are the plea of guilty, his remorse expressed in a letter he wrote to the Court and his relative youth at the time of offending. It seems that he was younger than the 2 offenders referred to above.

[12] In our view the aggravating and mitigating feature balance each other and accordingly we conclude that the appropriate term of imprisonment is 7 years.

[13] Referring to the judgment of this Court in *Mo'unga v R* [1998] Tonga LR 154 we
80 do not consider that the appellant falls within any of the categories enumerated therein. We decline to suspend any part of the sentence.

Result

[14] The appeal is allowed. The sentence of 15 years for robbery is quashed and replaced with a sentence of 7 years imprisonment. The other sentences remain in place and all are to be served concurrently.

Latu v Rex

Court of Appeal, Nuku'alofa
Salmon, Blanchard, and Ward JJ
AC 3/2014

31 March 2014; 9 April 2014

Appeal against sentence – rape and indecent assault convictions – sentence of 14 years – appeal allowed – sentence of eight years

The appellant was charged with three counts of rape and two counts of indecent assault. He pleaded not guilty and continued to maintain his innocence even after he was tried by a jury and convicted. In sentencing him the judge referred to previous convictions and that the current offending occurred while the appellant was on bail. He sentenced the appellant to 14 years in prison on each of the rape charges and to 18 months on each of the indecent assault counts, all sentences to be served concurrently. The maximum sentence for rape in Tonga was 15 years imprisonment. The previous offending was for drunkenness and trespassing. The appellant appealed against the sentence. An application for leave to appeal out of time was granted by the President of the Court of Appeal on 22nd January 2014.

Held:

1. The aggravating features of the offending were the multiple rapes and assaults, the effective detaining of the victim for some 24 hours and the use of a knife to threaten the victim. Also, the victim lost her virginity as a result of the offending and the appellant continued to maintain his innocence after he was convicted. The only mitigating feature was that he had no serious previous convictions. The appellant was a single man who lived with his mother.
2. The appropriate starting point when sentencing for rape was five years imprisonment. That level could be increased for aggravating and decreased for mitigating features. The court concluded that because the aggravating features seriously outweighed the only mitigating feature, a sentence of eight years imprisonment was appropriate. To encourage what was understood to be a serious attempt to rehabilitate himself, the final year of the sentence was suspended.
3. The appeal was allowed. The sentences in the Supreme Court relating to the rape charges were quashed and replaced with sentences of eight years imprisonment. The sentences on the indecent assault charges remained. All

sentences were to be served concurrently. The last year of the total eight year sentence was suspended for two years.

Case considered:
Fa'aoso v R [1996] Tonga LR 42

Counsel for the appellant : Mr L Niu SC
Counsel for the respondent : Mr S Sisifa

Judgment

[1] This appeal is against concurrent sentences totalling 14 years imprisonment on 3 counts of rape and 2 of indecent assault imposed in the Supreme Court on 17th May 2011.

[2] An application for leave to appeal out of time was granted by the President of the Court of Appeal on 22nd January 2014.

Background

[3] The victim, who was 24 years of age at the time of the offending, had been the 31 year old appellant's girlfriend for 1 or 2 years. On the appellant's return from 3 months in New Zealand, the victim told him that she no longer wished to be his girlfriend. Sometime later the appellant went to see the victim and, after an argument, threatened the victim with a knife and took her to a bush area where he raped and indecently assaulted her.

[4] The appellant then took the victim to an unused building used by the Vava'u Guest House where he again indecently assaulted her. The following morning he took her to another building in the same complex and raped her twice.

[5] Later in the day the victim was able to signal an employee at the Guest House who called for help.

[6] When charged, the appellant pleaded not guilty and continued to maintain his innocence even after he was tried by a Jury and convicted. In sentencing him the judge referred to previous convictions and that the current offending occurred while the appellant was on bail. He sentenced the appellant to 14 years in prison on each of the rape charges and to 18 months on each of the indecent assault counts, all sentences to be served concurrently. The maximum sentence for rape in Tonga is 15 years imprisonment. We were told by the Crown that the previous offending was for drunkenness and trespassing.

Submissions from Counsel

[7] Mr Niu emphasised that after the initial threat with the knife there was no physical injury. He also told us that the appellant now admits his guilt and that he has been an exemplary prisoner. He says the appellant is now remorseful and deeply regrets the offending.

[8] Mr Niu referred us to a number of sentences in rape cases and submitted that the appropriate penalty was 5 years imprisonment with the final 2 years suspended.

[9] For the Crown Mr Sisifa also referred to a number of comparable sentencing cases and acknowledged that the sentence imposed was manifestly excessive. He submitted that the appropriate sentencing range was 6 – 8 years.

Discussion

[10] We consider the aggravating features of this offending to be the multiple rapes and assaults, the effective detaining of the victim for some 24 hours and the use of a knife to threaten the victim. We also note that the victim lost her virginity as a result of this offending and that the appellant continued to maintain his innocence after he was convicted.

[11] The only mitigating feature is that he has no serious previous convictions. The appellant is a single man who lives with his mother.

[12] In *Fa'aoso v R* [1996] Tonga LR 42 this Court held that the appropriate starting point when sentencing for rape was 5 years imprisonment. That level can be increased for aggravating and decreased for mitigating features. It is useful to repeat what the Court said about the sentencing process in that case at p44:

> "Assessing an appropriate sentence following a conviction has always been recognised as a difficult task. This is so particularly when assessing the length of a prison sentence, where such a sentence is required. The sentencing judge must have regard to such factors as the seriousness of the crime, the maximum sentence prescribed, the need to deter others, sentences imposed in other similar cases to achieve consistency, any sentencing guidelines given by an appellate court, the desirability of encouraging rehabilitation, the need to show society's rejection of the conduct, and any aggravating features such as the accused's previous criminal history, the effect on a victim, the age of the victim, the degree of any violence, and the use of a weapon. Mitigating factors may include the age of the accused, an early plea of guilty, genuine expressions of remorse, any relevant medical, psychological, or other condition, the accused's standing in the community, and his family and personal circumstances. There will often be other factors to be taken into account in aggravation or mitigation."

[13] After considering the sentences imposed in the cases referred to us, we conclude that because the aggravating features seriously outweigh the only mitigating feature, a sentence of 8 years imprisonment is appropriate. To encourage what we understand to be a serious attempt to rehabilitate himself we are prepared to suspend the final year of that sentence.

Result

[14] The appeal is allowed. The sentences in the Supreme Court relating to the rape charges are quashed and replaced with sentences of 8 years imprisonment. The sentences on the indecent assault charges remain. All sentences are to be served concurrently. The last year of the total 8 year sentence is suspended for 2 years.

Fund Management Ltd anor v Commercial Factors Ltd anor

Court of Appeal, Nuku'alofa
Salmon, Blanchard, and Ward JJ
AC 6/2011

1 April 2014; 9 April 2014

Receivership – ranking of equitable charges – equitable priorities needed to be addressed – appeal dismissed

The history behind these proceedings was long and complicated and was well set-out in the judgment. It involved determination of competing interests to the estate of Dr Wang (deceased). The Court of Appeal, before whom no arguments about priority of equitable interests were advanced, remitted both sets of proceedings to the Supreme Court for further consideration. After hearing argument, the Lord Chief Justice declined to amend or add to the orders made appointing the receiver. He also recorded that FM/TSH had withdrawn their application concerning the caveat and had never become parties in the receivership proceeding in the Supreme Court. FM/TSH has now appealed against that decision of the Supreme Court. The argument made in the Supreme Court was renewed: that it should be ordered that the proceeds of sale should be divided between FM/TSH and CFL.

Held:

1. The ranking of equitable charges (not involving transfer of the debtor's interest in the land to the creditor) was governed by the common law, not by any provision in the Land Act. The creation of equitable interests by way of charge was not prohibited by any provision of the Land Act.
2. The court considered that the Supreme Court was right to decline to determine the question about the division of the proceeds of sale between FM/TSH and CFL. The court would have been called upon to carry out this task without the benefit of fully pleaded statements of claim and defence and on the basis of conflicting affidavit evidence which was not tested by cross-examination. Furthermore, little if any attention had been paid to the underlying equitable priorities, which were not addressed in the affidavits.
3. The receivership proceeding was therefore an entirely unsatisfactory vehicle for the determination of the issues, which would need to be the subject of a trial. If FM/TSH wished to pursue their claim they could only do so in a properly constituted proceeding. The court expressed no view on whether it was appropriate for such a proceeding to be brought or as to the

merits of FM/TSH's claim. The court simply determined that the receivership proceeding could not be converted into a vehicle for the claim made.

4. The present appeal was thus misconceived and was dismissed. The so-called request for orders filed on 15 March 2013, which essentially asked for the same relief as the appeal, was struck out. The appellants were ordered to pay the respondents' costs on the appeal and the striking out, such costs to be taxed if not agreed.

Cases considered:

Executor(s) (or Alternatively the Administrator) of Dr Sam Lin Wang (a.k.a Sam Lin Wong) Deceased and Helen Chen Wang (a.k.a Helen Chen Wong) v Commercial Factors Ltd) (Appeal No AC 6 of 2011)

Fund Management Ltd and Tourist Services Ha'apai Ltd v Christine Uta'atu as Court – Appointed Receiver for and on behalf of Commercial Factors Ltd (Appeal No 16 of 2010)

Statute considered:

Land Act (Cap 132)

Counsel for the appellants	:	Mr L Niu SC
Counsel for the first respondent	:	Dr R E Harrison QC, SC
Counsel for the second respondent	:	Mr R Stephenson

Judgment

[1] This matter has a long and complicated history but in order to deal with the issues before this Court on the present occasion an abbreviated account can be given.

[2] In 1998, a Dr Wang successively gave certain guarantees to the appellants Fund Management Ltd and Tourist Services Ha'apai Ltd jointly (FM/TSH) and to the first respondent Commercial Factors Ltd (CFL). To provide each of these creditors with some security Dr Wang authorized them to caveat his interests in leasehold land. These included Lease 5404. A hotel has been erected on the land comprised in this lease.

[3] Both FM/TSH and CFL lodged caveats in respect of the lease.

[4] When default was made by Dr Wang, FM/TSH obtained an order from the Land Court in 2004 for the sale by tender of the leasehold interest, but no sale was achieved and FM/TSH took no further steps by way of marketing the property.

[5] Dr Wang had also failed to meet his obligations to CSL. In 2010 there were discussions between representatives of FM/TSH and CFL about whether CSL might be able to join with FM/TSH in utilising the 2004 order for sale so that both could receive what was owed to them. In the end, however, CFL decided to proceed alone. It issued proceedings against the estate of Dr Wang, who had died shortly beforehand, seeking summary judgment and the appointment of a receiver to enforce the judgment, in particular by selling Lease 5404.

[6] FM/TSH complains that it continued to believe that CFL was co-operating with it and that the proceeds of any sale would be shared. It says it was unaware of the receivership application until after the second respondent, Ms 'Uta'atu, had been appointed as receiver by the Supreme Court.

[7] Judgment was entered for CFL on 8 March 2011 in an amount, including interest, of approximately TOP$8,500,000 and the receiver was appointed to enforce the judgment. The receiver proceeded to advertise the hotel, including the leasehold interest, for sale by tender. The only tender received was from CFL which agreed to pay an amount equal to the debt owing to it by Dr Wang on the basis that the price would be set off against that debt. The sale and purchase agreement between the receiver and CFL provided for the contingency that CFL might have to pay something to FM/TSH. In that case it would be credited with the amount it paid FM/TSH and the balance of the price of the hotel would be satisfied by set-off.

[8] Having entered into the agreement, the receiver applied to the Land Court for the removal of FM/TSH's caveat. She successfully argued that FM/TSH did not have a caveatable interest in Lease 5404. Over the opposition of FM/TSH, on 20 August 2011 the Land Court directed that the caveat be removed. CFL withdrew its own caveat and the Minister of Lands removed the FM/TSH caveat from the register. On 20 August 2011 the Minister approved the transfer of the lease to CFL.

[9] On the same day, FM/TSH appealed against the Land Court's decision of 20 August but it neither served a copy of its notice of appeal on CFL nor applied for a stay preventing the transfer of the lease from going ahead. The sale was settled on 12 September 2011 and the price was satisfied entirely by set-off. No money was paid to the receiver. The transfer of the lease was registered immediately.

[10] It was only on 16 September 2011 that the notice of appeal against the removal of the caveat was served on the receiver, who appears to have been unaware of it until then.

[11] Meanwhile Dr Wang's estate had appealed against the order appointing the receiver. FM/TSH was granted leave to intervene in that appeal in order to argue that the Supreme Court lacked the power to make such an order.

[12] The appeals against the removal of the caveat by the Land Court and the order of the Supreme Court appointing the receiver were heard at the same time and on 16 December 2011 the Court of Appeal delivered judgment in both: *The Executor(s) (or Alternatively the Administrator) of Dr Sam Lin Wang (a.k.a Sam Lin Wong) Deceased and Helen Chen Wang (a.k.a Helen Chen Wong) v Commercial Factors Ltd)* Appeal No AC 6 of 2011; *Fund Management Ltd and Tourist Services Ha'apai Ltd v Christine Uta'atu as Court – Appointed Receiver for and on behalf of Commercial Factors Ltd* Appeal No 16 of 2010. It held that the order appointing the receiver was validly made. It also concluded that the caveat should not have been removed because FM/TSH had had a caveatable interest. But it did not direct restoration of the caveat to the register because it had been informed of the registration of the transfer of the lease pursuant to the sale of the hotel. In fact FM/TSH had not sought the setting aside of the sale and still does not do so. It wishes

instead to take advantage of the sale and seeks a share of the amount which CFL agreed to pay.

[13] In effect, although Mr Niu did not put the matter in this way either at the earlier Court of Appeal hearing or before us, FM/TSH seems to be asserting that CFL was not entitled to set off the whole of the price and must account to the receiver in cash for a part of the price equivalent to Dr Wang's debt to FM/TSH, so that she can in turn pay it over to FM/TSH and that CFL was not entitled to raise a set-off to the extent of FM/TSH's claim, of which it was aware. Such an argument would seem to depend upon FM/TSH's ability to establish either an equitable interest in the lease or the proceeds of its sale, which interest has priority over any such interest of CFL, or alternatively that CFL's course of conduct towards FM/TSH prior to the transfer of the lease gave rise to a right on the part of FM/TSH to claim a share of the sum payable by CFL. Mr Niu was inclined to put the matter primarily on the latter basis, but the Court pointed out to him that it might be affected either favourably or unfavourably by the question of equitable priorities, by which we mean the existence of equitable charges over the lease and their priority inter se.

[14] The ranking of equitable charges (not involving transfer of the debtor's interest in the land to the creditor) is governed by the common law, not by any provision in the Land Act. The creation of equitable interests by way of charge is not prohibited by any provision of the Land Act. When the Legislature wanted to prohibit such charges it did so explicitly: see s.16 (repealed in 1999) which dealt with mortgages, pledges and charges over certain growing crops. Part VI of the Act, to which Mr Niu referred, is concerned only with legal mortgages, where the land is transferred by way of security: see the definition of "mortgage" in S.96. Section 137 to which counsel also referred does not determine priorities. It merely provides for lodgment of caveats and for their effect in stopping registrations.

[15] The present position is that the Court of Appeal, before whom no arguments about priority of equitable interests were advanced, has remitted both sets of proceedings to the Supreme Court for further consideration. After hearing argument, the Lord Chief Justice, in a decision delivered on 25 January 2013, has declined to amend or add to the orders made appointing the receiver. We note Dr Harrison's submission that the Court of Appeal's order sending that matter back to the Supreme Court did not contemplate any such additions or variations, but we need not determine whether it did. The Chief Justice also recorded that FM/TSH had withdrawn their application concerning the caveat and had never become parties in the receivership proceeding in the Supreme Court.

[16] FM/TSH has now appealed against that decision of the Supreme Court. The argument made in the Supreme Court is renewed: that it should be ordered that the proceeds of sale should be divided between FM/TSH and CFL. We consider, however, that the Supreme Court was right to decline to determine that question in the current proceeding. As we pointed out to counsel, the Court would be called upon to carry out this task without the benefit of fully pleaded statements of claim and defence and on the basis of conflicting affidavit evidence which has not been tested by cross-examination. Furthermore, little if any attention has been paid to the underlying equitable priorities, which are not addressed in the affidavits.

[17] The receivership proceeding is therefore an entirely unsatisfactory vehicle for the determination of the issues, which would need to be the subject of a trial. If FM/TSH wish to pursue their claim they may only do so in a properly constituted proceeding. We express no view on whether it is appropriate for such a proceeding to be brought
170 in the present circumstances or as to the merits of FM/TSH's claim. All we are determining is that the receivership proceeding cannot be converted into a vehicle for the claim now made.

[18] The present appeal is thus misconceived and is dismissed. The so-called request for orders filed in this Court on 15 March 2013, which essentially asked for the same relief as the appeal, is struck out. The appellants must pay the respondents' costs on the appeal and the striking out, such costs to be taxed if not agreed.

Tapueluelu anor v Attorney General

Court of Appeal, Nuku'alofa
Salmon, Blanchard, and Ward JJ
AC 18/2013

1 April 2014; 9 April 2014

Contempt of court – appeal against sentences – editor more liability than the publisher – sentence reduced for publisher

The appellants were the publisher and editor respectively of the Ko e Kele'a newspaper (Kele'a) which had a wide circulation in Tonga and the Tongan diaspora, principally in Australasia and the United States. In early June 2013, a defamation action, arising from a letter that had been published in Kele'a some month earlier, was heard in the Magistrate's Court before magistrate, Paula Tatafu. It was brought by seven government Ministers against the writer of the letter and the present appellants. Magistrate Tatafu found for the Ministers and awarded a substantial sum in damages and costs against the three defendants. On 24 June 2013, Kele'a carried an article in Tongan under the heading "The judgment will be thrown into the rubbish bin of history: Editor Kele'a". The article reported the court case and included a section headed "Opinion of the Editor Mateni". On 17 July 2013, the Attorney General lodged an application to have the appellants committed for contempt. The Lord Chief Justice found both appellants guilty of contempt of court and fined each $2,500 or one months imprisonment in default of payment and ordered they should pay the costs of the proceedings. They appealed against the sentences.

Held:

1. The sentencing judge accepted the published apology as an important mitigating factor but gave no indication of any other matters taken into account in the determination of the appropriate sentence and based it entirely on his determination of the seriousness of the contempt itself.
2. The court did not consider the penalty imposed on the second appellant was manifestly excessive and the appeal against his sentence failed. However, in the absence of more evidence of her involvement beyond the sole fact of being the publisher, the sentence on the first appellant failed to take differences into account and was, therefore, too high. The fine of $2,500 on the first appellant was quashed and substituted with one of $500.
3. In light of the partial success of the appeal the parties should bear their own costs of the appeal.

Statute considered:
Miscellaneous Amendments (General) Act 2010

Counsel for the appellants	:	Dr R E Harrison QC and Mr Etika
Counsel for the respondent	:	Mr Adsett AG

Judgment

[1] The appellants are the Publisher and Editor respectively of the Ko e Kele'a newspaper (Kele'a) which has a wide circulation in Tonga and the Tongan diaspora, principally in Australasia and the United States.

[2] In early June 2013, a defamation action, arising from a letter that had been published in Kele'a some month earlier, was heard in the Magistrate's Court before magistrate, Paula Tatafu. It was brought by seven government Ministers against the writer of the letter and the present appellants. Magistrate Tatafu found for the Ministers and awarded a substantial sum in damages and costs against the three defendants.

[3] On 24 June 2013, Kele'a carried an article in Tongan under the heading "The judgment will be thrown into the rubbish bin of history: Editor Kele'a". The article reported the court case and included a section headed "Opinion of the Editor Mateni".

[4] On 17 July 2013, the Attorney General lodged an application to have the appellants committed for contempt. The Attorney General submitted that the whole article constituted a contempt but particularly drew the court's attention to six passages which, he suggested, given their ordinary and natural meaning, suggested:

1. The magistrates were owned or controlled by the Minister of Justice and subject to his directions. Accordingly, a party in conflict with the Minister would not receive a fair trial, according to law;
2. Whereas the Supreme Court is independent of outside interference that is not the case with the Magistrates' Courts;
3. Whenever a leader of government brings proceedings in the Magistrates' Court the result will be favourable to the plaintiff.

[5] The respondents opposed the application on four principal grounds:

1. The intention of the application was to curtail their right to freedom of speech under clause 7 of the Constitution;
2. The article was a genuine expression of opinion in good faith without malice or improper motive;
3. The publication was in the public interest and was a fair and accurate report of legal proceedings as a whole;
4. The public benefit from the publication of the material outweighed any harm caused to the administration of justice.

[6] The Lord Chief Justice accepted the case was proved in respect to three of the six selected passages. He considered, "on the plain meaning it was being suggested that

the Magistrate's Court was biased in favour of the Government and, in particular, the Minister of Justice and that consequently a fair trial was not afforded when Ministers, and the Minister of Justice in particular, were the plaintiffs. It cannot be doubted that an allegation of bias against a judicial officer is not only an act calculated to bring that officer into contempt but is also an act calculated to lower public confidence in the court over which he presides."

[7] He found both appellants guilty of contempt of court and fined each $2,500.00 or one months imprisonment in default of payment and ordered they should pay the costs of the proceedings. They appeal only against the sentences.

[8] The judgment was published on 30 August 2013 and the appellants published what was described by the judge as a "fulsome apology in a prominent position" in the 9 September edition of Kele'a. It was sufficient for the Attorney General to invite the court to take it into consideration in mitigation of penalty. The translation of the apology has been given to this Court and we agree with the judge's description. It is not necessary to set it out but it is a complete retraction and unreserved apology and must properly be taken as a significant factor in mitigation of the offence. Mr 'Etika for the appellants emphasised their contrition and previous lack of convictions including contempt.

[9] The Lord Chief Justice explained:

> "The central allegation against the magistrate, that he was subject to the control of the executive, was wholly false and furthermore implied that the magistrate had not only breached his oath of office but that he had also breached clause 15 of the Constitution. In my opinion that is no need to depart from the assessment of Ward CJ in *Namoa*, a reported case with which the respondents should have made it their business to be familiar:
>
> > "untrue allegations of bias or impropriety will amount to a serious contempt".
>
> Taking all these factors into account I am of the view that an adequate financial penalty must be imposed. The respondents are husband and wife and jointly responsible for the publication of this contempt. Each respondent is to pay a fine of $2500 and each is given two months to pay."

[10] It is clear that the learned judge accepted the published apology as an important mitigating factor but gives no indication of any other matters taken into account in the determination of the appropriate sentence basing it entirely, it would appear, on his determination of the seriousness of the contempt itself. Mr Harrison, for the appellant, suggested to this Court that the reference to the "wholly false" allegation that the magistrate was subject to the control of the executive had to be considered against the legislative provisions involved. It has, for nearly a century, been the law that the magistrates were appointed by the Prime Minister with the consent of Cabinet. That was changed, by legislation designed to support the independence of the magistracy, by the Miscellaneous Amendments (General) Act 2010 which was enacted in November of that year. Although that occurred nearly three years before the

published article appeared, it is, as Mr Harrison suggests, some explanation for the author's error.

[11] It is certainly correct, as counsel submits, that the sentencing judge gives no indication of which, if any, matters of mitigation were taken into account in determining the appropriate sentence. Having decided, properly, to impose a fine, there is no reference to or consideration of the appellants' means in terms either of income or ability to pay. The judge, having taken into account the apology and the scale of sentences ordered in previous cases, including Namoa, formed the view that "an adequate financial penalty must be imposed" and continued; "The respondents are husband and wife and jointly responsible for the publication of this contempt".

[12] In the earlier judgment, he had carefully and accurately reviewed the law on this form of contempt and convicted them both but there was no indication whether he had considered the relative degree of responsibility of each. When passing sentence, the statement set out above fails to indicate any feature distinguishing the actual involvement or responsibility of each individual appellant and appears instead to allocate joint responsibility on the sole fact that they are husband and wife.

[13] Authorities in other jurisdictions suggest a court, when assessing the appropriate penalty, should determine the degree of control and possible intention of each individual contemnor. In cases of publication in newspapers the editor is generally found to hold the principal responsibility for the contents of any article in the newspaper whilst the publisher's responsibility, in the absence of evidence of specific knowledge or involvement, is usually seen as less.

[14] In the present case, there is a clear distinction between the responsibility of the second and first appellants. Not only was the second appellant the editor but it was clear he was also the author and source of the opinions expressed on it. The first appellant must share some responsibility as publisher but there is nothing before us to suggest any greater involvement.

[15] Counsel in the hearing below drew the court's attention to the penalties ordered in the few earlier cases in this jurisdiction. We do not set them out but the range of penalties was from a warning and costs to $1,500 (with a single exception in which the contempt was a deliberate act by a legal practitioner to influence a trial in which he represented one of the parties.)

[16] Mr Harrison suggests that the learned judge should have explained his reason for exceeding the previous scale. He accepts that inflation since the last case some years ago will have altered the value and impact of fines but we do not accept his suggestion that the judge needed to have accurate figures before he could relate the present case to previous penalties.

[17] Any court must take inflation into account but it is not a matter which requires more than his personal knowledge and experience of fines and their effectiveness in all cases. In the present case he fined both appellants approximately double the previous figures on the basis that this was a case near the top of the scale of seriousness.

[18] We accept that, as a direct attack on the integrity of a named individual judge, this was correctly so identified. We do not consider the penalty imposed on the second appellant was manifestly excessive and the appeal against his sentence fails. However, in the absence of more evidence of her involvement beyond the sole fact of being the publisher, the sentence on the first appellant fails to take differences into account and is, therefore, too high. We therefore quash the fine of $2,500.00 on the first appellant and substitute one of $500.00.

170 [19] In light of the partial success of the appeal the appropriate order is that the parties shall bear their own costs of the appeal.

Public Service Commission anor v Fukofuka

Court of Appeal, Nuku'alofa
Salmon, Blanchard, and Ward JJ
AC 7/2013

2 April 2014; 9 April 2014

Employment decision appeal – certainty needed for contract to be enforceable – parties to contract had obligation to comply with the legislation regardless of terms – appeal allowed

For the full facts and the Supreme Court decision, see *Fukofuka v Public Service Commission anor* [2012] Tonga LR 157.

Held:

1. Central to a determination of the appeal was the question as to whether section 20 of the Public Service Act in the form it was when the contract was signed became a term of the contract. The Supreme Court held very clearly that it did and the conclusion followed inevitably from this.
2. The Court of Appeal did not agree. Clause 21 of the contract did not have the effect of making all the provisions of the legislation referred to therein terms of the contract. Many of the provisions were irrelevant to the purpose of the contract. Nor could it have that effect in relation to sections or regulations which might be seen to confer a benefit on particular employees. If this were the case it would create uncertainty as to the contractual terms and the courts have long insisted that there must be certainty of terms for a contract to be enforceable. Further, the parties to the contract had the obligation to comply with the laws of Tonga regardless of its terms.
3. The appeal was allowed. The judgment of the Court below was set aside as was the award of damages and the costs order. The appellant was entitled to costs in this Court and in the Supreme Court to be taxed if not agreed.

Statutes considered:

Interpretation Act (Cap 1)
Public Service Act 2002
Public Service (Amendment) Act 2010

Counsel for the appellants	:	Mr Adsett AG, Ms Kautoke, and Ms Katoa
Counsel for the respondent	:	Mr Niu SC

Judgment

[1] This appeal is against a judgment of the Lord Chief Justice in which he upheld a claim by the respondent for damages for wrongful dismissal.

Background

[2] On 17 January 2007 the respondent was appointed by contract as Head of Department for the Ministry of Education, Women's Affairs and Culture. His appointment commenced on 1 January 2007 and was for a period of 2 years with the opportunity for extension for another 3 years. The contract was in fact extended for the further period ending on 1 January 2012. The contract was varied in 2008. The principal purpose of the variation was to provide certain additional benefits to the respondent.

[3] Central to the arguments in this Court and the Court below was clause 21 of the original contract which provided:

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

[4] It will be noted that one of the statutes referred to in the clause set out above is the "Public Service Act 2002". At the time the contract was entered into s.20 of that Act provided:

> "A Head of Department or employee of the Public Service shall take a leave of absence upon registering as a candidate for election to the Legislative Assembly and shall resign if elected."

[5] On the 20th September 2010 the Public Service Act was amended by the Public Service (Amendment) Act 2010. The amending Act emphasises the apolitical nature of the Public Service. S 18 of that Act deleted S 20 of the 2002 Act and replaced it with a new S 20:

> 20 - "Candidacy for Legislative Assembly, town officer or district officer."

> "A Chief Executive Officer or employee in the Public Service shall resign upon registering as a candidate for Election to the Legislative Assembly, the office of town officer or district officer."

[6] It can be seen that the amendment made a significant change to the law. Whereas previously an employee could take leave of absence upon registering as a candidate for election and was required to resign only if elected, the new provision required an employee to resign upon registering as a candidate.

[7] About a month prior to the passing of the 2010 amendment the Crown gave notice that a general election would be held on 25 November 2010 and that candidates must register on 21 October 2010.

[8] The passing of the amendment raised questions about its consequences. To answer one of these questions the Public Service Commission (the Commission) wrote to all Heads of Department advising that:

> "for Civil Servants intending to resign from the Public Service so they can register as a Parliamentary Candidate, the period of notice will be waived."

The period of notice referred to was that required by Clause 19.2 of the contract if an employee wished to resign. It should also be noted that one of the provisions of the amending act changed the title of "Head of Department" to "Chief Executive Officer."

[9] The respondent wished to register as a Parliamentary candidate and correspondence ensued between him and the Commission. The respondent maintained that the amending act did not apply to him because his contract was signed well before its passing. He invoked the provisions of the Constitution prohibiting the enactment of retrospective laws and maintained that his position if he registered as a candidate would be governed by s.20 in the form it was in at the time his contract was signed.

[10] The Commission replied advising it did not agree with his interpretation and that if he proceeded with registration he would be deemed to have resigned from the public service.

[11] Notwithstanding this warning the respondent registered as a candidate. The Commission determined that he was deemed to have resigned and paid him a gratuity payment together with leave and retirement fund payments to which he was entitled. The respondent was not elected to Parliament and brought these proceedings seeking damages for unlawful termination of his contract.

The judgment in the Supreme Court

[12] The Lord Chief Justice rejected a claim by the appellant that the acceptance by the respondent of the payments made to him estopped him from bringing his claim. There has been no appeal against this part of the judgment.

[13] The Lord Chief Justice held that clause 21 of the contract imported the provisions of the Public Service Act into the contract and that because of the necessity for certainty the imported terms must be those of the Act at the time of the contract. Thus one of the rights secured by the contract was the right to take leave of absence upon registering as a candidate and he would only be required to resign if elected. He held that the decision to apply the terms of the amended S 20 varied a contractual term without obtaining the respondent's agreement as required by clause 3.2 of the contract. He also referred to clause 20 of the Constitution which prohibits the enactment of retrospective laws insofar as they curtail or take away rights or privileges existing at the time of the passing of such laws. He upheld the respondent's claim and awarded damages.

Discussion

[14] Central to a determination of this appeal is the question as to whether s.20 of the Public Service Act in the form it was when the contract was signed became a term of the contract. The Lord Chief Justice held very clearly that it did and his conclusion followed inevitably from this.

[15] We do not agree. In our view clause 21 of the contract did not have the effect of making all the provisions of the legislation referred to therein terms of the contract. Many of the provisions are irrelevant to the purpose of the contract. Nor can it have that effect in relation to sections or regulations which might be seen to confer a benefit on particular employees. If this were the case it would create uncertainty as to the contractual terms. We agree with the statement in Burrows, Finn and Todd Law of Contract in New Zealand 2nd edition at para 3.7 that "the courts have long insisted that any agreement which is to have contractual force must be in terms which define with a sufficient degree of certainty the obligations which the parties are to undertake". In our view the purpose of the clause was just to draw the attention of parties to the contract to statutes and regulations that were relevant to their duties. It merely stated what would be the case even if the clause were not there. In our view it would take much more specific words to make these statutory provisions or parts of them terms of the contract. In fact it is quite unnecessary to do so because the parties to the contract had the obligation to comply with the laws of Tonga regardless of its terms. Had the parties intended to incorporate s.20 as a term, the contract would have to specifically record this.

[16] Mr Niu argued that in Tonga the reference to a statute which includes the year of its passing had the effect of not including any subsequent amendments. In order for amendments to be included the words "as amended" would have to have been added. We do not agree. Amendments to the Act became a part of the Act as from the time of the amendment. In fact s.33 of the Acts Interpretation Act makes that clear. It provides:

> "Every Act amending another Act shall, unless the contrary intention appears, be read and construed with that other Act and as part of that other Act."

No contrary intention appears in the amending legislation so that the new s.20 became
150 part of the original act on its enactment.

[17] Nor is there any question of retrospectivity. The provisions of the new s.20 only affected those registering as a candidate from the time of its enactment. In passing the amending provisions Parliament was exercising its function as lawmaker. There is no provision of the Constitution which would prevent the enactment of the new s.20.

[18] For the reasons set out above the appeal is allowed. The judgment of the Court below is set aside as is the award of damages and the costs order. The appellant is entitled to costs in this Court and in the Supreme Court to be taxed if not agreed.

Westpac Bank of Tonga v Fonua anor

Court of Appeal, Nuku'alofa
Salmon, Blanchard, and Ward JJ
AC 16/2013

3 April 2014; 9 April 2014

Land law – appeal – creditor could not impose enforcement provisions retrospectively – appeal dismissed

Land law – appeal – question of jurisdiction – bank sought only possession of the building – therefore application should have been made in Supreme Court rather than Land Court

The respondents, Mr and Mrs Fonua, mortgaged their leasehold interest and their dwellinghouse to Westpac Bank of Tonga in 2007. The mortgage was registered under the Land Act. The respondents failed to make repayments as required by the mortgage despite service on them of notices of demand. On 15 August 2013 Westpac filed in the Land Court an application for orders for possession and control of the land and dwellinghouse seeking vacant possession. It relied on a provision in the Personal Property Securities Act 2010. The Land Court dismissed the application. The appellant was granted leave to appeal.

Held:

1. It was not just to impose retrospectively on a debtor enforcement provisions which were not available to the creditor when the security created by the prior transaction was given by the debtor. The validity, effect and enforcement of such a security were governed by the law as it stood prior to Personal Property Securities Act 2010. The appeal by the bank failed.
2. The second reason why the appeal failed was that, on the basis on which it was put before the Court of Appeal, the application should have been made in the Supreme Court, rather than in the Land Court. The bank sought only possession of the building, which under Tongan law was not part of the land. The bank was not now invoking any right against an interest in the land.
3. The appeal was dismissed with costs to the respondents, to be taxed if not agreed upon.

Cases considered:
Niu & Ors v Tapealava AC 15 of 2012, 17 April 2013
Wilson v Church (No 2) (1879) 12 Ch D 454

Statutes considered:
Constitution of Tonga (Cap 2)
Land Act (Cap 132)
Personal Property Securities Act 2010

Counsel for the appellant	:	Mr Waalkens QC and Mrs Stephenson
Counsel for the respondents	:	Mr Niu SC

Judgment

[1] This appeal from a judgment of the Land Court raises issues about enforcement of a mortgage over registered leasehold land on which there is situated a dwellinghouse.

[2] The respondents, Mr and Mrs Fonua, mortgaged their leasehold interest and their dwellinghouse to Westpac Bank of Tonga in 2007. The mortgage was registered under the Land Act. It is not in dispute that the respondents have failed to make repayments as required by the mortgage despite service on them of notices of demand. That default continues.

[3] Westpac lodged a notice with the Ministry of Lands under s.109 of the Land Act in which it notified its intention to take possession of the land. The 14 day period mentioned in the section has expired.

[4] In the meantime, on 1 November 2010, the Personal Property Securities Act 2010 (PPSA) had come into force. Westpac took advantage of s.65(4) of that Act by registering a notice of its interest under the 2007 mortgage. That notice was a transition notice which was registered on 13 August 2013. The mortgage was a prior transaction as defined in s.65 (1) (a).

[5] On 15 August 2013 Westpac filed in the Land Court an application for orders for possession and control of the land and dwellinghouse seeking vacant possession. It relied on s.57(2)(a) of PPSA. Section 57 reads:

> Secured party's right to possession or control
>
> (1) Upon default, the secured party may take possession or control of collateral without legal proceedings if the secured party does not breach the peace.
>
> (2)(a) Upon default, the secured party shall be entitled to a special, expedited order from the court granting the secured party possession or control over the collateral.

> (b) Issues at the hearing are limited to the existence of a security agreement covering the collateral and at least one event of default.
>
> (c) An order to dispossess the debtor under this section may be appealed by the debtor, but no court shall stay the dispossession order or prevent the disposal of the collateral during the appeal process.
>
> (3) If the security agreement so provides, the secured party may require the debtor to assemble the collateral and make it available to the secured party at a place to be designated by the secured party which is reasonably convenient to both parties.
>
> (4) A secured party may render equipment unusable without removing it from its location, and may dispose of collateral on the debtor's place of business, residence, or any other location where the collateral is found.

[6] In a judgment delivered on 18 October 2013 the Lord President dismissed the application. He said that the provisions of PPSA to what he referred, primarily s.57:

> "...appear to grant not only the Land Court but also the Supreme Court an unregulated mandate to make immediately effective orders for the possession of land and improvements thereto, including dwelling houses, which are incapable of being stayed pending appeal, merely upon satisfying the Court that there was in existence a security agreement (whether valid or not) and that default has occurred (whether excusable or not). To my mind, such a procedure is unfair and sits uneasily with Clauses 14, 90 and 91(1) of the Constitution. Section 58(1) appears to be in conflict with Clause 114."

[7] Although he said the two criteria in s.57(2)(b) had clearly been met, he was not satisfied that it would be just to grant the application, which would result in the present respondents immediately being evicted from their home without any effective right of appeal. He referred to the principle that "when a party is appealing, exercising his undoubted right of appeal, [the] Court ought to see that the appeal if successful is not nugatory":*Wilson v Church (No 2)* (1879) 12 Ch D 454, 458 per Cotton LJ.

[8] The Lord President granted leave to appeal to this Court.

[9] For two reasons, Westpac's appeal must fail. The first is that Westpac was not entitled to rely on s.57 which does not apply to the enforcement of a prior transaction. Section 65(2), which was not drawn to the Lord President's attention by counsel, makes this clear:

> "The validity, effect and enforcement of a prior transaction or prior lien shall be determined by reference to the law in effect when the prior transaction was concluded or the prior lien arose, except as provided otherwise in this section".

[10] Understandably, the Legislature must have considered that it would not be just to impose retrospectively on a debtor enforcement provisions which were not available to the creditor when the security created by the prior transaction was given by the debtor. The validity, effect and enforcement of such a security are governed by the law as it stood prior to PPSA. On the other hand, there was nothing unreasonable about enabling a holder of such a security to register it under the Act and have its priority determined by s.65 (6) and (7).

[11] The second reason why the appeal fails is that, on the basis on which it is now put before this Court, the application should have been made in the Supreme Court, rather than in the Land Court. That is because Mr Waalkens, who did not appear below, said that his client was seeking only possession of the building, which under Tongan law is not part of the land. In other words, Westpac is not now invoking any right against an interest in the land. We hasten to add that it seems that the matter was not so treated in Westpac's application and was not put before the Lord President on this restricted basis.

[12] The PPSA applies to all transactions where the effect is to secure an obligation with collateral: s.5(1)(a). Mr Waalkens elected not to pursue the questions of whether a security over a lessee's interest in land (an interest which the common law called a chattel real) is to be classified in Tonga as real or personal property, and whether such a security is within the PPSA. We note that s.5(2)(a) excludes from the PPSA a transfer of an interest in land, and that exclusion may encompass a legal mortgage of a lease pursuant to Part VI of the Land Act under which it is transferred to the mortgagee by way of security. An equitable security in the form of a charge on a lease does not involve any such transfer. As the matter was not argued, we express no view on whether it could fall within the PPSA as a species of personalty.

[13] Fortunately, the position in relation to securities on buildings is much clearer. In Tonga they are not part of the real estate and may be dealt with separately from the land on which they stand. The PPSA recognises this, for s.5(1)(e) applies the Act expressly to a security interest in a building or other improvements as well as the rental of such a building or improvements for a period greater than one year. Furthermore, s.8(1)(a)(i) provides that collateral, defined in s.2 as "personal property subject to a security interest", may be personal property of any nature and s.8(1)(h) specifically includes as collateral and thus personal property under the Act "a building or other improvement to real property to which a security interest is attached or that is rented for a period exceeding one year".

[14] Accordingly, for the purposes of PPSA buildings and other improvements, treated separately from the land on which they stand, as Westpac now wishes to do, are personalty. The jurisdiction of the Land Court therefore does not extend to them. A dispute regarding them is not one "affecting any land or any interest in land" and so is beyond the jurisdiction conferred on that Court by s.149 of the Land Act: see *Niu & Ors v Tapealava* AC 15 of 2012, 17 April 2013.

[15] That is sufficient to dispose of this appeal but we should not leave it without saying something about the significance of the PPSA regime and expressing some provisional views about the important question of the constitutionality of ss.58 and 57, upon which we heard argument.

[16] The PPSA regime is a major reform of unsatisfactory statutes concerning securities over personal property which in common law countries had become outdated and anomalous in their operation. It classifies any arrangement which is in substance intended to provide security to a creditor over personal property as a security interest, without regard to its particular form (eg. charge, hire purchase agreement or financing lease) and regardless of where title to the collateral lies. It enables public notice to be given of the existence of the security interest and contains rules governing the priority of both notified and unnotified interests. The priority rules replace the common law rules for determining priority, again without regard to where title to the collateral happens to be. The PPSA has its origins in Article 9 of the Uniform Commercial Code of the United States of America, first developed over 60 years ago and inforce in every State. The English speaking provinces of Canada, then New Zealand (in 1999) and more recently Australia, have all adopted the Article 9 model with some local variations. The Tongan Act, we understand, was derived from the Australian legislation. As the Long Title to the Tongan PPSA says, it is an Act to facilitate business and consumer credit by providing rules on attachment, priority, publicity and enforcement of security interests in personal property. Its importance and overriding effect is apparent from s.4 which provides that in a conflict between a provision of the PPSA and any other enactment, the PPSA is to prevail unless the other enactment specifically cites or expressly amends the conflicting provision of the PPSA.

[17] Section 58 gives a secured party a right, after default by the debtor, to sell or otherwise dispose of the collateral. The Lord President was concerned that it might be in conflict with cl.114 of the Constitution, which forbids any transfer of a lease without the prior consent of Cabinet or, in the case of leases for a term of over 99 years, the prior consent of the Privy Council. But, if the PPSA does extend to securities over leases of land (a question we are leaving open), cl 82 of the Constitution (as amended) would require s.58 to be read subject to cl 114. So read, it would not be invalid.

[18] It seems likely that s.57 (set out at [5] above) is directed primarily towards chattels which a debtor can move from place to place to hinder or delay enforcement of the creditor's security. In such a case a creditor may require a peremptoryremedy in order to gain physical control of the collateral. Hence the need for the special expedited court order. However, the section is also available in relation to securities over buildings and improvements, which may also be harmed or neglected by the debtor to the prejudice of the creditor, in circumstances where speedy court intervention may be needed.

[19] One aspect of s.57 is problematical. Our provisional view is that the Lord President was right to be concerned that it would prevent a court from making an order preventing the disposal of the collateral during the currency of an appeal from an order granting the secured party possession and control of the collateral.

[20] The argument put by Mr Niu was that the court's inability to grant any form of stay is in conflict with the right to an appeal to this Court conferred by cl.91 of the Constitution. He supported the view of the Lord President that collateral might be

seized and then disposed of to a purchaser for value before an appeal was heard, thus rendering the appeal nugatory.

[21] Putting the question of disposal of the collateral to one side for a moment and looking only at a situation where the creditor has obtained an order enabling it to seize control of the collateral (or enter into possession of a building), we think there is much to be said for the view that, as control and possession can be restored to the debtor if the appeal succeeds, the appeal could not thereby be rendered nugatory by the absence of a stay. But if the matter proceeded further and a sale or other disposal were to occur before an appeal judgment could be delivered, then there might well be an impediment to restoring the collateral in kind to the successful debtor. There is therefore the appearance of a conflict between cl.91 of the Constitution and those portions of s.57 which would prevent the court from making any order preventing the disposal of the collateral during the appeal process: subs (2)(c) and (4). From a practical point of view, the removal of a building from the land could also result in loss to the debtor which might render a successful appeal nugatory, and it would therefore seem that the court should be able to make an order preventing removal pending the appeal decision. Apart from that aspect of s.57, however, we would not be minded to agree with the Lord President's strictures which we have quoted at [6] above.

[22] The appeal is dismissed with costs to the respondents, to be taxed if not agreed upon.

Langi v Rex

Court of Appeal, Nuku'alofa
Salmon, Blanchard, and Ward JJ
AC 6/2013

4 April 2014; 9 April 2014

Appeal against sentence – attempted rape, indecent assault and common assault – sentence imposed was 14 years as deterrent sentence – sentence reduced to nine years

The appellant was sentenced following a plea of guilty to an indictment charging one count of attempted rape, four counts of indecent assault and one of common assault. He was sentenced to fourteen years imprisonment on 1 March 2010 and appealed out of time with leave of the President granted on 29 April 2013. The appellant had seven previous convictions including one of assault, four of theft and the most recent for indecent assault for which he was sentenced to 18 months suspended for 3 years. He was in breach of the suspended sentence and the trial judge ordered that to take effect consecutively to the fourteen years.

Held:

1. An appropriate starting point for the offence was four years. The sentencing judge took a starting point far out of line with any other offence and described it as a deterrent sentence but gave no explanation of why such a sentence was necessary. It was insufficient simply to state, as did the sentencing judge, that the sentence was intended to be a deterrent without giving the reasons for adopting such a course.
2. The court considered that the starting sentence of four years should be reduced for the plea of guilty. In rape cases, that reduction may be more generous than in some other offences because the plea of guilty often saves the victim from the additional trauma of having to re-live the event in the witness box. For that, the starting sentence was reduced by one year to one of three years.
3. The serious aggravating factors already described merit an increase in the overall sentence by an additional four and a half years giving a final sentence for attempted rape of seven and a half years.
4. The court did not alter the sentences on the remaining counts save to order that they must all be served concurrently with the seven and a half year sentence and with each other. The offence was committed in breach of a suspended sentence of eighteen months imprisonment for indecent assault.

That sentence must be served consecutively to the seven and a half years giving a total sentence of nine years. There was reason to order that any part of this sentence should be suspended.

Counsel for the appellant : Mr Piukala
Counsel for the respondent : Mr Kefu

Judgment

[1] The appellant was sentenced following a plea of guilty to an indictment charging one count of attempted rape, four counts of indecent assault and one of common assault. He was sentenced to fourteen years imprisonment on 1 March 2010 and he now appeals out of time with leave of the President granted on 29 April 2013.

[2] The victim was a young Australian volunteer who cycled with friends to the beach at Fangamea on 30 December 2009. She was walking along the beach by herself and, when she was out of sight of her friends, the accused appeared, grabbed her and, when she screamed, punched her on the jaw. She continued to scream as he pushed and dragged her to a cave. During that time he continued to assault her and ignored her repeated pleas not to hurt her. Over the next half an hour or so he tried more than once to rape her and performed various indecencies on her. Eventually when it appeared he would succeed in raping her, she persuaded him to allow her to perform oral sex rather than to rape her. Once he ejaculated, she was able to escape and reach her friends. All the charges arose from that course of events.

[3] The appellant had seven previous convictions including one of assault, four of theft and the most recent for indecent assault for which he was sentenced to 18 months suspended for 3 years. In that case, he had broken into a house at night and indecently assaulted the female occupant. He was in breach of the suspended sentence and the trial judge ordered that to take effect consecutively to the fourteen years.

[4] The Court was provided with a social enquiry report on the appellant and a victim impact report. The latter showed that his victim had recovered from her physical injuries but was deeply hurt emotionally. She was continuously frightened to be alone and her confidence and self respect had been adversely affected to a very serious degree. She was due to take a new position in Solomon Islands but had to withdraw from the appointment because of the continuing fears induced by this experience.

[5] The judge passed what he described as a deterrent sentence and decided on a starting point of fifteen years. He passed the maximum sentence of ten years imprisonment for attempted rape, three years each for the first two indecent assault charges and one year for the third. The most serious indecent assault was the oral sex and received a sentence of four years. The last count of common assault received a sentence of 12 months. All counts were ordered to be served concurrently except for count five which was to be consecutive. The suspended sentence was activated in full consecutively to the fourteen years making a total sentence of fifteen and a half years.

[6] Mr Piukala for the appellant has produced a letter from the Commissioner of Prisons to say that the appellant is a well behaved prisoner but we do not accept that is a relevant consideration for this court. This is an appeal from the sentence passed

by the trial judge. The court must consider the manner in which the appellant was sentenced at the time the sentence was passed and as the facts were at that time. The appellant has served some four years of his sentence but it is not appropriate for this Court to consider his conduct over those four years. That is a matter for possible review by other authorities.

[7] This was a nasty, vicious attack on a young woman alone on the beach. It included substantial and repeated violence and was continued over a considerable period of time despite pleas by his victim for mercy. Far from being affected by her pleas, he repeatedly renewed his attack. The only mitigation is that he pleaded guilty at the first opportunity. The judge correctly gave some credit for that but pointed out that the overall circumstances of the case meant it was of limited value. Like the judge, we can find nothing beyond the plea to mitigate the sentence.

[8] The aggravating features, on the other hand are substantial. We do not detail them but four in particular were especially significant:

1. From the facts it appears the appellant planned his attack after seeing the victim was out of contact with her companions and alone;
2. The repeated physical violence which continued despite her pleas;
3. The additional humiliation of the victim having to perform oral sex to avoid rape;
4. The protracted sequence of events.

[9] In cases of this nature we consider that an appropriate starting point is four years. The sentencing judge he took a starting point far out of line with any other offence and described this as a deterrent sentence but gave no explanation of why such a sentence was necessary in this particular case or at that time. Any advice on sentence from an appellate court is for guidance only and a sentencing judge may exercise his discretion to take a different course where it is clear the circumstances of the particular case or the prevalence of such offences merit it. In any such case, however, the reason must be stated. It is insufficient simply to state, as did the judge in the present case, that the sentence is intended to be a deterrent without giving the reasons for adopting such a course.

[10] This was clearly a very bad case but that should be reflected in the final sentence as a result of a consideration of the aggravating features adding to the starting point of four years. It would appear that the judge decided the overall sentence and then, as it exceeded the maximum available for attempted rape, the principal and most serious offence, he adjusted the other sentences to give the total term he intended to impose.

[11] These offences formed one protracted and terrifying chain of events and the sentence should be appropriate for the whole sequence. In many cases, a detailed breakdown of events which formed part of the overall sequence leading to or forming part of the principal offence may reveal a number of lesser offences but their inclusion in the indictment does not alter the overall seriousness of the main offence. In the present case, the additional counts of indecent assault and common assault were all part of the attempt to commit rape. Undoubtedly they contributed to the

overall horror of the whole attack and can and should be taken as matters of aggravation of sentence but they do not require consecutive sentences.

[12] Counsel, helpfully, supplied the Court with a number of previous sentences for rape and similar offences. Whilst we do not have the full details of all those cases, they are enough to show that this case does not present any special reason justifying the judge's decision that it required a deterrent sentence.

[13] We consider that the starting sentence of four years should be reduced for the plea of guilty. In rape cases, that reduction may be more generous than in some other offences because the plea of guilty often saves the victim from the additional trauma of having to re-live the event in the witness box. For that, we reduce the starting sentence by one year to one of three years.

[14] The serious aggravating factors already described merit an increase in the overall sentence by an additional four and a half years giving a final sentence for attempted rape of seven and a half years.

[15] We do not alter the sentences on the remaining counts save to order that they must all be served concurrently with the seven and a half year sentence and with each other.

[16] As has been stated, this offence was committed in breach of a suspended sentence of eighteen months imprisonment for indecent assault. That sentence must be served consecutively to the seven and a half years giving a total sentence of nine years. We see no reason to order that any part of this sentence should be suspended.

Order

- Appeal against sentence allowed.
- Sentence of ten years for attempted rape quashed and a sentence of seven and a half years substituted.
- Sentences on all other offences on the indictment to be served concurrently with that sentence giving a total sentence on the indictment of seven and a half years imprisonment.
- Suspended sentence of 18 months passed on CR 212-06 to be activated and served consecutively to the seven and a half years giving a total term of imprisonment of nine years.

Longani v Rex

Court of Appeal, Nuku'alofa
Salmon, Blanchard, and Ward JJ
AC 8/2013

4 April 2014; 9 April 2014

Appeal against sentence – abetment to armed robbery – sentence of 12 years – appeal allowed and sentence quashed – sentence five years imprisonment

The appellant pleaded guilty to a single count of abetment to armed robbery. He was sentenced to 12 years imprisonment with the last two years suspended. The co-offender was sentenced to five years imprisonment with the last two years suspended. The appellant appealed against the sentence.

Held:

1. The appellant entered an early guilty plea. He had a previous conviction for drug growing and possession for which he had served a 3 year sentence. He was 31 at the time of the present offending. The aggravating circumstances for the appellant were his participation in a crime involving (a) the use of a firearm, (b) violence against the victim and (c) the taking of a large sum of money. He was not a first offender but had no previous conviction for violent offending. He must receive credit for his guilty plea. Counsel for the Crown acknowledged that the appellant had potential to rehabilitate himself.
2. The appeal was allowed, the sentence of 12 years imprisonment was quashed and a sentence of five years imprisonment imposed, with the final two years suspended for two years.

Counsel for the appellant : Mrs Vaihu
Counsel for the respondent : Mr Kefu SG

Judgment

[1] The appellant appeals out of time, with leave, against a sentence of 12 years imprisonment (with the last 2 years suspended) imposed by Shuster J after the appellant pleaded guilty to a single count of abetment to armed robbery.

[2] The Crown accepts that the sentence was manifestly excessive especially taking into account a sentence of 5 years imprisonment subsequently imposed on a co-

offender, who also had the benefit of suspension of the last 2 years of his sentence. He was ordered to pay compensation of $7000, which has been paid.

[3] The two offenders lured the victim to the wharf at Tu'imatamoana at around 6am on 29 May 2010 on the pretence of being interested in selling sea cucumbers. The co-accused approached the complainant's truck with a .22 bolt action rifle which he pointed at the victim, removing the keys of the truck. The co-accused hit the victim on the head with the butt of the rifle. The appellant then grabbed from the back seat a bundle of cash amounting to $15,000. The appellant then drove the co-accused away from the scene of the crime in another vehicle. For his part in the robbery the co-accused gave the appellant $2000.

[4] The accused entered an early guilty plea. He had a previous conviction for drug growing and possession for which he had served a 3 year sentence. He was 31 at the time of the present offending.

[5] We consider that the sentence imposed on the co-offender was lenient and presumably gave some credit for the payment of the compensation.

[6] The aggravating circumstances, so far as the appellant is concerned, are his participation in a crime involving (a) the use of a firearm, (b) violence against the victim and (c) the taking of a large sum of money. He was not a first offender but had no previous conviction for violent offending. He must receive credit for his guilty plea. Counsel for the respondent also acknowledged that the appellant has potential to rehabilitate himself.

[7] We consider that in these circumstances the appropriate sentence is one of 5 years imprisonment with the final 2 years suspended for 2 years.

[8] The appeal is allowed, the sentence of 12 years imprisonment is quashed and a sentence of 5 years imprisonment imposed, with the final 2 years suspended for 2 years.

Tahavalu anors v Vakameilalo anor

Court of Appeal, Nuku'alofa
Salmon, Blanchard, and Ward JJ
AC 4-5/2013

4 April 2014; 9 April 2014

Land law – appeal against order for possession of land – appellants only had revocable licence to occupy – appeal dismissed

For the full facts and the Supreme Court decision, see *Vakameilalo anor v Tahavalu anors* [2013] Tonga LR 1. The first ground of the appeal was that the matter should have been heard by a Judge with an assessor. The next two grounds alleged negligence and failure to consult on the part of the appellants' former counsel. Another ground was that the claim was statute-barred. The remaining grounds of appeal claimed that the appellants entered on to the land with the permission of the former land holder. Various promises were referred to and there was a claim that the appellants were denied natural justice.

Held:

1. The court found that because there were no disputed facts crucial to the determination of the matter, there was no need for an assessor to sit with the judge. Further the court rejected the grounds of appeal alleging negligence and failure to consult on the part of the appellants' former counsel.
2. The court was satisfied that the claim was not statute-barred. It was made within 10 years of the time when the right to bring such action first accrued to the respondent.
3. The court concluded on the basis of the facts disclosed in the affidavits that none of the appellants had any claim to occupation of the land other than in the form of a revocable licence. The time that had elapsed since the respondent gave notice to the appellants by letter of 28 August 2002 to vacate the land was more than enough to provide adequate notice of revocation. There was not a failure of natural justice.
4. The appeal was dismissed. Counsel for the respondent and the Minister did not seek costs. Accordingly no such order was made.

Cases considered:

Fie'eiki v Fifita [1995] Tonga LR 184

Matavalea v Uata [1989] Tonga LR 101 (PC)

OG Sanft v Tonga Tourist & Development Co [1981 – 1988] Tonga LR 113 (PC)

Schaumkel v 'Aholelei and Minister of Lands (AC 14/2012, 17 April 2013)

Tafa v Viau [2006] Tonga LR 287

Statute considered:

Land Act (Cap 132)

Counsel for the appellants	:	Mr Fakahua
Counsel for the respondent	:	Mr Edwards
Counsel for the third party	:	Mr Kefu SG

Judgment

[1] The appellants all occupy defined portions of land situated at Halaleva, Ma'ufanga and known as Fonua'eiki.

[2] The first respondent is the registered holder of the land, having succeeded to it as the heir of the previous holder Siaosi Tau'ovelata (Tau) Vakameilalo.

[3] In July 2009 the respondent commenced 7 sets of proceedings. One proceeding was against the first three named appellants, another 5 against each of the remaining appellants and the 7th against a party who took no part in the proceedings. Each proceeding sought possession of the land occupied by the appellants.

[4] In January 2013 the Lord Chief Justice gave judgment in favour of the respondent and made an order that the appellants vacate the land. Appeals were lodged on behalf of all the above named appellants. All proceedings were consolidated for the purpose of this appeal.

[5] The manner on which the proceedings came before the Chief Justice were somewhat unusual. The appellants each filed defences and applied to join the Minister as a third party. They filed affidavits against an application for summary judgment and in support of the application to join the Minister. The application for summary judgment was dismissed. Both the respondent and the Minister also filed affidavits.

[6] The judgment records that the parties attempted settlement between December 2011 and May 2012. On the 3rd May 2012 Mr Edwards, counsel for the respondent, filed a memorandum suggesting the matter be dealt with by way of written submissions and relying on the documents and affidavits already filed. Mr Tu'utafaiva, who was then acting for the appellants, and Mr Kefu, for the third party agreed that the main question was whether the respondent was bound by any promises made to the appellants by his predecessor in title, that further evidence was not needed and that the assistance of an assessor was not required. The Chief Justice proceeded on that basis. Mr Edwards filed submissions but despite extension of time to do so granted by the Judge no submissions were filed on behalf of the appellants or

the Minister. Mr Kefu explained to us that he filed no submissions because his role was to respond to those of the appellants. The Chief Justice was left with the difficult task of deciding the matter on the basis of submissions received from only one of the parties.

[7] Mr Fakahua claimed that Mr Tu'utafaiva did not have authority from the appellants to proceed in this way. However there was no evidence placed before us to support this contention so we proceed on the basis that the appellants were bound by the decision of their counsel.

[8] We have described the procedure followed in this case as unusual. The Land Act clearly envisages that factual issues will be tried by a Judge sitting with an assessor -see s.146 Land Act Cap 132. Parties cannot waive the requirement of the Act. Indeed this issue forms the first ground of the Notice of Appeal. The respondent and the Minister maintain there were no facts in dispute and we accept that, to a very large extent, this is true and indeed we have concluded that there are no disputed facts which are crucial to a determination of this matter. In *Fie'eiki v Fifita* [1995] Tonga LR 184 this Court considered an appeal raising the question of the absence of an assessor in a public sitting of the Court. The matters being heard were various applications in the nature of injunctive relief. The Court held there was no role for the assessor to play and that no questions concerning usages or custom arose. We have concluded that the same can be said in these proceedings but it is essential when evidence is being considered to be certain that is so. Accordingly we urge caution in adopting the procedures which were followed in this case. Having said this we acknowledge the very thorough and well reasoned judgment of the Chief Justice.

[9] Turning to the appeal, we have already noted that the first ground claimed that this matter should have been heard by a Judge with an assessor. For the reasons set out above we reject that ground of appeal.

[10] The next two grounds allege negligence and failure to consult on the part of the appellants' former counsel. For the reason already mentioned we reject those grounds too.

[11] Another ground which may be quickly disposed of is the allegation that the claim was statute barred. We are satisfied that the claim was made within 10 years of the time when the right to bring such action first accrued to the respondent. That was when he became the registered holder of the land in March 2002. The proceedings, as already recorded, were issued in July 2009.

[12] The remaining grounds of appeal claim that the appellants entered on to the land with the permission of the former land holder. Various promises are referred to and there is a claim that the appellants were denied natural justice. It is claimed that the "grant" to the respondent was made in the mistaken belief that the land was vacant. Some statements of defence claim that appellants were not notified of the Minister's intention to register the land in the respondent's name.

[13] Before dealing with these issues it is helpful to record important provisions of the Land Act. First it should be noted that this was not a "grant" of land as alleged in the Notices of Appeal. This was a case of succession by an heir. For this reason the decision of this Court in *Tafa v Viau* [2006] Tonga LR 287 can be distinguished. That case did involve a grant of land where it is necessary for the Minister to be satisfied that the land is "available" for grant. In the case of an heir the Act makes it clear that entitlement is absolute. For example S 54, which provides for the holder of an allotment to surrender the whole or part of the allotment, provides that, upon surrender, the allotment immediately devolves upon the person who would be the heir of the holder if the holder had died. Division VII of the Act dealing with devolution of allotments leads to the same conclusion as to the absolute entitlement of an heir. These issues were discussed by this Court in *Schaumkel v 'Aholelei and Minister of Lands* AC 14 of 2012 Judgment 17 April 2013.

[14] A landholder is prohibited from selling land to another person (s 12) and s 6 provides that "Every verbal or documentary disposition by a holder of any ...allotment which purports to effect a voluntary conveyance, an out-and-out sale, or a devise by will ...is null and void". Sections 4 and 5 emphasise the life interest and hereditary nature of land holdings. All these features were referred to in the decision of the Chief Justice.

[15] In general the only way in which a land holder can convey land to another person is by a surrender under s.54 and a re-grant, and even that will be defeated if there is a heir.

[16] Returning to the appeals, several of the appellants claim to have been allowed to occupy the land by Tau Vakameilalo. However at the times when this is said to have happened, Tau's father was still alive so that he had no right to grant a licence of any sort to the appellants. Mr Fakahua agreed that in all cases where promises were made concerning occupation or vesting of the land they were not made by the land holder. As to the claims of lack of notice from the Minister, Mr Fakahua acknowledged that there was no evidence from any appellant that notice had not been received. In fact the first 3 appellants acknowledge that they did receive the Minister's notice but did nothing about it. It is also clear that various of the appellants received letters from the solicitors for the respondent but took no steps to commence proceedings to establish an interest in the land. There is no doubt that all appellants have been aware for a lengthy period of time of the respondent's requirement that they vacate the land.

[17] We conclude on the basis of the facts disclosed in the affidavits that none of the appellants had any claim to occupation of the land other than in the form of a revocable licence. The time that has elapsed since the respondent gave notice to the appellants by letter of 28th August 2002 to vacate the land is more than enough to provide adequate notice of revocation. We do not consider that there has been a failure of natural justice.

[18] It is necessary to comment on the notice sent out by the Minister. Despite what we said at para [38] of *Schaumkel* we consider it good practice for the Minister (as he did in this case) to send notice of intention to register a successor in all cases where the land is occupied by others. There have been cases where a land holder by his words or conduct has been estopped from demanding possession at least during his lifetime: see *Matavalea v Uata* [1989] Tonga LR 101 (PC). Similarly if the land holder permits another to spend money on land in reliance upon grant of an interest he cannot later claim the interest is not a good one – *OG Sanft v Tonga Tourist & Development Co* [1981 – 1988] Tonga LR 113 (PC). Notice gives the opportunity for such possibilities to surface sooner rather than later. However, as recorded in *Schaumkel*, the Minister is obliged in a case such as this to vest the land in the heir.

[19] The appeal is dismissed. Counsel for the respondent and the Minister told us that in this eventuality they did not seek costs. Accordingly no such order is made.

Madden v Madden

Supreme Court, Nuku'alofa
Cato J
AM 5/13

19 April 2014

Maintenance order – variation of orders sought – means of provider should be taken into account – order varied

Mr Madden and Mrs Madden came to Tonga to enable him to become a financial consultant after business opportunities at his age, then about 60, had become more limited in New Zealand. Mrs Madden apparently assisted him in the business of Insolvency Management and Madden and Associates (IML and M&AL) with clerical work until they separated in December 2012, and she and the three school age children returned to NZ. They currently live in the former matrimonial home in Parnell. The Magistrate on 11 March 2013 had ordered the Mr Madden to pay maintenance at the rate of $2500 per week and also ordered the following: the sum of $17,600 in the bank account 128941 at the ANZ Bank was to be paid out to Anna Madden; the bank account 1241424 at the ANZ bank in the name of Wayne and Anna Madden be changed to be in the name of Anna Madden only and that she be the only signatory thereto; Mrs Madden was to apply the sum of $14,600 to all necessary costs and expenses for herself and the children and account thereto to Mr Madden and to this Court at the next hearing of this matter. The appellant had paid maintenance until he was unable to pay and had defaulted.

Held:

1. In the Magistrate's determination, there was little or no reasoned consideration of budgets, financial statements, and nothing much more than an assessment based on an unreasoned measure of the difference between a higher amount sought by Mrs Madden and that figure which at the time Mr Madden said he could afford to pay. Not only was the order plainly excessive, to my mind, but it lacked any reasoned assessment of Mr Madden's actual capacity or means to pay.
2. The court did not detect in Mr Madden a man who had undeclared wealth or who was attempting to obfuscate or reduce unreasonably any maintenance obligation. The court considered he was doing his best to make reasonable provision to the applicant and their family according to his means. Mr Madden was very committed to his children and was doing

his best also to provide the security that was reasonably within his means to provide.

3. The means of the provider must be considered in making maintenance orders. Maintenance orders should not be seen as giving rise to oppression, or made to a level where there was little prospect that they could be met.
4. In the appeal and defence of the cross-appeal Mr Madden was successful. However taking into account the circumstances of Mrs Madden, the court made no order for costs. Each party was to bear his or her costs.
5. The court made the following orders:
   i. The order of the Magistrate relating to maintenance of 12 March 2013 for Mr Madden to pay $2500 TOP weekly to the respondent was quashed and in its place were substituted the following orders of this Court. (The orders relating to the bank account no 1241424 made on 11 March 2013, and Mrs Madden's right to draw and solely enjoy the proceeds of this account as maintenance remained unaffected).
   ii. Mr Madden was to continue paying the mortgage and rates together with insurance on the Parnell property as per the interim orders;
   iii. He was to arrange for the insurance policy to cover he and Mrs Madden's joint interests in the Parnell property.
   iv. Mrs Madden was also to continue to take the weekly rental from the Touliki property as under the interim orders.
   v. Mrs Madden was to immediately provide an accurate list of all household property that she removed. She was to provide this to Mr Niu, forthwith and he to Mrs Stephenson.
   vi. The property was to be made available to Mr Madden or his agent and access given to the Pahu property or other place of storage for valuation as soon as was practicable, but not later than two weeks after Mrs Stephenson was advised. Lawyers may also mutually attend the valuation if the parties desired.
   vii. Sale of the items in Tonga was to proceed as soon as practicable after that, but not later than one month after valuation if the parties could not agree on division of the property.
   viii. The proceeds of sale were to be divided equally between them, after deduction of reasonable costs including any reasonable attendances of lawyers. In the event of property being taken by one party by agreement rather than sold then half of the fair valuation of that item should be credited to the other.
   ix. The parties' solicitors were requested to use their best endeavours to ensure that this process was sensibly implemented.

Case considered:

Sefesi v Fukofuka [2010] TLR 171 (CA)

Statute considered:

Maintenance of Deserted Wives Act (Cap 31)

Counsel for the appellant and cross-respondent : Mrs Stephenson
Counsel for the respondent and cross-appellant : Mr Niu

Judgment on appeal and final orders

[1] An interim application seeking a stay of maintenance and related orders made in the Magistrates Court in or about 11 – 12 March 2013 was filed on the 16th April, 2013. Because it appeared to me to raise issues which required immediate and urgent attention, the appellant being already in arrears of maintenance, I requested the representatives of the parties to appear before me at 10am on Friday the 19th April, 2013. It appeared to me clear then that there would be no agreement reached on any interim payment so I requested the parties to appear before me later at 4pm to argue the question of whether a stay of the Magistrate's orders should be made and interim orders substituted pending a hearing of the appeal against the magistrate's order that the applicant pay to the respondent $2500 TOP a week.

[2] I was informed the appellant had paid maintenance until he was unable to pay and had defaulted. In my view, on what I had seen that was not surprising. In all, I was informed he had paid approximately $12, 000 TOP to the respondent pursuant to the Magistrates' order to that date. In addition, it appears that the Magistrate on the 11th March 2013 had ordered the following;

1. It is ordered that the sum of $17,600.00 in the bank account no. 128941 at the ANZ Bank in the name of Wayne and Anna Madden and Associates be paid out to Anna Madden forthwith.
2. It is ordered that the bank account no 1241424 at the ANZ bank in the name of Wayne and Anna Madden be changed to be in the name of Anna Madden only and that she be the only signatory thereto.
3. The plaintiff shall apply the said sum of $14,600.00 to all necessary costs and expenses for herself and the children and account thereto to the defendant and to this Court at the next hearing of this matter.

[3] I should record that the applicant stated that neither he nor Mr Edwards were present when the order was made on the 11th March, 2013; however, the order itself asserts that the Magistrate had heard Mr Niu and Mr. Edwards (the former counsel of the applicant) and both parties agreed to the orders. I do not make any ruling on this; and nor I have been asked to. It seemed to me at the time of the interim hearings the orders were regarded as a fact. Indeed, the record shows Mr Edwards at the hearing on the 12th March 2013, referred to the bank account in such a way that the funds were at the disposal of Mrs Madden. The Magistrate, in his orders delivered on the 12th March 0213, expressly directed that his orders were to be first satisfied from this source that is account 1241434 and then the appellant was to commence paying maintenance at the rate of $2500.00 per week. I mention them because they are of some relevance to the present application.

[4] In a memorandum filed in this Court after the hearing had taken place, Mrs Stephenson who appeared for Mr Madden on the interim application and on this

hearing, although acknowledging that the funds subject of the Magistrate's order of the 11th March coming from the ANZ account were not the subject of appeal nevertheless sought an order that in the event of the Touliki property being sold that out of the matrimonial chattels located at the address, Mr Madden be reimbursed $8,800.00 (being half of the amount ordered by the Magistrate to be paid to Mrs Madden on the 11th March 2013 from the then jointly held ANZ account) be paid first to Mr Madden, with the remaining balance to be shared equally between Mr and Mrs Madden. I do not propose to make such orders. First any sale of the Touliki matrimonial property (that is chattels) was not the subject of any consideration by the Magistrate and is not the subject of this appeal. The proceeds from the funds in the ANZ account were ordered to be spent on the maintenance of Mrs Madden and the children and have been applied to this end.

[5] The applicant had on the interim application complained also that he required the return of office equipment and a vehicle to assist in being able to carry out his work as a financial consultant and alleged that the applicant removed these about the time she returned with the three children of the marriage to New Zealand. I did note, in my interim judgment, that the applicant had said he would be required to outfit the premises and presumably arrange a car purchase to run his business which he estimated would cost, $25,000 TOP. Plainly, if he is to continue in business he will have to have the means to do so, and if he had to incur additional capital expense, as I stated in my interim judgment this would affect the profitability of his business, being a financial consultancy. I make orders below at paras 35-36 and 41 in relations to this property.

[6] The essence of this appeal is that the Magistrate failed to take into account financial statements which had been presented by the appellant (copies were made available to this Court) which contrary to assertions made by Mrs Madden that he was earning in excess of $200,000 TOP, demonstrated this was not the case, ($300,000 claimed on the cross-appeal) and that his earnings both past and estimated over the next 12 months were much more modest. Examination of the accounts filed in the interim proceedings suggested also that this was so. For the 12 month period ending June 2012, business accounts for companies in which the respondent held a majority shareholding showed total fees of $178,638.00 gross and net after tax profit of $37,897.00. That did include, however, a salary allowance or deduction of 41, 667. I discuss this later at para 15. In the six month period for July to 12th December 2012, net after tax profit of $41,667.00 was shown.

[7] The Magistrate's ruling was brief. He said;

> "This case is claiming maintenance for the children, and with that being said the plaintiff claims $4000.00 a week, but the defendant thinks that $1400.00 should be given. My order is as follows;
>
> > "The defendant is to pay $2500 per week, starting this week, but to be taken from account 1241424, until the money there is finished and then continues on with the payment"

No account it would seem was given to the fact that the appellant had been meeting the terms of the mortgage on the Parnell property, which was a significant liability. I consider the Magistrate failed to properly consider and assess maintenance at a reasonable level having regard to Mr Madden's ability or means to pay a requirement in section 2 of the Maintenance of Deserted Wives Act – see further the approach of Court of Appeal in *Sefesi v Fukofuka* [2010] TLR 171 cited to me by Mrs Stephenson, where it said;

> "Without exhaustively describing what evidence might be needed to undertake the task, it would in many cases, require the judge to know the income of the person against whom the maintenance order was sought, details of what amounts that person might need to live including supporting a new partner (if any) and additional children (if any) and what other sources of income were available to that person (for example, income generated by the new partner). Equally important, would be evidence about the financial needs of the person claiming maintenance and any children of the marriage. That again would require evidence of the income (if any) of that person and the costs of rearing and educating the children."

There seemed to me, in the Magistrate's determination, to be little or no reasoned consideration of budgets, financial statements, and nothing much more than an assessment based on an unreasoned measure of the difference between a higher amount sought by Mrs Madden and that figure which at the time Mr Madden said he could afford to pay. Not only was the order plainly excessive, to my mind, but it lacked any reasoned assessment of Mr Madden's actual capacity or means to pay. Mr Edwards at the hearing for Mr Madden had strongly protested that his client was not in a position to pay the sum demanded. As such, in my view the order for payment of $2500.00 TOP weekly, or $130,000 TOP annually was plainly wrong and unreasonable, and this Court, at the request of both parties has been asked to consider the matters de novo, rather than remit the matter to the Magistrate for reconsideration. To this end, both parties filed a considerable amount of written material in support of their positions which I have considered. The position now is that I have half yearly to July 2013 actual earnings of Mr Madden, as set out in a financial statement which I find helpful.

[8] It would also seem by the date of the hearing before the Magistrate a large part of the funds in the frozen joint bank account bank had been already exhausted by Mrs Madden because Mr Niu announced to the Court that as the 11th March 2013, the balance in the account was only $7700.00. As I have said that money has now been expended I am told on meeting family commitments.

[9] It should be noted also that a substantial amount of the earnings in the period July – December 2012 for Insolvency Management and Madden and Associates (IML and M&AL) the companies Mr and Mrs Madden operated under before their separation were connected with Mr Madden's receivership of the Dateline hotel; his liquidation fees in that regard being it seems in the order of $65,000. He no longer had this work and, in his interim application, his forecast for the period January – December 2013, his earnings were estimated to be gross $135,000.00 and after expense a net

$37,633.07. Salary of $41,667, however, was shown as deduction in those accounts, as I have noted.

[10] Initially, Mrs Stephenson had indicated she wished to press jurisdictional issues as to whether maintenance should have been ordered under the Deserted Wives legislation on the basis that Mrs Madden had not in fact been deserted. Mr Madden, in his affidavit, filed in the interim proceedings and said that he had left the matrimonial residence, which had been rented, because of domestic discord, and later Mrs Madden had elected to return to live in New Zealand where the three children were being educated and however in Parnell their matrimonial home was. Mrs Stephenson announced, however, at the substantive hearing she had instructions from Mr Madden not to proceed further with these objections, and any question of jurisdiction was abandoned. Both parties had indicated they wanted me to consider the matter essentially de novo rather than remit the matter back to the Magistrate to rehear the matter. I agreed to do so. Initially Mrs Madden had indicated in the light of my findings on the interim hearing, she asked me to recuse myself. Later Mr Niu indicated that he did not object to me hearing the matter, and it seemed sensible for me to do so since I was already appraised of much of the background. The hearing of evidence continued over four days, during which both parties produced a large amount of documentary material, financial statements, budgets, bank statements and other documentation, and were extensively cross-examined all of which I have considered. I have also received from the parties' counsel submissions which I have read. Essentially, Mrs Stephenson contended there should be no upwards adjustment of the interim orders, and after considering all the evidence and submissions I have come to that conclusion with a slight variation being Mr Madden paying the home insurance on Parnell. My reasons are recorded below.

[11] Mr Madden and Mrs Madden came to Tonga to enable him to become a financial consultant after it seems business opportunities at his age, then about 60, had become more limited in New Zealand. Mrs Madden apparently assisted him in the business of Insolvency Management and Madden and Associates (IML and M&AL) with clerical work until they separated in December 2012, and she and the three school age children returned to NZ. They currently live in the former matrimonial home in Parnell.

[12] At the interim hearing, Mr Niu took objection to the fact that the estimated income in the forecast presented by Mr Madden of future earnings was based on only 1000 chargeable hours a year at a rate of $125.00 an hour. He said, essentially, that Mr Madden had underestimated the hours he could work, and he could work longer hours. Mr Niu did not pursue this line of inquiry at the hearing of the appeal. I took the view that Mr Madden was far from lazy but had energetically made the most of the opportunities he had to acquire work in Tonga. I shall discuss his present position below. Mr Niu also took the position that at the interim hearing, that Mr Madden's overall earnings were higher than estimated. Whilst it is true Mr Madden had had a better six months than possibly anticipated, to June 2013, I do not know what his next six months period will bring. He has estimated for the period July 2013 to June 2014 gross earnings of $135,400.00 with an after tax net profit of $60,303.38. I accordingly do not have a full 12 month actual earnings by Mr Madden unassisted by his wife, nor any real history of sole earnings to work with over any substantial period of time.

[13] The reality is as I have said, however, Mr Madden does not have the lucrative Dateline receivership any longer which was a significant part of the income in the last financial year in which he and the respondent were in the business together. Mr Madden also complains of some ill health. Mr Niu objected at the interim hearing that he had not presented medical certificates, and he repeats this in his submission, although he did not appear to seriously contend at the hearing Mr Madden did not have such problems. I am satisfied, however, having seen evidence produced by Mr Madden that he does have a serious problem with his eyesight – cataracts which will require him to undergo operations in December of this year the cost of which he will have to bear, being an amount of approximately $16,500.00, which is obviously necessary for him to be able to continue with his professional or any other quality life. That will also require him to recuperate for a period of a month and further reduce his earning potential for a limited period.

[14] On its face, the evidence before me at the hearing suggests that Mr Madden does not have the earning potential ascribed to him of $200,000 - $300,000 a year. Indeed, even in New Zealand never had this; or the means to pay the very significant maintenance ordered by the Magistrate, of $2500.00 TOP per week, or $130,000 TOP annually, out of net after tax earnings. I consider Mrs Madden was totally unable to support the view that he was a substantially higher earner than his financial papers disclosed, and indeed had greatly inflated, in her own mind, his earning capacity. She had claimed in her cross-appeal for an increase in the Magistrate's award to $5000 TOP, that he earned $300,000 per year. Mrs Madden in evidence said she was under the impression he would receive more than he did after early discussions with a Tongan business enterprise seemed not to mature or reflect what she at least considered was Mr Madden's rightful dues. I do not consider, as she suggested had taken place that Mr Madden would not have billed for money that was owing to him. There was a lean period after he had arrived in Tonga prior to his taking on the receivership of the Dateline hotel. The Dateline hotel fees had formed a major part in the statement of comparative summary of income filed in the interim proceedings for IML and M&AL (for the period July – December 2012), as I have said. Even so his earnings had not reflected very high earnings or even potential to achieve level of a high income after earner during this period. I do not accept Mrs Madden on the point that he was a very high income earner, at all.

[15] In this regard, I note also that in his forecast produced for the interim hearing Mr Madden claimed salary of $41,667 TOP, a figure which I have already mentioned. I did not consider the sum $41,667 TOP was an excessive amount by way of drawings as salary in my interim judgment. Mr Madden also, in my view, has the right to live at a reasonable level, expected of a man of his age.

[16] In additional financial statements supplied for this appeal, Mr Madden filed his 6 month actual return for his current practice. That showed, as I have said, that between December 12, 2012 and the 13th June 2013 he had gross fees of $94,975.00 made up of fees from financial and business advice of $82,855.00 and insolvency management fees of $12,120.00. From this, he deducted expenses which I considered not unreasonable of $22,219.00 as office related expenses, leaving a net income (after tax of $10,811.10) being $61,944.40. For the next 12 month period, he estimated his net income after tax to be much the same. Mr Niu claimed that these figures meant that

he had deliberately misstated or underestimated his earnings for the 12 month period that is from January to December 2013, that is for the year after he had separated. Although his six month actual earnings as shown in his financial statements suggested he would derive a higher net income than estimated, an estimate is only that. I do not see him as deliberately misleading the Court when he presented his financial statements in April 2012. What was in my view more relevant was his history of actual earnings to December 2012 when he and his wife separated as shown in the IML and M&AL accounts. Annualised they did not suggest him to be a particularly high earner, as Mrs Madden claimed.

[17] I pause here to say that, although Mr Niu questioned whether some of the expenditure was valid, such as his legal fees in these proceedings, some casual contract labour, some travel and accommodation, I did not form the view that his expenses were unreasonable or necessarily inflated for a professional practice. Mr Niu submitted his office expenses should be $2510.00 a month which annualised is $15,060.00. Although a variation, I would not describe the difference, in any event, as a remarkable discrepancy. Certainly, there was nothing in the overall picture considered broadly to suggest that he was being less than frank, given the uncertain nature of his practice. Even if some of the expenditure may have been questionable as business or private as Mr Madden on occasions seemed to concede, there was nothing of nay real significance that led me to consider that his accounting was so unreliable as to discount his assessment of expenses.

[18] Mr Madden also made the point that he had largely attempted to spread his earnings by a retainer method of charging so that he had a more reliable source of fees. Of the $82,855.00 of fees from financial and business advice, he considered that only $40,000 could be regarded as recurring, and this he estimated would increase by about 50% over the next year. The balance of $42,855.00 was no-recurring fees. He anticipated the insolvency side of his practice due to his relationship with one of the banks was likely to increase next year substantially. Much of this is uncertain, however. I note in the next year he estimated his net salary to be much the same as the salary he earned for the last six months, although his gross fees and expenditure were higher. I would describe the earnings of Mr Madden as falling within the range of moderate but not of a high earning professional. I do not consider it as necessarily indicative of a sustained history of earning at the level of $180,000 TOP a year which Mr Niu suggested I should regard as his income for maintenance purposes. That would amount to doubling his current gross earnings for the six month period but even if I were to do that, that does not reflect his net after tax profit. On this approach that would be closer to $120,000 TOP. I am in real doubt, however, that he will in the six months that is from July to December 2013 achieve that. Much is problematic. His current obligations to the Parnell household amount to half of that, and as well he has his living expenses and debts to pay. Mr Niu contended that his gross earnings for the 12 month period of, he submitted, $180,000.00 together with the rental income of Touliki of $43,410.00 should be accumulated to reflect the annual income of the business and of the expenses and property, totalling $223,410.00. From this, he deducted business expenses of $30,000 (Mr Madden claimed about $22,000 per six months) Parnell mortgage $38,320.80, Parnell rates $4,976.36, Parnell repairs $2000, Touliki repairs $2000 totalling $77297.16 making a total sum of $146,112.84 he contended was available for sharing. His suggestion was that this sum should be

divided by 5 leaving Mr Madden with $29,222.56. I have approached the matter differently as I indicate below.

[19] Whilst I am prepared to accept for these purposes, Mr Madden's estimate of his earnings in the next period of 6 -12 months, might be in the order of what he achieved in the 6 months to June 2013, I cannot accept this as a certainty, as I have said. The reasons are these.

1. Mr Madden is in the process of having his visa renewed in order to enable him to work here. His visa runs out on the 7th October, 2013. At the time of finalising this judgment I assume his ability to work here has been unaffected. Should this be declined this will put paid to any estimate of his likely earnings. In fact, as he himself said, he would have to look to other opportunities for employment elsewhere, he says in the Pacific because he seems not to want to return to New Zealand. The reality may be that circumstances dictate that he may well have to, should other suitable employment prospects in the Pacific not eventuate.
2. The second pressing problem is that Mr Madden is about Christmas scheduled to undergo a double eye operation because of failing sight due to cataract problems. He is booked in to have an operation in New Zealand. Whilst there is no reason to believe this will not be successful, it does necessitate a period of convalescence for him of at least a month. Mr Madden estimates this will affect his financial performance as a consequence. As I have said I do accept he is in need of this treatment.
3. The nature of the practice Mr Madden has of receiverships, and financial advice and accounting, means that much of his work has been one off, and although he has tried to rationalise his income stream by entering into monthly retainer arrangements which seems to have been working quite well, there is in my view uncertainty also about his future income stream.
4. Mr Madden is aged 62, an age most would regard as approaching the latter part of a working or professional life. Mrs Madden, it is noted, is considerably younger being aged 47. Although he is in reasonable health aside from his eyesight, it seems, sustained pressure which matrimonial discord can bring, may adversely affect health and the ability to work at a high level.

[20] I find, however, having heard Mr Madden and observing the very lengthy and careful cross-examination of him, by Mr Niu a candid witness, an intelligent man, and his professional approach to his practice, given his limited circumstances and his desire to work in Tonga to achieve his goals, commendable. Whether he is able to do so, successfully in the short, medium or long term is, in fact, in my view far more problematic.

[21] In previous estimates for the interim hearing, Mr Madden estimated his salary as being in the order of $41,667, which I did not consider unreasonable, but he did not approach the issue of his own needs in that way at this hearing. Rather from the net after tax income for the period December 12-13, he calculated his drawings as $58,744.95. Of these, $18,705.37 were for payments for credit card bills, miscellaneous Tonga living expenses of $3759.94, sundry transfers to BNZ (for various New Zealand expenses) $24,264.66 for NZ Insurance, rates, and mortgage (NZ), house rent in Nuku'alofa of $3000.00, Tonga Water Board of $71.85, and Touliki property maintenance $1208.00.

[22] Although Mr Niu cross-examined at some length, I did not find the appellant's drawings overly excessive or unreasonable. His reduction in credit card debt which had included family expenses was pressing and had the effect of reducing accruing interest. This liability, he admitted, would be reduced, substantially, no doubt freeing up some money in future years. Whilst it may be that this estimate could be reduced allowing more money as Mrs Madden claims in her own budget analysis of his drawings (where in she would allow him only a small part of the balance) to be available to be paid to her by way of maintenance, I am very doubtful that this is so. Rather, I consider in the light of the uncertainty of whether Mr Madden will in fact attain existing levels of remuneration, together with the fact that he does not own a car, nor indeed pays rent (enjoying an informal relationship with a client over the use of a car and accommodation from friends, though paying for some home help), means that I should be slow to find against Mr Madden that there is in fact more money available to pay a higher level of maintenance or equivalent to Mrs Madden than he is currently paying.

[23] I also take into account the fact that he has a substantial sum to pay for his forthcoming operation. If his relationship with his client is to alter over the car or he has no longer access to unpaid accommodation then the figure of $58,000 TOP is by no means an unreasonable assessment of his needs. I take into account also that whilst he has reduced his card commitment which reflected private and family expenses, a figure of $6,000.00 he says still remains. That is still a substantial debt. Further, he has other debts to be paid those to family being money he borrowed from close relatives to fund the early days of his return to Tonga. I also note that whilst the figures below of New Zealand commitments he pays on the Parnell property are reflected in an exchange rate of about 1.3 TOP per NZ dollar, (as at the interim hearing) the exchange rate has fallen currently further to 1.41 TOP which will increase his financial obligation. In all, Mr Madden did not present to me as a man whose wealth or means is such that he could afford to pay much more maintenance than he is currently paying by discharging mortgage, insurance and rates liability on the Parnell property, and giving Mrs Madden his share of the weekly Touliki rental. I also take into account the uncertainties of his present position, and the fact he is fast approaching the age when many would be thinking of retirement. He requires some buffer in my view against unexpected contingencies, which may be health, or a down turn in work. I did not detect in Mr Madden a man who had undeclared wealth or who, in any way, was attempting to obfuscate or reduce unreasonably any maintenance obligation. Indeed, to the contrary, I considered he was doing his best to make reasonable provision to the applicant and their family according to his means. I detected that Mr Madden was very committed to his children and was doing his best

also to provide the security that was reasonably within his means to now provide. I mention this further below.

[24] Mr Madden had contended also that the order for maintenance failed to take into account that he had been paying the mortgage of $2258.29 NZ monthly or $564.57 NZ a week. As well, he offered to pay rates for the property of $90 per week or $4320.00 NZ annually, and under the interim terms of maintenance is currently doing so. He was not ordered to pay the insurance but I consider that is fairly an outgoing and I make this also part of the order I impose. This means he will be paying in total mortgage and rates of $31,419.48 NZ on Parnell or at the rate of exchange of 1.3 (the rate at the date of the interim hearing) about $40,845.32 TOP annually ($785.48 weekly). In addition as I have said he will have to pay the insurance on Parnell.

[25] The former matrimonial home is in Parnell, a very valued residential suburb in Auckland and Mrs Madden is a joint owner. It has a sizable mortgage on it of about $NZ300,000.00 At the hearing, it emerged that in the opinion of Mr Madden (and Mrs Madden did not disagree) the property would today sell for about $NZ 1.1 million. The property was purchased I was told by Mr Madden out of funds he had accumulated during his expatriate working life, as was their jointly owned Touliki (Tongan) property, also a valuable family asset, with a possible equity it seems of around $4 – 500,000 TOP. Mr Madden, consequently, I was told has no retirement funds. Much of the accumulation of his former working life would appear to have been invested in these two properties, and in family expenditure. Mrs Madden complains there are repairs required to this, but it seems Mr Madden is paying for upkeep of Touliki.

[26] I consider, however, that only half of the amount of his total mortgage commitment on Parnell can truly be regarded as a maintenance payment because the other half represents his own obligation under the mortgage. However, the reality is that, if he cannot fund the mortgage and outgoings, then very shortly the Parnell property would be sold under a mortgagee sale and not only would some of the joint equity be probably lost but the family would have to move elsewhere. This would probably mean a move for the children away from their current proximity to the quality state schooling they now enjoy. From Mr Madden's perspective, it cannot be escaped that finding this payment monthly constitutes a considerable but essential family commitment. Taken purely as meeting Mrs Madden's share of the mortgage, and rates, he is paying a sum of $20,422.66 TOP annually, but he has to in fact find double this to render the family home secure.

[27] In his interim application before this Court, he said he could, in addition to paying the mortgage, allow Mrs Madden the full benefit of the Touliki rental of $880 TOP per week. The $880.00 ordered to be paid as an interim measure was accordingly paid from the weekly rental paid on the Touliki property, which is being leased out to the Immigration department. I was advised that the lease has been recently renewed for a further year. As to this, of the $880.00 rent, only half of this is Mr Madden's. However assessed on the basis of $440.00 per week being his share, that is a further annual $21,120.00 TOP he is paying as maintenance to Mrs Madden. That means together with paying Mrs Madden's share of the mortgage and rates, he is paying her about $41,542.66 TOP annually or $798.89 a week. If the full extent of

mortgage liability is taken into account that is $61,985.31 annually or $1,191.64 TOP weekly which is the figure I adopt as relevant because that money has to be found to sustain the mortgage. If that figure is taken on a six month basis it is $30,982.65 TOP. That figure is about half of his net income after tax shown in the statement of financial account for the year ended 30th June, 2013-that is the 6 month period which is the only actual and in that respect reliable statement of net earnings I have. I also take into account, that of the money frozen and available to Mrs Madden by the Magistrate on the 11th March 2003 as maintenance, half of that belonged to Mr Madden. However, much of that can be taken to be interim maintenance. The question I have to consider is whether I should increase the interim award. I have decided considering all the evidence and the competing submissions not to. Were I to have done so it would have been by a small amount for the children, but I consider that Mr Madden as he has done, will continue to support them, as he is able. In my view, with the rate of increase in exchange prejudicial to Mr Madden and the increased obligation to pay the insurance on the building, there is no room to require him to pay any more than he is currently paying. If there is any adverse material alteration in his earnings or present lifestyle, his ability to earn or this level of income cannot be achieved, this may well result in his having to apply for further relief by way of variation to a Magistrate.

[28] Mr Niu on behalf of his client had strongly contended on the interim hearing that I should not order any stay and nor was the maintenance order excessive. He had produced a budget of the respondent's needs which had been urgently obtained. These showed monthly bills estimated as $2038.33 NZ -$600 of which was a nanny. It seemed to me on the interim application, however, since the children were all at school, and two are in the later stages of secondary school, the nanny expense would be questionable in view of the parties' present situation. I am advised that Mrs Madden has had to dispense with the nanny who had been a long term nanny and indeed she is owed money under her contract of employment. She has returned to Tonga, although she is from the Philippines. I am advised that the younger child misses her but regrettably that is an incident of the parties' present position. Mr Niu claims that Mr Madden should pay additionally for this.

[29] In addition, there were other weekly expenses of $1105.00, and additional expenses of $12,950.00. Plainly, the issues of expenses and budgets ought to have been placed before the Magistrate. There is no record that they were. Mr Niu had strongly urged me Mrs Madden and family were entitled to be maintained at a level they were used to before the separation. That may be the ideal, as I said, in my interim judgment, but that all depends upon the financial means of the other spouse. In most cases, this will not be possible particularly where the standard of living formerly enjoyed is high as it seems to have been in this family, and yet the overall family income was comfortable rather than high. Mr Madden in evidence candidly admitted that the family had been living beyond their means. The amounts both owed on the joint and several credit cards would suggest this was so. Marital separation is generally in most households of average means and income, and I find this household no exception, followed by a marked reduction in financial means, and sensible adjustment has to be made for this. Plainly, section 2 of the Maintenance of Deserted Wives' Act is an acknowledgment that the means of the provider must be considered. *Sefesi v Fukofuka* [2010] TLR 171 also plainly bears this out. Maintenance orders

should not be seen as giving rise to oppression, or made to a level where there is little prospect that they can be met as I said in my interim judgment.

[30] In this Court, Mrs Madden cross appealed for the vacation of the order of $2500 and an increase of maintenance to $5000.00 per week. That was in my view totally unrealistic. In her budget filed in these proceedings, she claimed an annual sum for household and related expenses of $121,626.16 being household expenses, monthly utilities and clothing, school fees, electronics, arrears owing to nanny, her credit card, and car maintenance. This did not include house maintenance and the replacement of aged household items. She considered that Mr Madden's drawing of $52,000 were excessive, and argued for a claw back of $44,252.34. I have commented on that, and generally found his level of drawings not excessive. Overall, I considered that Mrs Madden had been slow to accept that separation had meant living expectations for her and her children of necessity would be reduced. In my view, her attempt to force Mr Madden to pay her significantly more maintenance than he was currently paying suggested to me she still had an unreal appreciation of his position. The breakdown of a marriage for whatever reason often takes a significant period of emotional adjustment and acceptance of the new reality.

[31] I am informed that Mrs Madden has a diploma in business and has skills. It seems she has carried out a sales business in New Zealand and has assisted Mr Madden with clerical and financial matters in Tonga, and probably elsewhere. I consider her a person of intelligence also and well capable of securing at least some part time employment. I observe that now the original shock of the breakdown of her marriage which arose in December last year has to some degree settled, (and perhaps some of the resentment has dissipated), she has at least turned her mind to her life, independently of Mr Madden, which is a positive movement forward for her. Whilst her employment prospects with her younger child still only at primary school, may be limited, as she claims, she seems determined to improve her position and contemplates a move to university to convert her diploma into a B Com. All that is laudable but I consider that can only be realistically achieved if the parties take steps to sensibly resolve issues involving division of their matrimonial assets in the not too distant future so that each has a financial independence for which present living and financial independence for which present living and financial arrangements do not allow. Mrs Madden is only 47 and she, unlike Mr Madden, has quite a number of years of potentially productive income earning although moderated whilst her youngest child is still at primary school.

[32] In this Court, at this hearing, Mrs Madden presented a budget which plainly showed that there was a considerable deficit between what she considered her family outgoings and what she was receiving from Mr Madden, as I have indicated. I do not propose to address individual items in this budget save for the item said to be food, drinks and others at $600 per week, or $NZ2400 a month. That does seem excessive to me. Plainly, Mrs Madden in her budget has to consider not only her own needs but those of her three children as well. I formed the view that Mrs Madden, as does Mr Madden, had considerable concern for the welfare of their children. I formed the view, however, that Mrs Madden was over indulgent with her children in the sense that they were given something of a free reign in relation to their likes and dislikes in food, and also other activities. No doubt also the elder children in their latter years at

school wish to maintain the lifestyle of their peers, but the reality is different, now. School fees and expenses are in modern New Zealand a concern even in state schools where levies and additional expenses are charged for school related outings. However, with the mortgage and rates of $40,845.32, TOP paid by Mr Madden and with a further sum of $45,760.00 TOP available being the joint annual rent from the Touliki property a significant sum is being received annually for living expenses and mortgage and other outgoings into this Parnell household. In my view, that sum should present an adequate basis for this family to live reasonably in Parnell and the children to receive their education at State schools. Indeed, somewhat begrudgingly, Mrs Madden under cross-examination from Mrs Stephenson appeared to concede that she was able to live within the maintenance provided by the rental money from Touliki albeit on a more restricted basis because she had to.

[33] I did not form the view, however, other than perhaps in over-indulging the children Mrs Madden herself engaged in excessive spending for her own ends. She drove an old car which requires some expenditure. She could not afford household repairs and certain family items had broken down and could not be replaced. She said her brother helped her financially from time to time. Her problems were rather of adjusting to a reduced family income because there were now separate living arrangements for her and her husband. In these circumstances more constrained spending and budgeting is a necessity to live within the financial provision available, which I have mentioned.

[34] Of considerable concern to me is that Mrs Madden had a credit card debt of $NZ 13,484.41. Like Mr Madden, she says that her expenses were family expenses although some part no doubt would be personal. She is presently paying off the minimum payment, however, the high rates of interest on cards means that if steps are not taken to reduce these debts, very quickly the amount owing could increase to an unmanageable extent for her. That is a personal debt or expense over and above the deficit in the budgetary needs. Mrs Madden prior to leaving Tonga in or about December and returning to New Zealand to live with her children in Parnell had frozen a joint bank account. The sum in the joint bank account was later made over to Mrs Madden as I have said. Mrs Madden says she expended much of this money on re-establishing herself and her children in New Zealand, and she did not reduce her credit card debt.

[35] As well, it emerged at the end of Mrs Madden's evidence, although it had been heralded by Mr Madden in his affidavit in the interim proceedings, that prior to leaving Tonga, Mrs Madden took two motor vehicles leaving Mr Madden without a vehicle of any kind. These vehicles were placed under lock and key at a family residence associated with Mrs Madden in Pahu. The cars have not been valued but it seems by Mrs Madden's estimate they could fetch $20,000 TOP. Both had come from New Zealand. As well, Mrs Madden removed a large number of items from the office where she and Mr Madden worked leaving it, it seems a shell, and some of the property from their residence. Various items were mentioned and, although the amounts vary and are problematic in terms of resale value, the sum involved is likely to amount to a few thousand dollars. This was property it seems brought from New Zealand some of if it new. This property is also I am informed secured at Pahu.

[36] I asked the parties to attempt to reach an accord on this property by Friday, 5th September, because it is also of some relevance to the parties' financial position and maintenance. Mr Madden complained that, as a consequence of these actions, he had to expend money to effectively operate an office. As I have said, he does not own a car and nor it seems does he rent accommodation as a consequence of a friendly arrangement he has. It is my view that Mr Madden has a half interest in this property whatever the value may be. If the property is realised, then Mrs Madden would be well advised to use any money she gains to discharge her credit card obligation forthwith. Mrs Stephenson invited me in a memorandum filed after the hearing to make further orders about the property. I declined to do so; however in a minute to counsel, I indicated, if agreement were not forthcoming, I would make orders in my judgment concerning this property and I do so. Mr Niu argued that because his client had been substantially successful in demonstrating that Mr Madden had earned more in the past six months than he had revealed at the time of the interim hearing in April that Mrs Madden had been out of pocket. He contended that she was successful in this appeal and that the moneys realised from property should be paid to her to meet costs, and he should be required to meet her credit card together with other commitments, the nanny and repairs to the Parnell home, her car and airfares to Tonga which he said were $4000.00. I do not consider this correct. In my view, Mr Madden has been successful in relation to the interim proceedings, in relation to these proceedings and in resisting the cross-appeal. The initial award was grossly inflated in my view, and he has had to bear the expense of revisiting this award and the cross appeal As I have said, I do not consider there has been any deliberate attempt to mislead the Court by him. Estimates of earnings are in their nature problematic particularly so when practice is in an early stage. I consider there was no basis for suggesting that he was a very high net income earner. I consider that the actions of Mrs Madden did greatly inconvenience Mr Madden, and the property should be shared equally.

[37] I observe also that Mr Madden has paid from time to time amounts to his daughters from his New Zealand account – mobile phones for them to keep in contact and what seems to be some pocket money. Mrs Madden went through Mr Madden's ANZ account and prepared a schedule of payments which amount to about $4402.94 paid to his two elder children principally Gala between February and July 2013. I consider those payments by Mr Madden important. He also said he funded in part a trip for them to Tonga with friends which accounts for some of the money he had spent. Very sensibly, both parties accept that it is important for the children to continue to have the support of both parents and in that regard I do not detect any acrimony. I am confident that aside from his maintenance obligations, Mr Madden will continue to support his children financially within reason, and within his available means. I have mentioned this already.

[38] Finally, it is important to emphasise that Mr Madden's responsibilities, as will be fixed in these orders and remitted to the Magistrates' Courts, do very much depend on his circumstances continuing, his level of income sustained, his ability to continue to work in Tonga, his good health, and also Touliki being unsold and rental available. If there is any material change in these circumstances, or in others including the fact that children have attained their majority, which in the case of the older children is within a couple of years, if sensible agreement cannot be reached on a variation of

these orders, further application for variation can be made to the Magistrates Court. Of their very nature orders such as these will have to be varied, be it consensually which is preferable and less costly, or by order as circumstances dictate. Orders of this kind in family matters cannot be regarded as forever set in stone.

[39] I consider that in the not too distant future, in any event, both Mr and Mrs Madden should consider and take advice on the benefits available to them from realising and dividing the two matrimonial assets, the Touliki property and the Parnell property in an orderly way. This plainly emerged to my mind at the lengthy hearing. Whilst for sentimental reasons, there may be a reluctance for this to occur, or a desire to leave one or either of the properties to the children, which Mr Madden voiced, as well as a possible desire to live and transfer his business to that property, circumstances have changed and realism must prevail. Consideration will need to be given to the fact that there is a substantial equity available which, if the assets are properly realised, should ensure that both parties are able to their lives independently and with a measure of comfort. If Touliki is sold then no doubt there can be and indeed will have to be some sensible mutual variation of these orders, possible mortgage debt on Parnell settled, and any provision for maintenance adjusted. That is for the parties, however, to decide as circumstances dictate.

[40] I consider that in the appeal and defence of the cross-appeal Mr Madden has been successful as I have said. However taking into account the circumstances of Mrs Madden, I make no order for costs. Each party is to bear his or her costs.

[41] The following orders are made;

1. The order of the Magistrate relating to maintenance of the 12th March 2013 for Mr Madden to pay $2500 TOP weekly to the respondent is quashed and in its place are substituted the following orders of this Court. (The orders relating to the bank account no 1241424 made on the 11th March 2013, and Mrs Madden's right to draw and solely enjoy the proceeds of this account as maintenance remain unaffected).
2. Mr Madden is to continue paying the mortgage and rates together with insurance on the Parnell property as per the interim orders;
3. He is to arrange for the insurance policy to cover he and Mrs Madden's joint interests in the Parnell property.
4. Mrs Madden is also to continue to take the weekly rental from the Touliki property as under the interim orders.
5. Mrs Madden is to immediately provide an accurate list of all household property that she removed. She is to provide this to Mr Niu, forthwith and he to Mrs Stephenson.
6. The property is to be made available to Mr Madden or his agent and access given to the Pahu property or other place of storage for valuation as soon as is practicable, but not later than two weeks after Mrs Stephenson is advised. Lawyers may also mutually attend the valuation if the parties desire.

7. Sale of the items in Tonga is to proceed as soon as practicable after that, but not later than one month after valuation if the parties cannot agree on division of the property.
8. The proceeds of sale are to be divided equally between them, after deduction of reasonable costs including any reasonable attendances of lawyers. In the event of property being taken by one party by agreement rather than sold then half of the fair valuation of that item should be credited to the other.
9. The parties' solicitors are requested to use their best endeavours to ensure that this process is sensibly implemented.

Each party to bear their own costs.

1. Leave is given for both parties to seek further orders of this Court only as to the property referred to 5, if agreement or implementations of these orders cause difficulty.
2. In other respects, variations of these orders are to be sought in the Magistrates' Court.
3. The orders made herein are remitted to the Magistrates Court.

'Ilangana v Westpac Bank of Tonga

Supreme Court, Nuku'alofa
Scott CJ
CV 10/2013

29 April 2014

Employment law – contractual powers of dismissal were not limited – no need for any reason to be given – claim dismissed

The Court of Appeal decision is reported at page 136 of this volume.

The appellant commenced employment with the Bank, then known as the Bank of Tonga, on 22 May 1989, shortly before her 18th birthday, and signed the employment contract. On 7 June 1992 the appellant turned 21 and shortly afterwards she became a member of the Bank's Retirement Fund which required her and the Bank to make contributions to the Fund based on percentages of her salary. The Rules of the Fund made provision for the payment of pensions to employees who attain the age of 55 years and have completed at least 15 years service with the Bank. The appellant had completed 23 years of service with the Bank when she was dismissed at the age of 41. On 18 October 2012 the new General Manager handed the appellant a letter dated that day which commenced "You are hereby notified that your services with Westpac Bank of Tonga are no longer required and that your employment with the Company is terminated." The appellant claimed for damages for wrongful by the Bank.

Held:

1. Even though the defendant Bank had its source in statute, its present character was essentially that of a private limited company, in the management of which the Government of Tonga had no part. Its staff were not public officers subject to the directions and control of the Public Service Commission.
2. The claim was in contract and clause 11(b) allowed the employer to terminate the employment without the need for any reason being assigned. The Code of Conduct had no relevance to that clause. No right to be heard was engaged. In the absence of unfair dismissal legislation there was no scope for the court to imply terms in conflict with the express terms of the contract.
3. The plaintiff's claim was dismissed with costs.

Cases considered:
Commodities Board v 'Uta'atu [1990] To LR 92
Malloch v Aberdeen Corporation [1971] 2 All ER 1278
R v CICB ex p. Aegon Lain [1967] 2 QB 684
R v East Berkshire Health Authority ex parte Walsh [1984] 3 All ER 425
R v Insurance Ombudsman ex p. Aegon Life Assurance Limited [1994] C.O.D. 426
R v Jockey Club ex p. Aga Khan [1993] 1 WLR 909

Statutes considered:
Bank of Tonga Act (Cap 105)
Commodities Board Act (Cap 115)
Pensions Act (Cap 8)

Counsel for the plaintiff	:	L M Niu SC
Counsel for the defendant	:	A H Waalkens KC with R Stephenson

Judgment

[1] On 22 May 1989 the Plaintiff entered into a contract of employment with the Bank of Tonga. A copy of the contract is document P-24 and 25.

[2] In July 2002 the Bank of Tonga changed its name to Westpac Bank of Tonga (Act 3 of 2002) however its identity as a statutory body established by the Bank of Tonga Act (Cap 105), now renamed the Westpac Bank of Tonga, was not affected (Section 4).

[3] On 30 June 2008 the Bank of Tonga Act (Cap 105) was amended by Act 3 of 2008 which, inter alia, provided that:

> "8(1) "The Board of Directors of the Bank shall consist of those persons who are from time to time appointed by the shareholders as Directors in accordance with the Bank's articles".

[4] In July 2008 the Government of Tonga which owned 60,000 D and E shares in the Bank sold those shares to the Westpac Banking Corporation.

[5] Schedule 3 to the Sale and Purchase agreement dated 4 July 2008 are amended Articles of Association describing the Westpac Bank of Tonga as a company having its head office in Nuku'alofa. The general powers of the Board (Article 72) are not inconsistent with Section 8 (1) of Cap 105 as amended.

[6] After her initial appointment as a grade 5 officer, the Plaintiff steadily progressed until on 14 June 2012 (Document P-18) she was appointed Head of Retail Services. This was a senior grade 1 appointment and she was part of the "Tonga Leadership Team". Her position carried an annual salary of $64,260.

[7] On 18 October 2012 the Plaintiff received a letter from the Bank's General Manager. The relevant parts of the letter are as follows:

> "Termination of Employment"
>
> You are hereby notified that your services with Westpac Bank of Tonga are no longer required and your employment with the company is terminated. One month's salary in lieu of notice will be credited to your account ... on 19th October 2012. By accepting this payment, you hereby acknowledge that reasonable notice of termination of your employment with Westpac Bank of Tonga has been provided to you."

[8] On 19 October (Exhibit P-22) the Plaintiff replied. She did not accept "the terms and conditions" of the letter of 18 October. She refused the one month's salary. She requested to be told why it had been decided to terminate her employment and pointed out that she had not been given an opportunity to make representations before the decision to terminate her employment had been taken.

[9] On 19 October the General Manager replied. The Plaintiff was sent a copy of her contract of employment. The General Manager asserted that the contract had been "validly and legally terminated" on the ground that the Plaintiff's services with the Bank were no longer required.

[10] It cannot be doubted that the Plaintiff then found herself in a very difficult position. Between 1997 and 2006 she had taken a number of staff loans for various purposes including a home loan from the Bank. By 2011 the amount owed was $138,000. She applied for a further loan but her application was refused. She then refinanced with the ANZ Bank. At the date of her termination she owed ANZ approximately $198,000. Apart from a temporary and rather poorly paid position with a money transfer firm she has not been able to secure the employment necessary to service her debt.

[11] The writ was issued on 20 February 2013. The relevant parts of the contract of employment are as follows:

> "11. This agreement shall be terminated as well by the death of the employee as by any of the following events:-
> (a) The retirement of the employee in accordance with the Terms of Employment approved by the Bank from time to time.
> (b) By one calendar month's notice in writing on either side or by the payment to the employee or the forfeiture of one month's salary in lieu of such notice.
> (c) The dismissal of the employee for misconduct, dishonesty, willful insubordination or the willful breach by the employee of any of the conditions of this agreement or of the employee's declaration of secrecy. Such dismissal may be with or without any period of notice as the Bank sees fit".

[12] In paragraph 18 of the Statement of Claim it was accepted that the Defendant had purported to act pursuant to clause 11(b) of the contract. No alleged breach of clauses 11(a) or 11(c) were pleaded. In paragraphs 11 and 19 the Plaintiff claimed that clause 11(b) had to be construed in the light of sections 7(1)(j) and 7(1)(jj) of the Bank of Tonga Act (as amended) and, so construed, had the effect that:

> "The Defendant could only terminate (The Plaintiffs) employment upon her death, or for misconduct, willful insubordination or willful breach by her of any of her conditions of employment".

In the words of paragraph 19:

> "The Plaintiff says that the Defendant has unlawfully terminated the contract and has unlawfully dismissed her because the termination was based on clause 11(b) which was, insofar as it purported to give the Defendant the right to terminate by giving one month's notice or one month's salary in lieu of such notice, invalid and contrary to the provisions of section 7(1)(j) of the Act".

[13] Section 7(1)(j) of the Bank of Tonga Act is as follows:

> "7(1). The Bank shall have the following powers and objects:
> (j) to promote and support schemes for the provision of pensions and of guarantee and other funds for or in connection with the employees of the Bank and others".

Section 7(1)(jj) to which reference was also made, reads:

> "(jj). To do all such other things as may be deemed incidental or conducive to the attainment of the above objects or any of them".

[14] The Statement of Defence was filed on 21 March 2013. Although several peripheral matters were denied, the principal facts (later embodied in a "Memorandum of Agreed Facts and Issues" dated 18 October 2013) were admitted. The claim that the Bank's entitlement to invoke clause 11(b) had been circumscribed by sections 7(1)(j) or (jj) was however rejected.

[15] The Plaintiff, who was the only witness, gave evidence on 9 April 2014. She described the consequences of her termination as outlined in paragraph 11 above. She told the Court that she is her family's sole breadwinner and, being unable to keep up with the mortgage payments as a result of losing her job, is facing the loss of her family's home.

[16] In the Plaintiff's view the manner of her dismissal was unfair: she was unaware of any shortcomings in the discharge of her duties; no complaint had ever been made to her; she had never been given the chance to make representations before she was dismissed. The "Code of Conduct and Doing the Right Thing" (Exhibit A) page 15, required breaches of the Code to be followed by "training, coaching and counselling" but none of these had been offered to her. While she knew that other members of staff

had been dismissed, none, so far as she knew, had been terminated in the way her employment had been brought to an end.

[17] It appears that at about the time that the Plaintiff left the Bank, several other employees were successfully prosecuted for offences of dishonesty. When being interviewed for other positions, potential employers had the unfortunate impression that somehow the Plaintiff had also been involved. In the absence of reasons being given for her termination she was unable to refute this impression.

[18] In the Plaintiff's opinion paragraphs (b) and (c) of clause 11 were to be taken together:

> "I understand clause 11(b) to mean that the Bank could not terminate by giving one month's notice but there had to be a good cause, as outlined in 11(c)".

[19] The Plaintiff told the Court that she had been a contributing member of the Bank's pension scheme until the scheme was wound up in 2012. All the Bank's employees were then transferred to the Tonga Government's National Retirements Benefits Scheme. Upon transfer she elected to withdraw the benefits which had accrued under the Bank's scheme and had been fully paid out. She used the proceeds to buy a minibus with which she hoped to start a small business.

[20] In cross-examination, the Plaintiff accepted that the Defendant is now a wholly owned subsidiary of the Westpac Bank. She also accepted that it is a commercial undertaking which carries on business for a profit. Asked about her pension, she expressed the opinion that section 7(1)(j) was binding on the Bank and had the effect of requiring it to employ her until pensionable age unless clause 11(c) of the contract could validly be invoked.

[21] Following the evidence, both counsel addressed the Court. Although Mr Waalkens began, it will be convenient first for refer to Mr Niu's oral submissions on 10 April since it was not until that time that the suggested impact of section 7(1)(j) on clause 11(b) was fully expounded.

[22] Mr Niu began by explaining that prior to the enactment of the Bank of Tonga Act (Cap 105) in 1972 there had been in existence a Tonga Savings Bank established by Act 7 of 1936. The Savings Bank was under the control of the Treasurer (Section 4). Some, at least, of the employees of the Savings Bank were public servants (Section 6). The repayment of monies deposited in the Savings Bank was guaranteed by the Government (Section 8). Section 14 gave His Majesty in Council the power to make Regulations affecting the Savings Bank. Disputes arising from the operation of the Savings Bank were to be referred for final decision by an arbitrator (Section 16).

[23] Section 6(1) of the Bank of Tonga Act (Cap 105) provided that the new Bank would "acquire and take over from the Savings Bank ... the business of the Savings Bank ... and shall assume the following liabilities and acquire the following assets ...". The liabilities were confined to the deposit liabilities of the Savings Bank. By Act 6 of 1976 the Savings Bank ceased to carry on business as provided by Section 6(2) of the Bank of Tonga Act (Cap 105).

[24] Although Mr Niu conceded that the employees of the Bank of Tonga were not public servants, he submitted that they were public officers within the scope of the Pensions Act (Cap 8) and were therefore entitled to be paid a pension upon reaching retirement age. This entitlement, as I understood Mr Niu to be submitting, would be frustrated if a person's employment were to be terminated before reaching pensionable retirement age.

[25] Mr Niu's alternative submission was that given the circumstances of its establishment, the Bank was, and has remained, a public body with the result that its employees and their terms of service fall within the scope of public law remedies. In support of this submission he relied on a passage from *Malloch v Aberdeen Corporation* [1971] 2 All ER 1278 (cited by the Privy Council with approval in *Commodities Board v 'Uta'atu* [1990] To LR 92) in which, at page 1294 Lord Wilberforce said:

> "One may accept that if there are relationships in which all requirements of rules of natural justice are excluded (and I do not wish to assume that this is inevitably so) these must be confined to what have been called "pure master and servant" cases which I take to mean cases in which there is no element of public employment or service, no support by statute, nothing in the nature of an office or a status which is capable of protection. If any of these elements exist, then, in my opinion, whatever the terminology used, and even though in some inter partes aspects the relationships may be called that of master and servant, there may be essential procedural requirements to be observed and failure to observe them may result in the dismissal being declared to be void."

In Mr Niu's submission there are present in the case of the Westpac Bank of Tonga not only elements of public employment and service but also support by statute. Accordingly, in the absence of demonstrated procedural fairness the Plaintiff's dismissal had to be declared void.

[26] Mr Waalkens filed detailed and helpful written submissions for which I am grateful. Put briefly, he submitted:

> (a) that there was no public law element in the employment relationship between the parties sufficient to displace the express terms of the contract of employment between them; and
>
> (b) that on its proper construction, the contract of employment gave the right to the Bank to terminate the Plaintiff's contract (subject to notice or payment in lieu) without cause.

[27] The identification of activities which are subject to public law is not an easy process and the most that can be derived from the passage from *Malloch* quoted above is that when the identified public elements are present there "may" be essential procedural requirements to be observed.

[28] As pointed out by Mr Waalkens, *Malloch* has to be read in the light of the later observations in *R v East Berkshire Health Authority ex parte Walsh* [1984] 3 All ER 425 in which the Master of the Rolls explained that it is the existence of special statutory provisions bearing directly on the right of the public body to dismiss a Plaintiff which imports the rules of natural justice, not the mere fact of employment by a public authority. In the case of the Commodities Board Act (Cap 115) referred to in *'Uta'atu's* case (above, paragraph 25) section 11(1) made specific provision for the regulation of the terms and conditions of the Board's employees. In the case of the Bank of Tonga Act no such Regulations appear.

[29] In De Smith, Woolf and Jowell *"Judicial Review of Administrative Action"*, 5th Edition 1995, after a detailed examination of the various facts and matters taken into consideration by the courts, the authors conclude, on page 175, that "the position can be summarized in the following propositions:

(1) The test of whether a body is performing a public function and is hence amenable to judicial review, may not depend upon the source of its power or whether the body is ostensibly public or a "private" body.

(2) The principles of judicial review prima facie govern the activities of bodies performing public functions.

(3) However, not all decisions taken by public bodies in the course of their public functions are the subject matter of judicial review. In the following two situations judicial review will not normally be appropriate even though the body may be performing a public function:

(a) where some other branch of the law more appropriately governs the dispute between the parties. In such a case that branch of the law and its remedies should and normally will be applied; and

(b) where there is a contract between the litigants. In such a case the express or implied terms of the agreement should normally govern the matter. This reflects the normal approach of English law, namely that the terms of a contract will normally govern the transactions, or other relationship between the parties, rather than the general law (*R v CICB ex p. Aegon Lain* [1967] 2 QB 684; *R v Insurance Ombudsman ex p. Aegon Life Assurance Limited* [1994] C.O.D. 426; *R v Jockey Club ex p. Aga Khan* [1993] 1 WLR 909 and other authorities referred to in the footnote). Thus, where a special method of resolving disputes (such as arbitration or resolution by private or domestic tribunals) has been agreed by the parties (expressly or by necessary implication), that regime, and not judicial review, will normally govern the dispute."

[30] In the present case, while the Defendant Bank undoubtedly has its source in statute, its present character is, as I find, essentially that of a private limited company,

in the management of which the Government of Tonga has no part. Its staff are plainly not public officers subject to the directions and control of the Public Service Commission.

[31] In my view the Pensions Act does not assist the Plaintiff. The right to receive a pension is contingent on the continuation of the employment, it does not confer a right to the employment being continued or a right to have the employment determined in any particular manner. Section 11 of the Pensions Act may also be noted.

[32] As will be seen from the Statement of Claim, this is an action in contract, not Judicial Review. In my view public law remedies are not available to the Plaintiff.

[33] I also find myself in agreement with Mr Waalken's second proposition. Clause 11 seems to me to be plain and unambiguous. Each of the paragraphs (a) (b) and (c) describes separate sets of events and has to be considered discretely. Paragraph (b) allows the employer to terminate the employment without the need for any reason being assigned. The Code of Conduct "Exhibit A" has no relevance to clause 11(b) which is a *termination* rather than a *dismissal*. No right to be heard is engaged. In the absence of unfair dismissal legislation there is no scope for the court to imply terms in conflict with the express terms of the contract.

Result:

The Plaintiff's claim is dismissed with costs, to be taxed if not agreed.

'Ilangana v Westpac Bank of Tonga

Court of Appeal, Nuku'alofa
Salmon, Handley, Hansen, and Tupou JJ
AC 17/2014

23 October 2014; 31 October 2014

Employment law – contractual powers of dismissal were not limited because employer was a public body – appeal dismissed

The Supreme Court decision is reported at page 128 of this volume.

The appellant commenced employment with the Bank, then known as the Bank of Tonga, on 22 May 1989, shortly before her 18th birthday, and signed the employment contract. On 7 June 1992 the appellant turned 21 and shortly afterwards she became a member of the Bank's Retirement Fund which required her and the Bank to make contributions to the Fund based on percentages of her salary. The Rules of the Fund made provision for the payment of pensions to employees who attain the age of 55 years and have completed at least 15 years service with the Bank. The appellant had completed 23 years of service with the Bank when she was dismissed at the age of 41. On 18 October 2012 the new General Manager handed the appellant a letter dated that day which commenced "You are hereby notified that your services with Westpac Bank of Tonga are no longer required and that your employment with the Company is terminated." The appellant claimed for damages for wrongful dismissal by the Bank. The Supreme Court dismissed the claim.

Held:

1. In the United Kingdom it has been held that a term of mutual trust and confidence was implied by law in contracts of employment. This meant that the court may have been able to imply an obligation on the employer to exercise its power of dismissal in good faith. However this was not pleaded, litigated, or argued.
2. The contract of employment provided that either party could terminate the contract without reason with one month's notice or by the payment to the employee or the forfeiture of one month's salary in lieu of such notice. The appellant attempted to this clause of the contract of employment by relying on the Bank's status as a public body established by the Bank of Tonga Act 1972. The appellant also relied on some of the rules of the Bank's Retirement Fund for the same purpose. However, the fact that an employer

was a public body established by statute did not limit its contractual powers of dismissal unless the statute so provides.

3. Had the appellant relied on an implied term of mutual trust and confidence this litigation would have taken a very different course. However her case as pleaded and presented was rightly rejected the appeal failed and was dismissed with costs.

Cases considered:

Johnson v Unisys Ltd [2001] 2 All ER 801
Malik v Bank of Credit and Commerce International SA [1997] 3 All ER 1
Vaioleti v Tonga Development Bank [1999] Tonga LR 57

Statutes considered:

Bank of Tonga Act 1972
Companies Act 1995

Counsel for the appellant	:	Mr Niu SC
Counsel for the respondent	:	Mr Waalkens QC and Mr Stephenson

Judgment

[1] The appellant appeals from the dismissal by the Lord Chief Justice of her claim for damages for wrongful dismissal by the Bank. Although in the result the appeal must be dismissed we do this without any sense of satisfaction because on the face of things the appellant's dismissal, although lawful, appears to have been harsh and unfair.

[2] Since there is no unfair dismissal legislation in Tonga the appeal must be decided in accordance with the common law, that is the contract of employment between the parties.

[3] The appellant commenced employment with the Bank, then known as the Bank of Tonga, on 22 May 1989, shortly before her 18th birthday, and signed the employment contract pleaded and relied on in these proceedings.

[4] Clause 1 provided:

> "On and from the 22nd day of May 1989 the Bank will employ the Employee and the Employee shall serve as Grade 5 officer or in such other capacity or upon such other duties ... as an authorised officer of the Bank shall from time to time specify."

[5] Clause 4 provided:

> "The remuneration of the Employee whilst [she] remains in the service of the Bank shall be at such rate payable at such times as the Bank shall from time to time determine."

[6] Clause 11 relevantly provided:

> "This agreement shall be terminated ... by any of the following events:-
>
> (a) The retirement of the Employee in accordance with the Term of Employment approved by the Bank from time to time.
>
> (b) By one calendar month's notice in writing on either side or by the payment to the Employee or the forfeiture of one month's salary in lieu of such notice.
>
> (c) The dismissal of the Employee for misconduct ... such dismissal may be with or without any period of notice as the Bank sees fit."

[7] The appellant's statement of claim pleaded cl 11 as a term of the contract, although it was alleged to be invalid because it was contrary to s.7(1)(j) of the Bank of Tonga Act 1972 as amended.

[8] Paragraph 12 of the statement of claim traced the plaintiff's career with the Bank marked by 13 promotions, culminating in her appointments as Manager Branch Banking in October 2006, Manager Human Resources in October 2009, and Head of Retail Services in January 2012.

[9] Her appointment as Manager Branch Banking in 2006 made her a senior officer of the Bank, and her appointment as Manager Retail Services in 2012 was said to make her one of the top five officers of the Bank, all of equal standing below the General Manager.

[10] The appellant tendered at the trial the letter dated 14 June 2012 from the Bank's General Manager, the head of the Bank in Tonga, confirming her appointment as Head of Retail Services. The letter included the statement: "In acceptance of this offer, please sign and return the attached duplicate of this letter. Should you wish to discuss the content of this letter, please do not hesitate to discuss with me personally." The letter also included this statement:

> "I wish you all the very best in your new role and are confident you will continue to make a valuable contribution to the business in the years to come."

The appellant signed and returned the duplicate the next day.

[11] The statement of claim did not allege that the appellant's many promotions over the years, the letter of 14 June 2012, or what may have followed that letter had varied or replaced the contract of employment of 22 May 1989.

[12] On 7 June 1992 the appellant turned 21 and shortly afterwards she became a member of the Bank's Retirement Fund which required her and the Bank to make contributions to the Fund based on percentages of her salary.

[13] The Rules of the Fund made provision for the payment of pensions to employees who attain the age of 55 years and have completed at least 15 years service with the Bank. The appellant had completed 23 years of service with the Bank when she was dismissed at the age of 41.

[14] The Bank's Retirement Fund was terminated in 2012, before the appellant's dismissal, after the National Retirement Scheme came into force. The appellant received her lump sum entitlements under the Fund.

[15] According to the appellant's oral evidence, after Westpac bought out the other shareholders in the 1990's the Bank issued its staff with pamphlets setting out the Westpac Code of Conduct. This document was not produced at the trial, although a document issued for a staff workshop to explain the Code of Conduct became an exhibit.

[16] No attempt was made to plead the Code of Conduct, or any part of it as a variation of the original contract of employment, or as the basis for an extended reciprocal implied term of mutual trust and confidence, or of any other express or implied term.

[17] In *Malik v Bank of Credit and Commerce International* SA [1997] 3 All ER 1, 5, 12, 14-16 the House of Lords held that a term of mutual trust and confidence was implied by law in contracts of employment. In *Johnson v Unisys Ltd* [2001] 2 All ER 801 a majority of the House of Lords, Lord Steyn dissenting, declined to apply this term to the dismissal of an employee. However Lord Nicholls at 803 said that this could not be done because it would conflict with the statutory remedy for unfair dismissal introduced in the United Kingdom in 1971. Lord Hoffmann said (at 817) that in the absence of such legislation the Courts may have been able to imply an obligation on the employer to exercise its power of dismissal under the equivalent of cl 11(b) in good faith, as did Lord Millett (at 825). However none of this was pleaded, litigated, or argued either at the trial, or in this Court.

[18] On 18 October 2012 the new General Manager handed the appellant a letter dated that day which commenced "You are hereby notified that your services with Westpac Bank of Tonga are no longer required and that your employment with the Company is terminated."

[19] The following day the appellant delivered a letter to the General Manager rejecting the Bank's offer of one month's salary. The letter including the following:

> "3. ... I would like to know the grounds and any evidence against me that you considered before making your unilateral decision to terminate my employment.
>
> 4. I would also like to know why you did not give me an opportunity to explain my side with regards to whatever information you had in your possession."

[20] The New General Manager replied by letter the next day stating that the Bank stood by its earlier letter, asserted its right to terminate on one month's notice and added:

> "3. The Bank's letter of 18 October clearly states that your services with the Bank are no longer required and this is the reason that your contract of employment was terminated."

[21] The appellant did not allege in her statement of claim that her contract contained at the outset an implied term that an employee with satisfactory service to the Bank, whose services were no longer required, was entitled to receive an appropriate reference from the Bank to assist her to obtain alternative employment. Nor did she allege that such a term came to be implied from a course of dealing as her successive promotions took her higher and higher in the Bank.

[22] The General Manager did not provide the appellant with such a reference, and it also seems clear that she did not ask for one. She may still be entitled to such a reference.

[23] At trial and in this Court Mr Niu for the appellant attempted to displace cl 11(b) of the contract of employment by relying on the Bank's status as a public body established by the Bank of Tonga Act 1972. It was owned initially by the Government of Tonga as to 40% and by three Commercial banks, including Westpac, who shared equally the other 60%. He also relied on some of the rules of the Bank's Retirement Fund for the same purpose.

[24] Although the Bank was established by statute, and the Government of Tonga initially was a substantial shareholder, it was never under the control of the Crown and from the outset it was essentially a Company which carried on general banking business for profit for the benefit of its shareholders. In any event, as Ward CJ held in *Vaioleti v Tonga Development Bank* [1999] Tonga LR 57, the fact that an employer is a public body established by statute does not limit its contractual powers of dismissal unless the statute so provides.

[25] Section 7 of the Act provides that "The Bank shall have the following powers and objects". Paragraph (j) provides:

> "to promote and support schemes for the provision of pensions ... and other funds for or in connection with the employees of the Bank ..."

[26] Section 7 contains the equivalent of the Memorandum of Association of a company incorporated under the general Companies Act of Tonga. As such it governed the corporate capacity of the Bank, but could not and did not impose any duty on the Bank, and certainly not a duty enforceable by someone who was not a shareholder.

[27] The Rules of the Bank's Retirement Fund provided for contributions both by members (r 14(1)) and by the Bank (r14(2)) but did not otherwise purport to alter the contract of employment between a member and the Bank.

[28] The Rules do not provide for admission to membership of the Fund, but r 20 refers to the Bank's compulsory retirement age of 60. The definition of membership in r 2 makes it co-extensive with a member's service with the Bank, and r 14 makes an employee's obligation to contribute to the Fund co-extensive with his or her membership, and thus with their employment.

[29] It is clear therefore that the Rules cannot, of their own force, alter cl 11 of the contract of employment.

[30] Had the appellant relied on an implied term of mutual trust and confidence this litigation would have taken a very different course. However her case as pleaded and
200 presented was rightly rejected at the trial and this appeal having failed is therefore dismissed with costs.

Rex v Manu anors

Supreme Court, Nuku'alofa
Cato J
CR 157-160/2014

16 May 2014

Sentencing – importing and possession of pseudoephedrine – involvement of serving police officer – sentence imposed

The prisoners, Valeliano Manu (a serving police officer at the time of offending), Chin Chui Liu (aka Kevin Liu) and Shiquing Lin appeared for sentencing on one count of importing, on 23 June 2011, a controlled chemical namely pseudoephedrine in an amount of 2017.3 grams into Tonga. The maximum penalty for doing so was 25 years imprisonment and, or a fine of up to $250,000. The prisoner, Xiu Ming Lin, appeared for sentence on one count of possession of a controlled chemical pseudoephedrine. The amount involved was 62 grams. The maximum penalty for being in possession was also 25 years imprisonment and, or a fine up to $250,000. The prisoners pleaded not guilty and a joint trial was held of a little over four weeks. The court delivered its verdicts on 26 November 2013. Manu, Kevin Liu (the name he went by at trial), and Shiqing Lin were all remanded in custody, and the sentences imposed were backdated to 26 November 2013. Xiu Ming Lin was granted bail but with no assurance that after submissions he would not also serve a sentence of imprisonment.

Held:

1. For sentencing purposes, the court found beyond any reasonable doubt that all four men were involved with contac for commercial purposes. Manu, Shiqing Lin, and Kevin Liu in relation to the importation of a significant amount of pseudoephedrine. The court found also that Xiu Ming Lin had possession of the smaller amount of contac 62 grams but also with commercial intent. The activities were well-planned, intended to violate border controls, and that the involvement of Manu in the enterprise was intended to better ensure the safe passage of the contac into Tonga. The only sensible purpose for this was the ultimate disposal of the contac for an illicit purpose, namely the manufacture of methamphetamine. This offending involved a significant breach of Tonga border controls made considerably more serious by the fact that Manu was a serving police officer. Whilst the importation into Tonga of a large quantity of contac

was in itself a serious crime, its seriousness was aggravated by the fact that a serving police officer was involved in the importation.

2. The principal consideration in sentencing on the offence of importing must be denunciation of planned importations involving the corruption of and involvement of corrupt police. Manu was a relatively experienced police officer having served with some distinction it seems in the Tongan police for several years. He was no novice to law enforcement. His involvement must be denounced and he must be punished firmly for the role he played. Likewise, must be the actions of those involved in corrupting a law enforcement officer.
3. With respect to Mr Manu, the court considered his previous lack of a criminal record, his record of service which showed some distinction, the fact that he had a young family, and reduced the starting point of 6 years by 8 months to one of 5 years and 4 months imprisonment. The court declined to suspend any part of his sentence because this was serious criminal offending engaged in by a serving police officer, even to the extent of obtaining leave from police duties. Manu calculated the odds against his being caught and intended to profit from his involvement. There was nothing advanced by way of any real contrition to justify suspension and rehabilitative considerations. He did not face up to his involvement in any criminal purpose; being rather an unfortunate victim of circumstance. The public interest would not be advanced by suspending any part of Mr Manu's sentence.
4. The court sentenced Mr Liu to five years and 8 months imprisonment. The court did not consider, in the public interest, that any part of that sentence should be suspended. Additionally, to the inherent criminality of the importation, he was directly involved in corrupting Mr Manu whom he knew well as a friend, a family man, was a serving police officer. His contrition was belated, and one that was not deserving of suspension.
5. Shiqing Lin was sentenced to five years and four months imprisonment after considering all matters in mitigation including the fact also that he had a child in China whom he was supporting. Whilst he may well have been involved with others who were not before the court, he was responsible for organizing the consignment from the Chinese end and the contac was intended for him.
6. Xiu Ming Lin was sentenced to 10 months imprisonment and the court did not consider that his belated acknowledgement of responsibility was a sufficient basis to suspend this sentence, in whole or in any part.

Cases considered:

R v L [2010] NZHC 1067
R v Puloka [2007] Tonga L Rep 223
R v Vete [2004] TLR 273

Statutes considered:

Evidence Act (Cap 15)
Illicit Drugs Control Act 2003

Counsel for the Crown	:	Mr Sisifa
Counsel for the first and fourth accused	:	Mr Pouono
Counsel for the third accused	:	Mr Corbett
The second accused was unrepresented		

Sentence

[1] The prisoners, Valeliano Manu, Chin Chui Liu, aka Kevin Liu and Shiquing Lin appear for sentencing on one count of importing, on the 23rd June 2011, a controlled chemical namely pseudoephedrine in an amount of 2017.3 grams contrary to section 5(b) of the Illicit Drugs Control Act 2003 into Tonga. The maximum penalty for doing so is 25 years imprisonment and, or a fine of up to $250,000.

[2] The prisoner, Xiu Ming Lin, appears for sentence on one count of possession of a controlled chemical pseudoephedrine contrary to section 5(b) of the Illicit Drugs Control Act 2003. The amount involved was 62 grams. The maximum penalty for being in possession is also 25 years imprisonment and, or a fine up to $250,000.

[3] The prisoners had pleaded not guilty and a joint trial had been held of a little over four weeks. I delivered my verdicts on the 26th November 2013. Manu, Kevin Liu, the name he went by at trial, and Shiqing Lin were all remanded in custody, and the sentences I impose today are to be backdated to the 26th November, 2013. Xiu Ming Lin was granted bail but with no assurance that after I had heard submissions he would not also serve a sentence of imprisonment.

[4] Manu, Kevin Liu and Xiu Ming Lin had been also indicted with attempted importing of a controlled chemical pseudoephedrine, on the 20-23rd June 2001, but were acquitted by me on this charge. This consignment which was a slightly earlier consignment than the second consignment involved the substitution of the contents of the container, a water cooler, by New Zealand customs with a placebo material similar in appearance to contact NT. The allegation was that this was a substitute for 4.2 kilos of contac NT which had been removed after the consignment from China addressed to Manu had been intercepted. The second importation originated in China and had been also addressed to Manu who at the time was serving police officer. There was some evidence of an even earlier consignment to Manu but nothing was made of this at trial. Manu had been involved in clearing both consignments after they had arrived from New Zealand into Tonga. There was evidence that for each consignment, Manu's services had been solicited by Kevin Liu whom he knew well and indeed was related to by his wife and marriage. There was evidence that Liu, Shiqing Lin, and Xiu Ming Lin all of whom had been living and working in Tonga for some time were well known to each other. It is not clear that Manu was associated with Shiqing Lin, or with Xiu Ming Lin, who I found were the persons responsible for obtaining the consignments from China.

[5] In relation to the attempted imporatation, Manu, Kevin Liu and Xiu Ming Lin were acquitted. Although I had no reasonable doubt that all, despite their protestations and explanations for not being involved knowingly in the importation of a controlled chemical, were knowingly complicit in a joint enterprise to import, I acquitted them because the Crown did not call the customers officer who, allegedly, had found the contac NT in the original consignment after it had been intercepted in New Zealand

and had removed it from the water boiler sending a sample for analysis to the ESR. The evidence the Crown relied on was hearsay and did not come within any statutory exception, so the statement of the custom's officer was inadmissible under the Tongan Evidence Act. This allegedly large consignment had been obtained by Manu after its arrival in Tonga from Customs' agents, given to Kevin Liu and taken by Liu to the address of Xiu Ming Lin where the water boiler and the placebo material were located in cans later by police. At the same address, a bag containing 62 grams of contac NT was located in a refrigerator in the house. I rejected Mr Xiu Ming Lin's innocent explanation for possession of this contac, namely that the bag belonged to another to another inhabitant and he had received some as a cold remedy, and convicted him of possession of pseudoephedrine.

[6] All of the prisoners had given evidence essentially distancing themselves from the importations and in Xiu Ming Lin's case possession also. I regarded their explanations for being involved in the attempted importation contrived. The inference I drew from all the evidence I heard was that Xiu Ming Lin and Shiqing Lin, Chinese immigrants and both well known to Kevin Lin who was a Taiwanese immigrant were all illegally involved in various ways with contac NT. Once innocent association such as a cold remedy was excluded, Xiu Ming Lin's possession of the contac could only have been for an illicit commercial purpose.

[7] As to the second consignment, this was a controlled delivery through New Zealand police. I found that, as with the first consignment, Manu was very actively involved in obtaining receipt of the consignment giving it again to Liu who contacted Shiqing Lin. Like the first consignment, the contac was secreted, this time in a number of aluminium bowls with compartments. Manu, Kevin Liu and Shiqing Liu were arrested with the consignment soon after delivery.

[8] For sentencing purposes, I find beyond any reasonable doubt that all four men were involved with contac for commercial purposes. Manu, Shiqing Lin, and Kevin Liu in relation to the importation of a significant amount of pseudoephedrine. I find also as I have said that Xiu Ming Lin had possession of the smaller amount of contac 62 grams but also with commercial intent.

[9] I find beyond any reasonable doubt that the activities were well planned, intended to violate border controls, and that the involvement of Manu in the enterprise was intended to better ensure the safe passage of the contac into Tonga. The only sensible purpose for this was the ultimate disposal of the contac for an illicit purpose, namely the manufacture of methamphetamine. This offending involved a significant breach of Tonga border controls made in my view considerable more serious by the fact that Manu was a serving police officer. Whilst the importation into Tonga of a large quantity of contac was in itself a serious crime, its seriousness is aggravated by the fact that a serving police officer was involved in the importation.

[10] I find all of the prisoners equally responsible for the importation. The principal would appear to be Shiqing Lin to whom Liu gave the consignment after he had received it from Manu, the intermediary Liu who appears responsible for the organization and introduction of Manu into the scheme, and Mr Manu the facilitator of the arrival of the importation into Tonga. Manu had dealt with customs officers and others after the packages had been received in Togna having at least, on one

occasion, absented himself from his police duties to do so. On the evidence I heard, I am satisfied that he was a willing participant and fully carried out his role in this criminal enterprise.

[11] The principal consideration in sentencing on the offence of importing must be denunciation of planned importations involving the corruption of and involvement of corrupt police. Manu was a relatively experienced police officer having served with some distinction it seems in the Tongan police for several years. He was no novice to law enforcement. His involvement in this activity must be denounced and he must be punished firmly for the role he played. Likewise, must be the actions of those involved in corrupting a law enforcement officer.

[12] Also must be denounced the cynical and planned breach of the Tonga illicit substances legislation for commercial profit. Conduct of this kind must be reflected in condign sentences consistent with Parliament's intention reflected in the heavy penalties contained in the Illicit Drugs Control Act 2003. This was premeditated offending. Not only must the offenders be punished and individually deterred but their sentences must be seen as a real warning to others intending to import a precursor substance such as contac for illicit purposes into Tonga, that this offending will not be tolerated.

[13] I have to consider objectively what is an appropriate starting point for the offence of importation taking into account the circumstances of the offending and the penalties provided for in the Act before any mitigating factors are considered. Precursors such as pseudoephedrine in other jurisdiction may involve lesser maximum sentences, but not in Tonga where aside from the offence of importing or exporting a drug under section 3 of the Act, which carries a maximum sentence of 30 years and or a fine of up to a million dollars, the Tongan legislation does not differentiate between the penalties for controlled chemicals and offences relating to drugs. Both attract penalties of 25 years of $750,000 or both. The cases cited to me by the Crown involving New Zealand precursor cases classified as class C drugs, involve much lower maximum penalties than here. In one such case of possession for supply, *R v L* 22nd June, 2010; [2010] NZHC 1067 a starting point for possession for supply was 2 years nine months set where the prisoner had been found in possession of an amount of contac in a very similar amount as here. The maximum penalty for such offending is however eight years in New Zealand. I consider further that this offending was more serious then possession for supply. It involved a deliberate and relatively sophisticated violation of the Act. Contac is well known to be a chemical for which there is now a very lucrative black market at least in Australasia where other sources of pseudoephedrine for the manufacture of the very harmful drug methamphetamine are difficult to obtain. Contac's use in the manufacture of methamphetamine means that its illegal import into Tonga in commercial quantities must be strongly condemned as I have said. It is important that this Court sends a strong message that those who are involfed in this kind of offending can expect to receive severe sentences. Although counsel for the prisoners Manu and Shiqing Lin, Mr Pouono and Mr Corbett, both advocated a starting point of 3 years and Mr Sisifa for the Crown, when requested by me to submit on the issue, a higher starting point of 6 years, I consider that an appropriate starting point is 4 and half years for an importation of this amount. The sentencing Judge in *Li* mentioned an amount of

grams similar to that here, depending on the quality of the cook, could realise an amount of methamphetamine between 442 and 663 grams which should have in New Zealand at that time, a street value of between $126,000 and $355,000. I mention these figures simply to illustrate the considerable illicit commercial value of contac NT in the drug trade.

[14] I find a serious aggravating feature of this offending, however, was the fact that Liu engaged Manu as the consignee and Manu willingly embarked on this illicit criminal enterprise. I consider that the other prisoner, Lin, must have known that Manu was a police officer. He would have wanted and, indeed, would have required knowledge about Manu in order to obtain his details so that the consignment could be addressed to him. I consider it most unlikely that Liu would not have informed him also that Manu was a serving police officer, and consequently that the security of the consignment would be enhanced. This Court must also send out a strong message condemning and punishing a corrupt police officer for his involvement in criminal activity, and also punishing those who introduce law enforcement officers (be it police for other border control officers) into their criminal enterprises. The overall starting point is increased to six years to reflect this aggravating factor.

I now turn to mitigating factors.

MANU

[15] Mr Manu is aged 33. He is married and has four children with ages ranging between 8 – 18 months. His wife is a school teacher. It goes without saying that the consequences of a lengthy sentence of imprisonment will fall heavily on her and the children, who so often are the unfortunate victims also of a parent's criminal offending. Manu came from humble beginnings and a large family, and resided in Niuatoputapu before coming to Tongatapu in 1998 for better schooling. In 2002, he joined the Tongan police and became a well-regarded officer in the scene of crime area. He participated in courses and training and it seems had achieved well in his studies. All this, he has now lost as a consequence of his actions the effect of which is not only to bring disgrace on himself but also to disgrace the Tongan police. His wife is a teacher and it would seem is in a position to look after the needs of the children albeit in more difficult circumstances. I do not consider, in these circumstances, that his family circumstances can be taken into account in any significant way in mitigation, but only perhaps as reflecting upon his former good character, which is supported by a reference from a Minister of his Church. The reality is however that his former good work and character has been seriously depreciated by his actions in joining this criminal enterprise.

[16] Manu in his comments to his probation officer appeared to continue to maintain that Liu, who was related by marriage, had lied to him and that he did not know the parcel was for controlled drugs. He seems only to regret his involvement at least in so far as he was reckless. He apologized for his recklessness. I do not, however, regard this limited acknowledgment as any contrition, at all.

[17] I have, already, rejected any suggestion of innocent involvement and given my reasons for doing so. In my view, he committed himself knowingly and fully to the joint enterprise, no doubt intending to profit by his association. Manu both personally

in comments made and reported to his probation officer asked for leniency and his counsel, whilst acknowledging the seriousness of his offending, asked for a fully suspended sentence.

[18] Taking all the personal factors I can into account, including his previous obvious lack of a criminal record, his record of service which showed some distinction, the fact that he has a young family, deprivation from them and he being a real factor weighing on his imprisonment, I reduce the starting point of 6 years by 8 months to one of 5 years and 4 months imprisonment.

[19] Although it was pressed upon me to suspend his sentence at least in part by Mr Pouono, I decline to do so. This was serious criminal offending engaged in by a serving police officer, even to the extent of obtaining leave from police duties. I have no doubt that Manu calculated the odds against his being caught and intended to profit from his involvement. There has been nothing advanced by way of any real contrition to justify suspension and rehabilitative considerations. He did not face up to and still appears to reject his involvement in any criminal purpose; being rather an unfortunate victim of circumstance. I do not consider the public interest will be advanced by suspending any part of Mr Manu's sentence in these circumstances.

CHIU CHIU LIU or KEVIN LIU

[20] Mr Liu is aged 31. He was married to a relative of Mr Manu's wife. He was married but is now living apart from his wife since 2012. He has two children both now with his wife. He was born in Taiwan and came to Tonga on a student visa in 2004. He had only junior level education it seems in Taiwan, but I formed the view he was intelligent. He was operating a shop in Tonga earning about $300 Top a month. He knew and seemed to associate with Shiquin Lin and Xue Ming Lin. He was reported as saying he accepted his conviction and now expressed remorse concerning his involvement. He asks for leniency. He has recent convictions for bodily harm in 2009, and false pretences in 2013. In the former case, I note he was sentenced to three years imprisonment suspended for three years with $4000 compensation and a fine of $2000.00. He has on previous convictions for drug related activity.

[21] In his report he mentioned peer pressure and advancing the interests of his friends. As I said in my observations and reasons for my verdict, Liu who represented himself and gave evidence denying involvement, which I did not accept, I regarded as intelligent but also manipulative. I regard him as much more than an intermediary. I do not view him as a person who would blindly advance the interest of others or be easily led astray as he perhaps suggests, but would ensure that he would profit from joining the scheme. He knew full well he was corrupting a serving police officer, a relative by marriage and a family man, which I find cynical. He was a willing and central contributor to the unlawful enterprise, of that I have no doubt. There is very little in my view to allow him mitigation aside from his very belated contrition which I do not regard as very convincing and the fact he too has young children, although this last factor has little value either.

[22] I sentence him to five years and 8 months imprisonment. For reasons, I have given in the case of Manu, I do not consider, in the public interest, that any part of that sentence should be suspended. Additionally, to the inherent criminality of the

importation, he was directly involved in corrupting Mr Manu whom he knew well as a friend, a family man, was a serving police officer. His contrition is belated, and one that I do not regard as deserving of suspension.

SHIQING LIN

[23] He is aged 32. He is separated and has one child. He was born in China and came to Tonga in late 2010. He lived with his family in impoverished circumstances and lived it seems with his grandparents. He married in China in 2002 and his only child, a son, is 11. He separated from his wife in 2006, due to alcohol problems. He looked after his son until 2010 when he came to Tonga. He has an aunt and brother here so he has some Chinese associations, in this county. His son is living with grandparents. He entered Tonga on a visitor's permit, but had heard about business opportunities from his relatives before he arrived and commenced working as soon as he arrived. He operated a shop in the market and later in Kolofo'ou. He has little formal education. He would send money from his earnings back to China for his child and grandparents.

[24] He admitted in his report that he was convinced by other Chinese friends to engage in importing and he could receive quite a big commission.

[25] He said otherwise at trial denying involvement, so like Liu, I also regard his expression of contrition as a belated statement and worthy of little or no discount in mitigation. He has no previous convictions which I do take into account reflective of his previous good character that he was remitting money back to China for the support of his child, and grandparent.

[26] Mr Corbett placed before me the case of *R v Puloka* [2007] Tonga L Rep 223 where Andrew J sentenced the accused, aged 34, who had been convicted after a trial for importing a substantial quantity of cannabis into Tonga to 6 years imprisonment. He had been previously convicted of importing cocaine and had been sentenced to six years imprisonment. Importation of cannabis under section 3 of the Illicit Drugs Control Act carried a maximum sentence of 30 years imprisonment and, or $1,000,000.00 fine as I have said, where, as the present offending attracts a lower penalty, even if only marginally so. Mr Corbett contrasted *Puloka* with his client's position and impliedly submitted he should be treated more leniently because he had no previous convictions, the quantity of drugs was of cannabis 1,175 kilos and the other pseudoephedrine 2.07 kilos, and Puloka was sentenced to six years imprisonment with no suspension of the sentence. Mr Corbett contended this was so because of the previous conviction for drugs.

[27] I do not agree. Importing a controlled chemical such as pseudoephedrine in a significant commercial amount is serious offending and, although falling outside section 3 because it is not importation of a drug, nevertheless the maximum for the offending is 25 years and or $750,000 fine. In the years since 2007, contac has been increasingly used as a precursor to the manufacture of the drug methamphetamine, and its significance for the black market has been widespread in Australaisia. Athough the amount of cannabis imported by Puloka was a very large amount, and he had previously been sentenced to a long term of imprisonment for cocaine, in the present case, not only is the amount imported significant commercially, but the

seriously aggravating feature justifying the overall starting point of 6 years is the role of Manu as a serving police office. Both involved in their different ways, examples of very serious offending but the circumstances are very different.

[28] Mr Corbett also attempted to persuade me based on *Vete* [2004] TLR 273 that his client should have part of his sentence suspended. I have considered *Vete* which was a case of partial sentence on crimes of serious violence influenced by the comparatively youthful ages of the offenders. Whilst in an appropriate case, those involved in offending against the Illicit Drugs Control Act 2003 may be deserving of suspended sentences, I do not consider it appropriate in this case. Here, the circumstances of importation involved the corruption and involvement of a police officer. The prisoner had given evidence denying involvement, and it is only awaiting sentence that he has accepted it seems his conviction, acknowledged he has learned a lesson, and expressed some contrition. A belated expression of contrition is not a firm foundation for suspending a sentence based on notions of rehabilitation. I do not consider there are any reasons advanced to justify suspension of any part of the sentence.

[29] I sentence Mr Shiqing Lin to five years and four months imprisonment considering all matters in mitigation including the fact also that he has a child in China whom he has been supporting. Whilst he may well have been involved with others who are not before the court, he was in my view responsible for organizing the consignment from the Chinese end, and on the evidence, the contac was intended for him.

[30] The consequence is that Manu and Shiqing Lin are both sentenced to five years and four months imprisonment. Liu does not have any such good character to rely upon, only a very belated expression of contrition, which I do not consider is really any mitigation, at all. Further, not only was Liu an organiser, it was he who knowingly manipulated and co-opted Manu into furthering this criminal enterprise. Hence, his sentence of five years and 8 months imprisonment. I backdate the sentences in the case of Manu, Kevin Liu and Shiquin Lin to the date when the prisoners were remanded in custody for sentence.

XIU MING LIN

[30] I now consider the position of Xiu Ming Lin. I did not immediately sentence him to remand in custody because I wanted to hear submissions on his behalf as to reasons why he should not be sentenced to imprisonment before doing so. I expressly said this should not be taken as any assurance that he would not be imprisoned. I have reflected on the matter and considered Mr Pouono's submissions. The only inference that I can draw from his possession of the 62 grams of contac in the refrigerator after my rejection of innocent association, is that he had it for a commercial purpose associated with methamphetamine, and not for the treatment for colds.

[31] Like Lin, he came to Tonga recently in 2011. He is 41 years old on a business visa which he may now I am informed lose. His wife has returned to China and his son has married and lives here. He now accepts the court's decision, and asked for leniency. He asks for a fine and says a friend will pay it. Mr Pouono urges me not to impose a custodial sentence and argues in substance, albeit against my reasons for

conviction, that he was a victim of circumstance and that he was given and had the contac for cold relief it seems but had no lawful excuse for having it. He says of Liu that it was his association with him that had drawn him into this. That may be so, but the inevitable inference that I have drawn is that his involvement with Liu was commercial, and he was not in any sense an unwilling victim of circumstance. Whilst not impugning, his acquittal, it was no coincidence contrary to his protestation to the contrary at trial that the water cooler containing the placebo material was located at his premises.

[32] I consider that the importance of contac as a precursor in the manufacture of methamphetamine requires me to impose sentences of imprisonment on those who are found in unlawful possession of this chemical for a commercial purpose unrelated to cold treatment. Deterrence must be the paramount sentencing consideration where contac is possessed for this reason. I consider an appropriate starting point for possession of 62 grams in this case is 16 months for his previous good character. His contrition like Liu and Shiqing Lin is I consider belated. The sentence I impose upon him is 10 months imprisonment. I do not consider in his case either that his belated acknowledgement of responsibility is a sufficient basis to suspend this sentence, in whole or in any part.

Rex v 'Ofa anors

Supreme Court, Nuku'alofa
Cato J
CR 212, 122, 123/2013

16 May 2014

Sentencing – manslaughter and abetment to actual bodily harm – death of child – guilty pleas and remorse – sentences passed

The accused, Fifita 'Ofa and her brother Tomasi 'Ofa originally stood indicated for the murder of Malia Kolo, a child aged 14. They pleaded guilty on the 7th March 2014 to manslaughter and the Crown accepted this plea in discharge of the indictment for murder. Moala Toumohuni was originally charged with abetting grievous bodily harm and she pleaded guilty to the lesser charge of abetment to actual bodily harm on 14 March 2014. The victim was disciplined by a severe beating from both her mother and her uncle. After the beating she was left neglected with no medical care or attention from 11 August 2013 to 15 August 2013. A neighbour intervened and the victim was admitted to hospital for care but died on 16 August 2013.

Held:

1. The paramount sentencing consideration was to protect children and young persons from violence. There was also a need to deter others as well as a need to denounce such conduct. There may be a common misconception that beatings associated with the discipline of children constituted an acceptable approach in Tonga life. However this was an unacceptable approach and violence of this kind, in any event, was never part of Tongan culture. Legislation on domestic violence and abuse was reflective of a changing attitude to violence in the family setting.
2. The starting point the court adopted for Fifita 'Ofa was 15 years. The court imposed upon her a sentence of 13 years imprisonment backdated the period of her remand in custody. The court allowed her two years for her early guilty plea, expression of remorse, and co-operation with police. The court considered the cruelty of her punishment and the wanton disregard of her daughter's health causing her death as placing this case in the higher level of sentencing for this kind of offending. The final two years were suspended for three years on condition that she commit no further crimes punishable by imprisonment for the period of her suspension, and on the following additional conditions, that she be placed on probation for a two year period, she was to reside where directed by her probation officer, she

was not to have any unsupervised care of children during her period of probation, and she was to take up on direction of the probation officer an appropriate course on anger management and child abuse.

3. The starting point adopted for the offence of manslaughter by Tomasi 'Ofa was 12 years imprisonment. The court took into account that he was a first offender, he pleaded guilty early, showed contrition and co-operated with authority; also that he probably did not know of the extent of the earlier beating. The sentence imposed for manslaughter was 9 years imprisonment backdated to the period he was remanded in custody for sentence. The final two years of the sentence was suspended for the two years on conditions that he was not to commit any offence punishable by a period of imprisonment during the period of suspension, and that on his release for the first 12 months he was under the direction of the probation office and was directed to undergo a suitable course on anger management and child abuse as directed by probation.

4. The maximum penalty for the offence of abetment to causing bodily harm was 5 years. The starting point for Moala Toumohuni who participated in this sort of severe beating of a child with a weapon as a confederate where only bodily harm was involved was three years and three months imprisonment. In her case she pleaded guilty, had no previous convictions and expressed remorse and has several children. She was sentenced to two years imprisonment backdated to the time she was remanded in custody. The final 12 months were suspended on the conditions that she commit no further offences punishable by imprisonment for a period of two years, and that she be placed on probation for this period and directed to attend a course on anger management and child abuse as directed by the Probation Office.

5. The court recommended that the Solicitor-General take all available steps to ensure that the children that were formerly living with Fifita 'Ofa were in appropriate care and received whatever counselling was required for their welfare, and that Fifita not be permitted unsupervised care of any children in the future.

Cases considered:

R v Mo'unga [2001] Tonga LR 1
R v Talia'uli [2010] Tonga LR 203
R v Wright [2003] 1 Cr App R (S) 257

Statute considered:

Criminal Offences Act (Cap 18)

Counsel for the Crown	:	Mr Lutui
Counsel for the first and second defendants	:	Mr Pifeleti
Counsel for the third defendant	:	Mr Pouono

Sentence

[1] The accused, Fifita 'Ofa and her brother Tomasi 'Ofa originally stood indicated for murder of Malia Kolo, a child aged 14. They pleaded guilty, however, on the 7th March 2014 to manslaughter and the Crown accepted this plea in discharge of the indictment for murder. They were represented by Mr Pifeleti who appeared for them on sentence, also. Moala Toumohuni pleaded guilty to one count of abetment to cause bodily harm under sections 8(a) and 107(1) & (2)(a) of the Criminal Offences Act. The charge originally proffered against her was reduced from one of abetting grievous bodily harm. She was represented by Mr T Fifita and pleaded guilty to the lesser charge, of abetment to actual bodily harm on the 14th March, 2014. The sentencing was delayed because of the ill health of counsel. Mr Pifeleti appeared to advance submissions at a hearing held on the 2nd May, 2014, and Mr Pouono appeared for Moala Toumohuni, also as a consequence of the continuing ill health of Mr Fifita. After adjourning the matter for consideration, I pass sentence today. All accused have been remanded in custody for sentence and all accused will have their sentences backdated to the date on which they were remanded in custody.

[2] All accused signed a common summary of facts. The circumstances of the offending are as sad and tragic as they are concerning. The victim, Malia Kolo, was Fifita 'Ofa's daughter. Tomasi 'Ofa was Fifita's brother. Moala Toumohuni was the de facto partner of Malia's father. The victim's parents separated when she was a young child and Malia together with her twin spent much of her childhood being raised by her father and Moala. It was only in mid-2013 that Malia returned to live with her mother and her partner in Kolonga.

[3] Malia ran away from home. Fifita on the 7th August 2013 called the victim's father and enquired if the victim had come by because she had run away from home. She asked the victim's father to have her returned to Kolonga if she could be found.

[4] On the morning of the 10th August, 2013, the victim's step brother and his wife met the victim at a flea market. They took her home to 'Umusi where her mother lived.

[5] Moala called Fifita to say that Malia had been located. Fifita telephoned Tomasi and informed her that the child had been found. Tomasi told her to bring Malia to Veitongo where he lived.

[6] Fifita 'Ofa arrived back in Kolonga accompanied by others. Fifita went into the house and started confronting the victim. Her twin procured a large stick approximately 2 feet long. She gave this to Fifita. Over the next two hours, Fifita proceeded to beat her with the stick all over her body. She was also confronted about a theft that had occurred in the neighbourhood of Kolonga in the past few days. She questioned her about her whereabouts. This beating lasted about two hours. It was severe. Moala Toumohuni grabbed Malia when she tried to escape and returned her to her mother to be beaten again.

[7] Afterwards, she was taken to Tomasi's residence in Veitongo and left there by Fifita for Tomasi to continue disciplining her. He did so for about an hour using a piece of watering hose approximately 2 feet long, and a wooden hammer. It was only

when her hand was badly injured by a blow from the hammer that he stopped hitting her.

[8] Her mother received her back at home on the evening of the 11th August, 2013. The child could not walk. She was left neglected in the living room without any medical care or attention. Her wounds turned sceptic. She wore diapers which were not regularly changed. She was observed to be in great pain and had difficulty breathing. She was left in this state from the 11th August to the 15th August 2013.

[9] The Court was informed by the Crown that it was only a neighbour's involvement that caused her to be admitted to hospital. She was immediately admitted to intensive care and her health deteriorated to the point where she died on the 16th August, 2013.

[10] I have read the pathologist's report which I requested be provided. It details numerous abrasions and bruising. There were further associated fractures in the bones of both forearms and the distal fibula of the right leg. A deep laceration was seen in the palmar aspect of the left index finger. Injuries on the hands were consistent with defensive injuries suggesting Malia had tried to ward off some of the blows. Some of the injuries were consistent with the use of a hammer or hammer head. Other abrasions were consistent with a hose pipe or a similar elongated weapon. At the time of admission, the report records she was in severe state of septic shock with clinical and laboratory results showing multiple organ failure. It was said death could have been prevented if the deceased had been brought in time to the hospital to have her wound debrided and receive further medical treatment. Cause of death was given in the report as septicaemic organ failure secondary to multiple infected sharp and blunt injuries.

[11] The only case of any real relevance as a comparable in Tonga is *R v Talia'uli* [2010] Tonga LR 203. There, the accused on two evenings had inflicted such severe punishment on his son, aged 4, that he died shortly after. The accused pleaded guilty to a single count of manslaughter. He was married, aged 31, with two other children, 7 and one. The deceased had a twin sister. The prisoner was a self-employed mechanic, with a good working record. He had no previous convictions and had co-operated with the police.

[12] The Chief Justice, Scott CJ, emphasised the need for real deterrence in cases against young children and of the community's demand for severe punishment. The prisoner was sentenced to 15 years with a substantial period being suspended. I conclude from this that had the accused not pleaded guilty the starting point would have been in excess of 15 years.

[13] Of relevance also in this regard is an English case, *R v Wright* [2003] 1 Cr App R (S) 257 which also illustrates how severe sentences can be expected in cases involving violence, cruelty, neglect and the of children. The defendant had been convicted of manslaughter and cruelty to children. The child concerned at the time of her death was about 7. She was the daughter of the defendant's partner. She had been kicked several days before she was found dead. The defendant was 31 and said to have limited abilities. The sentencing judge had imposed cumulative sentences of 10 and 5 years for manslaughter and cruelty. On appeal, it was said the sentencing range

was between 12 and 15. The Court imposed a total sentence of 12 years. The cruelty charge remained, but was made concurrent with the 12 years for manslaughter.

[14] In this case, Fifita 'Ofa has previous convictions for assaults on two of her children in 2009 involving the use of knives. In those instances, she had been concerned that her partner visiting New Zealand had left her for another woman. She had used the knife to cause injury as some kind of warning to him of what she could do if he became involved with another woman. As a consequence, it seems he returned to Tonga. She had been sentenced to 12 months imprisonment by a magistrate, and had appealed against the failure to suspend her sentence. On appeal, the Court indicated some concern at the 12 months sentence and, indeed, the fact that the magistrate had assumed jurisdiction to sentence, and dismissed the appeal against the failure to suspend the sentence.

[15] I have read the probation reports. Fifita 'Ofa is aged 35. She is living in a de facto relationship. She has had 10 children. She is reported as saying that in her upbringing violence was the usual way of parental discipline. Malia was the youngest of 4 children she had with Mr Kolo. She had separated in 2000 as a consequence of her husband becoming involved in a relationship with Moala Toumohuni.

[16] She and her second partner had 6 children. This was a family that seems to have been involved in domestic violence and her husband is in prison for assaulting her in 2014.

[17] Fifita had little education. Her partner worked as a fisherman. It seems that Malia and her twin sister were brought back into the care of Fifita because they would not obey their father. Fifita admitted in the probation report that she had become very angry when she questioned her daughter about stealing property from a neighbour and had thought she was telling lies. She admitted beating her all over her body and stopping only when she got tired. She told her probation officer she was aware that Malia would be subjected to further discipline by her brother.

[18] She said when she picked Malia up she was surprised she could not walk. She said she was too afraid to seek medical assistance because of her involvement. She expressed remorse for her behaviour and asked for leniency. Her children, I am advised, have been taken into care of other relatives. I intend to make a recommendation later in this judgment about them.

[19] I have read the report also on her brother Tomasi. He is aged 38 and has no previous convictions. He is still single. He has a child, however, by a previous relationship. He derives an income from plantation work and diving. His mother supports him saying he was polite person and she asks for leniency. His excuse for participation was to help his niece, in the Tongan customary way, to mend her ways.

[20] He said he never knew she was badly assaulted by the mother first, and he explained that during the assault, he would give her advice and that continued for about an hour. It would seem he also knew that the deceased required medical treatment because she could not walk when her mother came to pick her up, but he did not seek medical assistance, either. He seems to accept responsibility for his actions and, like his sister, is remorseful.

[21] Moala Toumohuni is aged 43. She reports a good home environment. She said that she had been living with the deceased's father since the deceased was three. They had four children including Malia living with them. She said there were problems with the twins running away from home. They were becoming involved in criminal activity, she suspected. She admitted also, in the probation report, physically disciplining the deceased.

[22] She had little formal education. She did weaving to generate income. She was a first offender. She admitted to her probation officer the beating by Fifita was "huge and too heavy". She admitted pushing the deceased back to Fifita for the beating to continue when she tried to run away. She also expressed remorse. She spoke of reconciliation between her and her partner and partner's immediate family. She said apology had be made and accepted.

[23] Mr Pifeleti, for his clients, pointed to their violent upbringing which he said contributed to this offending. He said both had pleaded guilty on his advice and had co-operated with police and I accept that. He also advanced Tongan customary discipline. He asked for leniency for them. Mr Pouono submitted that his client was much less involved and I agree, although her conduct in being a spectator to the beating and in returning the child to her for the beating to continue was reprehensible.

[24] Mr Lutui for the Crown submitted that in the case of Fifita her offending merited a lengthy sentence of imprisonment and that because of her previous offending against children it should not be suspended. He referred to *R v Talia'uli*. He suggested a starting point of 12 years and the end sentence should be one between 12 and 14 years taking into account mitigating and aggravating features. I have adopted a slightly different approach in this case, but the result is similar.

[25] This case involved the repeated beating of a child for about two hours by Fifita with a stick that broke in two that broke in two. It was extremely cruel punishment, as was the beating she received from Tomasi for a further hour with weapons. Further, the prisoner left her child with Tomasi knowing she would receive more punishment. Given she had used a stick; she must have foreseen her brother would also likely to use a stick or similar object. She did not, it seems, inquire about her daughter for a long period of time after leaving her with daughter's obvious serious medical condition after she had received her back into her care. It must have been a terrifying and very painful ordeal for the child. Malea could have survived had the mother not considered her own position ahead of her daughter's. The starting point, I adopt applying *R v Talia'uli* is 15 years. I have taken also into account that this was not Fifita's first encounter with child abuse. She seems to have acted in total disregard of the warning she received in 2009 that physical abuse of children was and is entirely unacceptable.

[26] The paramount sentencing consideration is to protect children and young persons from violence, and their consequences. Not only for these reasons are severe sentences inevitable in cases of this kind, but there is a need to deter others as well as a need to denounce such conduct. I add also that there may be a common misconception that beatings associated with the discipline of children constitute an acceptable approach in Tonga life. Mr Lutui, however, rightly in my view, points out that it is an unacceptable approach and violence of this kind, in any event, he

submitted, was never part of Tongan culture. Legislation on domestic violence and abuse is reflective, he submitted also, of a changing attitude to violence, in the family setting.

FIFITA 'OFA

[27] I accept Fifita may now be remorseful, and that she has assisted me to infer this by her early guilty plea to manslaughter. I accept also that her inability to deal with her daughter in a less severe manner may have been a consequence of the violence she had been privy to as a child. The literature on child abuse seems to support this, and it is all too often sadly advanced as an explanation for violent offending. But, if so it can never be regarded as an excuse. I allow her two years, for her early guilty plea, expression of remorse, and co-operation with police. The sentence I impose upon her is one of 13 years imprisonment backdated the period of her remand in custody. I consider the cruelty of her punishment and the wanton disregard of her daughter's health causing her death as placing this case in the higher level of sentencing for this kind of offending.

[28] Mr Lutui, as I have said, submitted that I should not allow any part of that sentence be suspended. However, I disagree. First, she has pleaded guilty and co-operated with the authorities. *R v Mo'unga* [2001] Tonga LR 1 would suggest that this is a factor that would justify a sentence being at least in part being suspended. I also consider, in her case, there are advantages in suspending part of the sentence because it gives the Court the opportunity of imposing conditions aimed at ensuring she receives some supervision, assistance and education on release so that any children with whom she comes into contact, and possibly her own, are protected. In my view, however, she should not be permitted custodial care of children. I suspend the final two years of her sentence for three years on condition that she commit no further crimes punishable by imprisonment for the period of her suspension, and on the following additional conditions;

1. That she placed on probation for a two year period;
2. She is to reside where directed by her probation officer;
3. She is not to have any unsupervised care of children during her period of probation;
4. She is to take up on direction of the probation officer an appropriate course on anger management and child abuse.

TOMASI 'OFA

[29] I accept he is also contrite and has pleaded guilty at the first opportunity and also has co-operated with authority. He plainly had become involved only at the request of his sister and probably did not know of the extent of the earlier beating. However, being her uncle and, like the mother in a position akin to trust, he beat her with weapons most cruelly; a hammer and a hose, and these injuries contributed materially to her death. Who caused the fractures is unknown; but he left her for some time before contacting the mother, and then she could not walk when she arrived home. He must have known she was in a very bad way when she left his home, but he did not seek medical assistance, either, nor did he seem to make inquiry later. For this child,

already having been the victim of gross abuse by her mother, to have received a further beating with weapons from her uncle would have been quite simply terrifying. The starting point I impose for the offence of manslaughter in his case is 12 years imprisonment. I have taken into account he is a first offender, has pleaded guilty early, showed contrition and co-operated with authority; also that he probably did not know of the extent of the earlier beating. The sentence I impose for manslaughter in his case is 9 years imprisonment backdated to the period he was remanded in custody for sentence. In his case, I also suspend the final two years of the sentence for the period of suspension, he being a first offender on the following conditions;

1. He is not to commit any offence punishable by a period of imprisonment during the period of suspension.
2. On his release for the first 12 months he is under the direction of the probation office and is directed to undergo a suitable course on anger management and child abuse as directed by probation.

MOALA TOUMOHUNI

[30] She is in a different position. Unlike the 'Ofa's, she pleaded guilty not to manslaughter which carries a maximum sentence of 25 years, but to abetment to causing bodily harm, the maximum sentence being 5 years. Mr Lutui, in her case, submitted a starting point of 12 months imprisonment and also submitted that it would be appropriate to suspend a substantial part of her imprisonment.

[31] I accept that, although her role was much less than the 'Ofa's, she nevertheless was heavily complicit in the offending of Fifita 'Ofa. She with her partner, Malea's father, had the care of Malea for about 10 years. She was in effect very much a step mother. She took no steps to persuade Fifita to stop the beating; rather she was present and intervened at one point to stop Malea running away, returning her to her mother for the punishment to continue. She not only condoned the cruelty but actively supported it. The starting point I would impose for a person, who participated in this sort of severe beating of a child with a weapon as a confederate where only bodily harm was involved would be three years and three months imprisonment. In her case, she also pleaded guilty, has no previous convictions and expresses remorse and has several children. Also apologies have been given and received with her husband's family. I sentence her to two years imprisonment backdated to the time she was remanded in custody.

[32] I however suspend the final 12 months imprisonment on the following conditions;

1. She commit no further offences punishable by imprisonment for a period of two years;
2. She is placed on probation for this period and directed to attend a course on anger management and child abuse as directed by the Probation Office.

[33] Finally, I recommend that the Solicitor – General take all available steps to ensure that the children that were formerly living with Fifita 'Ofa are in appropriate care, and receive whatever counselling is required for their welfare.

[34] I strongly recommend that Fifita not be permitted unsupervised care of any children in the future.

Ongoloka v Pongi anor

Supreme Court, Nuku'alofa
Scott CJ
AM 6/2014

16 May 2014

Civil appeal – jurisdiction of Magistrates' Court – respondents abandoned excess – appeal abandoned
Magistrates' Court – jurisdiction – excess claim abandoned – unliquidated damages could be limited

On 21 March 2013 a road traffic accident occurred at the junction of Laifone and Taufa'ahau Roads. The respondents commenced proceedings in the Magistrates' Court on 4 July 2013. They claimed that the cause of the accident was the appellant's failure to exercise care in the manner of his driving. The respondents claimed compensation of $10,000, damages of $500, and lawyers fees of $1,200. The appellant denied negligence and pointed out that the jurisdiction of the Magistrates' Court was limited to $10,000. Since the total amounts claimed exceeded the limit it was pleaded that the Magistrates' Court had no jurisdiction to hear the respondent's claim. On 29 January 2014 the Magistrate gave an interim ruling affirming that the Court's jurisdiction was limited to $10,000 but ruling that costs, if awarded, were not included in this limit. The appellant appealed on the grounds that the Magistrate should not have dealt with the action at all, whether by hearing submissions, adjourning or making rulings when the claim as presented exceeded his $10,000 jurisdictional limit. The action should simply have been struck out.

Held:

1. The respondents clearly abandoned their claim for the excess in accordance with section 59(3) and the court was satisfied that the Magistrate was right to rule that the court therefore had jurisdiction to deal with the action.
2. It was the total value of the claim which was the relevant figure. Thus, if both general and special damages were sought the combined amount of the claim could not exceed the $10,000 limit. Costs were not part of the claim but followed the successful prosecution of the claim. If, therefore, $10,000 was awarded there was no bar to a further award of costs.
3. With respect to a claim for unliquidated damages, such a damages claim should not be quantified but left to the court for evaluation. The problem however was that given the jurisdictional limit of the Court it might be

argued that a claim for general damages potentially exceeds the limit and therefore was beyond the jurisdiction of the court to entertain. The answer to this problem was for a claim for general damages only to be followed by the words "limited to $10,000". When both special and general damages are sought the claim should specify that the total amount claimed was "limited to $10,000".

4. The appeal was dismissed with costs.

Cases considered:

Legon v Count [1945] 1 All ER 710

Tu'ikolovatu Palu v Lesieli Taufa Palu [1908-1959] To LR 53

Statute considered:

Magistrates' Courts Act (Cap 11)

Rules considered:

Magistrates' Courts Rules 2007

Counsel for the appellant : T Fakahua

Counsel for the respondents : 'O Pouono

Judgment

[1] On 21 March 2013 a road traffic accident occurred at the junction of Laifone and Taufa'ahau Roads. The Respondents commenced proceedings in the Magistrates' Court on 4 July 2013. They claimed that the cause of the accident was the Appellant's failure to exercise care in the manner of his driving. The Respondents claimed:

(i) compensation of $10,000.00
(ii) damages of $500.00
(iii) lawyers fees of $1,200.00.

[2] During the appeal Mr Pouono explained that by "compensation" he meant special damages namely the damage to the Respondents vehicle; by "damages" he meant general damages for shock and being "baffled".

[3] In a Defence filed on 18 July 2013 the Appellant denied negligence. He also pointed out that the jurisdiction of the Magistrate's Court is limited to TOP$10,000 by virtue of Section 59(2) of the Magistrates' Courts Act (Cap 11) as amended. Since the total amounts claimed exceeded the limit it was pleaded that the Magistrate's Court had no jurisdiction to hear the Respondent's claim.

[4] In a reply to the Defence the jurisdiction plea was "noted".

[5] On 27 January 2014 the matter come on for hearing before Magistrate M. Kaufusi. Mr Fakahua raised the jurisdiction point. Mr Pouono is then recorded as saying:

> "The actual claim is $10154, deduct $154 and leave with only $1,000. The $500 is for the damages alone. I propose that the court should accept

> the compensation of $10,000 which was the actual claim. The compensation for the damages done will be estimated according to the facts that will be heard during the trial".

[6] I must confess that I do not find the submission entirely clear, however at the hearing of the appeal Mr Pouono explained that he was confirming to the Magistrate that his total claim would be restricted to $10,000 and that the excess, $154 "compensation" and $500 "damages" were abandoned.

[7] On 29 January 2014 the Magistrate gave an interim ruling affirming that the Court's jurisdiction was limited to $10,000 but ruling that costs, if awarded, were not included in this limit. He gave the Respondents seven days in which to make further submissions.

[8] On 31 January Mr Pouono filed a reply. Again, I did not find the meaning entirely clear, perhaps because of the translation. He did however confirm at 3(b) that the "damages" of $500 were no longer required while at 5 he stated: "the case should proceed in this Court's jurisdiction in the value of $10,000".

[9] Three grounds of appeal were filed. At the hearing of the appeal Mr Fakahua confirmed that his central ground of complaint was that the Magistrate dealt with the action at all, whether by hearing submissions, adjourning or making rulings when the claim as presented exceeded his $10,000 jurisdictional limit. In Mr Fakahua's submission the action should simply have been struck out.

[10] Neither counsel nor the Magistrate referred to Section 59(3) of the Magistrates' Court Act which reads as follows:

> "(3) A plaintiff may abandon so much of a claim as exceeds the jurisdiction of the Magistrate's Court in order to keep the claim within the jurisdiction of the Court".

[11] In my view there is no need for any application to be made by a Plaintiff to comply with Section 59(3) – he merely gives notice to that effect. Once notice has been given the excess is abandoned and the action proceeds as normal.

[12] I also agree with the Magistrate that it is the total value of the claim which is the relevant figure. Thus, if both general and special damages are sought the combined amount of the claim cannot exceed the $10,000 limit. I further agree with the Magistrate that costs are not part of the claim but follow the successful prosecution of the claim. If, therefore, $10,000 is awarded there is no bar to a further award of costs.

[13] The final matter which sometimes causes difficulty is a claim for unliquidated damages. Such a damages claim should not be quantified but left to the court for evaluation. The problem however is that given the jurisdictional limit of the Court it might be argued that a claim for general damages potentially exceeds the limit and therefore is beyond the jurisdiction of the court to entertain. The answer to this problem is for a claim for general damages only to be followed by the words "limited to $10,000". When both special and general damages are sought the claim should specify that the total amount claimed is "limited to $10,000" (see *Legon v Count* [1945] 1 All ER 710 and Rule 7(2)(b) of the Magistrates' Courts Rules 2007).

[14] The Respondents in this case having clearly abandoned their claim for the excess in accordance with Section 59(3), I am satisfied that the Magistrate was right to rule that the court therefore had jurisdiction to deal with the action.

[15] I should perhaps add that *Tu'ikolovatu Palu v Lesieli Taufa Palu* [1908-1959] To L.R. 53 was decided before the Magistrates' Courts Act (Cap 11) was amended to include Section 59(3).

Result: The appeal is dismissed with costs to be taxed if not agreed.

Yang anor v Manoa anor

Land Court, Nuku'alofa
Scott P
LA 11/2013

6 June 2014

Land law – action on tenancy agreement – outside Land Court jurisdiction

The first and second plaintiffs applied to restrain the defendants from locking them out from the shop and the premises above it. They pleaded that the tenancy agreement of 20 October 2007 was valid and binding and in the circumstances it should be specifically performed and in accordance with its provisions until 9 June 2023. The plaintiffs also sought damages and costs. On 11 July 2013 a defence and counterclaim were filed. Numerous grounds of defence were advanced including misrepresentation, want of consideration, illegal trading, and "immoral and unbecoming behaviour" including playing poker on the Sabbath. It was claimed that the arbitrary terms of the agreement between the parties deprived the landlord of his rights to his building and his land without a lease in accordance with the Land Act and therefore was invalid and not enforceable. The defendant's counterclaim sought general damages for trespass, special damages arising from unpaid rent and an order for eviction. A detailed reply and defence to the counterclaim was filed on 26 August 2013. On 3 October 2013 the defendants filed an application to strike out the plaintiff's claim. The principal issue was the validity of the tenancy claimed by the plaintiffs.

Held:

1. Courts have usually, but not always, held that buildings erected on land were not part of the land and therefore do not encroach upon the title to the land upon which they are located.
2. It was not easy to determine, on the basis of the authorities, how precisely the rule was to be formulated and there were several difficult questions as yet unanswered. For example, were buildings "in general" not to be regarded as fixtures? Was the ruling in *Kolo* merely a "broad proposition" or was that proposition modified by *Fonua*? If it was "open" to a mortgagee to pledge the buildings separately, was it also open to pledge them as part of the land? Could buildings be found "as a matter of fact" to be affixed to the land and if so, what considerations were to be taken into account in arriving at that conclusion? Given that most buildings could only be reached by passing over the land on which they stood, did the grant of a tenancy of such a building also involve the grant of a license to

cross the land to reach it? If so, what would the consequence be of the revocation of such a license? If a building only was mortgaged, but not the land upon which it stood or which surrounded it, how could the mortgagor derive any benefit from exercising the powers of sale of the building, following default?

3. "The process of the development of the law in Tonga" relating to what were called "tenancies" (an increasingly common form of right of occupation) was being hampered by uncertainties.
4. The court was bound by authority and ruled that the action was beyond the jurisdiction of the Land Court and must accordingly be dismissed.

Cases considered:

Bank of Tonga v Kolo SC 1019/92 and 701/93
Bank of Tonga v Vaka'uta 19/41
Cowley v Tourist Services etc [2001] To. L.R. 183
Kolo v Bank of Tonga [1997] To L.R. 181
Maka v Kainga [2006] To LR 43
Mangisi v Koloamatangi [1999] TOCA 9
Nakao v Fua 6/88
Niu and Ors v Tapealava AC 15/12
Tonga Industries Traders Limited v Shell Pacific Islands Limited LA 2 of 2005
Tu'ipulotu v Ma'afu 721/94
'Unuaki 'O Tonga Royal University of Technology and Anr. v Kingdom of Tonga LA 16 of 2013
Westpac Bank of Tonga v Fonua [AC16/13]

Statutes considered:

Land Act (Cap 132)
Supreme Court Act (Cap 10)

Rules considered:

Supreme Court Rules 2007

Counsel for the plaintiffs	:	LM Niu SC
Counsel for the defendants	:	Mrs P Taufaeteau

Decision

1. The First Defendant is the registered owner of a town allotment at Haveluloto Tohi 376 Folio 39, having an area of 759.6 square meters. According to paragraph 2 of an affidavit sworn by him on 19 June 2013 the First Defendant built a retail shop measuring approximately 10 x 20 feet with a small room above it at the front part of his allotment abutting Niumeitolu Road. He continued to live in his house on the allotment but operated a retail business from the shop and a taxi business from the room above.

2. According to the First Defendant, in 1998 he was approached by one Meng Sen Tsay who wanted to rent the shop which by then had apparently been extended.

Exhibit B to the affidavit is a copy of a "Tenancy Agreement" apparently entered into between the First Defendant and Tsay on 29 June 1999. According to the agreement, its term runs from 2 June 1999 to 1 June 2008. The "premises" are described as follows:

> "The Landlord is desirous of renting out a retail store at the frontage of land at Haveluloto opposite to Vaiola Hospital to the tenant for the purpose of retail store".

Under the heading "use of premises" the agreement provides:

> "6. The tenant agrees:
>
> 6.1 not to use the premises or cause or permit the premises to be used for any illegal purpose; and
>
> 6.2 not to cause or permit a nuisance; and
>
> 6.3 not to use the premises for any other purpose than a retail store".

Under the heading "Alterations and additions to the premises" the agreement provides:

> "9.1 Not to attach any fixture or renovate, alter or add to the premises without the landlord's permission;"

3. In paragraph 6 of his affidavit the First Defendant stated that in about 2005 the First Plaintiff telephoned him in the USA:

> "She sought my permission with proposal to build on top of the retail shops for her own business as diners and restaurant ... I did not want her involved in my agreement with Mr Tsay however I finally agreed to let her build as long as it does not affect the tenancy downstairs. I had never agreed for her to assign or sublet to third parties".

4. In paragraph 7 the First Defendant stated:

> "On 20th October 2007 the First Plaintiff entered into a renewal agreement without my knowledge between my wife, agent and heir and they were not privy to the contract of 2005".

A copy of the 2007 agreement was Exhibit D.

5. In paragraph 8, the First Defendant stated that in May 2010 he returned to Tonga. He discovered that "the First Plaintiff lived upstairs and there was no diner or restaurant business".... "She even let downstairs as a retail shop operated by Second Plaintiff".

6. In paragraphs 12 to 16 the First Defendant stated that neither of the Plaintiffs had a business license as required by the Business License Act 2002, that their activities at the premises were accordingly illegal, that the First Plaintiff used the premises for illegal gambling and that "the agreement is invalid and the continuation of the Plaintiff to open the building for business is not proper for they have no business licenses to operate over the shop and my allotment".

7. This affidavit was filed by the First Defendant in response to an application by the First and Second Plaintiffs to restrain the Defendants from locking them out from the shop and the premises above it. The writ was issued on 13 June 2013. In paragraph 22 of the Statement of Claim it was pleaded that:

> "The tenancy agreement of 20 October 2007 is valid and binding and in the circumstances it should be specifically performed and in accordance with its provisions until 9 June 2013". (It is possible that the date should read 9 June 2023).

In addition to the injunction, the Plaintiffs also sought damages and costs.

8. In her affidavit filed in support of the injunction application the First Plaintiff gave an account which differed in several important respects from that given by the First Defendant. According to her, after Tsay rented the First Defendant's shop:

> "He enlarged it at great costs to him to about 230 square metres". "In the year 2000 Mr Tsay sub-let the whole enlarged store to me. It had bedroom and accommodation facilities in it as well. I paid rent to Mr Tsay and he paid his rent to the Defendants. The Defendants were aware of that and agreed to it. Mr Tsay's tenancy was to end in June 2008."
>
> "In 2005 the Defendants asked me to rent the store directly from them when Mr Tsay's tenancy would end, for 5 years i.e. from June 2008 to June 2013 for a total sum of $16,500."

According to the First Plaintiff, she paid the $16,500 to the Defendants "there and then" for the period June 2008 to June 2013. Meanwhile, she continued to pay Tsay for the remaining three years of his tenancy.

A copy of the 2005 agreement was Exhibit A to her affidavit. The tenant is named as Yuzhen Yang. Under the heading "Alterations and additions to the premises" the agreement provides:

> "5. The landlord agrees:
>
> 5.1 to attach any fixture or renovate, alter or add to the premises to 230 square metres" (sic).

In paragraph 6 of her affidavit the First Plaintiff stated that in October 2007 she and the Defendants entered into a further agreement to run from June 2013 to June 2023. A copy of that agreement is Exhibit B to her affidavit. Under the heading "alterations

and additions to the premises" paragraph 5.1 of the 2005 agreement is repeated. A new Clause 2 was however included as follows:

> "Possession of the Premises.
>
> 2. The landlord agrees:
>
> 2.1 The tenant has the right and freedom to transfer this tenancy to a third party during the period of the tenancy".

10. According to paragraph 8 of her affidavit, in June 2009 she "sublet the retail store and accommodation facilities downstairs to the Second Plaintiff and he moved in with his family and lived in it and carried on his retail business there".

11. It appears that the First Defendant returned to Tonga in about July 2010. He approached the First Plaintiff, claimed that she had breached their agreement and demanded money to remedy the breach. There then followed several exchanges between the parties and their lawyers. Mr Niu demanded assurance that the Plaintiffs would not again be harassed. He did, however, agree that the First Plaintiff would remove her ducks from the Defendant's land. Mrs Taufaeteau demanded payment of $3500 which the Defendants claimed to be owed pursuant to the 2007 Agreement failing payment of which "evacuation of the premises" was demanded by no later than 9 June 2013.

12. By about 11 June 2013 the situation had deteriorated to the point that the First Defendant locked up the premises. The shop could not be operated by the Second Plaintiff and the First Plaintiff could not get upstairs.

13. In a supporting affidavit the Second Plaintiff stated that on 1 June 2013 he signed a Tenancy Agreement with the First Plaintiff to run for five years from 1 June 2013. A copy of the Agreement was Exhibit A to his affidavit. At paragraphs 4, 5 and 6 the Second Plaintiff described how the First Defendant had demanded that he and his family move out of the premises and how the First Defendant came and chased his customers away and locked the Second Plaintiff inside the shop. After the police were called the shop was opened but was then locked again. As a result of these actions the Second Plaintiff averred that he was losing "no less than $170 per day profit" and was unable to pay his creditors, including the First Plaintiff.

14. On 20 June 2013 the application for the injunction came before me. Just prior to the hearing a notice of opposition was filed by Mrs Taufaeteau. It sought refusal of the application on the following grounds:

> "(a) Reliance on O.2 Rule 2 Land Court and pursuant to Order 13 Rule (2)(b) Supreme Court Rules 2007.
>
> (b) The Respondent is the lawful holder of the allotment where the dispute was issued upon.

(c) The Applicants agreement of October 2007 is invalid and unlawful pursuant to S13, S14 and S15 of the Land Act Cap 132.

(d) The second applicant is a stranger and interim injunction should not be granted for it is unlawful to sue for property which has been in the undisputed possession of the Defendants as ownership of more than five years.

(e) Further ground stated in supporting affidavit."

15. At the hearing Mrs Taufaeteau indicated that the Defendants would not resist an order permitting the First Plaintiff to continue residing upstairs at the premises until disposal of the action but she opposed the reopening of the shop. I could find no benefit to be derived by any party from keeping the shop closed and therefore granted an interim injunction ordering the Defendants to remove the corrugated iron and plywood sheets which had been nailed across the doors and windows of the shop and to refrain from further obstructing the Plaintiffs from the use of the premises. In my ruling I emphasized the need to have the action brought on for trial as soon as possible.

16. Unfortunately, the Second Defendant did not comply with my order. After several further hearings the First Defendant was fined $500 in default 30 days imprisonment. He refused to pay the fine. On 21 November, after he told me that he would rather go to prison then pay the fine the First Defendant was committed for 28 days. He was released on same day after the fine was paid for him. After his release and several other applications for his re-committal, the First Defendant very wisely left Tongatapu and no further disturbances have been brought to my attention since January 2014.

17. On 11 July 2013 a Defence and Counterclaim were filed. Numerous grounds of defence were advanced including misrepresentation, want of consideration, illegal trading, and "immoral and unbecoming behaviour" including playing poker on the Sabbath. In paragraph 4 of the Defence it was claimed that the "arbitrary terms" of the agreement between the parties "deprived the landlord of his rights to his building and his land without a lease in accordance with the Land Act and therefore is invalid and not enforceable". The Defendant's Counterclaim sought general damages for trespass, special damages arising from unpaid rent and an order for eviction. A detailed Reply and Defence to the Counterclaim was filed on 26 August 2013.

18. On 3 October 2013 the Defendants filed an application to strike out the Plaintiff's claim "under Order 8 Rule 8" of the Supreme Court Rules 2007. It was supported by an affidavit of the First Defendant. In this affidavit the First Defendant denied having any contractual relationship with the Plaintiffs and stated that they were trespassing on his land. He suggested that the Land Court had no jurisdiction to punish him for contempt and that the committal was unconstitutional. In paragraph 9 he stated:

"It is just and proper for an order stating that the case be struck out against myself in the Land Court being the registered land owner and owner of the retail shop, as well as any other order in place".

19. On 17 October 2013 a further affidavit was filed by the First Plaintiff. At paragraphs 12, 20 and 21 she revealed that the Second Plaintiff "decided he could no longer wait to continue his business there and has decided to and did sell his stock to one You Libin and moved out of the store altogether"... "now even You Libin is not paying rent to me while the store is closed". Exhibit B to her affidavit was a receipt purportedly issued by the Second Plaintiff to You Libin "for the transfer of the stock and goods today" amounting to $20,700.

20. On 17 January 2014 an application was filed by the Defendants "to vary the injunction order dated 20 December 2013 and application for jury trial especially the remedy sought for injunction and damages". The grounds advanced in support of this application did not significantly differ from those filed on 3 October 2013.

21. On 20 January 2014 a further application was filed by the Defendants. With respect, the meaning of the application is not easy to discern but it seems that the Defendant's claimed:

> (1) That the Land Court had no jurisdiction to commit for contempt;
> (2) That the Plaintiff's action was statute-barred by virtue of Section 16(1) of the Supreme Court Act; and
> (3) That the Land Court had no jurisdiction to entertain the Plaintiff's claim.

After hearing both counsel I explained to Mrs Taufaeteau that if the legality of the committal was to be further contested then she would have to raise the matter in the Court of Appeal. It was also pointed out that Section 16(1) does not apply to the Land Court which has its own limitation provision (Section 170). After further discussion with counsel it became clear that the principal contention by the Defendants was that the Land Court had no jurisdiction to deal with the Plaintiff's claim to have a valid tenancy of the shop premises. It is a pity that this objection to the jurisdiction of the Court was not raised earlier, given the nature of the Plaintiffs' claim and in particular paragraph 22 (see paragraph 7 above). Unfortunately, the obstinacy and aggressiveness of the First Defendant were such as to divert all concerned from the principal issue which is the validity of the tenancy claimed by the Plaintiffs. I asked for written submissions.

22. On 7 May 2014 I heard further argument. Mrs Taufaeteau relied on my own Decision in *'Unuaki 'O Tonga Royal University of Technology and Anr. v Kingdom of Tonga* LA 16 of 2013 in which I declined to follow *Tonga Industries Traders Limited v Shell Pacific Islands Limited* LA 2 of 2005, preferring *Maka v Kainga* [2006] To LR 43.

23. Mr Niu filed a written submission which was admirably brief and to the point and for which I am grateful. He referred to Clause 90 of the Constitution:

> "90 – 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" etc (not relevant).

In Mr Niu's submission this is a case where the central issue is whether the Defendants have the right to enjoy the full use of their land unfettered by the Plaintiffs' occupation of part of it or whether, by entering into a valid tenancy they had voluntarily surrendered that right.

He described the dispute as:

> "One which concerns the title to the allotment namely the right of the title holder to possession occupation and use and to exclude all others".

He referred to Section 149(1)(b) of the Act which gives the Land Court Jurisdiction:

> "(b) to hear and determine all disputes claims and questions of title affecting any land or any interest in land ... and in particular all disputes claims and questions of title affecting any tofi'a, tax or town allotment or any interest therein;"

He might also have referred to Section 149(1)(e) which gives the Land Court Jurisdiction:

> "(e) To hear and determine any question or amount of damage, loss, compensation, mesne profits, rent or claim in respect of any allotment, lease, sub-lease, permit or interest of any kind in land".

In his submission, a dispute, claim or question which may affect the unrestricted right of title to land can properly be said to be a case "concerning title to land" within the meaning of Clause 9.

24. I have considerable sympathy with Mr Niu's submission: as it seems to me, the reality is that the First Defendant is faced with a situation in which substantial premises erected on approximately 1/3 of the land to which he has title are being used and occupied by a series of different persons with some of whom he had no prior dealings. It is plain that the fact of the occupation of the shop premises amounts to a curtailment of his right to enjoy the whole of his land. The problem however, is that the courts have usually, but not always, held that buildings erected on land are not part of the land and therefore, by what seems to me, with respect to be something of a legal fiction, do not encroach upon the title to the land upon which they are located.

25. Mr Niu suggested that a review of the current legal position was now desirable. I agree, as did the Royal Land Commission which in its report dated 30 March 2012 recommended:

> "83 – that the interest over land shall include interest over fixtures of the land (including dwellings).
>
> 84 – that the Land Act is amended to recognise tenancy agreements and their registration."

26. In these circumstances, it may be helpful if I briefly set out some of what I take to be the most important considerations and authorities which have led to the present position.

27. The earliest reference to this question which I have been able to find is *Bank of Tonga v Paea He Lotu Kolo* SC 1019/92 and 701/93 in which the central question for determination was whether a writ of distress encompassed a dwelling house. At page 4 of his judgment Ward CJ wrote:

> "I accept the reasoning of Dalgety J in *Bank of Tonga v Vaka'uta* 19/41 that properties such as houses and fixtures which cannot be subject to distress in England because they accrete to the land are considered severable from the land under our law and are properly described as goods and therefore subject to distress."

28. In a later judgment in the same year and in the same case Hampton CJ referred to the differences of opinion on the question of whether a "house" is a fixture on Tongan land or not:

> "On the one side *Nakao v Fua* 6/88 and *Tu'ipulotu v Ma'afu* 721/94 and on the other side such as *Bank of Tonga v Kolo* 1019/92 and 701/93 and *Bank of Tonga v Vaka'uta* 19/91".

29. In *Kolo v Bank of Tonga* [1997] To L.R. 181, 183 (actually heard on 4 and 7 August 1998). The Court of Appeal said:

> "Of more significance was an argument that the house forms part of the land to which it is attached and thus falls within the jurisdiction of the Land Court under Section 149 of the Land Act so as to be excluded from the jurisdiction of the Supreme Court by Clause 90 of the Constitution."

> "Clause 90 of the Constitution reserves to the Land Court and on appeal to the Privy Council "cases concerning title to land". Thus the Appellant's argument raises a Constitutional question of great importance. The Constitution directs attention to "titles to land" rather than the incidents of the possession of land. In commercial practice that is how the Constitutional limitation has been understood. Buildings, as Ward CJ pointed out [in *Bank of Tonga v Kolo*] ... have been regarded as items of personal property rather than as forming part of the reality. Because of the Constitution of Tonga and because of Tonga's traditions the intricate law of fixtures and accretions to land which applies elsewhere is not wholly appropriate in Tonga.
>
> Although all the implications have not yet been worked out and their working out should be left to the process of development of the law of Tonga case by case we think that the broad proposition stated by Ward CJ should be accepted. That means it was open to Mr Kolo to pledge his house to the Bank as an item separate from the land on which it stood".

The Court distinguished *Nakao v Fua* in which it found "nothing which is contrary to this conclusion". In that case Martin CJ had found "as a fact that [the buildings] are fixtures – they cannot be moved and therefore form part of the land". The basis of the distinction was apparently that the declaration that the buildings on the land were comprised in the lease was made in the Supreme Court and the question of the buildings being "involved in a question of title to the land" was not raised.

30. In *Cowley v Tourist Services* etc [2001] To. L.R. 183 the Court of Appeal reaffirmed *Kolo v Bank of Tonga* and stated:

> "In Tonga the law of fixtures, as understood in other common law countries has been somewhat modified so that buildings are not, is general, regarded as fixtures. They are treated rather as "chattel houses" are in Barbados – that is to say personal property detachable from the land".

Although the focus of the appeal was on the legality of certain sub-leases, it appears that the legality of tenancies was also considered. The Court concluded:

> "It would be inconsistent with this approach (and destructive of ordinary weekly tenancies of houses and shops in Tonga) to treat Section 13(a) [of the Act] as applicable to the short term tenancy agreements in the present case ... accordingly these, too, although not registered, avoid any offence to Section 13 ... Whoever built a shop or house, it may be the subject of a short term tenancy from a lessee or sub-lessee of the land on which it is situated".

31. In 2006 the Land Court again revisited the matter. The dispute concerned the right to evict shopkeepers from a shop they had erected on the Plaintiff's land. The Court, after referring to *Mangisi v Koloamatangi* [1999] TOCA 9; CA 11 of 1998 held that the contract to operate the shop conferred no interest of any kind in the land and accordingly the Land Court had no jurisdiction in the matter (*Maka v Kainga* [2006] TO L.R. 43). The Court distinguished *Tonga Industries etc v Shell Company* LA 2/2005 on the ground, apparently, that "the subjects of the tenancy agreement are described in it as buildings on the land together with the use of land adjoining the buildings. For the reasons given by me in *'Unuaki 'O Tonga* (above, paragraph 22) I do not accept that *Tonga Industries* was correctly decided.

32. The question again came before the Court of Appeal in *L. Niu and Ors v Tapealava* AC 15/12: -

> "14 – The relevant exclusion from the jurisdiction of the Supreme Court flows only from Section 90 of the Constitution and it relates to "cases concerning titles to land". Accordingly, the issue in the appeal depends on whether the proceedings ... concerned "titles to land".
>
> "20 – Actions for trespass to land and trespass to goods protect lawful possession, not title as such".

"24 – The right of a lawful occupier to undisturbed possession until the Land Court makes an order requiring him to vacate is another aspect of the right conferred by lawful possession of the property and the house".

"The power [of the Land Court] will be exclusive if the dispute concerns titles to land but is not expressed to be exclusive (of the Supreme Court) in other land cases such as the present, where title is not in issue".

33. Finally, the question was again considered by the Court of Appeal in *Westpac Bank of Tonga v Fonua* [AC16/13]:

"11 – The application should have been made in the Supreme Court, rather than the Land Court ... because the client was only seeking possession of the building, which under Tongan law is not part of the land.

"13 – The position in relation to securities on buildings is much clearer. In Tonga they are not part of the real estate and may be dealt with separately from the land on which they stand ... the jurisdiction of the Land Court does not extend to them."

"14 – A dispute regarding [buildings] is not one "affecting any land or any interest in the land" and so is beyond the jurisdiction conferred on [the Land Court] by Section 149 of the Land Act".

34. Apart from the question whether buildings are part of the land on which they stand, there is the second question which is the exact nature of "tenancies" in Tonga.

35. The general nature of tenancy in English Law is explained in Halsbury 4th Edition paragraphs 1 – 16:

"Paragraph 1 - The relationship of landlord and tenant was originally one of contract only but from early times the contract conferred an estate in land on the tenant without losing all its contractual characteristics".

"Paragraph 16 – A tenancy may be granted of land of any part of land .... tenancies may be granted of ... building or any part of a building".

"Paragraph 6 – In determining whether the agreement creates between the parties the relationship of landlord and tenant or merely that of licensor and licensee, the decisive consideration is the intention of the parties ... primarily the Court is concerned to see whether the parties to the agreement intend to create an arrangement personal in its nature or not ... so that ... the grantor's capacity to grant a lease will ... be relevant ... in assessing the nature of the interest created by the transaction".

36. The Land Act makes no mention of the "ordinary weekly tenancies of houses and shops" referred to in *Cowley* still less of the type of tenancy being propounded in this

case, transferable and of up to ten years in duration. The creation of leases and sub-leases is permitted by Division II and apparently by Section 19(3), however these are not effectual to pass or confer any interest in land until duly registered (Section 126) and must be in the form specified by Section 124.

37. It seems to be the generally accepted view that "permits" referred to in Section 124 apply only to permits issued to aliens pursuant to Section 14 (see e.g. *Royal Land Commission Report* page 96). Section 125 however refers to two distinct forms of permits embodied in the different Forms 2 and 6. The Commission suggested that permits be removed from the Land Act altogether and be replaced by tenancy agreements. At present such agreements are simply not recognised by the Act by that name but there seems no good reason not to regard them as unregistered Form 6 permits. They would then unarguably be within the purview of the Court and the requirement for them to be registered would then tend to reduce the scope for troublesome ambiguities in their drafting.

38. In the present case, as has been seen:

(a) The 2005 agreement purportedly allowed the tenant to extend the shop from its original 10 x 20 feet area onto 230 square metres of the First Defendant's land;

(b) The Defendants wish to argue that the occupation by the Plaintiffs or their agents of part of their land exposes them to criminal prosecution for breach of Section 50 of the Land Act; and

(c) Counsel for the Plaintiffs himself contends that a central issue in the case is whether the right to the unfettered occupation of the land has been voluntarily surrendered by the Defendants.

39. In my respectful opinion it is not at all easy to determine, on the basis of the authorities, how precisely the rule is to be formulated and the present uncertainty seems to give rise to several difficult questions as yet unanswered. For example, are buildings "in general" not to be regarded as fixtures? Is the ruling in *Kalo* merely a "broad proposition" or has that proposition been modified by *Fonua*? If it is "open" to a mortgagee to pledge the buildings separately, is it also open to pledge them as part of the land? Can buildings be found "as a matter of fact" to be affixed to the land and if so, what considerations are to be taken into account in arriving at that conclusion? Given that most buildings can only be reached by passing over the land on which they stand, does the grant of a tenancy of such a building also involve the grant of a license to cross the land to reach it? If so, what would the consequence be of the revocation of such a license? If a building only is mortgaged, but not the land upon which is stands or which surrounds it, how could the mortgagor derive any benefit from exercising the powers of sale of the building, following default?

40. Section 149 of the Land Act clearly confers a much wider jurisdiction on the Land Court then Clause 90 of the Constitution. In cases such as the present, involving, as it appears, both land and contract questions, dealing with them separately in different courts leads to confusion, duplicity and considerable additional expense.

41. In my opinion "the process of the development of the law in Tonga" relating to what are called "tenancies" (an increasingly common form of right of occupation) is being hampered by the uncertainties which I have attempted to outline. Meanwhile, I hold myself bound by authority and rule that this action is beyond the jurisdiction of the Land Court and must accordingly be dismissed.

Tu'ifua anors v Public Service Tribunal anor

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

13 June 2014

Civil procedure – application to have counsel disqualified – application dismissed

On 4 October 2013 counsel for the second defendant sought an order "That A.H. Waalkens is disqualified as Counsel for the Plaintiffs in this matter or in any matter before the courts of the Kingdom of Tonga". The ground was that Mr Waalkens should be denied audience in the Courts of Tonga because as Lord Chancellor he had such extensive powers over the judiciary that it may reasonably be inferred that those members of the judiciary (Magistrates, Puisne Judge, Chief Justice, Judges of Appeal) would be frightened into complying with his submissions rather than considering them independently, impartially and on their merits as was required.

Held:

1. The day to day administration of courts was the responsibility of the Chief Justice with the assistance of the Puisne Judge, the Chief Magistrate, the Registrar, sometimes one or two officers in the Ministry of Justice and, very occasionally, the Public Service Commission. The Lord Chancellor was a valued adviser and friend to the judiciary; to represent him as a threatening presence or a powerful supervisor was seriously to misrepresent the true position.
2. The application was dismissed. The plaintiffs were to have their costs, to be taxed if not agreed.

Cases considered:

Arab Monetary Fund v Hashim The Times 4 May 1993
Black v Taylor 6 PRNZ 690
Clear Communications Ltd v Telecom Corporation of New Zealand Ltd 14 PRNZ 477
Ebner v Official Trustee in Bankruptcy [2000] HCA 63; 205 CLR 337
Lali Media v Lavaka [2003] Tonga LR 114
R v Gough [1993] AC 646

Counsel for the plaintiffs	:	A H Waalkens KC
Counsel for the first defendant	:	Mrs P Tupou
Counsel for the second defendant	:	Mrs K L Clark QC with Mrs 'A N Taumoepeau SC

Decision

[1] On 8 August 2012 the Public Service Commission dismissed the Second Defendant from his employment as Chief Secretary and Secretary to Cabinet. He appealed to the Public Service Tribunal (the First Defendant) and on 21 March his appeal was allowed.

[2] On 24 June 2013 the Plaintiffs, as Chairperson and members of the Public Service Commission, obtained leave to move for judicial review of the Tribunal's decision. The grounds are set out in the Statement of Claim filed on 1 July 2013. As appears from paragraph 21 the Tribunal took the view that the purported termination of the Second Defendant's employment was invalid since it was made without the prior approval of Cabinet. The other grounds of appeal were not considered.

[3] A Statement of Defence was filed by the Second Defendant on 31 July 2013. In paragraph 22 he denied the Plaintiff's assertion that the approval of Cabinet was not required.

[4] On 4 October 2013 Mrs Taumoepeau filed the present application which seeks an order:

> "That A.H. Waalkens is disqualified as Counsel for the Plaintiffs in this matter or in any matter before the courts of the Kingdom of Tonga".

Thirteen grounds were advanced in support of the application, together with an affidavit by the Second Defendant who deposed that he supported it.

[5] The principal submissions were that:

(a) It is improper for Mr Waalkens to appear as counsel given the responsibilities accorded to him by Clause 83 B of the Constitution: "he has to make a choice whether to be a supervisor or a litigator".

(b) Mr Waalken's appearance as counsel would reasonably give "the ordinary lay person" the perception that the court was not "operating independently" and that it was subject to "possible undue influence". "The public may think that the judge is biased".

(c) In these circumstances, the Courts should "refuse him rights of audience". Any decision to the contrary would risk "bringing the judicial process into disrepute".

[6] The hearing took place on 20 May 2014. Mrs Clark handed up a written submission running to 176 paragraphs (more or less), 50 pages in length and containing 194 footnotes and a spreadsheet comparing the functions of the Lord Chancellor in Tonga to the judiciaries of New Zealand, Australia (Federal), United Kingdom, Canada (Federal) and Tonga. She also handed up a bundle of 23 authorities

and a second volume containing commentaries, substantial extracts from and complete copies of over a dozen statutes including the Canadian Judges Act 1985 (in both English and French).

[7] In the third sentence of her concluding paragraph 8.2 Mrs Clark summarized her argument:

> "The Lord Chancellor's broad powers in respect of the judiciary including security of tenure, financial security and administrative arrangements concerning the judiciary must preclude his appearance as counsel, particularly as counsel for the executive, if the constitutional fundamentals of actual and perceived judicial independence and impartiality are to be upheld".

[8] In an earlier paragraph 1.5.7 Mrs Clark put the same proposition slightly differently:

> "If the constitutional office of the Lord Chancellor is engaged by a party as counsel, the appearance of partiality arises: a fair minded observer would be objectively reasonable to apprehend that, in the light of the Lord Chancellor's powers in respect of the judiciary, the judges might favour the party represented by the Lord Chancellor".

[9] In paragraph 7.12 Mrs Clark suggested that given the Lord Chancellor's powers, a fair minded lay observer would reasonably apprehend that if he acted as counsel "the judges might unconsciously favour" his submissions.

[10] In paragraph 7.13 Mrs Clark explained, following *Ebner v Official Trustee in Bankruptcy* [2000] HCA 63; 205 CLR 337 that for bias to be established it is necessary first, "to identify *the factor* which might lead a judge to decide a case going beyond the legal and factual merits and secondly, to articulate the *logical connection* between that factor and the feared deviation". In paragraph 7.14 she identified the *"perceived factor"* to be "the potential for the judge to be subject to the powers the Lord Chancellor possesses, including as Chair of the Judicial Appointments and Discipline Panel. The *logical connection* was identified as being that "the judges might unconsciously favour the party represented by the Lord Chancellor because of fear of disadvantage if the Lord Chancellor's client is unsuccessful".

[11] In paragraph 7.21 Mrs Clark suggested that:

> "... if the Lord Chancellor appears as counsel, the fair minded observer, even if not apprehending partiality would think that the Court ought not to be subjected to a perception of conflict between a judge's personal interest and [his] duty".

[12] Mrs Clark's submissions, both written and oral were skilful, tactful and elegant. She accepted that the application raised "delicate" questions. I agree. Stripped of its embellishments, the submission is simple: Mr Waalkens should be denied audience in the Courts of Tonga because as Lord Chancellor he has such extensive powers over

the judiciary that it may reasonably be inferred that those members of the judiciary (Magistrates, Puisne Judge, Chief Justice, Judges of Appeal) would be frightened into complying with his submissions rather than considering them independently, impartially and on their merits as is required.

[13] Before directly addressing this submission, it may be convenient to dispose of several questions which were alluded to but which are not in issue. The first is that it is accepted (*Black v Taylor* 6 PRNZ 690) that the Court has the inherent jurisdiction to deny audience to counsel in a particular case "where the integrity of the judicial process would be impaired by counsel's adversarial representation of one party against the other". In *Clear Communications Ltd v Telecom Corporation of New Zealand Ltd* 14 PRNZ 477, 482 & 483 the High Court suggested ten principles which should be borne in mind before audience is denied to counsel in a particular case. The tenth principle is that:

> "Although the jurisdiction is not to be emasculated by setting the threshold so high that it could never be attained, there must be something truly extraordinary before removal could be contemplated. It could be justified only in cases of truly egregious misconduct likely to infect future proceedings".

[14] Secondly, where bias is raised:

> "The governing principle (in Australia) is that ... a judge is disqualified if a fair minded observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide" (see *Ebner*, supra, 344 paragraph 6).

In England and Wales the test is slightly different. The question there to be answered is:

> "Whether having regard to the [relevant] circumstances there [is] a real danger of bias on the part of the (decision maker) in the sense that he might unfairly regard (or have unfairly regarded) with favour, or disfavour, the case of a party to the issue under consideration" (*R v Gough* [1993] AC 646).

I am not aware that the superior Courts in Tonga have decided which test to apply (although see *Lali Media v Lavaka* [2003] Tonga LR 114). There may not in fact be much practical difference between them. Since, in this case, it is not the removal of the judge but the removal of counsel appearing before him which is being sought, the principle must in any event be somewhat modified.

[15] Thirdly, the importance of preserving the independence and impartiality of the judiciary in Tonga is not doubted. It is recognised in Clause 83 A of the Constitution which reads:

> "The existing underlying constitutional principles of the Rule of Law and Judicial Independence shall always be maintained".

It is reaffirmed in the oath taken by the Chief Justice and the other Judges which commits them:

> "to perform truly and with impartiality [their] duties as a judge in accordance with the Constitution and the Laws of the Kingdom".

In addition, judges are well aware of international treaties and declarations to the like effect. For example, Article 14 of the International Covenant On Civil and Political Rights 1966 requires:

> "that everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law".

Principle IV of the Commonwealth (Latimer House) Principles 2003, states:

> "An independent, impartial, honest and competent judiciary is integral to upholding the rule of law, engendering public confidence and dispensing justice".

[16] In his concise written submissions in answer, Mr Waalkens (to whose appearance at the hearing of the application no objection was taken) first pointed out that contrary to what was being suggested (see especially paragraph 1.5.7 quoted in paragraph 8 above) it was not the office of Lord Chancellor which was being engaged to represent the Plaintiffs but Mr Waalkens in his personal capacity as a member of the inner Tongan Bar. He suggested that Mrs Clark's analysis of the Lord Chancellors powers was misconceived and provided no "real" or even "remote" possibility of bias. While there might be a particular matter in which conflict of interest might dictate that he should not appear, this principle applies equally across the Bar. The suggestion that a fair minded observer might reasonably conclude that the judge would grant favour to the case being advanced by counsel simply because of his status as Lord Chancellor was described as "absurd".

[17] In part 5 of her submissions Mrs Clark, by detailed reference to the Constitution, described the powers invested in the Lord Chancellor. She compared those powers with the powers previously and currently conferred on the Lord Chancellor in England and Wales. She suggested:

(i) "that judges in Tonga are comparatively vulnerable to reduction of their retirement age, as the Lord Chancellor, acting with the consent of the King in Privy Council may make regulations to establish a retirement age for judges".

(ii) "judge's salaries have ... less protection in Tonga [than in England and Wales, Australia, New Zealand or Canada]. "The level of judicial salaries rests entirely with the King" ... "set on the basis of recommendation of the JADP" (of which the Lord Chancellor is the chairman). Even Fiji offers better protection.

(iii) "judicial pensions are determined by statute in Australia, United Kingdom and Canada" whereas in Tonga they are "a matter of

discretion for the Lord Chancellor, the JADP and the King in Privy Council".

(iv) In Australia and Canada "judicial discipline is essentially handled by the Judiciary" whereas in Tonga "the only member of the Judiciary on the Judicial Appointments and Discipline Panel (of which the Lord Chancellor is the chairman) is the Chief Justice".

(v) In New Zealand and the UK the Ministry of Justice administers the courts. In Tonga, however "the Lord Chancellor's responsibility for administration of the Courts is unusual in that the responsibility for administration of the courts usually resides in the executive or in the courts themselves".

Taken together, it was suggested, these factors clearly demonstrate the extent of the Lord Chancellor's powers in relation to the judges: he has a say in when they retire, in their salaries, in their pensions and in their discipline. How could a judge before whom Mr Waalkens chose to appear reasonably be expected not to be influenced by such considerations?

[18] Mrs Clark's submissions were clearly the product of very considerable and admirable industry. Such industry can however only reveal a limited portion of the whole reality, the balance being supplied by experience. It may well be true, as the poet tells us that there is "at best only a limited value in the knowledge derived from experience" however almost exclusive reliance on academic research without the additional benefit of that experience that comes from living in (or at least regularly visiting) and regularly practising at the Bar at which one is appearing carries with it the risk that the difference between appearance and reality will be insufficiently appreciated. It is plain to me that this is what happened in this case.

[19] The actuality is in fact quite different from scenario described by Mrs Clark. It is as follows. The Supreme Court of Tonga has one Chief Justice and, at present, one Puisne Judge. Both are employed on contract. Subject to contract, they hold office according to the Constitution "during good behaviour". These contracts ("inevitable in some jurisdictions" – Latimer House Principles) are freely entered into by the parties and their breach would attract the normal consequences. They do not provide that salaries can be reduced. No attempt to reduce or freeze salaries has ever been made, so far as I am aware. No regulations have been made to provide for retirement age. None are necessary because the matter is dealt with in the contracts. The general tendency is anyhow for retirement ages to be increased in the Pacific, not reduced. So far, all the superior court judges have been expatriates. Their employment is not, and is not expected to be, pensionable. In the 3½ years that I have been a member of the JADP two complaints have been received against judicial officers, both magistrates. The recommendations to the Privy Council to terminate the appointment of the first and to accept the resignation of the second were unanimous and followed a full discussion in the Panel. The Lord Chancellor himself did no more than chair the meeting. The Lord Chancellor's responsibility for "the administration of the courts" is similar in character and aspiration to his responsibility (also in Clause 83B) "for the maintenance of the rule of law". In fact, the Lord Chancellor whose appointment is part-time and held ad interim and who usually visits Tonga about every six weeks for 2 or 3 days, has no department, has no staff and has issued no administrative

instructions at all since his appointment. The day to day administration of courts is the responsibility of the Chief Justice with the assistance of the Puisne Judge, the Chief Magistrate, the Registrar, sometimes one or two officers in the Ministry of Justice and, very occasionally, the Public Service Commission. The Lord Chancellor is a valued adviser and friend to the judiciary; to represent him as a threatening presence or a powerful supervisor is seriously to misrepresent the true position.

[20] If the premises fail then so must the conclusion drawn from them. The "perceived factor" is, in my judgment and experience simply without basis in fact. It amounts to no more than a theory derived from the study of papers. No evidence of anyone having any experience of the work of the Lord Chancellor or of the courts was adduced at all. Assuming, however, for the sake of argument, that the Lord Chancellor actually had the powers and influence attributed to him, would the "logical connection" then follow?

[21] I have already quoted from paragraph 7.21 of Mrs Clark's submission but think that the last words of the quotation bear repeating:

> "The Court ought not to be subjected to a perception of conflict between a judge's personal interest and [his] duty".

In my opinion, this hopelessly idealistic supposed precept, so sweet, so quaint, seriously distorts the reality of judicial life in the Islands.

[22] In paragraph 6.39 Mrs Clark referred approvingly to Section 113(1) of the Constitution of the Republic of Fiji. This Constitution was drafted by a military government which had abolished its democratically enacted predecessor resulting in the termination of all those judges who still remained on the bench. Some had contracts, some had "permanent" appointments but all were equally swept away. They lost their salaries, their pensions and their houses. This was not the first time that judges in Fiji were treated in this way, it had happened before, in 1989. And, neither is such treatment of judges confined to Fiji. In Papua New Guinea, in the Solomon Islands, and most recently in Nauru, the essential powerlessness of the judiciary in the face a determined military or executive prepared to flout the law has been amply demonstrated.

[23] In the time that I have been in Tonga I have presided over civil and criminal trials and appeals in which the parties have included the Princess Royal, the Prime Minister, the former Prime Minister, the Deputy Prime Minister, the Leader of Opposition, the then Speaker of the Legislative Assembly, the Minister of Justice and the entire Cabinet, to identify just some. Sometimes I have found against them, sometimes in their favour. They are all, in their own way, powerful persons in Tonga who, should they chose so to do, could probably make a judges' continuation in office difficult or unpleasant, to say the least. Not one has done so and the reason for that is clear: contrary to what the Applicant implies, the people of Tonga, both high and humble, appreciate and respect the need for an impartial and independent judiciary. It is respect for the judiciary rather than a piece of paper which protects the judiciary from the interference so sadly seen elsewhere and which gives the courts (and their local officers in particular) the courage to take sometimes very difficult decisions. Unsubstantiated allegations of weakness or bias do not, in my view assist to maintain

that respect. In may not be out of place to remind counsel that such allegations should not be advanced merely on the basis of client's instructions; they should only be made if counsel are satisfied that proper grounds exist to support the application (*Arab Monetary Fund v Hashim* The Times 4 May 1993).

[24] A number of concluding points may be made. First, none of the authorities relied upon by Mrs Clark provides a precedent for the denial of audience to a legal practitioner in good standing in all courts of the jurisdiction to which he is admitted. If the application were to be granted in the form in which it is sought, then Mr Waalkens would be unable to represent himself in, for example, a minor traffic matter in the Magistrate's Court. He would also be debarred from representing his client on any appeal against my decision on this application to the Court of Appeal. Secondly, there is no suggestion that Mr Waalkens has misconducted himself in an "egregious" manner.

[25] The third point is that if accepted, there appears to be no logical reason for restricting the principle advanced by Mrs Clark to the appearance by Mr Waalkens. The Attorney General, with whom I have being friendly for many years has appeared several times before me without objection. Lord Tupou, a Law Lord and also a member of the Judicial Appointments and Discipline Panel is a regularly appearing practitioner. The Minister of Justice represented himself before me last year. None of these appearances has raised any objection from the Law Society which is the body which would seem to me to be in the best position to make an application of this kind if it thought it to be appropriate. Should I now disqualify the leader of the Bar and all those other members of the Bar who are well known to me on the ground of possible "unconscious" bias? Are we now going to begin "making windows into men's souls"?

[26] Fourthly, the only issue for argument in the Plaintiff's application to the Court is a purely legal question: was Cabinet's prior consent required before the Second Defendant's services could lawfully be terminated? Answering that question will not involve assessment of the merits, evaluation of the credibility of witnesses or the exercise of discretion. The suggestion that a tribunal would "subconsciously" be frightened by Mr Waalkens into misconstruing the law in the knowledge that its misconstruction would later be laid open for inspection by a higher court on appeal seems altogether too far fetched. I cannot conceive that a fair minded observer would begin to find the suggestion credible.

[27] In paragraph C of the grounds of application, Mrs Taumoepeau advised that:

> "we will consider an appeal if [the application] is ruled against us".

I was surprised to find such a statement appearing in an application presented by Senior Counsel as I had thought it was well understood that this sort of indication is regarded as being quite improper and as amounting to a threat to the Court hearing the application. Apart, however, from wondering whether the indication was designed "subconsciously" to affect my unbiased consideration of the application, I was fortunately able to take advantage of counsel's error. It was not necessary to set out in as much detail as would otherwise be the case all the submissions placed before me by counsel. Neither need the position of the Judges of Appeal in relation to the application be considered. The former will doubtless appear in their entirety in the

appeal books while the Court of Appeal will be able to decide whether to grant audience to Mr Waalkens without being hampered by my views on the propriety of them so doing.

Result:

The application is dismissed. The Plaintiffs are to have their costs, to be taxed if not agreed.

Finau v Heimuli

Supreme Court, Nuku'alofa
Scott CJ
CV 11/2013

27 June 2014

Mesne profits – damages for trespass arising from a previous relationship of landlord and tenant – not applicable where no relationship – claim dismissed

The plaintiff was the oldest daughter of 'Olive Uikilifi (who died in 1980) by his second wife Mele who died in July 1994. Prior to her death she held a widow's estate on a town allotment Naililili registered in 'Olive's name. The defendant's grandparents were 'Olive and his first wife 'Olieti. Upon Mele's death the allotment reverted to the Crown. In 2007 after protracted legal proceedings it was finally granted to the defendant. An appeal against that grant was dismissed by the Court of Appeal in *Finau v Minister of Lands anor* [2012] Tonga LR 127 (CA). The house was built by 'Olive. The shop was built either by 'Olive or by Ani and her husband Semisi. The water tank was installed prior to 'Olive's death. On 'Olive's death intestate Mele acquired the house by virtue of Section 16 of the Probate and Administration Act (Cap 16) but the water tank and the shop were prima facie divisible among his children (whether all, legitimate or illegitimate is not clear). Upon Mele's death the only claimants to her estate (which comprised the house, the shop and the water tank), were the plaintiff and her siblings. At the time the estate vested in the plaintiff it was worth a total of $1,100; the house was worth $800, the shop was worth $200 and the water tank was worth $100. In 1994 the allotment reverted to the Crown. At no time either prior to or after that date could the plaintiff be considered as an heir to the allotment either apparent or presumptive for the simple reason that she was a married woman before her mother's death. The best that she could hope for was the defeat of the defendant's claim and the grant of a lease to her. Once her license to occupy the land granted to her by her mother came to an end with her mother's death, her only right to the chattels on the land, the house, the shop and the water-tank was to remove them, a right similar to that of a lessee to remove houses and other improvements from the land prior to its reversion to the lessor. In fact, the plaintiff decided not to exercise that right, presumably because she hoped that the proceedings in the Land Court would ultimately result in a decision in her favour. However, those proceedings were not finally resolved until 2012, that is, 15 years after she was ordered to leave the land following its reversion to the Crown. On 5 December 2012 the plaintiff demanded payment of rent for the dwelling house calculated at the rate of $500 per month for 67 months since March 2007 and rent of the shop at the rate of $300 per

month since January 2002 (January 2003 in the statement of claim) for 130 months, the two claims amounting to $33,500 and $39,000 respectively, totalling altogether $72,000. The plaintiff brought a claim for "mesne profits" against the defendant for the use and occupation by the defendant or his agents of the house, the shop and the water tank.

Held:

1. At no time since the land reverted, had the plaintiff any right to the land except to access it in order to remove her chattels from it, a right to be exercised within a reasonable time of the land's reversion. Whatever that reasonable time might have been, it was clear that by 2007 it had expired. The situation therefore was that the right to enjoy the benefits of the ownership of the chattels had been abandoned.
2. Mesne profits were merely damages for trespass arising from a previous relationship of landlord and tenant. Because the plaintiff lost the right to occupy the land in 1997, a claim for mesne profits for the use and occupation of the land, or the premises situated thereon was misconceived.
3. The plaintiff's claim was dismissed.

Cases considered:

Jolly, Re [1900] 2 Ch 616
Mount Carmel Investments Ltd v Thurlow [1988] 1 WLR 1078

Statute considered:

Probate and Administration Act (Cap 16)

Rules considered:

Supreme Court Rules 2007

Counsel for the plaintiff	:	L M Niu SC
Counsel for the defendant	:	Mrs F Vaihu

Judgment

1. This action is the latest chapter in a long saga of litigation between the parties stretching back to 1997.

2. The Plaintiff is the oldest daughter of 'Olive Uikilifi (who died in 1980) by his second wife Mele who died in July 1994. Prior to her death she held a widow's estate on a town allotment Naililili registered in 'Olive's name.

3. The Defendant's grandparents were 'Olive and his first wife 'Olieti.

4. Upon Mele's death the allotment reverted to the Crown. In 2007 after protracted legal proceedings it was finally granted to the Defendant. An appeal against that grant was dismissed by the Court of Appeal in September 2012 [AC 9 of 2012].

5. Following Mele's death the Defendant applied for Letters of Administration of her property (which of course, did not include the allotment itself). According to the Letters granted to her, this property consisted of:

> "1. One old wooden dwelling house [valued at] $800.00
> 2. One old shop buildings $200.00
> 3. One concrete water tank $100.00"

6. On 1 October 1994 the Plaintiff's siblings Sela, 'Ana and Talite agreed to surrender their claims to the property to the Plaintiff. It is not in dispute that the house, the shop and the water tank belonged to the Plaintiff after her mother's death. They were, however, located on land which reverted to the Crown in the year her mother died.

7. According to paragraph 10 of Mr Niu's written submissions filed on 13 May 2014:

> "In 1997 the Court ordered the Plaintiff (and her family) to vacate the allotment on which the three properties were situated until the question of ownership of the allotment was decided. The Plaintiff locked up the properties and vacated the allotment."

> "In about February 2000 the Defendant authorized and instructed his cousin and her husband (Kanongata'a) to occupy and use the dwelling house and water tank without the consent of and without consulting the Court or the Plaintiff, and they did".

8. On 5 May 2000 the Supreme Court (C129/97) gave permission to Palu and Fakalelu Kanongata'a and their immediate family to continue to reside in and use the premises subject to conditions "until the Honourable Minister for Lands has made a final determination of the right to this land ... ". According to Mr Niu, the final determination was made on 30 August 2006.

9. Following the Minister's determination and the grant in 2007 the Plaintiff did not remove the house, the shop or the water tank from the allotment. Presumably, she hoped that her appeal against the grant of the land to the Defendant in the Land Court would be upheld, that a lease over the land would be granted to her and that she would consequently be able to resume habitation and use of her property that she had vacated in 1997. As it turned out, however, the appeal was not ultimately successful and she was forced to abandon all hope of returning to the land. This action is a claim for "mesne profits" by the Plaintiff against the Defendant for the use and occupation by the Defendant or his agents of the house, the shop and the water tank.

10. On 5 December 2012 the Plaintiff demanded payment of rent for the dwelling house calculated at the rate of $500 per month for 67 months since March 2007 and rent of the shop at the rate of $300 per month since January 2002 (January 2003 in the Statement of Claim) for 130 months, the two claims amounting to $33,500 and $39,000 respectively, totalling altogether $72,000.

11. The trial took place on 18 March 2014. Mr Niu called four witnesses. The first witness told the Court that she was renting a three bedroom house for $300 per month at Fasi. She and her husband had improved the house otherwise the rent might have

been $1000 per month. The second witness told the Court that she rented a shop out for $600 per month. The third witness was the Plaintiff's elder sister who confirmed that her mother left a house and a water tank "that is all". She had agreed to renounce her share in favour of the Plaintiff.

12. The Plaintiff's evidence was that she and her husband and six children all lived in the house with her mother Mele after 'Olive died. Mele died in 1994 in New Zealand. The Plaintiff applied for the Letters of Administration. Her lawyer had placed the values on the property in the estate however she had signed the application and agreed with the valuation. She and her family moved out of the house in 1997. The Defendant's cousin Fakalelu moved into the house in about 1999. This was arranged by Ani, 'Olive's daughter by his first marriage. She accepted that Fakalelu had renovated the bedrooms and painted the house.

13. The Plaintiff was shown document P-23 a photograph of a lean to shop. This, she told the Court, depicted a new shop which had replaced the old shop which was demolished in 2013. She was not told before the old shop was removed and did not know what had happened to the materials.

14. In cross-examination the Plaintiff agreed that the house which 'Olive had built was worn down but stated that 'Olive had renovated it. She also agreed that Palu and Fakalelu had claimed to have spent a lot of money on the house. She had never asked for rent during the years that the land case was proceeding through the Courts. She agreed that she was unable to pay the costs awarded against her either by the Land Court or the Court of Appeal and that she had offered the house, the shop and the water tank in lieu of the payment of those costs.

15. The final witness was the Defendant. He lives in America and his mother in law is living in the house on the allotment. The Defendant stated that the house had been built by his grandparents but was already deteriorating in 1969. Palu and Fakalelu had substantially improved the house. They renovated or installed a bathroom, ceilings, doors, "the rear end" and the roof. Since his mother in law had moved in further renovations or replacements had been made to the floors (he had fallen through the floor on one occasion), to the windows and to the doors "the whole building was renovated".

16. Asked about the ownership of the house, the shop and the water tank the Defendant stated his view that whoever won the land would also take these. His mother Ani had applied for Letters of Administration but her application was put on hold pending the outcome of the land case. The Defendant told the Court that "although I have been in conflict with the Plaintiff for over 20 years about the property it has never before [today] been revealed that Letters of Administration over Mele's estate had been granted to the Plaintiff".

17. At the conclusion of the evidence both counsel agreed to file written submissions. I am grateful for the submissions filed. Having considered the evidence and the submissions I find the position to be as follows.

18. The house was built by 'Olive. The shop was built either by 'Olive or by Ani and her husband Semisi. The water tank was installed prior to 'Olive's death. On 'Olive's death intestate Mele acquired the house by virtue of Section 16 of the Probate and

Administration Act (Cap 16) but the water tank and the shop were prima facie divisible among his children (whether all, legitimate or illegitimate is not clear). Upon Mele's death the only claimants to her estate (which comprised the house, the shop and the water tank), were the Plaintiff and her siblings. At the time the estate vested in the Plaintiff it was worth a total of $1,100.00; the house was worth $800, the shop was worth $200 and the water tank was worth $100.

19. In 1994 the allotment reverted to the Crown. At no time either prior to or after that date could the Plaintiff be considered as an heir to the allotment either apparent or presumptive for the simple reason that she was a married woman before her mother's death. The best that she could hope for was the defeat of the Defendant's claim and the grant of a lease to her. Once her license to occupy the land granted to her by her mother came to an end with her mother's death, her only right to the chattels on the land, the house, the shop and the water-tank was to remove them, a right similar to that of a lessee to remove houses and other improvements from the land prior to its reversion to the lessor. In fact, the Plaintiff decided not to exercise that right, presumably because she hoped that the proceedings in the Land Court would ultimately result in a decision in her favour. Unfortunately, those proceedings, as has already been seen, were not finally resolved until 2012, that is, 15 years after she was ordered to leave the land following its reversion to the Crown.

20. At no time since the land reverted, has the Plaintiff had any right to the land except to access it in order to remove her chattels from it, a right to be exercised within a reasonable time of the land's reversion. Whatever that reasonable time might have been, it is plain that by 2007 it had expired. The situation therefore was that the right to enjoy the benefits of the ownership of the chattels had been abandoned.

21. In these circumstances my view is that the Plaintiff's claim is unarguable. A claim to have been deprived of the fruits of letting the house and the shop cannot be maintained by a Plaintiff who had no ability to exercise that right.

22. On the evidence it is clear to me that in any event the house, in the condition in which it was left by the Plaintiff, was barely habitable and in no state to be let out. I accept the Defendant's evidence that it was old and dilapidated. According to the Plaintiff's own evidence it was renovated by 'Olive however that must have been prior to 1980, when he died. After that date, the renovations which were substantial were carried out and paid for by the Defendant or his agents. It seems likely that the condition of the shop was similar and led to it being pulled down in 2013. Mr Niu did not try to argue that the water-tank could have been let out. If, as I find, the house and the shop, as left by the Plaintiff on the land, were in such a poor condition that they could not be let out then being deprived of the opportunity to let them out cannot attract compensation.

23. During legal argument I expressed doubt about the Plaintiff's entitlement to recover mesne profits, it being my understanding that mesne profits are merely damages for trespass arising from a previous relationship of landlord and tenant. Mr Niu referred to a passage in *Clerk & Lindsell on Torts* (paragraphs 23.52 in the 16th Edition) in which it was stated that "mesne profits are compensation for the value of the use of occupation of the premises ... extending to all loss suffered by the

Plaintiff". Unfortunately, Mr Niu overlooked the preceding paragraph in which it is stated that:

> "In an action for recovery of possession of land the Plaintiff may join a claim for mesne profits".

however:

> "If recovery of land is time-barred by adverse possession the right to recover mesne profits is lost, just as is the right to recover rent (*Mount Carmel Investments Ltd v Thurlow* [1988] 1 WLR 1078; *Re Jolly* [1900] 2 Ch 616)".

24. In my view, the Plaintiff, having lost the right to occupy the land in 1997, a claim for mesne profits for the use and occupation of the land, or the premises situated thereon is misconceived. In my opinion given the circumstances, neither of the authorities referred to by Mr Niu in his written submissions assists the Plaintiff.

25. Before leaving the matter, I wish briefly to refer to the costs awarded against the Plaintiff in the previously closely related proceedings which remain unpaid. Under RSC O.17 r1(b) the Court may, on the application of a Defendant, stay an action if it appears that the Plaintiff may be unable to pay the costs of the Defendant if ordered to do so. From the Plaintiff's evidence that is the situation in this case. Counsel are reminded that it is not only where the Plaintiff is ordinarily resident overseas that the Court will entertain an application to stay.

26. Finally, and for the record, I should clarify that in the second sentence of the first paragraph of my judgment of 22 June 2012 in LA 25 of 2010 I stated that the Plaintiff was living in the house on the allotment. That was incorrect; as has been seen, she vacated the allotment in 1997.

Result: The Plaintiff's claim is dismissed.

The Defendant is to have his costs, to be taxed if not agreed.

Mafi v Public Service Commission anor

Supreme Court, Nuku'alofa
Scott CJ
CV 237/2010

27 June 2014

Employment law – public service dismissal process- decision to dismiss and sentence declared null and void

The plaintiff joined the Civil Service in August 1990 as an Educational and Training Officer. By 1999 he had risen to the rank of Deputy Director of Tourism. In November 2008 he was appointed Acting Director of Tourism. He held this position until he was suspended on 2 December 2009. On 31 May 2010 the first defendant (PSC) advised the plaintiff that he had been dismissed with effect from the date of his suspension. On 11 October 2010 he was advised by the PSC that his appeal to Cabinet had not been accepted and that his dismissal from the Service had been confirmed. The plaintiff sought a declaration that the decisions to dismiss him taken on 25 May 2010 and 29 September 2010 were null and void.

Held:

1. There were four principal areas of concern identified. The first was the alleged offence itself. The offence was concerned with the obligation of employees not to compromise their Department or the Public Service through their personal behaviour. The 23 October 2009 letter was sent privately by the plaintiff to the chairperson and copied privately to the Prime Minister's Secretary. There was nothing in the plaintiff's actions that would have had the effect of compromising either the Department of Tourism or the Public Service in general.
2. The second area of concern was that the court did not accept that the plaintiff's complaint alleged bias or dishonest conduct.
3. Where a public servant was charged with a disciplinary offence, which was denied, the officer must be given an opportunity to be heard before a finding of guilt was arrived at. The officer must then be given a further opportunity to make representations before penalty was imposed. Where the officer appealed, an opportunity must be given for his representations to be made to the appellate tribunal before a decision was taken to confirm the findings of guilt or the sentence imposed or both. Although the PSC gave the plaintiff the required opportunity to be heard before it found him guilty, it did not allow him an opportunity to make representations as to

sentence. It gave no reasons for concluding that the only adequate punishment for the offence was dismissal. Furthermore, the Cabinet, which was sitting in a quasi-judicial capacity also failed to give the plaintiff an opportunity to make representations either as to why the appeal against conviction should be allowed or why the sentence imposed on him should be set aside or varied. Those failures fundamentally vitiated the dismissal procedure.

4. The plaintiff sought a declaration that the decisions to dismiss him taken on 25 May 2010 and 29 September 2010 were null and void. That declaration was granted. He also sought general damages for "emotional, physical and mental distress" and, if not reinstated, special damages for loss of salary. It was the long-standing practice of the court not to award damages for distress caused by wrongful dismissal. The court did not have the power to order reinstatement; however the declaration had the result that the plaintiff was entitled to receive the benefits that would have accrued to him had he not been dismissed from his substantive position of Deputy Director in December 2009.

5. Note that the criticisms of Cabinet's involvement in the Public Service Appeal process led to the 2010 amendment of the Public Service (Disciplinary Procedures) Regulations 2003 which provided an appeal to the Public Service Tribunal, rather than to Cabinet.

Cases considered:

Addis v Gramophone Co Ltd [1909] AC 488
Mele 'Amanaki v Mishka Tu'ifua and Ors (CV1139 of 2007)
PSC v 'Epeli Langiloa [1997] FLR 303

Statute considered:

Public Service Act 2002

Regulations considered:

Public Service (Disciplinary Procedures) (Amendment) Regulations 2010
Public Service (Disciplinary Procedures) Regulations 2003

Counsel for the plaintiff	:	W Edwards
Counsel for the defendants	:	S Sisifa with Miss Rose Kautoke

Judgment

[1] The Plaintiff joined the Civil Service in August 1990 as an Educational and Training Officer. By 1999 he had risen to the rank of Deputy Director of Tourism. In November 2008 he was appointed Acting Director of Tourism. He held this position until he was suspended on 2 December 2009. On 31 May 2010 the First Defendant (PSC) advised the Plaintiff that he had been dismissed with effect from the date of his suspension. On 11 October 2010 he was advised by the PSC that his appeal to

Cabinet had not been accepted and that his dismissal from the Service had been confirmed.

[2] On 16 December 2010 a writ, statement of claim and application for leave to move for judicial review were filed. Leave was granted on 20 December 2010. A Statement of Defence was filed on 19 January 2011. Thereafter there were prolonged attempts to settle this matter. These were not successful and it was finally set down for trial in June 2014. While attempts to settle are always encouraged, it is unsatisfactory that this action which I find to be relatively straightforward was not brought to trial much sooner. Since the primary aim of a Plaintiff in judicial review who alleges that his dismissal was invalid is reinstatement, the granting of relief becomes much more complicated with the passage of time.

[3] The Plaintiff held office subject to the provisions of the Public Service Act 2002. He was required to conform to the 2004 Code of Conduct for the Public Service (GS 9/04). Paragraphs 3 and 4 of the Code lay down principles governing the officer's "Relationship with Government" and "Relationship with the Public". Paragraph 6 is entitled "Personal Behaviour". It states, relevantly, as follows:

> "(1) The fourth principle of the Code of Conduct is concerned with the obligation of employees not to compromise their Department or the Public Service through their personal behaviour.
> (2) All employees of the Public Service shall:
> (a) -
> (b) -
> (c) -
> (d) Act with care and diligence
> (e) - (j) - "

[4] On about 22 December 2007 the PSC advertised the position of Director of Tourism. The Plaintiff and three other candidates applied. They were interviewed by a panel of four including the Minister of Works and the Chairperson of the PSC (Chairperson). According to document D-1 the Plaintiff obtained the highest score however the panel was unable unanimously to recommend him for appointment. Instead (Document D-2) the PSC wrote to the Minister of Tourism proposing several options including continuation of the acting arrangement for six or twelve months followed by re-advertisement.

[5] According to the Plaintiff he was not informed of the outcome of his application for several months. The other three candidates were however advised that their applications had been unsuccessful. He began to make enquiries and received certain information. It seems that the position was eventually re-advertised and he re-applied. He wrote to the Chairperson on 23 October 2009 (D-3) complaining that he had only recently been advised that his first application had not been successful. He explained that he was unable to accept that he did not have the necessary skills for appointment. In addition:

> "Certain Panel Members, Ministers and Senior PSC staff and even yourself admitted to Tourism Industry members that I had won the

> interview and was recommended for the post but the Hon. Prime Minister objected to my being appointed to the post."
>
> "I'm currently seeking legal advice with intention for legal proceedings on the grounds of discrimination and inconsistence recruitment practice. I will also be seeking an appointment with the Prime Minister to seek his reasoning for objecting to my appointment."

The letter was copied to the then Prime Minister's personal assistant.

[6] The Chairperson sent an exceptionally careful and well written reply to the Plaintiff on 27 October. She accepted that the delay in informing him of the outcome of his application was unacceptable and apologized. She offered to make the panel's report available to him. She did not dispute the Plaintiff's right to complain about what had happened and even to proceed with legal action if he had decided on that course. In paragraph 3 of her letter she described the Plaintiff's allegation that the panel's recommendation had been overruled by the Prime Minister as "a very serious allegation to make". It seems, however, that the focus of her concern was not so much the allegation of the PM's intervention as the alleged breach of confidentiality by the panel's members. She concluded her letter by inviting the Plaintiff to meet with her to discuss his concerns.

[7] The day after the letter was written the then Chief Secretary and Secretary to Cabinet wrote to the Chairperson. His savingram (D-5) was headed "Vicious and unfounded allegation against the Prime Minister". Apparently the PM's personal assistant had forwarded her copy of the 23 October letter either to the Chief Secretary or to the PM. Mr Kautoke wrote:

> "... this office has received the message sent by email to you dated 23 October from Mr Sione Moala ... where he made the allegation that he had won the interview for the post of Chief Executive Officer CEO, Tourism *but that the Hon. Prime Minister objected to his being appointed to the post*.
>
> In my position as head of department I find this vicious and unfounded allegation to be a serious one made against a Head of Government, the Prime Minister of Tonga.
>
> "In consultation with the Prime Minister it is our recommendation that Mr Sione Moala be suspended immediately from the Service in view to being dismissed after due process by the Public Service Commission".

[8] On 28 October the PSC forwarded the correspondence to the Minister of Tourism. His acknowledgement was sought. On 30 October the Minister replied (Document D-17).

> "I took up the matter with Sione ... and found that Sione was just frustrated and disappointed that he was not awarded the post of Directorship. While rumours had gone around that he had won the

> interview and [was] recommended for the job. Despite his dissatisfaction and after the course of our discussion he accepted the fact of the matter as stipulated in the overall result of PSC processes and was willing to put things behind and move on with things as usual.
>
> Also I acknowledge the response from Chief Secretary and his recommendation for your office to take action on the allegation against the Hon. Prime Minister. I hereby agree and leave the matter to your good office to proceed as necessary".

[9] After taking advice from the Solicitor General the PSC again wrote to the Minister. It advised him that his letter of 30 October "was not considered complete in accordance with the PSC Disciplinary Procedures Regulations 2003. Thus:

> The Committee requested that a complete report be kindly submitted to the PSC Office specifying why you consider the breach of discipline serious and including evidence to substantiate the same. The report should contain the following please:
>
> 1. Confirmation from the Hon. Prime Minister that the allegation made by Mr Mafi is not true.
> 2. The recommendations of the panel to the post of Director of Tourism to which Mr Mafi's email referred.
>
> - That you would kindly terminate the acting of Mr Moala Mafi and appoint a new Director of Tourism
>
> And that either the new acting Director or the Minister himself prepare a complete report for the PSC.

[10] On 23 November the Minister replied. He described the Plaintiff's allegation against the Prime Minister as "out of ground and serious". He again confirmed that the allegation that the PM had intervened in the appointment process was incorrect.

[11] On 25 November the PSC Disciplinary Committee reconvened. It was decided that the Plaintiff be charged with:

> "(1) Failure to act with care and diligence, contrary to Section 6(2)(d) of the Code of Conduct".

The particulars of the charge, set out in full at P-67-8 were to the effect that by suggesting that he had won the interview but failed to obtain appointment by reason of the PM's intervention and by stating that he was taking legal advice, he had failed to act with care by:

> (i) Wrongfully alleging bias and dishonesty against the Prime Minister;
> (ii) By "aggravating the damage" to the PM by copying his allegation to the PM's personal assistant;

And had failed to act with diligence by:

(iii) Wrongly stating that he had "won" the interview;

(iv) Wrongly claiming that he had been recommended for the position; and

(v) Wrongly alleging that the PM had objected to the appointment".

[12] On 2 December 2009 the PSC sent two letters to the Plaintiff. The first, P-66, informed him that he had been suspended from duty without pay for serious breach of discipline with effect from 3 December 2009. The second letter charged the Plaintiff with the serious breach of discipline set out in paragraph 11 above. Copies of the relevant documents were enclosed and the Plaintiff was given 14 days to answer the charge.

[13] The Plaintiff replied on 14 December (Document D-14 and Exhibit A). He referred to the delay in informing him of the outcome of his application. He also referred to the rumours that he had heard about the PM's intervention. He stated that in his opinion the Chief Secretary had no authority to direct the PSC to take action against him, in particular, to suspend him without a hearing. He maintained that in his 23 October letter he was merely "asking questions or clarification". He accepted the Chairperson's offer to supply him with a copy of the panel's report. He also offered his apology to the PM and to the PSC. If the disciplinary proceedings were not to be cancelled then he asked for a hearing and for his legal counsel to be present.

[14] On 3 February 2010 the PSC convened a meeting to hear the Plaintiff's representations. Mr Clive Edwards appeared for the Plaintiff. A full minute of the meeting is at D67-72. The Plaintiff again explained the circumstances which led out to his letter. He denied having the intention to accuse the Prime Minister. Mr Edwards submitted that the Plaintiff had not committed any disciplinary offence at all. He had merely, in a privileged letter "put forth an idea or complained to the PSC". This should not lead to him losing his job. His written apology should be sufficient and he should be forgiven, especially as he was a senior officer with many years of unblemished service.

[15] After hearing the Plaintiff and Mr Edwards the PSC found the Plaintiff guilty as charged. It took the view that the Plaintiff "was given an opportunity to prove himself but had failed to dispute the charges made against him". "[Plaintiffs] representation which was supported by Clive Edwards was focused mainly on why it is a problem to speak against the PM. The Commission noted that that is not the issue". The Commission concluded by agreeing "that the appropriate disciplinary measure be discussed at the next PSC meeting".

[16] On 25 May 2010 the PSC met. No minutes of the meeting were discovered by the Crown and it is not disputed that neither the Plaintiff nor his legal representative was given notice of the meeting or was present. On 31 May the Plaintiff was advised (P-76) that it had been decided that he be dismissed with effect from 2 December 2009. He was advised that he had a right of appeal to Cabinet as provided by Regulation 13 of the 2003 Regulations.

[17] On 25 June 2010 the Plaintiff's appeal was lodged with Cabinet. The grounds of appeal are set out in full at D78-81. In summary, the Plaintiff submitted:

(i) That the intervention by the Chief Secretary contravened Regulations 3, 5, 7 and 9 of the Regulations;
(ii) That he had not committed a breach of discipline, either serious or minor;
(iii) That his letter of 23 October was merely and enquiry; it was private and not for publication;
(iv) That his right to freedom of expression was not being respected;
(v) That he had faithfully served the Government for many years without complaint;
(vi) That he had already been severely punished by being suspended without pay since December 2009;
(vii) That he had not been convicted of fraud or criminal conduct and therefore the whole matter should have been disposed of "in true Tongan and Christian spirit of talanoa and forgiveness".

[18] On 8 July 2010 the PSC filed its response to the appeal. A copy is P84-90. On the whole, the response was a reasonably fair account of what had occurred. It did not, however, attempt any explanation of why it had been thought necessary for the Plaintiff to be dismissed rather than suffer any of the other penalties available under Regulation 10. In fact, the sentence imposed on the Plaintiff was not mentioned at all, except in Annex 14, the PSC decision of 25 May, already referred to. There were two assertions which I find were either incorrect or misleading. The first, at page D-85 is the statement:

> "The PSC Office considered the matter as disciplinary only when the Minister of Tourism reported Mr Mafi's actions and allegations as a serious breach and concurred with the letter from the Chief Secretary and Secretary to Cabinet dated 28 October 2009".

This suggestion is not borne out by the PSC's letter of 28 October 2009 (P-52 and the annexures) and appears to be at variance with paragraph 3 of a saving from PSC to the Solicitor General dated 2 November 2009 (not discovered) referred to in paragraph 8 of the Solicitor General's reply dated 5 November (D-10).

[19] Secondly, the statement that the Plaintiff had not taken up the Chairperson's 27 October suggestion of a meeting between them (P-89) is in my opinion somewhat unfair given the Chief Secretary's letter to the Chairperson sent the very next day.

[20] On 11 October 2010 the Plaintiff was advised by PSC that Cabinet at its meeting on 29 September 2010 had dismissed his appeal (P-91). It is not in issue that neither the Plaintiff nor his counsel attended the Cabinet meeting and that neither of them was given an opportunity to make representations either as to the PSC's finding of guilt or the sentence passed.

[21] The Statement of Claim raises numerous grounds of complaint, among them:

(i) The Plaintiff was not guilty of any disciplinary offence, whether minor or serious;
(ii) The words complained of did not allege dishonesty or bias;
(iii) The copying of the 23 October letter to the PM's PA did not "aggravate the damage to the PM";
(iv) No enquiry or report was carried out by the Plaintiff's Head of Department as required by Regulations 5 and 7;
(v) No copy of the report was attached to the charge as required by Regulation 7(1)(c);
(vi) The disciplinary proceedings were not initiated by the Plaintiff's Head of Department;
(vii) The PSC did not act independently but at the direction of the Chief Secretary; and
(viii) There was no reasoned decision given by the Cabinet.

[22] A detailed and careful Statement of Defence was filed on 19 January 2011. The trial took place on 3 and 4 June 2014. Only the Plaintiff gave evidence. The papers were all admitted by consent and the facts were substantially undisputed. The Plaintiff told the Court that apart from a 2 year contract, now expired, with TCC, he had been unemployed since his dismissal. He confirmed the correctness of the Retirement Board Notice dated 19 February 2011 (P-92). He again maintained that he had been told that the PM had objected to his appointment: the late Minister had told him personally. He denied suggesting that the PM was biased or dishonest.

[23] Mr Edwards filed comprehensive written submissions for which I am grateful. Mr Sisifa presented oral submissions in answer, making the best of a difficult brief.

[24] Although I find that the circumstances of the Plaintiff's dismissal reveal several questionable decisions, in my view four principal matters of concern may be identified.

[25] The first problem is the alleged offence itself. I agree with Mr Edwards that, as is stated in subsection (1) of the Regulation, Regulation 6 is "concerned with the obligation of employees not to compromise their Department or the Public Service through their personal behaviour". As pointed out, and not disputed by the Defendants, the 23 October letter was sent privately by the Plaintiff to the Chairperson and copied privately to the PM's Secretary. I can find nothing in the Plaintiff's actions having the effect of compromising either the Department of Tourism or the Public Service in general.

[26] Secondly, I do not accept that the Plaintiff's complaint alleges bias or dishonest conduct.

[27] Thirdly, it is absolutely fundamental that where a public servant is charged with a disciplinary offence, which is denied, the officer must be given an opportunity to be heard before a finding of guilt is arrived at. The officer must then be given a further opportunity to make representations before penalty is imposed. Where the officer appeals, an opportunity must be given for his representations to be made to the appellate tribunal before a decision is taken to confirm the findings of guilt or the

sentence imposed or both (see *PSC v 'Epeli Langiloa* [1997] FLR 303 in which the Fiji Court of Appeal reviewed the principal authorities).

[28] In the present case, although the PSC gave the Plaintiff the required opportunity to be heard before it found him guilty, it did not allow him an opportunity to make representations as to sentence. It gave no reasons for concluding that the only adequate punishment for the offense was dismissal. Furthermore, the Cabinet, which was sitting in a quasi-judicial capacity also failed to give the Plaintiff an opportunity to make representations either as to why the appeal against conviction should be allowed or why the sentence imposed on him should be set aside or varied. In my judgment those failures fundamentally vitiated the dismissal procedure.

[29] The Plaintiff seeks a declaration that the decisions to dismiss him taken on 25 May 2010 and 29 September 2010 were null and void. That declaration will be granted. He also seeks general damages for "emotional, physical and mental distress" and, if not reinstated, special damages for loss of salary. It is the long-standing practice of the Court not to award damages for distress caused by wrongful dismissal (*Addis v Gramophone Co Ltd* [1909] AC 488). The Court does not have the power to order reinstatement (*'Epeli Langiloa* supra) however the declaration will have the result that the Plaintiff is entitled to receive the benefits that would have accrued to him had he not been dismissed from his substantive position of Deputy Director in December 2009.

[30] In conclusion, it will be noted that the criticisms of Cabinet's involvement in the Public Service Appeal process expressed in *Mele 'Amanaki v Mishka Tu'ifua and Ors* (CV1139 of 2007) referred to by Mr Edwards have been followed by the repeal of the 2003 Regulations and their replacement by the 2010 Amendment Regulations which provides an appeal to the Public Service Tribunal, rather than to Cabinet.

Result: It is declared that the Plaintiff's dismissal from the Public Service in 2010 was null and void.

The claims for damages are dismissed.

I will hear argument as to costs.

In the Matter of Tupou

Supreme Court, Nuku'alofa
Scott CJ
PA 6/13

2 August 2014

Probate – house not included in value of estate – letters of administration not authorised

On 7 May 2013 the applicant applied for letters of administration in respect of the estate of her late husband Viliami Po'uli Tupou and stated that the deceased had assets worth $5,600 at the time of his death. A valuation report was attached and revealed that the unimproved value of the land comprised in the lease was estimated to be $40,600. From this sum $35,000 had been deducted for "reclaiming and gravel fillings" resulting in a final figure of $5,600 for the unimproved value of the land. There was a house on the land which was not included in the value of the estate.

Held:

1. The court considered that the applicant's suggestion that the value of her late husband's estate did not exceed $5,600 was not acceptable. The court declined to authorize letters of administration to issue.
2. It was fundamentally wrong to calculate the value of an estate by taking into consideration the rent payable multiplied by the number of years remaining to the lessee. That approach fundamentally confuses the value to the lessor with the value to the lessee.

Statute considered:

Probate and Administration Act (Cap 16)

Counsel for the applicant : Mrs P Tupou

Ruling

[1] On 7 May 2013 the Applicant applied for letters of administration in respect of the estate of her late husband Viliami Po'uli Tupou. The application stated that the deceased:

> "owned and had as his properties on the date of his death assets worth $5,600.00"

[2] In paragraph 8 of the standard supporting affidavit, the Applicant deposed:

> "that the estate concerned is Lease No.5114 at Halaleva, Tongatapu."

In paragraph 9 the Applicant deposed:

> "that I caused a proper valuation of the Lease to be undertaken and I attach hereto a true copy of that valuation…".

[3] Exhibit A to the affidavit was a certificate from the Acting Secretary for Lands, Survey and Natural Resources which revealed that the lessee of Lease 5114 was Viliami Po'uli Tupou, that the rental to the lessor Government of Tonga was $45.00 per annum and that the lease would expire on 14 January 2041.

[4] The valuation report is Exhibit 1 to the affidavit. This report reveals that the unimproved value of the land comprised in the lease is estimated to be $40,600. From this sum $35,000.00 had been deducted for "reclaiming and gravel fillings" resulting in a final figure of $5,600 for the unimproved value of the land.

[5] The cover page of the valuation report depicts what appears to be a rather attractive 3 or 4 bedroom wooden house built on the land. Upon receipt of the report and the Applicant's affidavit I asked Mrs Tupou to justify excluding the value of the house from the deceased's estate.

[6] Mrs Tupou relied on Section 16 of the Probate and Administration Act (the Act) which states that:

> "the widow shall inherit the dwelling house on the town allotment … whether the deceased left a will or not but the rest of the property of an estate shall be divisible according to Schedule 1 hereto".

[7] In my opinion the wording "but the rest of the property of an estate" leaves no doubt at all that the dwelling house is to be regarded as part of the estate, albeit a part reserved for the widow. In my opinion Section 16 provides no ground for excluding the dwelling house from the estate.

[8] Section 3 of the Act requires:

> "the Court [to] ascertain the value of the property of the deceased as correctly as the circumstances allow."

In the present circumstances I am of the opinion that the Applicant's suggestion that the value of her late husband's estate did not exceed $5,600 is not acceptable. On the basis of the information before me, I decline to authorize letters of administration to issue. This decision may of course be reviewed if further and credible information is supplied.

[9] Before leaving the matter I wish to refer to PA 15/12 In the matter of Filimone Kata Fie'eiki deck. In that ruling I held that, contrary to past practice, it was fundamentally wrong to calculate the value of an estate by taking into consideration
70 the rent payable multiplied by the number of years remaining to the lessee. In my opinion that approach fundamentally confuses the value to the lessor with the value to the lessee. I described this question as an important issue and hoped that the matter would be taken on appeal for final clarification. That has yet happen.

Pedras v Prime Minister anors

Supreme Court, Nuku'alofa
Scott CJ
CV 36/2014

29 and 30 July 2014; 12 August 2014

Immigration – removal order – judicial review – plaintiff was treated fairly – declined to declare order null and void

The Court of Appeal decision is reported at page 217 of this volume.

The plaintiff, a citizen of the United States of America, entered Tonga on about 16 January 2014 and was granted the usual one month visitor's visa. Shortly thereafter he applied for a two year residence visa and submitted his passport to the Immigration Division of the Ministry of Foreign Affairs for processing. He had married a Tongan subject in 2000. On 2 May 2014 the Ministry of Foreign Affairs received a Diplomatic Note Verbale from the Embassy of the United States of America which requested the Tonga Government to "consider the removal of the Applicant from Tonga". An indictment charging the plaintiff with wire fraud in the US and a warrant for the plaintiff's arrest was attached. On 5 May 2014, after considering the memorandum sent to him by the Director of Public Prosecutions, the Deputy Prime Minister (the second defendant) issued a declaration that the plaintiff was an undesirable immigrant and the Principal Immigration Officer (the third defendant) issued a removal order in respect of the plaintiff. On 26 May the plaintiff filed an application for leave to move for judicial review of the removal order of 5 May. He sought a declaration that the order was null and void together with certiorari to quash the order. He also sought an injunction to stay his removal until further order, and sought damages of $14000 for unlawful imprisonment. On 22 July 2014 leave to move for judicial review was granted by consent. The undertaking of the Solicitor General not to remove the plaintiff from the jurisdiction was extended until further order. Bail was extended on the same terms. The hearing of the review was on 29 July.

Held:

1. The plaintiff, a citizen of the United States, at common law had no right to enter Tonga or to remain in the Kingdom except by leave of the Crown. If he obtained a right to enter the Kingdom then that right expired on the day his permit expired. He had no legitimate expectation to have his permit

renewed and the refusal to renew his permit may be decided by the Secretary of State without giving any reasons.

2. The original monthly permit given to the plaintiff expired without renewal. At common law, therefore, the position was that he was within the Kingdom unlawfully. The Crown, in exercising its royal prerogative had the right to expel an alien and send him home whenever his presence in the country was deemed not to be conducive to public good. Incidental to this right it could arrest the alien, detain him and put him aboard a ship or aircraft bound for his own country.
3. A right of appeal against the exercise of a statutory authority did not imply a right to make oral representations, and a failure to permit an oral hearing to take place did not lead to the inevitable conclusion that the appellant was unfairly treated. While it was not doubted that the Prime Minister had a duty to act fairly the standards of fairness were not immutable.
4. The only reservation that the court had about the procedure laid down by the Immigration Act was that by virtue of section 4 the Prime Minister was given power to issue directions to the Principal Immigration Officer, by section 8(2) the Prime Minister was given the power to deem undesirability, the appeal from a Section 11 cancellation or declaration was to the Prime Minister and the appeal against a removal order was also to the Prime Minister. While there was nothing to show that the Prime Minister acted except in the utmost good faith, a procedure which allowed an appeal from a decision of a person to that same person was unsatisfactory. Tonga was a very small country and a proliferation of expensive appellate tribunals was to be avoided. However, appeals to the Prime Minister (or indeed to Cabinet) were now somewhat outdated and should be looked at again.
5. While the procedures followed were not entirely flawless the court was satisfied that the plaintiff was treated fairly. The court declined to declare the removal order null and void, to order it to be quashed or to restrain the Principal Immigration Officer from proceeding with the plaintiff's removal from the Kingdom. The claim for damages for unlawful imprisonment was also dismissed.
6. The plaintiff's claim (and the application for habeas corpus) was dismissed with costs to be taxed if not agreed.

Cases considered:

Doody v Secretary of State for Home Affairs [1993] 3WLR 154
Local Government Board v Arlidge [1915] AC 120
O'Reilly v Mackman [1983] 2 AC 237
R v Governor of Brixton Prison ex parte Soblen [1963] 2 QB 248
R v Home Secretary ex parte Cheblak [1991] 1WLR 890
R v Home Secretary ex parte Hosenball [1977] 1WLR 766
Schmidt v Secretary of State, Home Affairs [1969] 2 Ch 149

Statutes considered:
Evidence Act (Cap 15)
Extradition Act (Cap 22)
Immigration Act (Cap 62)
Nationality Act (Cap 59)

Counsel for the applicant : L M Niu SC
Counsel for the respondents : 'A Kefu SC

Judgment

[1] The Plaintiff, who is a citizen of the United States of America entered Tonga on about 16 January 2014. It appears that he was granted the usual 1 month visitor's visa. Shortly thereafter he applied for a two year residence visa and submitted his passport to the Immigration Division of the Ministry of Foreign Affairs for processing.

[2] The Court was told that in November 2000 the Plaintiff married a Tongan subject Ane Koloi by whom he has two children now aged 15 and 13. Prior to their arrival in Tonga the Plaintiff and his family had been living in New Zealand for about two and a half years.

[3] In March 2013, the Plaintiff applied for registration as a Tongan subject. He relied on Section 2 of the Nationality Act (Cap 59-as amended) which provides as follows:

> "The following persons shall be deemed to be Tongan subjects-
> (a) –
> (b) –
> (c) –
> (d) any non-Tongan who marries a Tongan provided that he –
> (i) lodges a written declaration with the Minister of Foreign Affairs that he wishes to assume Tongan Nationality; and
> (ii) takes the oath of allegiance prescribed by this Act; and
> (e) – "

[4] The oath of allegiance is set out in Section 14 of the Act and "shall be sworn before the Prime Minister or, if authorized in writing by the Prime Minister, a Minister or a diplomatic or consular officer". It is accepted that the Plaintiff has not in fact taken the oath of allegiance.

[5] On 2 May 2014 the Ministry of Foreign Affairs received a Diplomatic Note Verbale from the Embassy of the United States of America in Suva Fiji. Although the exact contents of the note were not disclosed to the Court its effect was to request the Tonga Government to "consider the removal of the Applicant from Tonga by way of deportation, expulsion or other lawful means under domestic law" (affidavit of the Third Defendant dated 25 July 2014). Attached to the Note were certified copies of several documents including:

(i) An indictment filed in September 2013 in the U.S District Court, Central District of California, Southern Division, charging the Plaintiff with wire fraud;
(ii) A warrant for the Plaintiff's arrest dated 5 December 2013;
(iii) A photograph of the Plaintiff; and
(iv) A copy of the relevant pages of a US passport issued to the Applicant on 29 April 2014 valid until 14 May 2014 and good only for return to the United States before the date of its expiry.

[6] According to paragraph 4 of the same affidavit, the Note also advised Foreign Affairs that the passport previously held by the Plaintiff (the passport submitted by him to Foreign Affairs for the processing of his citizenship application) had been cancelled.

[7] On 5 May 2014 the Director of Public Prosecutions sent a memorandum to the Acting Prime Minister. A copy is Annex A to an affidavit of Viliami 'Unga Fa'aoa, Deputy Police Commissioner, sworn on 19 May 2014 and filed in CR 64 of 2014. The Director sought the following:

(i) Consideration of the information supplied in the Note Verbale; and
(ii) A decision, pursuant to Section 8 (2)(g) of the Immigration Act, that the Applicant was an undesirable immigrant.

[8] Section 8 of the Immigration Act (Cap 62) as relevant to this application reads as follows:

" 8 (1) Any person who –
(a) –
(b) is a member of any of the prohibited classes as defined in subsection (2) of this section, shall be a prohibited immigrant and, save as hereinafter expressly provided, his entry into or presence in the Kingdom shall be unlawful.

(2) the following persons are members of the prohibited classes -
(a) any person who, not being exempt, is not the holder of a valid permit issued under the provisions of this Act;
(b) to (e) -

(f) a person who has been convicted by a court in any country outside the Kingdom for an offence which –
(i) is punishable by death or imprisonment for a term of not less than two years in the country of conviction; or
(ii) -
and has not received a free pardon;
(g) any person who, in consequence of information received from any source deemed by the Prime Minister to be reliable, or from any government, through official or diplomatic channels, is deemed by the Prime Minister to be an undesirable immigrant;
(h) to (j) –

(3) the burden of proof that any person is not a prohibited immigrant shall lie upon that person.

[9] On 5 May 2014, after considering the memorandum sent to him by the DPP, the 2nd Defendant issued a declaration that the Plaintiff was an undesirable immigrant within the meaning of Section 8 (2)(g) (Exhibit B to the third Defendant's affidavit). On the same day the Third Defendant issued a removal order in respect of the Plaintiff. A copy of the order is Exhibit C to the same affidavit. Principally, it requires the Commissioner of Police to detain the Plaintiff and to place him on the next available connecting direct flight to the United States.

[10] On 6 May an application for habeas corpus was filed (CR 64/14). In a supporting affidavit of even date the Plaintiff deposed that he had been taken into custody on 5 May and that he was detained at the Central Police Station prior to being flown out of Tonga at 4:00pm on the same day.

[11] On 7 May the Plaintiff, his counsel and Mr. Kefu appeared before me. Mr. Corbett, who was then acting for the Plaintiff, informed the Court that his client wished to exercise his right to appeal to the Prime Minister against the removal order (see Section 23). Mr. Kefu consented to a stay of the removal order to allow the appeal to be heard. Bail was opposed and after being told that arrangements were being made to accommodate the Plaintiff more suitably, he was remanded in custody.

[12] On 19 May the passport issued to the Plaintiff on 29 April together with his wife's green card was handed to the Court. I then granted bail subject to residential and reporting conditions and understand that he was released from custody on the same day.

[13] On 21 May the Plaintiff appealed to the Prime Minister against the removal order. A copy of the appeal is Exhibit A to the affidavit of 'Aholatu Palu, acting Chief Secretary and Secretary to the Cabinet dated 25 July 2014. The grounds of appeal were:

(1) the Plaintiff is a Tongan citizen;

(2) the removal order was invalid; and
(3) the Extradition Act (Cap 22) rather than the Immigration Act should have been applied to the request received from the Embassy.

Mr. Niu requested an oral hearing of his client's appeal.

[14] On 23 May the appeal was dismissed. A copy of the notice of dismissal is Exhibit B to Mr. Palu's affidavit. The ground on which the appeal was dismissed may be set out in full:

"(1) The appellant is currently wanted in the USA to stand trial in a US Federal Court on four counts of wire fraud;
(2) The appellant's US passport has been revoked by the United States of America government;
(3) The appellant is not a Tongan subject as he has not satisfied and completed the requirements required under Section 2(d) of the Nationality Act;
(4) The declaration made by the Acting Prime Minister made under Section 8 (2)(g) of the Immigration Act on 5 May 2014 was valid and lawful because the appellant is a fugitive from the law of the United States of America.
(5) The Extradition Act does not apply in this case because the United States Government has not submitted to the Tongan Government an extradition request under Section 7 of the Extradition Act;
(6) The removal order issued by the Principal Immigration Officer on 5 May 2014 as a result of a declaration made by the Acting Prime Minister on 5 May 2014 is sufficient to satisfy section 23 (1) of the Immigration Act".

[15] On 26 May the Plaintiff filed an application for leave to move for judicial review of the removal order of 5 May. In the Statement of Claim the Plaintiff sought a declaration that the order was null and void together with certiorari to quash the order. Additionally, he sought an injunction to stay his removal until further order. He also sought damages of $14000 for unlawful imprisonment.

[16] In his Statement of Claim the Plaintiff pleaded (paragraph 6) that the Defendants should not have resorted to the Immigration Act but should have complied with the requirements of the Extradition Act. In paragraph 7 it was pleaded that the Section 8 (2) declaration was wrongful and unlawful. In paragraphs 8 to 12 it was pleaded that the removal order was invalid for want of compliance with the provisions of the Act and that the Plaintiff should have been afforded an opportunity to be heard before a finding was made under Section 8 (2)(g) and before the removal order was made. In paragraphs 14 to 17 it was pleaded that the Plaintiff should have been given a third opportunity to be heard before his appeal was dismissed. In paragraph 19 it was pleaded:

"The Plaintiff, irrespective it his nationality, is entitled to equal protection of the laws of Tonga as he is within the jurisdiction of Tonga and he prays for such protections forthwith".

[17] On 22 July 2014 leave to move for judicial review was granted by consent. The undertaking of the Solicitor General not to remove the Plaintiff from the jurisdiction was extended until further order. Bail was extended on the same terms. The hearing of the review was set for 29 July. On 25 July a Statement of Defence was filed. The Defence sought dismissal of all the claims. In particular, it was denied that the Immigration Act was wrongly relied upon, it was denied that the provisions of the Immigration Act had been wrongly applied, it was denied that the Plaintiff had a right to an oral hearing at any stage before his removal and it was pleaded that the procedures actually followed had sufficiently satisfied the requirements of natural justice.

[18] The hearing took place on 29 July. Both counsel filed helpful written submissions for which I am grateful. It was agreed that the claim for damages would await the outcome of the application for the prerogative orders. It is not now necessary to set out the submissions of counsel in full. Briefly Mr. Niu submitted:

(a) The procedure followed by the Defendants had deprived the Plaintiff of his right to natural justice;
(b) Sections 8(2), 11(2) and 11(4) of the Immigration Act had been misapplied; and
(c) The Plaintiff should have been presumed to have been innocent as required by Section 46 of the Evidence Act;

[19] Mr. Kefu submitted:

(a) that there was no breach of the Immigration Act;
(b) alternatively, if there was a breach it was merely technical and did not undermine the Plaintiff's rights;
(c) that the refusal to grant the Plaintiff an oral hearing did not amount to a denial of natural justice;
(d) that the Extradition Act had no relevance to this application;
(e) that the grant of relief in judicial review was in any event discretionary;
(f) that the grant of relief in the circumstances of this case would be detrimental to good administration and would not ultimately avail the Plaintiff.

[20] On 30 July, after the conclusion of the hearing, and without seeking the leave of the Court, Mr. Niu filed additional submissions. Although I did not reject these submissions, the filing of submissions after the conclusion of the hearing should be avoided, not least because the other party is given no opportunity to reply. In his additional submissions, Mr. Niu suggested:

(1) that the Second Defendant had breached the Plaintiff's constitutional rights by deeming him to be an undesirable immigrant; and

(2) that the failure by the Third Defendant to cancel the Plaintiff's permit as required by Section 11(2) vitiated the removal process.

Consideration of the issues.

A – Common Law

[21] The Plaintiff, a citizen of the United States, at common law, has no right to enter Tonga or to remain in the Kingdom except by leave of the Crown (see *Schmidt v Secretary of State, Home Affairs* [1969] 2 Ch 149, 168). If he has obtained a right to enter the Kingdom then that right expires on the day his permit expires. He has no legitimate expectation to have his permit renewed and the refusal to renew his permit may be decided by the Secretary of State without giving any reasons.

[22] In the present case it appears that the original monthly permit given to the Plaintiff has expired without renewal. At common law, therefore, the position now is that he is within the Kingdom unlawfully.

[23] The Crown, exercising its royal prerogative has the right to expel an alien and send him home whenever his presence in the country is deemed not to be conducive to public good. Incidental to this right it can arrest the alien, detain him and put him aboard a ship or aircraft bound for his own country (*R v Governor of Brixton Prison ex parte Soblen* [1963] 2 QB 248, 300).

B – The Immigration Act

[24] The Immigration Act (Cap 62) is intituled "An Act to make better provision for the control of Immigration". It was enacted in 1969. In Section 6 the Common Law position is restated:

> "(1) No person other than a citizen of the Kingdom shall enter the Kingdom unless –
>
> (a) He is in possession of a valid permit lawfully issued to him under the provisions of this Act; or
>
> (b) He is exempted from the provisions of this Section under the provisions of Section 7 of this Act.
>
> (3) No person shall remain in the Kingdom after the expiry or cancellation of his permit".

The Act also creates several offences including:

> "6 (3) Any person who contravenes the provisions of this Section shall be guilty of an offence against this Act".

Section 7 is not relevant to these proceedings.

[25] Although I was not supplied with the passport used by the Plaintiff to enter the Kingdom it appears clear that the monthly permit endorsed upon it will long ago have

expired. In these circumstances, he is no longer the holder of a valid permit and therefore Section 8 (2)(a) applies with the result that, by virtue of Section 8 (1)(b) he is a prohibited immigrant whose presence in the Kingdom is unlawful.

[26] The main focus of Mr. Niu's attention on Section 8 was not on Section 8 (2)(a) but on Section 8(2)(g). As has been seen, he submitted first, that resort to Section 8(2)(g) was unlawful given that the matters alleged against the Plaintiff did not meet the Section 8(2)(f) threshold. Since Section 8(2)(f) requires a conviction to be entered, how could a mere indictment (with the attendant presumption of innocence) suffice to establish an alternative ground, Section 8(2)(g)?

[27] I do not accept this argument. In my view, Section 8(2)(g) is much wider in its scope than Section 8(2)(f) and extends to any conduct which in the opinion of the Prime Minister leads him to the belief that the alien's continued presence in the Kingdom is undesirable. That conduct may be conduct which has resulted in serious criminal charges being laid or may even include conduct which, though legal overseas, is not now acceptable in Tonga. In the words of Donaldson MR in *R v Home Secretary ex parte Cheblak* [1991] 1WLR 890, 900: "suspicion of involvement in serious crime, a long criminal record or other antisocial behavior" will suffice.

[28] Mr. Niu suggested that the Plaintiff should have been afforded a hearing before the Prime Minister reached the decision to deem him undesirable. I disagree. It is clear from *Soblen's* case (315, 316) and from *Cheblak's* case (910) that the power to order deportation following such a decision being reached is:

> "exercisable if the Secretary of State *deems* that person's deportation to be conducive to the public good. Such a power is one which, it seems to me, confers upon the Secretary of State a discretion limited only by the requirement that he must act in good faith".

In this case there is nothing to suggest that the Prime Minister did not so act.

[29] Mr. Niu next suggested that the removal order purportedly made under the provisions of Section 23 was invalid since section 12 (1) had not been enlivened by any cancellation of the Plaintiff's permit or declaration that his presence in the Kingdom was unlawful as provided for in Sections 11(1) or 11(2). While close examination of the provisions of the Act suggests that Mr. Niu may have a point, I am satisfied that it cannot avail the Plaintiff.

[30] Section 11 (1) does not apply to the Plaintiff since it is not part of the Crown's case that he entered the Kingdom under false pretenses. Section 11 (2) does not apply because it appears clear that the Plaintiff's visitor's permit had expired by 5 May 2014. In these circumstances, the unlawfulness of the Plaintiff's situation was the result of his continued presence in the Kingdom after the *expiry* of his permit not its cancellation.

[31] While Section 12 provides that a person shall not remain in the Kingdom after a Section 11 cancellation or declaration, there is nothing in the Section to prevent the operation of common law which, as already seen, is to the effect that an alien whose

presence is not authorized by a permit to remain in the Kingdom is within the Kingdom unlawfully (also provided for by Section 6(2) of the Act).

[32] Although the statutory removal power contained in Section 23 is dependent on Section 12 having come into operation, it does not exclude the common law power to remove an unlawful immigrant. Furthermore, as pointed out by Mr. Kefu, Section 23 is the only Section in the Act which provides for the removal of immigrants who, after lawfully entering the Kingdom have become unlawful immigrants. Were Mr. Niu's argument to be accepted, it would lead to the absurd and illogical result that persons whose presence had become unlawful otherwise than by exercise of the Section 11 powers (eg by virtue of Section 6 (a) or Section 8 (1)(b)) could not lawfully be removed from the Kingdom. Statues should not be construed in this way (see Bennion *Statutory Interpretation* 2nd Edn. Sections 314, 315 and 316).

C – The right to be heard.

[33] Mr. Niu submitted that the Plaintiff had a right to be heard (i) before he was deemed to be an undesirable immigrant (ii) on his appeal under Section 11 (4) and (iii) on his appeal under Section 23 (2) of the Act. No argument was addressed to the appeal provisions contained in Section 30 and in particular to the effect of Section 30 (3). I have already dealt with (i) and take the view that Section 11 (4) does not apply since no cancellation or declaration was made under Sections 11(1), (2) or (3). As to (iii) it has been seen that the Plaintiff appealed to the Prime Minister on 21 May.

[34] Mr. Niu's submission was that the Plaintiff was entitled to the oral hearing that he requested in his appeal. I disagree. A right of appeal against the exercise of a statutory authority does not imply a right to make oral representations (*Local Government Board v Arlidge* [1915] AC 120) and a failure to permit an oral hearing to take place does not lead to the inevitable conclusion that the appellant has been unfairly treated. While it is not doubted that the Prime Minister has a duty to act fairly (*O'Reilly v Mackman* [1983] 2 AC 237, 279) the 'standards of fairness are not immutable' (*Doody v Secretary of State for Home Affairs* [1993] 3WLR 154, 168 and see also, *R v Home Secretary ex parte Hosenball* [1977] 1WLR 766).

[35] In the present case, Mr. Niu filed a four page appeal against the removal order. He was given total freedom to advance whatever facts or matters he wished on behalf of his client. He did not deny that the Plaintiff had been indicted, that there was a warrant for his arrest or that his passport had been cancelled. After those representations had been considered by the Prime Minister he was advised that the appeal had been rejected and why. Mr. Niu did not specify any matters which he wished to place before the Prime Minister but which he was prevented from doing. In my opinion, it has not been shown (with one reservation to which I shall return) that the procedure followed was unfair.

D – Use of the Immigration rather than the Extradition Act.

[36] While *Soblen's* case has been overtaken by developments in administrative law, it is nevertheless still useful when considering the argument advanced by Mr. Niu. In the words of Denning MR:

> "The law of extradition is one thing; the law of deportation is another".

[37] I do not think that a detailed exegisis of all the differences between the two Acts is now required. It is sufficient to point out (a) that the Extradition Act applies to Tongans and non-Tongans alike whereas the Immigration Act only applies non-Tongans and (b) that the primary purpose of the Immigration Act is to remove undesirable aliens from the Kingdom whereas the purpose of the Extradition Act is to surrender an alleged criminal to the requesting country.

[38] It is important carefully to compare the powers given to the Principal Immigration Officer under Sections 21 on the one hand and Sections 23 and 24 on the other. In the former Section (which has no application to the facts of this case) the Principal Immigration Officer has power to return the alien to his place of embarkation or the country of his birth or citizenship. In my opinion Sections 23 and 24 do not include this power and neither can an expelled alien be forced to return to his country following his departure.

[39] In my view, in theory at least, the Plaintiff, if unsuccessful in challenging the order for his deportation will satisfy the requirements of the Immigration Act by leaving the Kingdom by whatever means are available to him. The difficulty that he faces is that his passport, valid for general travel, has been revoked. It seems that he has no other travel document and that all that the United States government is prepared to issue him with is a one-way passport good only for travel to the United States. It is almost certain, in these circumstances, that his deportation will have the effect that he will be forced to return to the United States, not by reason of being extradited to the United States but by reason of the fact that no carrier is likely to accept him for travel, without a visa, to any other destination. This, however, does not mean that the deportation is a disguised extradition which does not comply with the stringent requirements of the Extradition Act. As Denning MR said in *Soblen's* case, 305:

> "The fact that the applicant was a wanted criminal in the eyes of the United States, and the fact that the United States asked for him does not take away the power of the Home Secretary to make a deportation order. I see no ground for attributing to the Home Secretary anything in the nature of a sham or want of bona fides or any unlawful or ulterior motive".

E – The Presumption of Innocence.

[40] Mr. Niu suggested that the order for the removal of the Plaintiff violates the presumption of innocence embodied in Section 46 of the Evidence Act. As the location of this rule suggests, the presumption is primarily evidential. Were this not the case then persons charged with serious crimes could not be detained in custody

pending their trial. In *Cheblak's* case (supra) at page 907 Lord Donaldson discussed the tension between civil liberties on the one hand and national security on the other. This, he explained, may require a wholly innocent man who has a real grievance at having been detained in prison pending his trial to accept his misfortune as part of the price of citizenship in a society in which the rule of law prevails. Mr. Niu's submission fails.

F – The Constitution of Tonga – Clause 10.

[41] Mr. Niu suggested that Clause 10 of the Constitution forbade punishment being imposed before conviction and sentence. While this is so, detention before trial and conviction are accepted as not constituting "punishment" within the meaning of the Clause. The Immigration Act specifically allows the detention before removal of unlawful immigrants. I was not told whether an application for bail had been made pursuant to Section 24. As has already been seen, the Plaintiff was released on bail as soon as his replacement passport and the passports of his dependents had been handed to the Court. I can find no breach of Clause 10 in this case.

G – Reservation

[42] The only reservation that I have about the procedure laid down by the Immigration Act is that by virtue of Section 4 the Prime Minister is given power to issue directions to the Principal Immigration Officer, by Section 8 (2) the Prime Minister is given the power to deem undesirability, the appeal from a Section 11 cancellation or declaration is to the Prime Minister and the appeal against a removal order is also to the Prime Minister. While in the present case there is nothing to show that the Prime Minister acted except in the utmost good faith, a procedure which allows an appeal from a decision of a person to that same person is unsatisfactory. Tonga is, of course, a very small country and a proliferation of expensive appellate tribunals is to be avoided. In my view, however, appeals to the Prime Minister (or indeed to Cabinet) are now somewhat outdated and should, I respectfully suggest be looked at again.

[43] It will be remembered that the prerogative remedies sought by Mr. Niu are entirely discretionary. While the procedures followed in this case were not entirely flawless I am satisfied that the Plaintiff has been treated fairly. I do not find that he has discharged the onus placed upon him by Section 8(3) of the Act. In these circumstances I decline to declare the removal order null and void, to order it to be quashed or to restrain the Principal Immigration Officer from proceeding with the Plaintiff's removal from the Kingdom. In the circumstances, the claim for damages for unlawful imprisonment must also be dismissed.

Result:

The Plaintiff's claim (and the application for habeas corpus) is dismissed with costs to be taxed if not agreed.

Pedras v Prime Minister anors

Court of Appeal, Nuku'alofa
Salmon, Handley, Hansen, and Tupou JJ
AC 26/2014

21 October 2014; 31 October 2014

Immigration – removal order appeal – new facts – common law powers not available when subject matter was dealt with by statute – appeal allowed

The Supreme Court decision is reported at page 205 of this volume.

Judicial review proceedings were heard on 29 July 2014. The principal relief sought was a declaration that the removal order of 5 May was void, and that a writ of certiorari might issue to quash that order. The Chief Justice gave judgment on 14 August 2014 and dismissed the proceedings. The appellant appealed to the Court of Appeal. The Chief Justice was not informed by the Crown that the Principal Immigration Officer had issued a two year permit for the appellant to remain in the Kingdom. The appellant was not aware of this either as he had lodged his United States passport with the Immigration Department, and had not collected it before he was detained. Therefore, the Chief Justice inferred that the normal one month's permit granted to the appellant on his arrival in Tonga had expired in March without being renewed and at common law the appellant was in the Kingdom unlawfully. On the basis of new evidence, not before the Chief Justice, the appellant had an unrevoked permit to remain in the Kingdom for nearly two years, and the order for his removal under s 23(1) was invalid and void because the necessary statutory conditions had not been satisfied.

Held:

1. A declaration that a person was an undesirable immigrant made under section 8(2)(g) of the Immigration Act had no immediate effect on the rights or liberty of the relevant alien. At common law the position was clear. The Crown had a prerogative power to deny entry to an alien and, subject to any permit, to expel an alien, or deport him to the country from which he had come and for this purpose to arrest and detain him. However these powers, which formed part of the Royal Prerogative, ceased to be available when the subject matter was dealt with by statute. The court concluded therefore that the common law prerogatives of the Crown in respect of aliens ceased to be available in Tonga following the passing of

the Immigration Act, and the prerogative could not support the order for the appellant's removal.

2. The appellant argued that he was entitled to an oral hearing of his appeal to the Prime Minister under section 23(2), and that the Crown was not entitled to use the deportation power to return the appellant to the United States. On both of those questions the Court of Appeal agreed with the Chief Justice. There was no general right to an oral hearing before an administrative decision maker, and a hearing on the papers may be perfectly fair for legal purposes.

3. A concurrent power to order the extradition of an alien did not prevent the Executive using its power of deportation to achieve the same practical result. The deportation power may be used to return a fugitive from justice to his own country. The powers were different although they may overlap. Citizens of Tonga could not be deported but may be extradited. Aliens may be deported or extradited to their own country, or extradited to a foreign country.

4. The following orders were made: the appeal was allowed; the orders of the Supreme Court were set aside; in lieu thereof a declaration that the removal order of 5 May 2014 in respect of the appellant was null and void and without legal effect; the removal order was quashed; the third respondent was to pay the appellant's costs of the appeal, and of the habeas corpus and judicial review proceedings in the Supreme Court; the appellant was unconditionally released from his bail; and the proceedings were remitted to the Supreme Court for the hearing and determination of the appellant's claim for damages.

Cases considered:

Attorney General v De Keysers Royal Hotel [1920] AC 508
Attorney General for Canada v Cain [1906] AC 542
Local Government Board v Arlidge [1915] AC 120
R v Governor of Brixton Prison ex-parte Soblen [1963] 2 QB 243
Schmidt v Secretary of State for Home Affairs [1969] 2 Ch 149

Statutes considered:

Extradition Act (Cap 22)
Immigration Act (Cap 62)
Interpretation Act (Cap 1)

Counsel for the appellant : Mr Niu SC
Counsel for the respondents : Mr Kefu AG

Judgment

[1] The appellant, a citizen of the United States who is married to a Tongan, has appealed from the decision of the Lord Chief Justice, seeking to prevent his deportation to the United States to face charges of wire fraud in the United States District Court for the Central District of California.

[2] He arrived in Tonga with his family from New Zealand on 16th January, 2014 and was granted the usual one month's permit on arrival. He later applied for Tongan citizenship and as part of that process on 15th April the Principal Immigration Officer issued him with a 2 year permit. A corresponding visa was entered in his United States passport held by that office in connection with his citizenship application, as required, it would seem, by s 9(2) of the Immigration Act.

[3] On 2nd May the Ministry for Foreign Affairs received a formal request from the United States Embassy in Suva for the deportation of the appellant to the United States to stand trial on the charge of wire fraud. On the same day the Senior Immigration Officer and the Deputy Police Commissioner met the Deputy Prime Minister and briefed him on this request.

[4] On 5th May the Director of Public Prosecutions and the Deputy Police Commissioner again met the Deputy Prime Minister and tendered formal written advice from the Director. A copy of this advice was annexure A to the affidavit of Mr Fa'aoa, the Deputy Police Commissioner, of 19th May, 2014.

[5] The Deputy Prime Minister, acting in the office pursuant to s.24(a) of the Interpretation Act, in the absence of the Prime Minister from the Kingdom, made a declaration under s.8(2)(g) of the Immigration Act declaring that the appellant was "an undesirable immigrant".

[6] Section 8 relevantly provides:

> "(1) Any person who –
>
> (a) is not entitled to enter the Kingdom without a permit...; and
>
> (b) is a member of any of the prohibited classes as defined in subsection (2) of this section, shall be a prohibited immigrant and ... his presence in the Kingdom shall be unlawful.
>
> (2) The following persons are members of the prohibited classes–
>
> ...
>
> (f) a person who has been convicted by a court in any Country outside the Kingdom for an offence which –
>
> (i) is punishable by ... imprisonment for a term of not less than 2 years ...
>
> (g) any person who, in consequence of information received from any source deemed by the Prime Minister to be reliable, or from any Government through official or diplomatic channels, is deemed by the Prime Minister to be an undesirable immigrant;
>
> ..."

[7] Thereupon the Principal Immigration Officer made a removal order purporting to act under s.21 of the Act. It was common ground before the Chief Justice and this Court that this was an obvious typographical mistake, that the section intended was s.23, and the order should be read in that way.

[8] Section 23(1) relevantly provides:

> "Where the presence of any person in the Kingdom is unlawful by reason of the provisions of section 12 such person shall ... be liable to removal from the Kingdom by order of the Principal Immigration Officer"

[9] The appellant was taken into custody pursuant to this removal order on 5th May.

[10] On 6th May the appellant commenced Habeas Corpus proceedings in the Supreme Court to secure his release, and at an urgent interlocutory hearing on 7 May, before the Chief Justice, an order was made staying the removal order. The appellant was granted bail on 19th May.

[11] On 21st May the appellant purported to appeal to the Prime Minister under s.23(2) from the removal order of 5th May. The notice of appeal was a three and a half page document prepared and signed by Mr Niu. Section 23(2) provides:

> "(2) Any person in respect of whom an order of removal has been made under the provisions of subsection (1) may appeal to the Prime Minister in such manner and within such time as may be prescribed."

It was common ground that relevant regulations had not been made. On 23rd May the Prime Minister, then back in the Kingdom, dismissed the appeal.

[12] The Prime Minister's reasons for dismissing the appeal referred to a briefing he had received from the Principal Immigration Officer on 21st May, and written legal advice he had received from the Attorney General's Office on 22nd May. The contents of the briefing from the Principal Immigration Officer, whose decision was challenged by the appeal, and the written legal advice from the Attorney General's office, were not disclosed to the appellant or to Mr Niu before the appeal was dismissed.

[13] On 26th May the appellant filed a statement of claim in the Supreme Court seeking judicial review of the order for his removal and on the same day he applied ex-parte for leave to bring such proceedings, and for an injunction to prevent his removal from the Kingdom.

[14] Leave to apply for judicial review was granted by consent on 22 July and the proceedings were heard by the Chief Justice on 29 July. The principal relief sought was a declaration that the removal order of 5th May was void, and that a writ of certiorari might issue to quash that order.

[15] Relief was not expressly claimed in respect of the decision of the Acting Prime Minister of 5th May declaring the appellant an undesirable immigrant, or in respect of the order of the Prime Minister of 23rd May dismissing his appeal, but the statement of claim alleged that the appellant should have been given an opportunity to be heard

before the declaration was made under s.8(2)(g), before the order for his removal was made under s.23, and before his appeal to the Prime Minister under s.23(2) was dismissed.

[16] The Chief Justice gave judgment on 14th August, 2014 dismissing the proceedings. The appellant appealed to this Court and has been on bail in the meantime.

[17] The Chief Justice was not informed by the Crown that the Principal Immigration Officer had issued a two year permit for the appellant to remain in the Kingdom presumably under s.9 of the Act. The appellant was not aware of this either as he had lodged his United States passport with the Immigration Department, and had not collected it before he was detained.

[18] Unaware of this significant fact, the Chief Justice inferred that the normal one month's permit granted to the appellant on his arrival in Tonga had expired in March without being renewed. The result was that at common law the appellant was in the Kingdom unlawfully. He noted that the Crown "exercising it's royal prerogative, has the right to expel an alien", and for this purpose can arrest and detain him, and put him on board a ship or aircraft bound for his own Country.

[19] The Chief Justice rejected Mr Niu's argument that the power in s.8(2)(g) was not available because of s.8(2)(f) and because the appellant had not been convicted of the offence with which he was charged.

[20] He also rejected Mr Niu's argument that the appellant should have been given a hearing before the Deputy Prime Minister decided to declare him an undesirable immigrant and his further argument that the power in s.23 was not available in this case.

[21] On the latter point the Chief Justice said: "while close examination of the provisions of the Act suggests that Mr Niu may have a point. I am satisfied that it cannot avail the Plaintiff."

[22] Section 12(1) of the Act relevantly provides:

> "A person shall not remain in the Kingdom after the cancellation of any permit, or after the making of any declaration under the provisions of subsection(3) of section 11..."

[23] Section 11 relevantly provides:

> "(2) Where at any time, during the period of validity of a permit, the Principal Immigration Officer is satisfied that the holder of such permit is a prohibited immigrant, the Principal Officer shall cancel such permit.
> (3) Where any person has entered the Kingdom by virtue of a permit, and the Principal Immigration Officer is satisfied;
> (a) ...
> (b) that such person is a prohibited immigrant
> the Principal Immigration Officer may declare

> ... that the presence of such person in the Kingdom is unlawful.
>
> (4) On making any cancellation under ... subsection (2) or on making any declaration under subsection (3) ... the Principal Immigration Officer shall by notification ...inform the person affected thereby of the grounds on which such cancellation or declaration has been made and such person may appeal against such cancellation or declaration ... within such time and in such manner as may be prescribed, to the Prime Minister whose decision shall be final".

[24] The appellant's two year permit, valid until 16th February 2016, was not cancelled by the Principal Immigration Officer under s.11(2) although the Acting Prime Minister's decision deeming the appellant, pursuant to sec 8(2)(g), to be an undesirable immigrant, if valid, made him a prohibited immigrant under s.8(1)(b).

[25] The Chief Justice concluded that the power to revoke a permit in s.11(2) did not have to be exercised because the appellant's permit had expired before 5th May and that s.12 did not exclude the common law rule that an alien whose presence is not authorized by a permit to remain is here unlawfully, and can be detained and deported.

[26] He also rejected Mr Niu's arguments that the appellant was entitled to an oral hearing of his appeal to the Prime Minister, and that the removal order was invalid because it amounted to extradition without complying with the safeguards in the Extradition Act.

[27] The Principal Immigration Officer did not exercise the power under s.11(3)(b) to declare the presence of the appellant in the Kingdom to be unlawful. Since neither s.11(2) nor (3) were activated the power in s.12(1) was not available, and therefore the power in s.23(1) was not available.

[28] There was, therefore, no statutory basis which could support the order for the removal of the appellant made by the Principal Immigration Officer on 5th May, 2014.

[29] The appellant challenged the validity of the declaration by the Acting Prime Minister of 5th May that he was an undesirable immigrant, on both formal and procedural grounds. The respondents for their part claimed that the appellant's permit was revoked by operation of law when his United States passport was cancelled on 5th May, 2014, and that the order for removal of the appellant could be supported at common law under the Royal Prerogative.

[30] Mr Kefu was unable to point to any provision in the Act which provides that the cancellation of the passport of a resident alien revoked any permit which may have been granted to him and we do not think such a provision can be implied. The requirement in s.9(2) for an applicant to produce his passport to enable a visa to be issued to correspond with his permit assumes that the permit exists independently of the passport.

[31] The appellant submitted that the power ins.8(2)(g) to declare him to be an undesirable immigrant could not be activated by information that he had been charged with a criminal offence punishable on conviction by imprisonment for not less than two years because para (f) provided that a person convicted of such an offence was a prohibited immigrant. If a relevant conviction had this result, how, Mr Niu SC submitted, could a mere charge, without conviction, have the same result.

[32] There is a short answer to this submission. In our judgment, in agreement with the Chief Justice, each paragraph in s.8(2) provides an independent basis for the person concerned being or becoming a prohibited immigrant. The fact that a person does not fall within one or more of those grounds provides no foundation for a conclusion that he or she cannot come within another. A person is a prohibited immigrant if he or she falls within any one of the specified grounds.

[33] Mr Niu's second point on s.8(2)(g) is that the procedures followed in this case culminating in the declaration of the Acting Prime Minister that the appellant was an undesirable immigrant denied him procedural fairness, and that declaration should be quashed on judicial review.

[34] On the basis of new evidence, not before the Chief Justice, it has become clear that the appellant has an unrevoked permit to remain in the Kingdom for nearly two years, and the order for his removal under s.23(1) was invalid and void because the necessary statutory conditions had not been satisfied.

[35] The position at common law was clear. The Crown had a prerogative power to deny entry to an alien and, subject to any permit, to expel an alien, or deport him to the Country from which he had come and for this purpose to arrest and detain him: *Attorney General for Canada v Cain* [1906] AC 542; *R v Governor of Brixton Prison ex-parte Soblen* [1963] 2 QB 243, 300 CA.

[36] However these powers, forming part of the Royal Prerogative, ceased to be available when the subject matter was dealt with by statute. As Lord Denning MR said in *Soblen's* case (above at p.301)

> "... it is quite plain that the Royal Prerogative is now supplanted and replaced by the Aliens Order 1953."

That Order was made under the Aliens Act 1905: *Schmidt v Secretary of State for Home Affairs* [1969] 2 Ch 149, 160 per Lord Denning MR.

[37] This accords with the general principle applied in *Attorney General v De Keysers Royal Hotel* [1920] AC 508, 526 where Lord Dunedin said:

> "... if the whole ground of something which could be done by the prerogative is covered by the statute, it is the statute that rules. On this point I think that the observation of the learned Master of the Rolls is unanswerable. He says: "what use would there be in imposing limitations if the Crown could at its pleasure disregard them and fall back on the prerogative?"

[38] We conclude therefore that the common law prerogatives of the Crown in respect of aliens ceased to be available in Tonga following the passing of the Immigration Act, and the prerogative cannot support the order for the appellant's removal.

[39] A declaration that a person is an undesirable immigrant made under s.8(2)(g) has no immediate effect on the rights or liberty of the relevant alien.

[40] If further executive action is to be taken the powers in s.11(2) or (3) must be exercised. In either event the person affected has a right of appeal to the Prime Minister under s.11(4), and prima facie this is his opportunity to be heard against action taken under s.11, and any earlier steps such as a declaration under s.8(2)(g) which supported that action.

[41] If the alien's appeal to the Prime Minister under s.11(4) is dismissed and the alien does not leave of his own accord an order for his removal may be made under s.23(1) which will attract a further right of appeal to the Prime Minister under s.23(2). If the order for his removal was made before an appeal under s.11(4) was either lodged or could be "heard" both appeals could be "heard" together.

[42] Prima facie an alien's only avenue for redress against a valid exercise of the powers conferred by the Immigration Act are his rights of appeal under s.11(4) and s.23(2), but they do not exclude judicial review for invalid exercises of those powers.

[43] Since the order for the appellant's removal must be set aside it is not necessary for the Court to deal with Mr Niu's arguments that the appellant was entitled to be informed in advance of the basis on which a declaration under s.8(2)(g) would be sought against him, and to be given a reasonable opportunity to answer that case.

[44] It is also unnecessary for the Court to deal with his further argument that the procedures leading up to the decision of the Prime Minister to dismiss the appellant's appeal under s.23(2) were unfair and denied the appellant natural justice. The Court did not hear full argument on these questions, and we were not referred to the decision of Martin CJ in *Haidas Kada v The Principal Immigration Officer* (no.67/88), available on the website of the Crown Law Office, who dismissed an action for judicial review of the dismissal by the Prime Minister, without reasons, of the plaintiff's appeal from the decision of the Principal Immigration Officer refusing his application for a permit to remain in Tonga, a decision under an earlier version of the Act. In these circumstances we should not express what would necessarily be only tentative opinions on these questions.

[45] We propose however to express our views on two further arguments where in our judgment the law is clear. Mr Niu argued that the appellant was entitled to an oral hearing of his appeal to the Prime Minister under s.23(2), and that the Crown was not entitled to use the deportation power to return the appellant to the United States. On both these questions we agree with the Chief Justice.

[46] The decision in *Local Government Board v Arlidge* [1915] AC 120 stands as clear authority for the propositions that there is no general right to an oral hearing before an administrative decision maker, and that a hearing on the papers may be perfectly fair for legal purposes.

[47] It is also clear that a concurrent power to order the extradition of an alien does not prevent the Executive using its power of deportation to achieve the same practical result. The deportation power may be used to return a fugitive from justice to his own Country: *R v Governor of Brixton Prison ex-parte Soblen* [1963] 2 QB 243 CA. The powers are different although they may overlap. Citizens of Tonga cannot be deported but may be extradited. Aliens may be deported or extradited to their own country, or extradited to a foreign country.

[48] The following orders are made:

(1) Appeal allowed.
(2) Orders of the Supreme Court of 14 August 2014 set aside.
(3) In lieu thereof a declaration that the removal order of 5 May 2014 in respect of the appellant is null and void and without legal effect.
(4) The said removal order is quashed.
(5) The third respondent is to pay the appellant's costs of the appeal, and of the habeas corpus and judicial review proceedings in the Supreme Court.
(6) The appellant is unconditionally released from his bail.
(7) The proceedings are remitted to the Supreme Court for the hearing and determination of the appellant's claim for damages.

Taxpayer A v Minister of Revenue

Supreme Court, Nuku'alofa
Scott CJ
AM 8/2014 [Tax action 1/2013]

19 September 2014

Tax appeal – question of definition of business – took into account circumstances in Tonga – appeal allowed

In 2013 the Commissioner of Revenue disallowed the taxpayer's claims for depreciation, improvements and refurbishments in relation to a building which she had rented to an overseas diplomatic mission. On 28 February 2013 the taxpayer applied for a review of the Commissioner's decision. On 26 January 2014 the Tax Tribunal upheld the Commissioner's decision. The taxpayer appealed from the Tribunal pursuant to section 10 of the Revenue Services Administration Act. The central question was whether the taxpayer was carrying on the business of renting and thus deriving business income, in which case deduction should have been allowed for depreciation, or whether as the Commissioner contended, the rental derived was simply property income under section 14 of the Income Tax Act 2007 and as such not being derived from a business enterprise, there could be no allowance for depreciation.

Held:

1. The court found that several of the well-established indicia were only of limited relevance and indeed may be misleading in the circumstances in Tonga. Tonga was a very small country with an economy in the early stages of development.
2. When the local circumstances and the circumstances of the taxpayer were borne in mind, there was little doubt that the taxpayer undertook the activity in a "planned, organised and business like" manner with the aim of making a profit. The facts were that a business woman decided to lease land and build upon it, a very substantial residence with the sole purpose of letting it out to one of the diplomatic missions or a tenant of a similar kind, for the purpose of profit. She did not own the land or the house before she took the lease and erected the building and she had no intention to occupy the residence herself. Given the very small market in Tonga for residences of this type and size, the business only had one asset and therefore the amount of "regular, repetitive and onerous" administration of the asset was limited.

3. The Tribunal erred by not asking itself whether the taxpayer's activities could fairly be regarded as "an undertaking conducted for pecuniary profit". If it had asked that question then the answer would clearly have been in the affirmative. The appeal was allowed.

Cases considered:

Calkin v CIR [1934] 1 NZ CR 440
Martin v F.C of T [1953] HCA 100; (1953) 90 CLR 470

Statutes considered:

Income Tax Act 2007
Revenue Services Administration Act 2002

Counsel for the appellant	:	P Finnigan
Counsel for the respondent	:	M O'Shannassy

Judgment

[1] In 2013 the Commissioner of Revenue disallowed the taxpayer's claims for depreciation, improvements and refurbishments in relation to a building which she had rented to an overseas diplomatic mission. On 28 February 2013 the taxpayer applied for a review of the Commissioner's decision in accordance with Section 60 of the Revenue Services Administration Act.

[2] On 26 January 2014 the Tax Tribunal upheld the Commissioner's decision. This is an appeal from the Tribunal pursuant to Section 10 of the Act. The Section confines appeals to questions of law.

[3] The facts, as found by the tribunal and which are not in issue, are principally set out in paragraph [6] of the Tribunal's Ruling as follows:

(a) The taxpayer took out a loan in the amount of $700,000 to build the residence in 2006 for the sole purpose of letting it out;
(b) The residence was first rented in 2007 and has remained rented ever since;
(c) In 2009 the taxpayer took out another very sizeable loan to extend both wings of the house and to renovate the existing structure;
(d) The taxpayer is paying off the loans and no profit has been made, as yet;
(e) Although the taxpayer had previously thought otherwise, she now regards her rental income as business income since her only purpose in building and renting the residence was to make a profit.
(f) Prior to letting the premises she entered into tenancy agreements and she then held quarterly meetings with the tenants to discuss any matters of concern;
(g) Prior to letting the premises they were advertised and potential tenants were interviewed.

(h) Invoices and receipts were issued every three months;
(i) She routinely maintains the premises and when required by the tenant arranges modification to the buildings and landscaping and planting in the compound.

[4] Additionally in paragraph [10] of the Ruling reference is made to the fact that the taxpayer is also the managing director of Royco Amalgamated Co. Ltd a well known company in Tonga with wide-ranging business interests.

[5] In paragraph 6 of the Ruling the Tribunal expressed the central issue before it in the following terms:

> "Whether the [taxpayer] was carrying on the business of renting and thus deriving business income, in which case deduction should have been allowed for depreciation, or whether as the Commissioner contends, the rental derived is simply property income under Section 14 of the [Income Tax Act 2007] and as such not being derived from a business enterprise, there can be no allowance for depreciation".

This formulation of the fundamental question is not disputed.

[6] In paragraphs 27 and 28 of submissions filed on 5 August 2013 Mr. O'Shannassy asserted that "over the years" the Courts have held that a number of indicators are relevant, in "combination and as a whole" in arriving at "a large and general impression" (*Martin v F.C of T* [1953] HCA 100; (1953) 90 CLR 470, 474) that the taxpayer's activities have "commercial flavour" and should therefore be regarded as a business. The factors are:

(a) Whether the activity has a significant purpose or character;
(b) Whether the taxpayer has more than just an intention to engage in business;
(c) Whether the taxpayer has a purpose of profit as well as a prospect of profit from the activity;
(d) Whether there is repetition and regularity of the activity;
(e) Whether the activity is of the same kind and carried on in similar manner to that of the ordinary trade in that line of business;
(f) Whether the activity is planned, organized and carried on in a businesslike manner such that it is directed at making a profit;
(g) The size, scale and permanency of the activity; and
(h) Whether the activity is better described as a hobby, a form of recreation [or] a sporting activity.

[7] At paragraph 3 of Mrs Tupou's submissions filed on 20 January 2014 these eight considerations were accepted as correctly setting out the principal indicia of business activity and at paragraph [8] of the Ruling the Tribunal generally applied these indicia to the taxpayer's circumstances before concluding that:

> "The rental income derived was no more than an incident of the ownership of the property and did not reach that level of sustained activity or management that could be described as a business operation".

[8] Both Counsel made comprehensive and learned submissions for which I am grateful. In essence Mr O'Shannassy says that no error of law was made by the Tribunal and that the facts were correctly assessed. Mr Finnigan submits that the Tribunal misconstrued the meaning of the legal term "business".

[9] In paragraph [8] of the Ruling already referred to, before listing the indicia set out in paragraph 7 above the Tribunal stated:

> "For the Commissioner, Mr. O'Shannassy acknowledged that, whilst there was no statutory definition of business, there had been considerable discussion in various authorities overseas.
>
> [While] the cases and principles extracted from them are no more than guidelines [the principles which] point to business activity include:
>
> [Indicia (a) to (h) set out in paragraph 7].

[10] The statement that there is no statutory definition of business in the Income Tax Act is not correct. In Section 2 "business" is defined to:

> "include any profession, trade, manufacture or undertaking (including an undertaking in the nature of trade) conducted for pecuniary profit, but shall not include employment".

[11] In fine, Mr Finnigan's submission is that by confining itself to the indicia of business and by failing to consider whether the taxpayer's activities might constitute "an undertaking conducted for pecuniary profit" the Tribunal fell into error. The inferences drawn by the Tribunal from the primary facts were, in other words, based on an incorrect legal test and were accordingly erroneous in law.

[12] As is clear from authorities referred to by Mr Finnigan and, in particular *Calkin v CIR* [1934] 1 NZ CR 440, the question whether the taxpayer was engaged in an undertaking conducted for pecuniary profit might result in an answer different from the question whether the indicia suggested that a business simpliciter was being engaged in.

[13] In my view several of the indicia are only of limited relevance and indeed may be misleading in the circumstances which obtain in Tonga. Tonga is a very small country with an economy in the early stages of development. The Tribunal, in paragraph [10] of its Ruling, took the view that with only three tenants over several years and only quarterly meetings with tenants there was insufficient "regular, repetitive or onerous" activity which could fairly be seen to point to business activity. This observation, of course, is relevant to indicia (d), (e), and (f). In my view, however, when the local circumstances and the circumstances of the taxpayer are borne in mind, a rather different conclusion is reached. Looking at the facts placed before the Tribunal in this way, a business woman will be seen, already actively involved in the family business, already having a home of her own, deciding to lease land and build upon it, a very substantial residence with the sole purpose of letting it out to one of the diplomatic missions or a tenant of a similar kind, for the purpose of

profit. Her evidence was that she did not own the land or the house before she took the lease and erected the building and that she had no intention to occupy the residence herself. Given the very small market in Tonga for residences of this type and size, it is not surprising that the business only has one asset. Since it has only one asset the amount of "regular, repetitive and onerous" administration of the asset is perforce limited. On the other hand there seems little doubt that the taxpayer undertook the activity in a "planned, organised and business like" manner with the aim of making a profit.

[14] This is not a case of a taxpayer lucky enough to possess a property and then taking the profits of letting that property out. This is the case of a taxpayer who already had a residential property of her own but who decided to take advantage of the arrival in Tonga of increased overseas diplomatic representation by building accommodation suitable for their needs.

[15] In my opinion the Tribunal erred by not asking itself whether the taxpayer's activities could fairly be regarded as "an undertaking conducted for pecuniary profit". If it had asked that question then, in my view, the answer would clearly have been in the affirmative.

Result: The Appeal is allowed.

I will hear counsel as to costs.

Police v Tangifua

Supreme Court, Nuku'alofa
Scott CJ
AM 13/2014

3 October 2014

Criminal appeal – charge not clear – respondent discharged – appeal allowed – amended charge to be heard at Magistrate's Court

On 14 April 2014 an incident occurred at Talafo'ou in which Malakai Lolohea sustained serious injuries. On 30 April 2014 the respondent appeared in court and said that it was not clear with what he had been charged. The Magistrate refused leave to amend the charge and either discharged or acquitted the respondent. The police appealed those decisions.

Held:

1. Where a charge was technically defective, the prosecution should be given an opportunity to put matters right by amending the charge and the accused should be given an opportunity to consider his position if placed in any difficulty by leave to amend being granted. Accused persons should not be acquitted merely because a charge was technically defective. The situation was different if the defect could not be rectified, for example if the offence charged no longer existed.
2. It was very important that the prosecution carefully consider all the facts before deciding how to charge.
3. The appeal was allowed and the matter was remitted to the Magistrate's Court for the amended charge to be put to the respondent.

Case considered:

Police v Latu Pilimilose Liava'a (AM 13 of 2013)

Statute considered:

Criminal Offences Act (Cap 18)

Counsel for the appellant : Mr A Kefu
Counsel for the respondent : Ms M Manavahetau

Judgment

1. On 14 April 2014 an incident occurred at Talafo'ou in which Malakai Lolohea sustained serious injuries. The Respondent was charged:

> "You did grievous bodily harm contrary to section 107(1)(2)(3)(5) AB Chapter 18 Laws of Tonga 1988 Volume 1. Whereby you maliciously and without legal right used a wooden coconut scraper to hit Malakai Lolohea causing grievous bodily harm".

2. On 30 April 2014 when the Respondent appeared in Court to answer the summons, defence counsel pointed out that section 107 of the Criminal Offences Act related to Bodily Harm, not grievous Bodily Harm, a more serious offence, dealt with in Section 106. Counsel also pointed out that section 107 which was amended in 2012 now contains two limbs viz. "Serious" and "Simple". Serious bodily harm is referred to in subsection (4) and carries a maximum of 5 years imprisonment. Simple bodily harm is covered in section (5) and carries a maximum of 3 years imprisonment.

3. Given the wording of the summons, it was not at all clear what the Respondent had been charged with and defence counsel was quite right to raise the matter. The prosecutor was wrong to state that the charge, as is stood, was adequate.

4. When the defect in the charges was brought to the Magistrate's attention, he refused leave to amend the charge and either discharged or acquitted the Respondent. It is these decisions of the Magistrate which are appealed.

5. In *Police v Latu Pilimilose Liava'a* (AM 13 of 2013) I explained that where a charge is technically defective, the prosecution should be given an opportunity to put matters right by amending the charge and that the accused should be given an opportunity to consider his position if placed in any difficulty by leave to amend being granted. Accused persons should not be acquitted merely because a charge is technically defective. The situation is of course different if the defect cannot be rectified eg if the offence charged no longer exists.

6. As also explained in *Liava'a* case it is very important that the prosecution take care to charge correctly. In the present case the wording of the charge "grievous" not only did not refer to section 107 but also was in conflict with s107(5) which refers to "simple" bodily harm. Apart from the inconvenience which flows from careless charging important consequences flow from the choice of charge laid. Section 106 is beyond the jurisdiction of the Magistrate's Court as the maximum sentence is 10 years imprisonment. Section 107(4) is also beyond the jurisdiction of all magistrates whose jurisdiction has not been enhanced as it carries a maximum of 5 years imprisonment. Only section 107(5) is within the general jurisdiction of the Magistrate's Court. The prosecution must carefully consider all the facts before deciding how to charge. During discussion Mr. Kefu advised the Court that it was now intended to proceed against the Respondent under section 106.

7. Ms. Manavahetau generously conceded that the appeal could not be resisted. The appeal is allowed and the matter remitted to the Magistrate's Court for the amended charge to be put to the Respondent.

Leone v Rex

Court of Appeal, Nuku'alofa
Salmon, Handley, Hansen, and Tupou JJ
AC 15/2013

20 October 2014

Civil procedure – appellant dissatisfied with his lawyer – appellant elected to undertake his own appeal - adjourned

The appellant appealed against his conviction and sentence on a charge of fraudulent conversion by a Public Servant. The appellant was dissatisfied with the grounds of appeal and with his lawyer's conduct of the case. As a consequence his lawyer sought and was granted leave to withdraw. The appellant elected to undertake his own appeal and sought an adjournment.

Held:

1. The court granted the application on specified conditions.

Counsel for the respondent : Mr Sisifa

Minute of the Court

[1] The appellant has appealed against his conviction and sentence on a charge of fraudulent conversion by a Public Servant.

[2] When the appeal hearing commenced Mr Pouono appeared for the appellant. It became apparent that Mr Leone was dissatisfied with the grounds of appeal and with Mr Pouono's conduct of the case. As a consequence Mr Pouono sought and was granted leave to withdraw. Mr Leone elected to undertake his own appeal.

[3] He sought an adjournment to enable him to amend the notice of appeal and to raise further issues. We granted his application on the following terms:

(i) The appeal is adjourned to the next session of the Court of Appeal.

(ii) On or before the 30th November, 2014 Mr Leone is to file an affidavit setting out in appropriate detail issues relating to his dissatisfaction with his Counsel's conduct of the hearing in the Supreme Court and annexing to that affidavit any supplementary material he wishes to rely on. His affidavit should waive expressly Solicitor client privilege so that the Crown may obtain

an affidavit from Mr Pouono responding to the matters raised by the appellant. Mr Leone must also by the 30th November file an amended notice of appeal.

(iii) The Crown must file any affidavit in reply and amended submissions by 14th January, 2015.

(iv) Bail is renewed on existing terms to the conclusion of the next session of the Court of Appeal.

(v) The Registry is to provide the members of the Court with a transcript in English of the preliminary hearing.

Ve'ehala v Kingdom of Tonga

Court of Appeal, Nuku'alofa
Salmon, Handley, Hansen, and Tupou JJ
AC 25/2014

20 October 2014; 31 October 2014

Civil procedure – appeal against decision striking out amended statement of claim – appeal allowed and claim reinstated
Employment law – police force – breach of implied term of employment – claim to proceed to trial

The Lord Chief Justice struck out the appellant's amended statement of claim which sought damages for wrongful dismissal from the Police Force. The appellant applied for leave to appeal against that decision.

Held:

1. The court concluded that the appellant had a contract of employment with the Government. The conditions of that employment were set out in the Police Act. They included the provision as to discharge in section 17. The conditions of employment also included implied terms of fairness and observance of the rules of natural justice. A statutory scheme replaced the monarch's prerogative to dismiss at pleasure.
2. The appellant should have been advised of the ground of dismissal and the basis for it and should have been given the opportunity to be heard before dismissal took effect. The failure to take these steps breached an implied term of his employment that his employer was obliged to treat him fairly and in accordance with natural justice.
3. In the light of the court's findings it was unnecessary to consider whether leave should be granted in respect of the appellant's further grounds of appeal. The appeal was allowed and the statement of claim was reinstated. The pleadings were finalised as a claim in contract with any appropriate amendments so that the matter may proceed to interlocutories and trial. The appellant was entitled to costs in this Court and in the Supreme Court.

Cases considered:

'Asitomani v Superintendent of Prisons [2003] Tonga LR 84

Jarratt v Commissioner of Police for New South Wales [2005] HCA 50; (2005) 224 CLR 44

Kingdom of Tonga v Palu aka Tapueluelu [2009] Tonga LR 86

Ram Prasad v The Attorney General [1999] FJCA 52

Statutes considered:

Crown Proceedings Act (Cap 13)

Police Act (Cap 35)

Prisons Act (Cap 36)

Counsel for the appellant : Mr L Niu SC

Counsel for the respondent : Mr Kefu

Judgment

[1] This application for leave to appeal is against a decision of the Lord Chief Justice striking out the appellant's amended statement of claim. The claim sought damages for wrongful dismissal from the Police Force.

[2] The Chief Justice took the view that the proceeding, though presented as a private law claim for damages arising from breach of contract, was in reality an out of time motion for judicial review without leave having been obtained beforehand.

[3] In para 9 of his judgment the Chief Justice said:

> *"In my view both counsel have overlooked the fundamental point which is that as a general rule, public servants do not have contracts of employment. Subject to statutory limitations the Crown has the right to terminate the employment of Public Servants at will. The statutory limitations invariably import the rules of natural justice into the dismissal procedure and when those rules are not observed the procedural shortcomings may lead to the dismissal being quashed. When this happens the officer is regarded as not having been dismissed at all, rather as having retained the entitlements, including salary, which he would have continued to enjoy had he not been wrongfully dismissed. Ordinarily there is no room for an award for damages once certiorari has issued in respect of an unlawful dismissal."*

[4] The Chief Justice then said that the statement of claim while it asserts the existence of a contract, provides no detail of it. He referred to *Ram Prasad v The Attorney General* [1999] FJCA 52 where the Fiji Court of Appeal held:

> *"... the judge was correct to conclude that, as the appellant had been appointed under a statutory provision, public law applied to his appointment and any claim resulting from his*

dismissal could only be brought by an application for judicial review".

With respect we are of the view that the law has developed since that judgment was given. As will be seen we hold the view that the appellant's claim is one in private law.

[5] The Chief Justice concluded that although no application to strike out had been made the Court had the power to take this step of its own initiative and he proceeded to do so.

[6] The history of these proceedings is of relevance. As recorded in the judgment, on 28 May 2007 the appellant was interdicted from duty by the Minister of Police. An interdiction is a suspension without pay. The appellant was advised of his interdiction by letter from the Minister dated 28/5/2007. The reason given for the interdiction was that a complaint had been made regarding inappropriate actions in relation to a young woman. The letter recorded that "Investigative and legal works will be commenced against you in regards to this complaint and you will be informed on a later date of any further requirements".

[7] In fact the appellant was not advised of "any further requirements". The next step was a letter of 8 October 2007 advising the appellant that the Cabinet had approved his dismissal from the Police with effect from 29 May 2007. The Cabinet decision was made on 26 September 2007. The letter gave no reasons for the dismissal and the appellant was not given the opportunity at any stage to be heard by the Cabinet. However it is pleaded that on receiving the advice of interdiction the appellant met the Minister of Police in May 2007 and told him that the complaint received was false and he supported this with a written statement confirming the denial. The Minister told him he would be informed of the outcome of the investigation but as recorded above this did not happen.

[8] The statement of claim also records that the appellant made enquiries with the police officer in charge of the investigation and was advised that there was no ground for the complaint. It is also pleaded that in July 2010 the appellant appealed to the Prime Minister against his dismissal but received no response.

[9] The statement of claim was not issued until September 2011 which was shortly after Mr Niu was instructed. We were told that the appellants former Counsel, who was elected to Parliament in 2010, tried to resolve the matter in discussion with the Minister of Police. The judgment records that in October 2011 the respondent applied for leave to file a defence out of time and leave was granted to file a defence within 3 days. Over two years later no defence had been filed and Mr Niu filed notice of intention to proceed. On the 8th November 2013 the matter came before the Chief Justice who expressed the opinion that the action appeared to be for judicial review but leave had not been sought. He set the preliminary matter down for hearing on 12 December. On the 28th November the appellant filed an amended statement of claim which replaced a claim for reinstatement or alternatively salary, with one for special damages amounting to $171,529 representing a claim for salary from the date of dismissal until the appellants 60th birthday being the retirement age. A statement of defence was filed in January 2014. The Chief Justice repeated his view that the claim

was in reality one for judicial review and asked for written submissions from each party. His judgment followed.

[10] In can be seen from the above summary that the issue to be addressed in written submissions was the question of whether the proceedings were properly brought as an ordinary action or whether they should have been brought as an application for judicial review. If the former they were issued in time. If the latter they were out of the time (an application for leave to proceed must be made within 3 months from the date when grounds for the application first arose). There is provision for an extension of time for good reason.

[11] Mr Niu sought leave to appeal which the Chief Justice granted on the 11 August 2014. The grounds of appeal set out in the notice of appeal claim that the Supreme Court failed to consider the fact that the claim was based on two grounds – unlawful dismissal or alternatively breach of contract of employment. The notice of appeal claims that the dismissal was unlawful because the appellant was given no opportunity to be heard thus breaching the rules of natural justice. At the hearing before us Mr Niu sought leave to add further grounds of appeal claiming that Order 39 of the Supreme Court Rules (which provides for judicial review) is ultra vires s.7 of the Crown Proceedings Act.

[12] As can be seen from the above discussion the central issue is whether the appellant proceedings are required to be brought by way of judicial review. For the reasons that follow we have concluded that the law does not require that procedure to be followed.

[13] In *'Asitomani v Superintendent of Prisons* [2003] Tonga LR 84, a decision referred to by the Respondent in the Court below, Ford J (as he then was) discussed this issue in the context of a claim by a prison officer. His comments at pps 88–89 provide a useful discussion of the developing approach by the Courts to these issues. We respectfully adopt his views as our own in this case.

> *"I mention these matters because, in theory at least, judicial review proceedings were designed to enable the court to deal with applications more speedily and at less expense than had previously been the case. It would appear, however, that those objectives have not been achieved in the present proceeding. When the judicial review procedure was introduced back in 1977, in the form of Order 53 of the English Rules of the Supreme Court, it created, as was described in the* ***White Book*** *(1991) pp.14/1 and 14/6:*
>
> *"... a uniform, flexible and comprehensive code of procedure for the exercise by the High Court of its supervisory jurisdiction over the proceedings and decisions of inferior courts, tribunals or other persons or bodies which perform public duties or functions ... The remedy of judicial review is concerned with reviewing, not the merits of the decision in respect of which the application for judicial review is made, but the decision-making process itself."*

Order 27 of the Tonga Supreme Court Rules follows the English RSC Order 53. The review procedure can be invoked only where some element of public law is involved and it is not an available remedy to a litigant seeking to enforce private rights only. In Vaioleti v Tonga Development Bank [1999] Tonga LR 57, Ward C.J. refused an application by an employee for judicial review of his dismissal decision. The Chief Justice made the following observations:

"In determining whether a case is appropriate for judicial review, the court must consider whether it is an action that requires the enforcement of private or public law rights. The definition of public law is not clear and modern case law is continually changing the distinction between private and public law rights. Moreover, judicial review has been allowed in some cases involving substantial elements of private law and refused in some where there is undoubtedly a public law element. In general terms, the more a case involves the enforcement of private law rights, the less likely it is that the court will consider it is a suitable case for judicial review."

The present case, perhaps, illustrates some of the shortcomings that can arise when a plaintiff uses the review process, instead of ordinary action, to seek redress for grievances arising out of an employment relationship. Although based in public law, in the sense that the relationship is regulated by the Prisons Act (Cap 36) and the Prison Rules rather than a written contract of employment, the plaintiff's grievances inevitably involve private rights and as such the review process is inappropriate. The remedies now being sought could have been invoked in a private law action.

There are exceptions to this general observation. In certain public law situations it will be appropriate for an employee to use the review process to seek from the court, for a particular purpose, one or other of the prerogative remedies. Had the plaintiff, for example, used the judicial review process during the long period of his suspension to review the Minister's actions at that stage then the matter may have taken an entirely different course and his dismissal may never have come about.

The main reason for the inappropriateness of the judicial review process is that in most employment related cases the litigant is not so much concerned with reviewing the decision-making process as with seeking a judgment based on the merits. When that is the objective, a litigant should simply proceed by way of ordinary action. As May L.J. observed in R

v East Berkshire Health Authority, ex parte Walsh [1984] 3 All ER 425 (at 434):

"Employment disputes not infrequently have political or ideological overtones, or raise what are often described as 'matters of principle'."

On top of that, disputes arising out of disciplinary actions almost inevitably involve sharp conflicts in evidence with claims and counterclaims being thrown around with abandon. In such situations, it is appropriate that the court should determine the merits of the case on oral evidence properly tested by cross-examination. That option, however, is not available when a plaintiff elects to proceed by way of judicial review rather than ordinary action. In judicial review proceedings no oral evidence is called. The issues are determined on the strength of the affidavit evidence before the court and cross-examination on that affidavit evidence is the exception rather than the rule.

In McClaren v Home Office [1990] ICR 824 the Home Office sought to strike out an action brought against it by a prison officer upon the ground that the plaintiff ought to have proceeded by way of judicial review. The action related to a dispute over working hours. The plaintiff's appeal against the judge's order striking out his action was allowed by the Court of Appeal. Woolf L.J. said (at 836):

"In relation to his personal claims against an employer, an employee of a public body is normally in exactly the same situation as other employees ... the fact that a person is employed by the Crown may limit his rights against the Crown but otherwise his position is very much the same as any other employee. However, he may, instead of having an ordinary master and servant relationship with the Crown, hold office under the Crown and may have been appointed to that office as a result of the Crown exercising a prerogative power or, as in this case, a statutory power. If he holds such an appointment then it will almost invariably be terminable at will and may be subject to other limitations, but whatever rights the employee has will be enforceable normally by an ordinary action. Not only will it not be necessary for him to seek relief by way of judicial review, it will normally be inappropriate for him to do so."

In *Kingdom of Tonga v Palu aka Tapueluelu* [2009] Tonga LR 86 this Court considered an appeal on a wrongful dismissal claim brought by the Superintendent of Prisons. That claim was brought as an ordinary action and it appears that procedure was accepted by the parties in the Supreme Court as appropriate. It was not necessary for this court to rule on the issue.

[14] There are close similarities between the appointment provisions for prison officers and those for police officers. The Prisons Act (Cap 36) provides for the appointment of prison officers to be made by the Minister of Police with the approval of Cabinet (s.8). The Police Act (Cap 35) provides for police officers to be enlisted to serve by the Minister of Police with the approval of Cabinet (s.10). Both statutes provide for a set period of engagement with provision for re-engagement. In each case there is a prohibition on resignation without consent. Both statutes set out the circumstances in which an officer may be dismissed. In our view if claims for wrongful dismissal may be made by way of ordinary action for a prison officer the same should apply for a police officer.

[15] A decision of the High Court of Australia discussed in the *Kingdom of Tonga v Palu* also concerned a claim for wrongful dismissal. *Jarratt v Commissioner of Police for New South Wales* [2005] HCA 50; (2005) 224 CLR 44 supports the approach of the Supreme Court Judges in *'Asitomani* and *Palu*. In the joint judgment of McHugh, Gummow and Hayne JJ this was said at p.63:

> *"Upon the footing that the purported removal of the applicant from his statutory office was invalid, the authorities in this Court indicate that the refusal to allow the applicant to perform his duties for the balance of his term and receive his remuneration was without justification and amounted to, or was 'analogous to', wrongful dismissal. The reasoning in the authorities appears sufficiently from the statement of Starke J in* Lucy v The Commonwealth [1923] HCA 32; (1923) 33 CLR 229 at 253 ...
>
> *'The relation between the Crown and its officers is contractual in its nature. Service under the Crown involves, in the case of civil officers, a contract of service – peculiar in its conditions, no doubt, and in many case subject to statutory provisions and qualifications – but still a contract. And, if this be so, there is no difficulty in applying the general law in relation to servants who are wrongfully discharged from their service. A servant so treated can bring an action against his master for breaking his contract of service by discharging him. The: measure of damages in such an action is not the wages agreed upon, but the actual loss sustained, including, of course, compensation for any wages of which the servant was deprived by reason of his dismissal.'*
>
> *This reasoning indicates why, in the present case, the award of damages by Simpson J did not cut across the principle that, where there has been a denial of procedural fairness in the exercise of statutory or prerogative powers, the law does not recognise a cause of action for damages and confines the complainant to public law remedies.*
>
> *In assessing damages in a case such as the present and by analogy to an action for wrongful dismissal, it may well be*

> *urged that account has to be taken that at some time in the balance of his term the applicant may have been liable for removal under procedures which did meet the requirements of the Act. However, statements of Rich J and of Starke and Dixon JJ in* Geddes v Magrath [1933] HCA 57; (1933) 50 CLR 520 at 530-531, 533-535 *appear to suggest the contrary and that the presence of a power of removal would be disregarded in assessing damages against the respondents."*

[16] We conclude that the appellant had a contract of employment with the Government. The conditions of that employment are set out in the Act. They include the provision as to discharge in s.17:

> *"17(1) Any police officer may with the approval of Cabinet be discharged by the Minister of Police at any time –*
>
> *(a) if he is pronounced by a Government medical officer to be mentally or physically unfit for further service;*
>
> *(b) on reduction of establishment;*
>
> *(c) if the Minister considers that he is unlikely to become or has ceased to be an efficient police officer so that it is desirable in the public interest that he should be discharged from the Force; or*
>
> *(d) for misconduct.*
>
> *(2) Every police officer discharged under the provisions of the last preceding sub-section, other than those dismissed for misconduct, shall be given one month's notice of intention to discharge him from the Force or, at the option of the Minister of Police, one month's pay in lieu of such notice."*

The conditions of employment also include implied terms of fairness and observance of the rules of natural justice. A statutory scheme replaces the monarch's prerogative to dismiss at pleasure. Referring again to the *Jarratt* judgment Gleeson CJ said at p.51:

> *"The common law rule concerning service at pleasure was established long before modern developments in the law relating to natural justice, and the approach to statutory interpretation dictated by those developments. It was also established at a time when public service was less likely to be subject to statutory and contractual regulation than at present. We are here concerned, not with the pristine common law principle, but with a statutory scheme of office-holding and employment."*

And at pps. 56-57:

> *"We are not here concerned with the monarch's 'prerogative' power to dispense with the services of a subject at pleasure. We are concerned with a statutory scheme for the management of the Police Service and for the employment of*

> *its members, likely to have been intended to embody modern conceptions of public accountability. Where Parliament confers a statutory power to destroy, defeat or prejudice a person's rights, interests or legitimate expectations, Parliament is taken to intend that the power be exercised fairly and in accordance with natural justice unless it makes the contrary intention plain. This principle of interpretation is an acknowledgment by the courts of Parliament's assumed respect for justice."*

And in the joint judgment of McHugh, Gummow and Hayne JJ the same view of the application of the rules of natural justice was expressed (p.61-62) and they added: "at the least that, when the Commissioner was contemplating a recommendation of removal of the applicant, the applicant should have been notified of the proposal, advised of any specific allegations against him and the content of any adverse report, and given an opportunity to respond to those allegations and any criticisms of his performance as a Deputy Commissioner".

The *Jarratt* judgment also contains some useful comments on the assessment of damages in such cases.

[17] Although the letter of dismissal gives no grounds for taking this step it seems clear that the only applicable ground in s.17 must be ground (d) i.e. for misconduct. There has never been any suggestion that any other ground could apply and in any case the other grounds require one month's notice to be given or one month's pay in lieu, neither of which occurred in this case. Subject to contrary evidence at trial it would appear that the appellant should have been advised of the ground of dismissal and the basis for it and should have been given the opportunity to be heard before dismissal took effect. The failure to take these steps breaches an implied term of his employment that his employer was obliged to treat him fairly and in accordance with natural justice.

[18] There is a further provision in the Police Act relevant to the appellant's employment. The appellant, who held the rank of sergeant, was subject to ss.40 and 41 relating to interdiction:

> *"40. (1) The Minister of Police may, subject to confirmation by Cabinet, interdict from duty any police officer below inspectorate rank pending trial for any offence whether under the provisions of this Act or before a court and pending determination of any appeal.*
>
> *(2) A police officer interdicted from duty under the provisions of this section shall not by reason of such interdiction cease to be a police officer:*
>
> *Provided that the powers, privileges and benefits vested in him as a police officer shall, during his interdiction, be in abeyance but he shall remain subject to the same responsibilities, discipline and penalties and to the same authority as if he had not been interdicted.*

> *41. A police officer interdicted from duty under the provisions of sections 39 and 40 of this Act shall not, save as is hereinafter provided, be entitled to receive any pay in respect of the period of such interdiction:*
>
> *Provided that –*
>
> *(a) he shall be allowed to receive such portion of his pay as Cabinet may direct; and*
>
> *(b) if the proceedings against such officer do not result in the dismissal of the police officer, he shall be entitled to the full amount of the emoluments which he would have received if he had not been interdicted."*

As already indicated the appellant was not tried or even charged with an offence. No proceedings of any kind were brought against him. On this basis it seems that the appellant must be entitled to his wages for the period of interdiction.

[19] Mr Kefu for the respondent argued that the appellant's claim is purely a public law claim and in support of that submission noted that the terms of appointment, employment and dismissal of the appellant were based on statute. The authorities referred to above establish that this is no bar to a private law claim. Mr Kefu also claims that the appellant did not plead a contract or identify which provisions of that contract had been breached. We do not agree. There is specific reference to the terms and conditions of his employment, expressions which suggest a contract. In para 13 of the amended statement of claim specific reference is made to "a breach of the contract of employment". Breaches of the alleged terms and conditions are expressly referred to.

Conclusion

[20] We are satisfied that the appellant's claim is a private law claim properly brought as an ordinary action. We hold that as pleaded the appellant had a contract of employment with the respondent. The amended statement of claim sufficiently pleads a contract, the terms of it and a breach of those terms. On the pleadings the failure to hear the appellant before dismissing him for misconduct is a clear breach of the rules of natural justice the observance of which is an implied term of the contract. In the light of our findings it is unnecessary to consider whether leave should be granted in respect of the appellants further grounds of appeal. For the above reasons we allow the appeal and reinstate the statement of claim. The pleadings should now be finalised as a claim in contract with any appropriate amendments so that the matter may proceed to interlocutories and trial. The appellant is entitled to costs in this Court and in the Supreme Court.

Tu'akalau v Rex

Court of Appeal, Nuku'alofa
Salmon, Handley, Hansen, and Tupou JJ
AC 13/2012

20 October 2014; 31 October 2014

Criminal appeal – application for leave to appeal – jury's verdicts not against the weight of evidence – application dismissed

The appellant was a former police officer who, after trial by jury, was found guilty of counts of forgery, using a forged document knowing it to be forged, and of attempting to interfere with the course of justice. She was sentenced to 18 months imprisonment on the first two counts, fully suspended, and on the third count she was ordered to perform 60 hours of community work. On 18 September 2012 she appealed against her conviction and alleged that the verdicts of guilty were against the weight of the evidence, and that the sentence was excessive. She needed leave to appeal against her convictions and her sentence. Leave was refused and she sought leave to appeal under s 28 of the Court of Appeal Act.

Held:

1. The jury was entitled to find that the appellant's knowledge of the other driver and his family, and her attempt to settle the complaint in January 2010 not only supported the third charge of attempting to interfere with the course of justice, but also threw light on the reasons for the absence of the first statement and the first file. They provided a motive for the appellant's actions in failing to record the complaint, and attempting to deceive the Deputy Commissioner. The jury was also entitled to reject the appellant's evidence that she gave the file to Inspector Kaufusi and to infer that this evidence was concocted in an attempt to explain the disappearance of the file and the first statement. Inspector Kaufusi's denial provided powerful support for the circumstantial case against the appellant.
2. The court could not possibly find that the jury's verdicts were against the weight of the evidence, or more accurately that they were unreasonable, or unsafe and unsatisfactory.
3. The verdicts could not be disturbed, and the application for leave to appeal against conviction was dismissed.

Statute considered:
Court of Appeal Act (Cap 9)

Counsel for the appellant	:	Mr O' Pouono
Counsel for the respondent	:	Mr S Sisifa

Judgment

[1] This is an application by a former police officer, for leave to appeal from the decision of the Lord Chief Justice refusing leave to appeal from her conviction on counts of forgery, using a forged document knowing it to be forged, and of attempting to interfere with the course of justice. She had elected trial by Jury, and the Jury returned verdicts of guilty on all three counts.

[2] On 14th September, 2012 Cato J, the trial Judge, sentenced the applicant to 18 months imprisonment on the first two counts, fully suspended, and on the third count she was ordered to perform 60 hours of community work.

[3] On 18th September, 2012 the applicant appealed against her conviction, alleging that the verdicts of guilty were against the weight of the evidence, and that the sentence was excessive. She needed leave to appeal against her convictions under s 16(b) of the Court of Appeal Act because her grounds of appeal raised questions of fact alone. She also needed leave to appeal against her sentence under s 16(c).

[4] The trial Judge refused a certificate that it was a fit case for appeal against her conviction, and on 24th May, 2013 the Lord Chief Justice, sitting as a single Judge of the Court under s 28, refused leave to appeal against conviction and sentence. The applicant, as was her right under s 28, now seeks leave to appeal from her conviction from the Full Court.

[5] The grounds of appeal against conviction acknowledge that there was evidence before the Jury which entitled them to convict, but assert that, given the weight of the evidence, the verdicts were unreasonable.

[6] There was no challenge to the summing up, and there was no request from Counsel who appeared for the applicant at the trial for any redirection or further direction.

[7] The trial Judge directed the Jury that the defence had not really challenged the objective elements of the forgery, and using a forged document counts, and that the real question for them was whether the accused did those acts with the intention of deceiving Deputy Commissioner Taniela Faletau.

[8] The applicant gave evidence at the trial, and denied having any intention to deceive. The trial Judge directed the Jury that the Crown had to prove beyond all reasonable doubt that she had that intention. The Jury were directed that if they had any doubt about that they would acquit, a direction that was favourable to the applicant.

[9] If the Jury did not accept the applicant's denials, and they were not bound to do so, they were fully entitled to convict because there was a powerful circumstantial case

against her. This was essentially a question of fact for the Jury which heard and saw the applicant give her evidence.

[10] The complainant went to Mu'a Police Station on 17th August, 2009 and spoke to the appellant, a policewoman on duty, who recorded the complainant's statement that her father's parked car had been damaged when Latu Tonga backed his car into it, and then drove off.

[11] The appellant told the complainant her complaint could not be registered until the police received a written estimate of the cost of repair.

[12] The appellant said this was the practice at that station, and she was supported in this by Inspector Kaufusi. Deputy Commissioner Faletau's evidence was to the contrary. However in January 2010 the appellant opened a file which she handed to Deputy Commissioner Faletau although it did not contain an estimate of the damage.

[13] Just before the appellant went off duty on 17th August, 2009, according to her evidence, she gave the file with the complainant's statement to Inspector Kaufusi, but the latter denied this. The complainant gave hearsay evidence, without objection, that her father, since deceased, obtained a written estimate of the cost of repair and took it to the Police Station on 18th August, the following day. The file, the original statement, and the estimate were never found.

[14] In January 2010 the father complained to Deputy Commissioner Faletau about the delay in investigating and following up his daughter's complaint. Deputy Commissioner Faletau then asked the appellant to produce the file.

[15] The appellant prepared a file, backdated it to make it appear that it had been created in August 2009, and obtained a second statement from the complainant which she also backdated to 17th August, 2009. She placed this in the file and gave it to the Deputy Commissioner without a word of explanation. The back dated statement was the document relied upon as a forgery because it told a lie about itself, and it's delivery to the Deputy Commissioner was the use relied upon to support the second count.

[16] When the Deputy Commissioner examined the file he noted a number of significant discrepancies, and on examining the station diary for the 17th August 2009 he found that the complaint had not been recorded there as it should have been.

[17] The complainant said, but the appellant denied, that when her original statement was being taken the appellant said she knew Latu Tonga, and that he did not have a driver's license. The appellant said that in the complainant's first statement the latter said that she would drop the complaint if compensation was received. The complainant denied this.

[18] In January 2010, after the appellant had been asked by the Deputy Commissioner to produce the file, she called on the complainant with Latu Tonga and his mother who handed over a sum of money to the complainant in an attempt to settle the complaint.

[19] The Jury were entitled to find that the appellant's knowledge of the other driver and his family, and her attempt to settle the complaint in January 2010 not only

supported the third charge of attempting to interfere with the course of justice, but also threw light on the reasons for the absence of the first statement and the first file. They provided a motive for the appellant's actions in failing to record the complaint,
120 and attempting to deceive the Deputy Commissioner.

[20] The Jury were also entitled to reject the appellant's evidence that she gave the file to Inspector Kaufusi and to infer that this evidence was concocted in an attempt to explain the disappearance of the file and the first statement. Inspector Kaufusi's denial provided powerful support for the circumstantial case against the appellant.

[21] This Court cannot possibly find that the Jury's verdicts were against the weight of the evidence, or more accurately that they were unreasonable, or unsafe and unsatisfactory.

[22] In our judgment the verdicts cannot be disturbed, and the application for leave to appeal against conviction must be dismissed.

Hu'ahulu v Rex

Court of Appeal, Nuku'alofa
Salmon, Handley, Hansen, and Tupou JJ
AC 8/2014

20 October 2014; 31 October 2014

Sentencing appeal – rape of feeble minded woman – 13 years replaced with sentence of 5 years

The appellant was convicted after trial before a jury on 25 August 2011 of the rape of a 23 year old feeble minded woman. He was sentenced on 9 September 2011 to 13 years imprisonment, the last 3 years to be suspended. On 4 February 2014 the appellant sought to appeal out of time, and leave to appeal, against conviction and sentence. Leave to appeal against the sentence was granted but leave to appeal the conviction was not granted.

Held:

1. The court agreed that the sentence imposed was manifestly excessive. The appellant's only previous conviction was for drunkenness. He co-operated in the preparation of a pre-sentence report and apologized to the complainant's mother for his action. It seems that at least at the time of his conviction he accepted the jury's verdict. The court considered that given his age of 27 and his lack of serious prior offending, part of his sentence should be suspended.
2. The court took 6 years as the starting point and reduced it by one year to recognize his contrition. The sentence imposed in the Supreme Court was vacated and replaced with a sentence of 5 years imprisonment the last year to be suspended for a period of 2 years.

Cases considered:

Fa'aoso v R [1996] TLR 42
R v Fonua CR 73/2012
R v Langi CR41/2013

Counsel for the appellant : Mr Fa'otusia
Counsel for the respondent : Mr Sisifa

Judgment

[1] The appellant was convicted after trial before a Jury on the 25th August, 2011 of the rape of a 23 year old feeble minded woman. He was sentenced on the 9th September, 2011 to 13 years imprisonment, the last 3 years to be suspended.

[2] On the 4th February, 2014 the appellant sought to appeal out of time, and leave to appeal, against conviction and sentence. Leave to appeal against the sentence was granted by the President of the Court of Appeal on 12th March 2014 but leave to appeal the conviction was not granted.

[3] Initially Mr Fa'otusia for the appellant maintained that the full court should grant leave to appeal the conviction but later abandoned this position and proceeded just with the appeal against sentence.

[4] The Judge took as his starting point for anyone charged with the rape of a feeble minded person on a not guilty plea, a sentence of 13 – 14 years imprisonment because such people deserve protection. While not disagreeing with this sentiment the Judge provided no precedent for a sentence of this length. We note that the starting point for rape set by this Court in *Fa'aoso v R* [1996] TLR 42 is 5 years and the maximum sentence is 15 years. The Judge made a reduction to 13 years and suspended the last 3 years because the defendant had apologized and had accepted the Jury's verdict.

[5] Mr Fa'otusia submitted that the sentence was excessive in comparison with similar cases and referred to two cases where more serious rapes had attracted much lighter sentences. He submitted that the sentence should be reduced to 6 years with 3 years suspended.

[6] For the Crown Mr Sisifa acknowledged that the sentence was manifestly excessive. He referred to 2 cases involving feeble minded complainants. Both involved guilty pleas. In *R v Fonua* CR 73/2012 a 62 year old accused was sentenced to 4 years imprisonment with 2 years suspended for the rape of a 45 year old woman. The Judge in that case noted that protection of a vulnerable person was a major sentencing consideration and rape of a feeble minded person justified a starting point of 6 years. He made a reduction of 2 years for the guilty plea, previous good character and contrition. In *R v Langi* CR41/2013 the same Judge sentenced an 18 year old accused to 3 years imprisonment with a 15 months suspension for the rape of a 44 year old feeble minded woman. The youth of the prisoner was an important factor in the sentence imposed.

[7] Mr Sisifa suggested that the sentence should be in the range of 4 – 6 years and that suspension of part was appropriate.

[8] The appellant was 27 years old at the time of the offending. He maintained that the sex was consensual. However the Jury was obviously satisfied that the complainant was feeble minded and that the appellant knew or should have known this was so. We agree that there is a need for protection of such complainants.

[9] We agree that the sentence imposed was manifestly excessive. The appellant's only previous conviction was for drunkenness. He co-operated in the preparation of a pre-sentence report and apologized to the complainant's mother for his action. It

seems that at least at the time of his conviction he accepted the Jury's verdict. We think given his age and lack of serious prior offending that part of his sentence should be suspended. We take 6 years as the starting point in this case and reduce this by one year to recognize his contrition. The sentence imposed in the Supreme Court is vacated and replaced with a sentence of 5 years imprisonment the last year to be
80 suspended for period of 2 years.

Kaufusi anor v Rex

Court of Appeal, Nuku'alofa
Salmon, Handley, Hansen, and Tupou JJ
AC 14 & 15/2014

21 October 2014; 31 October 2014

Criminal appeal – continuum of similar offending – general deficiency approach to indictments allowed – appeal dismissed

The appellants (Mrs Latu and Mr Kaufusi) were convicted of embezzlement and falsification of accounts. Mrs Latu was found guilty and Mr Kaufusi entered pleas of guilty after the Crown had closed its case. Both were acquitted on a count of theft laid alternatively to that of embezzlement. Mrs Latu was sentenced to 2 years and 3 months imprisonment, the last 6 months suspended for 12 months. Mr Kaufusi's sentence was 2 years and 8 months imprisonment, with 9 months of the final year suspended for 2 years. Both appellants appeal against conviction on the count of embezzlement and, their application for leave to appeal against sentence having been declined, for leave to appeal against sentence. The sole ground of the appeals against conviction was that the indictments were defective in that the count of embezzlement (and the alternative count of theft) covered multiple offences which should have been the subject of separate charges. They argued that each separate act of taking and falsification should have been the subject of a separate count. It was submitted that the indictment circumvented s 160 of the Act which precludes the trial at the same time of more than five such counts. They also submitted that the sentences imposed were manifestly excessive.

Held:

1. The Supreme Court found that the Crown was entitled to allege in one count a series of related acts, notwithstanding that each could have been the subject of a separate count. It relied on a common law rule which permitted a series of connected acts of dishonesty to be included in a count alleging a general deficiency. If the general deficiency rule could not be invoked the appellants and their co-accused could have been tried for only five of the multiple acts of conversion they were accused of committing. Only a small portion of the criminality involved in their offending would have been captured. There would have been little consequential saving in time or cost. The Crown would have been required to lay out evidence of the overall scheme in order to prove the individual acts of theft. It would be an affront to common sense if the Crown were to be required to call

evidence of the entire course of criminal activity but could secure convictions on only small portion of it.

2. In cases where there was a pattern of repeated offending of the same kind the Court found no reason why the rigours of the rule against duplicity should not, in the interests of justice, be relaxed.
3. The appeals against conviction were dismissed. Leave to appeal against sentence was granted but the appeals were dismissed.

Cases considered:

Director of Public Prosecution v Merriman [1973] AC 584
R v Balls (1871) LR 1 CCR 328
R v Funaki [2005] Tonga LR 239
R v Halapua CR 91 of 2009
R v Lawson, 36 Cr. App. R. 30
R v Talia [2013] Tonga LR 97
R v Tomlin [1954] 2 All ER 273

Statutes considered:

Court of Appeal Act (Cap 9)
Criminal Offences Act (Cap 18)

Counsel for the appellant : Mr Niu SC
Counsel for the respondent : Mr Sisifa

Judgment

Introduction

[1] After trial before Cato J the appellants (Mrs Latu and Mr Kaufusi) were convicted of embezzlement contrary to s.158 Criminal Offences Act (the Act) and falsification of accounts contrary to s.159(a). Mrs Latu was found guilty and Mr Kaufusi entered pleas of guilty after the Crown had closed its case. Both were acquitted on a count of theft laid alternatively to that of embezzlement. Mrs Latu was sentenced to2 years 3 months imprisonment, the last 6 months suspended for 12 months. Mr Kaufusi's sentence was 2 years and 8 months imprisonment, with 9 months of the final year suspended for 2 years.

[2] Both appellants appeal against conviction on the count of embezzlement and, their application for leave to appeal against sentence having been declined by the Lord Chief Justice sitting as a single Judge of this Court, for leave to appeal against sentence under s.28 of the Court of Appeal Act.

[3] The sole ground of the appeals against conviction is that the indictments were defective in that the count of embezzlement (and the alternative count of theft) covered multiple offences which should have been the subject of separate charges. The sentences imposed are submitted to be manifestly excessive.

Further background

[4] The appellants and 6 others who faced related charges worked at the foreign exchange section of the Westpac Bank. The Crown case was that over a period of several years on multiple occasions each converted bank funds to their own use by manipulating foreign exchange rates and falsifying entries in the logs which, as tellers, they were required to maintain. The charges against Mrs Latu involved 19 separate transactions between 22 June 2011 and 3 January 2012 amounting in aggregate to $30,917.60.MrKaufusi was alleged to have stolen a total of $41,301.03 on 48 occasions between 17 January 2008 and 30 June 2011.

[5] The deception practised by the appellants and their colleagues was quite simple. Each foreign exchange teller was required to record daily the receipt of foreign currency. At the end of the day the full list of foreign currencies and the equivalent in Tongan currency at the prevailing exchange rate was calculated and checked by the supervisor. The amount actually paid out was recorded in the tellers ledger log. The amount of Tongan currency in each of the two returns should have been the same. On later examination it was found they were not because, by manipulating foreign exchange rates, the amount recorded as paid out in Tongan currency was understated. The teller kept the difference.

The indictments

[6] The indictments of the appellants and their co-accused contained 3 counts, respectively of embezzlement, alternatively theft contrary to s.143 of the Act, and falsification of accounts. Particulars of each count set out the period spanned by the offending and the total sum involved.

[7] At the outset of the trial counsel for the appellants and their co-accused objected to the way in which the indictment was framed. They argued that each separate act of taking and falsification should have been the subject of a separate count. It was submitted that the indictment circumvented s.160 of the Act which precludes the trial at the same time of more than five such counts. s.160 provides as follows:

> "160. In the case of any person intended to be tried in the Supreme Court for embezzlement, falsification of accounts or fraudulent conversion respectively, unless there are special reasons, no order shall be made preventing the trial at the same time of any number of such offences not exceeding 5, whether alleged to have been committed within 6 months from the first to the last of such offences against the same person or not. Nothing in this section shall prevent an indictment containing more than 5 counts from being presented."

[8] Cato J ruled against the objection. He decided that the Crown was entitled to allege in one count a series of related acts, notwithstanding that each could have been the subject of a separate count. He relied on the common law rule enunciated in *R v Balls* (1871) LR 1 CCR 328 which permits a series of connected acts of dishonesty to be included in a count alleging a general deficiency. The rule has been applied in this

jurisdiction in *R v Funaki* [2005] Tonga LR 239 and more recently by Cato J himself in *R v Talia* CR 69 of 2013.

This appeal

[9] Mr Niu argued that the rule of general deficiency does not apply to cases such as the present where each separate act could have been the subject of a separate charge. Relying on the judgment of Pearson J in *R v Tomlin* [1954] 2 All ER 273 he submitted the rule does not apply where it is possible to trace and prove separate acts of embezzlement. In the result, Mr Niu said, the indictments were in flagrant violation of the rule against duplicity.

[10] Mr Sisifa responded that the concept of general deficiency was properly applied. He argued that it could be invoked when the fraudulent activity involved repeated offences over a period of time. Were that not so, he said, it would be impossible to present an indictment that captured the criminality of the alleged offending.

Discussion

[11] The general principle in respect of what has come to be known as the rule against duplicity is that no one count of the indictment should charge the accused with having committed two or more separate offences – see the discussion in Archbold, Criminal Pleading, Evidence and Practice (2009) at 1 – 135. A common law "exception" to the rule emerged in situations concerning "continuous taking" or "general deficiency". The issue in this appeal is whether the exception applies in this case.

[12] The purpose of the rule against duplicity is to enable an accused to know the case he or she is required to meet. It is a rule of elementary fairness but also necessary for the purpose of such matters as a submission of no case to answer or a plea in mitigation. Accordingly, it is necessary to consider the underlying principles of fairness and clarity in deciding whether a count is bad for duplicity – see generally Archbold (supra) at 1-136 - 1-138.

[13] Pragmatic considerations also play a part. In *Director of Public Prosecution v Merriman* [1973] AC 584 Lord Morris of Borth-y-Gest said (at 539) that questions relating to duplicity:

> "... are best answered by applying commonsense and by deciding what is fair in the circumstances."

In the same case Lord Diplock said (at 607) that the rule against duplicity:

> "... has always been applied in a practical, rather than a strictly analytical, way for the purpose of deciding what constituted one offence."

[14] A discussion of general deficiency usually begins with *R v Balls*, the case principally relied on by Cato J. In *Balls* the accused faced three counts of embezzlement. He was a member of a co-partnership who was responsible for receiving payments from persons who bought coal from the co-partnership, to bank the aggregate sum received weekly on a Tuesday and to provide an account of

payments received. He failed to bank and account for the full amount received. He was charged with embezzlement of the total sum he had failed to account for on three separate occasions. They encompassed 31 different payments received. The conviction was upheld. Cockburn CJ said at 332-3:

> "It is quite true that if a man receives a number of separate sums and has to account for each of them separately, only three instances of failure to account can be proved under one indictment. Thus, if there were to be one accounting on Monday, and one on Tuesday, and one on Wednesday, and so on, only three defaults could be charged and proved; though even in such a case, evidence of other instances might be given in order to show that the instances charged were not merely accidental, but that what was done was done intentionally and fraudulently. But here no difficulty of this nature arises. I agree that the prisoner might have been indicted for embezzling any of the separate small sums received by him. But it appears upon the case that his duty was to receive the small sums from time to time to send in the weekly accounts every Tuesday; and every Tuesday to pay the gross amount received by him during the preceding week into a bank. It is true that each of the small sums received had to be accounted for; but he might well be charged with embezzling the aggregate amount. And evidence of the individual items was admissible to show how this aggregate was made up. It would be very mischievous if, in such cases as these, servants could not be indicted for embezzling the aggregate amounts for which they fail to account. No doubt, in such cases, there is an embezzlement of each of the smaller sums going to make up the total not accounted for; but there is not the less an embezzlement of the whole."

[15] *Balls* was applied in *R v Tomlin* (supra at [9]) where a shop manager challenged as bad for duplicity a charge that he had embezzled a sum of money over a specified period. It was impossible to prove when individual sums had been taken over the period. The Court of Criminal Appeal held the indictment was unobjectionable. Pearson J, giving the judgment of the court, said that the fact that, as in *Balls*, the appellant might have been indicted for embezzling any of the separate small sums received did not prevent him from being indicted for embezzling the aggregate of those sums. The court went on to approve the view of Lynskey J in *R v Lawson*, 36 Cr. App. R. 30 and said in conclusion (at 275):

> "We desire to make it plain in conclusion, agreeing therein with Lynskey, J., that, in the ordinary case, where it is possible to trace the individual items and to prove a conversion of individual property or money, it is undesirable to include them all in a count alleging a general deficiency. What we are not willing to do is to elevate a rule of practice, applicable to circumstances where it may be required to avoid injustice, into a rule of law applicable to circumstances where it will defeat justice... ."

[16] Mr Niu relied on this passage to support his argument that the indictments offended the rule against duplicity. He argued that general deficiency could be

invoked when property was stolen over a period and it was impossible to prove the separate acts that had led to the overall loss. But, said Mr Niu, general deficiency does not apply and should not be relied on when there is evidence of individual acts of taking over a period each of which constitute and could be charged as a separate offence.

[17] We accept that the rule of practice referred to in *Tomlin* would support such an approach. But we do not accept that the rule should be applied in cases such as the present. It is to be noted that, in enunciating what he was careful to describe as a rule of practice which should not be elevated into a rule of law, Pearson J was referring to the ordinary case where the rule may be required to avoid injustice. He was not laying down a principle of universal application. To apply the rule in this case would be to apply it to circumstances where it would, as Pearson J feared it could, defeat justice.

[18] It is not suggested that there is any lack of clarity or uncertainty in the indictment. The Crown provided further particulars which identified with precision the dates and amounts involved in each separate act of conversion. Mr Niu rightly acknowledged that no prejudice to the appellants resulted from the way the indictment was framed. They had notice of each and every act relied on by the Crown as constituting the offence. The accused in cases where individual acts cannot be particularized are arguably disadvantaged by comparison. The appellants' argument requires that the general deficiency rule can be applied whenever the prosecution is unable to prove individual acts of conversion but not in cases where it can. In our view that outcome would be both anomalous and unjust.

[19] If the general deficiency rule could not be invoked in this case the appellants and their co-accused could have been tried for only five of the multiple acts of conversion they were accused of committing. Only a small portion of the criminality involved in their offending would have been captured. There would have been little consequential saving in time or cost. The Crown would have been required to lay out evidence of the overall scheme in order to prove the individual acts of theft. As was acknowledged in *Balls*, it will always be permissible – we would say necessary - to give evidence of other instances in order to show that what was done was done intentionally and fraudulently. It would be an affront to common sense if the Crown were to be required to call evidence of the entire course of criminal activity but could secure convictions on only small portion of it.

[20] We are satisfied that this is not the "ordinary case" that Pearson J had in mind. In cases where there is a pattern of repeated offending of the same kind, as in this case, we see no reason why the rigours of the rule against duplicity should not, in the interests of justice, be relaxed.

[21] We note that the same reasoning appealed to Cato J in *R v Talia*, (supra at 7). He said at [6]:

> "Although in many cases of general deficiency it may not be [possible] to isolate all of the wrongful acts, where there has been a continuum of similar unlawful offending or a similar modus operandi or pattern involving many acts generally involving small amounts, the approach of alleging a general deficiency should in my view be permitted."

We agree.

Appeals against sentence

Mr Kaufusi

[22] In sentencing Mr Kaufusi, Cato J adopted a starting point of 3 years 9 months. He allowed 13 months for mitigating factors. These were Mr Kaufusi's belated guilty plea, his previous good character and the fact that his family had repaid the money. In suspending 9 months of his sentence, the Judge assessed him as having good prospects of rehabilitation.

[23] Mr Niu did not criticize the starting point adopted by the Judge but said there had been insufficient allowance made for mitigating factors. He contrasted the Judge's approach with the allowance he made for a co-offender, Stephanie Cocker, whose offending he described as the most serious of those who pleaded guilty. She had stolen a total of $97,450 over a two year period. The starting point of four and a half years reflected this. Mitigating factors -an early guilty plea and good character – reduced the sentence to three years of which one year was suspended. The Judge said her early guilty plea demonstrated genuine contrition.

[24] Mr Kaufusi's plea came too late to qualify him for any significant discount on sentence. Mr Niu said he would have pleaded guilty at the beginning of the trial after the Judge rejected the objection to the indictment were it not for a concern that to do so would prejudice his appeal rights. If that was his belief it was misplaced and we do not think he can seek further credit for his pleas of guilty on that account. Mr Kaufusi could not have complained if the Judge had given him no credit at all for his late pleas. We infer, however, from the aggregate allowance of 13 months for mitigating factors that the Judge allowed a nominal discount of one month for the late guilty pleas.

[25] The question then is whether Mr Kaufusi's repayment of the full amount stolen and previous good character were sufficiently recognized, specifically whether a discount of 12 months adequately reflected those factors. While the Judge could have been more generous, we do not believe he is shown to have erred.

[26] It is important that there is a meaningful allowance when recompense of losses is made. It demonstrates a desire to atone and of course lessens the impact of the crime on the victim. If adequate allowance is not routinely made, there is also the concern that the incentive to make reparation will be reduced.

[27] In our view a discount of little over 25% for good character and for making reparation is sufficient though the Judge could not have been criticised if he had allowed more. We see no inconsistency with the allowance for mitigating factors in Cocker; the greater part of the discount of 33% to her sentence would have derived from the early guilty plea.

[28] Nor do we consider the Judge has been shown to have erred in the period of suspension he chose. Mr Niu referred us to the decision of Schuster J in *R v Halapua* CR 91 of 2009 in which 3 years of a sentence of 3 years 1 month was

suspended. It was also a sentence for embezzlement. The sum involved - $16000 – was repaid in full.

[29] Previous sentencing decisions at first instance are generally of limited assistance, particularly where a different Judge is involved and there is a significant discretionary element. *Halapua* is no exception. On the face of it the end sentence of 3 years 1 month was very high; there had been an early guilty plea and co-operation with the police as well as full reparation. We have the clear impression that mitigating factors were a significant factor in the decision to suspend almost the entire sentence.

[30] We accept that Cato J could well have suspended more of the sentence but, again, there is no error of principle in his approach and the period of suspension was well within the scope of his discretion. Mr Kaufusi may see some inconsistency in the fact that, despite making full reparation, he will serve only one month less than Mrs Cocker whose offending was more serious. But when regard is had to other distinguishing features, we do not consider there is an unacceptable degree of disparity.

Mrs Latu

[31] Mrs Latu stole a little over $30,000 over the period June 2011 – January 2012. There were 19 separate acts of defalcation. Aged 24 years at sentence, she had begun working part-time at Westpac in 2009 after graduating with a diploma in business accounting. She became a full-time teller in 2011. Mrs Latu said she had come under pressure from older and more senior employees to join in the fraudulent scheme. This appears to have been accepted by the Judge who said he suspected she "fell victim to the seductive influence of others around her".

[32] Cato J imposed the end sentence of 2 years 3 months imprisonment after deducting 6 months for previous good character from a starting point of 2 years 9 months. In suspending 6 months of the sentence, he took into account her youth and the fact that she may have succumbed to pressure from others. Though somewhat sceptical of the sincerity of her expressions of remorse, describing her apology as belated and convenient, he was prepared to recognize that she had some prospects of rehabilitation.

[33] Mr Niu did not criticize the term of imprisonment to which Mrs Latu was sentenced. He focused on the period of suspension, arguing that it should have been 21 months. As she has served 6 months, a successful appeal would effect her immediate release.

[34] We are not without sympathy for Mrs Latu. She was young and vulnerable to her co-workers, who had been exploiting the loophole in the system for some years. The pressure on her to fall into line could have been considerable.

[35] It is not however suggested that the Judge did not appropriately weigh the context of Mrs Latu's offending in reaching the end sentence. As in the case of Mr Kaufusi, we accept that the Judge could not have been criticised if he had suspended a greater portion of the sentence. But he gave consideration to all relevant considerations. His conclusion that Mrs Latu's prospects of rehabilitation did not

justify a longer period than six months was one he was entitled to reach in the exercise of his discretion.

[36] The sentences imposed on both appellants could be seen as comparatively stern. It is however worth emphasizing that, unless the sentencing Judge has made an error of principle, we are not at liberty to interfere unless the sentences are manifestly excessive. Neither sentence was in that category.

Result

[36] The appeals against conviction are dismissed. Leave to appeal against sentence is granted but the appeals are dismissed.

Manu anor v Rex

Court of Appeal, Nuku'alofa
Salmon, Handley, Hansen, and Tupou JJ
AC 1 & 2/2014

22 October 2014; 31 October 2014

Criminal appeal – importing pseudoephedrine and possession of pseudoephedrine – appeal against conviction and sentence – dismissed

The appellants (Mr Manu and Mr Lin) and three others were tried in the Supreme Court on charges that arose from an alleged scheme to import pseudoephedrine into Tonga. Pseudoephedrine was a controlled chemical under the Illicit Drugs Control Act 2003 (the Act) and was the principal ingredient used in the manufacture of methamphetamine, one of the illicit drugs listed in Schedule 1 of the Act. All accused were acquitted on a charge of attempting to import pseudoephedrine on 23 June 2011. Mr Manu (and his co-accused other than Mr Lin) were however convicted of importing pseudoephedrine on a later occasion and Mr Lin was convicted of possession of pseudoephedrine. Mr Manu and Mr Lin were sentenced to imprisonment for 5 years 4 months and 10 months respectively. Both appealed against conviction and sentence. Mr Manu's appeal against conviction was advanced on three grounds: 1. he had been unlawfully arrested; 2. there was insufficient evidence to show he knew the package contained pseudoephedrine; and 3. there was evidence the package had been interfered with after its arrival in Tonga and before Mr Manu took delivery. Two grounds were advanced in support of Mr Lin's appeal against conviction: 1. he was unlawfully arrested; and 2. there was no or insufficient evidence to show that Mr Lin knew the powder found in his refrigerator was a controlled chemical.

Held:

1. The Judge found that Mr Manu's actions in inviting inspection no more than a further bold step on his part to secure the packages without revealing who the true importer was. Whether Mr Manu's actions were consistent with ignorance of the contents of the package or supportive of the Crown case was a matter for the Judge. That ground of appeal could not succeed.
2. There was nothing to raise concerns that the conviction of Mr Manu might be unsafe. There was no suggestion at the trial that the package had been tampered with and the Judge was not asked to address the question. The third ground of appeal also failed.

3. The court was satisfied that there was ample evidence to support the Judge's finding that the mental element of the charge of possession for Mr Lin was established. In addition to the matters considered by the Judge the court found it significant that Mr Lin told the officers the substance in the refrigerator was "cold tablets" whereas he told them that the (innocuous) powder found in his bedroom was "candy". This evidence was strongly supportive of the Judge's finding that Mr Lin knew the nature of the substance in the refrigerator and its intended use.
4. There was no error in the way the Judge approached sentence for the appellants. The end sentence appropriately reflected the criminality involved in the offending and made proper allowance for factors personal to Mr Manu. For Mr Lin, the Judge made generous provision for mitigating factors and reduced the sentence by six months from a starting point of sixteen months.
5. The appeals by both Mr Manu and Mr Lin against conviction and sentence were dismissed.

Statutes considered:
Illicit Drugs Control Act 2003
Police Act (Cap 35)

Counsel for the appellant : Mr Pouono
Counsel for the respondent : Mr Sisifa

Judgment

Introduction

[1] The appellants (Mr Manu and Mr Lin) and three others were tried by Cato J on charges arising from an alleged scheme to import pseudoephedrine into Tonga. Pseudoephedrine is a controlled chemical under the Illicit Drugs Control Act 2003 (the Act). It is the principal ingredient used in the manufacture of methamphetamine, one of the illicit drugs listed in Schedule 1 of the Act. All accused were acquitted on a charge of attempting to import pseudoephedrine on 23rd June 2011. Mr Manu (and his co-accused other than Mr Lin) were however convicted of importing pseudoephedrine on a later occasion and Mr Lin was convicted of possession of pseudoephedrine.

[2] Mr Manu and Mr Lin were sentenced to imprisonment for 5 years 4 months and 10 months respectively. Both appeal against conviction and sentence.

Background

[3] The charges arise out of a joint operation of Tongan and New Zealand Customs and Police. In June 2011 New Zealand Customs intercepted a consignment from China addressed to Mr Manu in Tonga. On inspection the package was found to contain a water boiler in which there was 4.2 kilograms of Contac NT, a cold remedy, in tablet form. Contac NT contains pseudoephedrine. The Contac NT was removed

and replaced by a placebo. The water boiler was released and transported to Tonga where it was uplifted by Mr Manu. It was delivered to Mr Lin. When police later searched his house, the placebo material was found in two milk cans in his bedroom.

[5] One week later, on 30 June 2011, another package sent from China and addressed to Mr Manu arrived in Tonga. It contained a quantity of small kitchen bowls. Pseudoephedrine amounting in total to 2014.3 grams was concealed in the bottom of the bowls. Again Mr Manu took delivery of the consignment which was delivered to the premises of another accused.

[6] When the police operation was terminated and the premises occupied by the accused searched, a bag containing Contac NT in powder form was found in a refrigerator in the house where Mr Lin lived. This led to the charge of possession of pseudoephedrine.

[7] The appellants and their co-accused were acquitted of attempting to import pseudoephedrine on 23 June 2011. Cato J was satisfied that the appellants and two of the co-accused acted in concert to import the water boiler and its contents into Tonga but, by failing to call the customs officer who intercepted and inspected the consignment in New Zealand, he found the Crown had not proved the presence of pseudoephedrine. However Cato J found that all accused other than Mr Lin had been part of a joint plan to import the second consignment into Tonga.

Conviction Appeal – Mr Manu

[8] Mr Manu's appeal against conviction was advanced on three grounds:

(a) He had been unlawfully arrested.
(b) There was insufficient evidence to show he knew the package contained pseudoephedrine.
(c) There was evidence the package had been interfered with after its arrival in Tonga and before Mr Manu took delivery.

[9] Mr Pouono initially contended that Mr Manu's arrest was unlawful because he had not been told of the nature of the offence for which he was being arrested as required by s 115(3) Tonga Police Act. This complaint had been rejected by the Judge. Mr Pouono was obliged to accept that the Judge was right to do so as there was clear evidence that s 115(3) had been complied with and there was nothing in Mr Manu's evidence to suggest otherwise.

[10] Mr Pouono made an oral submission that the Police had failed to administer a caution to Mr Manu. This was not raised at trial, in the grounds of appeal or in Mr Pouono's written agreement, and ultimately was not pressed.

[11] We observe that even if these complaints had had some foundation, they would not have assisted Mr Manu. At best a breach of s 115(3) or failure to caution Mr Manu would have led to the exclusion of his statement. That would not have helped him. He made no admissions and his statement was admitted without objection.

[12] In support of the second ground Mr Pouono referred to undisputed evidence that Mr Manu had authorized the custom agent who handled the importation to open the

package in preparation for custom clearance. He contended this was consistent with Mr Manu having no knowledge that the package contained an illicit substance. It was, he said, "a clear explanation as to the mental state" of Mr Manu.

[13] The same submission was made to Cato J who dealt with it in the following passage of his decision.[1]

> "Manu emphasized as part of his defence that, when he inspected the first consignment and handled the boiler he suggested to custom's officers that they open the boiler and inspect it. He also invited them by phone to open the second package. He advances this as evidence that he did not know what was in the packages and was not part of any unlawful enterprise. Whilst I consider this possibility, I reject it. As a serving police officer of experience, Manu's actions in assuming deceptively a consignee's role I find unconvincing. His actions in assuming the role of consignee were brazen. He was known as a police officer to one of the customs officers Funaki, and I find his actions in inviting inspection no more than a further bold step on his part to secure the packages without revealing who the true importer was."

[14] Cato J was fully entitled to make this finding. Whether Mr Manu's actions were consistent with ignorance of the contents of the package or supportive of the Crown case was a matter for the Judge. This ground of appeal cannot succeed.

[15] In support of the third ground of appeal Mr Pouono referred to evidence that between the time the package was delivered to the cargo shed at Fua'amotu Airport by New Zealand Custom officers and the time it was opened someone had written Mr Manu's name and telephone number on it. We understand him to be suggesting that this might raise concerns as to the integrity of the package and the possibility that it may have been interfered with.

[16] There is nothing in this evidence to raise concerns that the conviction of Mr Manu might be unsafe. Moreover, the matter was not an issue at trial. There was no suggestion the package had been tampered with and the Judge was not asked to address the question. The third ground of appeal also must fail.

Conviction appeal – Mr Lin

[17] Two grounds were advanced in support of Mr Lin's appeal against conviction:

(a) He was unlawfully arrested.
(b) There was no or insufficient evidence to show that Mr Lin knew the powder found in his refrigerator was a controlled chemical.

[18] Mr Pouono submitted that Mr Lin was not told why he was arrested and the nature of the offence for which he was being arrested contrary to s 115(3) Tongan Police Act. Mr Pouono made a brief submission to the same effect to Cato J, arguing

[1] paragraph 35(e)

that this should lead to Mr Lin's acquittal. The Judge did not comment on the submission in his decision.

[19] That could well be because the matter had not been raised in the course of the trial. There is no evidence directed to the issue. The arresting officer was not asked about it. Mr Lin did not address it in his evidence. Regardless, it is clear from the evidence of events leading up to Mr Lin arrest that he would have been well aware that his arrest arose from the powder found in the refrigerator. Even if this were not the case irregularities in relation to his arrest would not have impacted on his conviction. Like Mr Manu, he made no admissions. The exclusion of his statement would not have affected the prosecution case.

[20] Mr Pouono argued that there was insufficient evidence to show that Mr Lin knew the substance found in his refrigerator was a controlled chemical as required by s.5(b) of the Act and was reckless as to whether it was to be used for the purpose of an offence against s.4, in this case the manufacture of an illicit drug.

[21] In concluding that Mr Lin knew that the substance in the refrigerator was Contac NT the Judge referred to what he described as the deliberate lie he told that the refrigerator belonged to another occupant of the house and inconsistencies between his evidence and what he initially told the police. We are satisfied that there was ample evidence to support the Judge's finding that the mental element of the charge of possession was established. In addition to the matters considered by the Judge we find it significant that Mr Lin told the officers the substance in the refrigerator was "cold tablets" whereas he told them that the (innocuous) powder found in his bedroom was "candy". This evidence is strongly supportive of the Judge's finding that Mr Lin knew the nature of the substance in the refrigerator and its intended use.

Appeals against sentence

Mr Manu

[22] Mr Pouono did not seek to argue that the term of imprisonment imposed on Mr Manu was excessive. His criticism was that Cato J had failed to consider the alternative available sentence of a fine.[2] He also argued that the Judge had not considered mitigating factors and should have made provision for suspension of the prison sentence.

[23] It appears that Cato J was not invited to consider imposing a fine. There was nothing to indicate that he was given any information about Mr Manu's ability to pay a fine. Mr Pouono's plea at sentencing was directed to persuading the Judge that the prison sentence should be fully suspended.

[24] Even if the Judge had been invited to consider imposing a fine, we have no doubt that he would have declined to do so. He emphasized the seriousness of the offending, the need for deterrence and the seriously aggravating factor of a police officer's involvement in a criminal enterprise. In the circumstances, a fine, even a substantial

[2] S.5(7) of the Act prescribes a maximum sentence of a fine of $750,000 or 25 years imprisonment or both.

fine, would have been an inadequate response, capable of being perceived as little more than a license fee for highly profitable criminal activities.

[25] Cato J gave full and sympathetic consideration to mitigating factors, noting Mr Manu's previous good character and record of service and the impact of a prison sentence on his young family. He reduced the sentence by eight months to take account of these factors. He examined the arguments for suspension with care, concluding however that, in the absence of contrition, there was nothing to justify suspension.

[26] We can find no error in the way the Judge approached sentence. The end sentence appropriately reflects the criminality involved in the offending and makes proper allowance for factors personal to Mr Manu.

Mr Lin

[27] Mr Pouono submitted, as he had in relation to Mr Manu's sentence, that the Judge erred in not considering a fine. He also complained that there had been a failure to consider mitigating factors.

[28] The Judge was asked to impose a fine on Mr Lin who said he had a friend who would pay it. In responding to that submission, the Judge said:[3]

> "I consider that the importance of Contac as a precursor in the manufacture of methamphetamine, requires me to impose sentences of imprisonment on those who are found in unlawful possession of this chemical for a commercial purpose unrelated to cold treatment. Deterrence must be the paramount sentencing consideration where contac is possessed for this reason."

We agree. A fine is not an appropriate sentencing option in drug offending involving a commercial element.

[29] The Judge made generous provision for mitigating factors, reducing the sentence by 6 months from a starting point of sixteen months. Again, we find no error in his approach.

Result

[30] The appeals by both Mr Manu and Mr Lin against conviction and sentence are dismissed.

[3] at [32]

Mokofisi v Minister of Lands anor

Court of Appeal, Nuku'alofa
Salmon, Hadley, Hansen, and Tupou JJ
AC 23/2014

23 October 2014; 31 October 2014

Land law – proviso to section 82 Land Act – order sought to enforce proviso – time-barred – appeal dismissed

Esafe Tonga (the great grandfather) became the registered holder of allotments on 3 August 1907 and remained the holder until his death on 10 January 1928. His widow Seini then became entitled to a life estate and she died on 3 February 1929. The great grandfather and his widow were survived by their eldest son Mokofisi Tonga (the appellant's grandfather) and by at least one younger brother, 'Olive Tonga. Under the rule of succession in section 82(c) the grandfather became entitled to the allotments. However, the grandfather did not lodge a claim and his younger brother 'Olive became the registered holder on 1 August 1929. There was nothing before the Court which revealed the basis of 'Olive's registration, but the grandfather did not challenge that registration. On 30 January 2014 the solicitor for the appellant wrote to the Minister outlining the appellant's claim to the allotments through his father and grandfather. The Minister was asked to exercise his powers under the proviso to section 82; hold an enquiry, and effect a posthumous registration of the allotments in the name of the appellant. The letter concluded by stating that if no reply was received within 28 days proceedings would be commenced "to give effect to the proviso ...". On 28 March 2014 the appellant commenced proceedings in the Land Court claiming an order of mandamus requiring the Minister to conduct an inquiry under the proviso to determine if the grandfather "failed" to have himself registered following the death of his mother on 3 February 1929. The Lord Chief Justice held that the appellant's action was time-barred because he claimed through ancestors whose claims were time barred and he dismissed the action. The appellant appealed.

Held:

1. The proviso to section 82 protected an heir to a deceased male holder if the latter failed to register his allotment under Division II of (not "or") Part VIII of the Act, which relevantly included section 122. The proviso did not refer to section 87 or to the failure of "the deceased male holder" to claim the allotments as heir within 12 months from the death of the last holder. It stated that the failure to register "shall not of itself be a bar to the grant to

his heir," allowing full scope for the operation of any other bars to such a grant, including the time bar in section 170.

2. The proviso could only assist an heir who was the heir of "the deceased lawful male holder." The relevant deceased male holder was the great grandfather who died on 10 January 1928. His heir was the grandfather. The father never became "the lawful male holder" of the allotments because 'Olive Tonga and his successors were then the registered holders. The proviso did not assist the heir of the heir, let alone the heir of the heir of the heir.
3. The grandfather ceased to be "the holder" of the allotments at the latest on 1 August 1929, when 'Olive Tonga became the registered holder. Accordingly, when the grandfather died he was not "the deceased lawful male holder" of the allotments for the purposes of the proviso, and the appellant's claim failed.
4. The court held that the proviso to section 82 did not enable the appellant to avoid the operation of section 170 and establish a claim to the allotments. The appeal was dismissed with costs.

Cases considered:

Lokotui v Fifita & ors [1992] Tonga LR 18
Motuliki v Namoa & ors (1981-1988) Tonga LR 141

Statute considered:

Land Act (Cap 132)

Counsel for the appellant	:	Mr Fonua
Counsel for the first respondent	:	Mr Kefu
Counsel for the second respondent	:	Mr Fakahua

Judgment

[1] This is an appeal from the decision of the Lord Chief Justice who summarily dismissed the appellant's application for an order for mandamus to require the Minister to perform his duty to hold an enquiry under the proviso to s.82 of the Land Act. This states:

> "Provided always that the failure of the deceased lawful male holder of any town or tax allotment to register the same under the provisions of Division II or (should read "of") Part VIII of this Act shall not of itself be a bar to the grant to his heir under this section, and that provided the Minister of Lands is satisfied upon enquiry that the deceased person was the lawful holder of the said allotment it shall be lawful for him to effect posthumous registration at the request of the heir."

[2] Section 4 provides that the holder of a tax or town allotment has a life estate in the land. Section 82 provides, subject to the rights of a widow under s.80, for the order of succession to such allotments on the death of the last lawful male holder.

[3] Section 122 relevantly provides:

> "Whenever any person becomes entitled under the rules governing the devolution of allotments ... to an allotment he shall within one month of so becoming entitled present to the Minister the deed of grant formerly in the possession of his predecessor in title ..."

It then provides for the registration of the successor on the original and duplicate deeds of grant.

[4] The appeal relates to town allotment *Ha'akune* DG 109/61 and tax allotment *Konga Nualei* lot 40. Esafe Tonga (the great grandfather) became the registered holder of these allotments on 3 August 1907 and remained the holder until his death on 10 January 1928. His widow Seini then became entitled to a life estate under s.80 but it is not known whether she sought or obtained registration before her death on 3 February 1929.

[5] The great grandfather and his widow were survived by their eldest son Mokofisi Tonga, who was the former's heir, and by at least one younger brother, 'Olive Tonga. Mokofisi Tonga was the appellant's grandfather.

[6] Under the rule of succession in s.82(c) the grandfather, the heir of the deceased last male holder, became entitled to the allotments. It seems that the grandfather did not lodge a claim and his younger brother 'Olive became the registered holder on 1 August 1929. This result might have been achieved lawfully by the grandfather surrendering the allotments under s.54(1) or by operation of law under s.87 and subsequent grant to 'Olive under s.88. There is nothing before the Court which reveals the basis of 'Olive's registration, but we do know that the grandfather did not challenge that registration in his lifetime.

[7] Sione Moala Tonga (the father) was the eldest son and heir of the grandfather. If the grandfather and father had lodged their claims to the allotments within the 12 months set by s.87, had become registered, and remained the holder until their deaths, the appellant, who was his father's heir, would have become entitled to those allotments on the death of the father on 13 January 1982, subject to lodging his claim within 12 months.

[8] Section 170 relevantly provides:

> "No person shall bring in the Court [the Land 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 ..."

[9] The appellant claims through his father and grandfather. Assuming in the appellant's favour that the registration of 'Olive Tonga on 1August 1929 was wrongful for some reason, the grandfather's right to bring an action in the Land Court to recover the allotments accrued at that time, and his claim would have been barred in 1939 by the then equivalent of s.170, prior to his death sometime in the 1940's.

[10] On 30 January 2014 the solicitor for the appellant wrote to the Minister outlining the appellant's claim to the allotments through his father and grandfather. The

Minister was asked to exercise his powers under the proviso to s.82; hold an enquiry, and effect a posthumous registration of the allotments in the name of the appellant. The letter concluded by stating that if no reply was received within 28 days proceedings would be commenced "to give effect to the proviso ..."

[11] Unfortunately the Minister did not reply to this letter and on 28 March the appellant commenced proceedings in the Land Court claiming an order of mandamus requiring the Minister to conduct an inquiry under the proviso to determine if the grandfather "failed" to have himself registered following the death of his mother on 3 February 1929.

[12] On 9 May the Minister applied for an order that the statement of claim be struck out because it did not disclose a reasonable cause of action. On 27 June the Chief Justice held that the appellant's action was time barred because he claimed through ancestors whose claims were time barred and he dismissed the action. This is the clear effect of s.170 and is settled law: *Motuliki v Namoa & ors* (1981-1988) Tonga LR 141; and *Lokotui v Fifita & ors* [1992] Tonga LR 18 CA.

[13] Mr Fonua, counsel for the appellant, submitted that an inquiry by the Minister under the proviso, and administrative action to give effect to the findings, did not involve or require an action in the Land Court. He also submitted that mandamus proceedings to require the Minister to perform his duty under the proviso were not within the jurisdiction of the Land Court and should have been brought in the Supreme Court. The appellant attempted to file the proceedings in the Supreme Court but the Registry would only accept them in the Land Court.

[14] Mr Fonua submitted that the Land Court had no power to issue the prerogative writs and the case should be treated as if it had been heard in the Supreme Court.

[15] This Court would long hesitate before deciding that a case should fail because it had been brought in the wrong Court when the plaintiff had been prevented from filing it in the correct Court by Court staff. It is not necessary to decide the point because the action was brought in the correct Court.

[16] In our judgment the appellant's claim, as the letter of demand and the relief claimed in the statement of claim made clear, was within s.149(1)(b) because it involved a "dispute", "claim", or "question of title" affecting land or any interest in land. The Minister can be sued in the Land Court in accordance with s.158, and the Court has jurisdiction under s.149(1)(b) to "hear and determine" relevant disputes, claims and questions. Accordingly all appropriate orders can be made against the Minister, including orders requiring him to perform his duties under the Act. It is not necessary to decide whether the Land Court can issue a writ of mandamus for this purpose.

[17] The proviso to s.82 protects an heir to a deceased male holder if the latter failed to register his allotment under Division II of (not "or") Part VIII of the Act, which relevantly includes s.122.

[18] The proviso to s.82 does not refer to s.87 or to the failure of "the deceased male holder" to claim the allotments as heir within 12 months from the death of the last holder.

[19] It states that the failure to register "shall not of itself be a bar to the grant to his heir," allowing full scope for the operation of any other bars to such a grant, including the time bar in s.170. Moreover the proviso can only assist an heir who is the heir of "the deceased lawful male holder." The relevant deceased male holder was the great grandfather who died on 10 January 1928. His heir was the grandfather.

[20] It was not alleged or proved that the grandfather ever became "the lawful male holder" of these allotments, but even if he did the proviso could only help his heir, the father. However the grandfather's claim, if any, became time barred in 1939 in his lifetime before the father became his heir on his death.

[21] The father never became "the lawful male holder" of these allotments because 'Olive Tonga and his successors were then the registered holders. The proviso does not assist the heir of the heir, let alone the heir of the heir of the heir.

[22] We have not overlooked the definition of holder in s.2 which applies unless the context otherwise requires. The definition includes in paragraph (c) *"any Tongan subject claiming to be interested in land which he is legally capable to hold."*

[23] There is nothing to indicate that the grandfather ever "claimed" to be interested in the allotments, and there is certainly nothing to indicate that he lodged a claim within 12 months of the death of his mother.

[24] We are inclined to the view that the context requires there to be only one "holder" as defined at any given time. On that basis the grandfather ceased to be "the holder" of these allotments at the latest on 1 August 1929, when 'Olive Tonga became the registered holder. Accordingly, when the grandfather died he was not "the deceased lawful male holder" of the allotments for the purposes of the proviso, and the appellant's claim fails for that reason also.

[25] We hold, in agreement with the Chief Justice, that the proviso to s. 82 does not enable the appellant to avoid the operation of s.170 and establish a claim to these allotments.

[26] The appeal fails, and is dismissed with costs.

Hala'ufia v Rex

Court of Appeal, Nuku'alofa
Salmon, Handley, Hansen, and Tupou JJ
AC 19/2014

24 October 2014; 31 October 2014

Criminal appeal – against conviction and sentence – no error found in the lower court's approach – appeal dismissed

The appellant was convicted of the manslaughter of Kali Fungavaka. He was sentenced to imprisonment for 11 years, the final year suspended. He appealed against conviction and sentence. The sole ground of appeal against conviction was that the Judge erred in accepting the evidence of a prosecution witness. His appeal against sentence related to the period of suspension which he claimed was inadequate.

Held:

1. The court was fully entitled to accept Mr Manu's version of the events that took place in the charge room and to prefer his evidence where it conflicted with the evidence of police officers also present.
2. In sentencing the appellant, the court adopted a starting point of 13 years imprisonment which was reduced by two years to take account of his previous good character. The period of suspension gave further recognition to his good character. The court regarded that as appropriate. The appellant had not co-operated with the authorities or shown remorse. There was no basis for a longer period of suspension. The Court of Appeal found no error in the lower court's approach. The reasons for limiting the period of suspension to one year in the exercise of discretion were cogent and persuasive.
3. The appeal against conviction and sentence was dismissed.

Counsel for the appellant : Mr 'O Pouono
Counsel for the respondent : Mr Kefu AG

Judgment

Introduction

[1] After trial before Cato J the appellant was convicted of the manslaughter of Kali Fungavaka. He was sentenced to imprisonment for 11 years, the final year suspended.

He appeals against conviction and sentence. The sole ground of appeal against conviction is that the Judge erred in accepting the evidence of a prosecution witness, 'Onitulei Manu. His appeal against sentence relates to the period of suspension which he claims is inadequate.

Background

[2] On 17 August 2012 Mr Fungavaka was socialising with others at the Time Out bar in the main street of Nuku'alofa. He was a Tongan, living in New Zealand and employed as a police officer. He was visiting Tonga to attend his grandfather's funeral, and was drinking at the bar with a relative, Tavake, following the funeral. Both were intoxicated.

[3] The appellant, who held the rank of Inspector, was the officer in charge of a group of Tongan police officers known as the Tactical Response Group (TRG) which arrived at the bar. The TRG is responsible for policing difficult and dangerous situations and also routinely polices bars and nightclubs in Nuku'alofa.

[4] In circumstances which did not emerge clearly from the evidence Mr Fungavaka and Tavake were arrested for drunkenness. Tavake was placed in the police vehicle. Mr Fungavaka resisted arrest and instead of being placed in the vehicle was escorted to the police station on foot by two members of the TRG, Mr Maile and Mr Faletau. The station is only a short distance from the bar.

[5] The Judge found that in the course of being escorted to the station Mr Fungavaka was hit by Mr Maile with some sort of weapon and punched by Mr Faletau. At a later stage both were involved in further assaults on Mr Fungavaka leading to Mr Maile's conviction for manslaughter and Mr Faletau's for assault with intent to cause grevious bodily harm.

[6] The assault which led to the appellant's conviction, and which was found to be a substantial cause of Mr Fungavaka's death, took place immediately after his arrival at the police station. He was first taken into a room at the front of the police station known as the charge room. A counter separated the charge room from the area open to the public which is accessed immediately on entry into the building. Mr Manu, the witness whose evidence the appellant seeks to impugn, was standing near the counter in this public area when Mr Fungavaka was brought in. He was taken by the two arresting officers behind the counter.

[7] The evidence of Mr Manu was that while Mr Fungavaka was being taken through the charge room by Mr Maile and Mr Faletau the appellant entered and struck him on the top of his head, towards the back, with a torch he was carrying. He said the torch was about one and a half feet long. Mr Manu said that the appellant then poked Mr Fungavaka in the chest with his torch. Mr Fungavaka was then taken into the watchhouse which adjoins the charge room. Mr Manu said he heard thumping sounds and Mr Fungavaka screaming abuse. He identified the appellant as one of those present at the scene.

[8] The Judge found, relying on the evidence of a number of other witnesses, that while Mr Fungavaka was in the watchhouse he was strangled by the appellant with such force as to fracture the thyroid cartilage in his throat.

[9] From the watchhouse Mr Fungavaka was taken to the cells, dragged by Mr Maile and Faletau. The Judge found that in the course of this manouvre Mr Maile stomped "with all his might" on Mr Fungavaka's face. He was placed in a cell with other intoxicated prisoners, one of whom was the son of Mr Manu who had been arrested earlier for drunkenness. There was an altercation as a result of which Mr Manu's son also faced a charge of manslaughter. He was tried separately, acquitted of manslaughter but convicted of assault with intent to cause grevious bodily harm.

[10] Mr Fungavaka was then taken to another cell where it became obvious that his medical condition was deteriorating. He was taken to hospital where he underwent surgery to alleviate pressure on his brain. Treatment was unsuccessful. He died on 23 August 2012. A pathologist, Dr Fintan Garavan, told the Court that he had suffered a fractured skull and other head injuries. They caused bleeding in the brain which was the direct cause of death. He said the pressure on the throat that caused the fracture of the thyroid cartilage would have been a secondary factor which materially contributed to death.

[11] Cato J found that the appellant was responsible for the skull fracture by means of the blow with the torch to Mr Fungavaka's head. He said that was a substantial cause of death. The judge was also satisfied that the appellant committed the act of strangulation which, by disrupting the blood flow and oxygen to the brain, also materially contributed to death.

The conviction appeal

[12] Mr Pouono submitted that there were three reasons why the Judge erred in accepting the evidence of 'Onitulei Manu:

(a) His evidence was "tainted" because of the nature of his son's involvement in the case.
(b) His evidence was, in any event, unreliable.
(c) The Judge failed to have proper regard for Mr Manu's previous conviction.

Involvement of son

[13] Mr Pouono argued that in the circumstances Mr Manu could be expected to, as he put it, "put the blame on others but not on his own flesh and blood". He submitted that Mr Manu had an obvious incentive to tailor his evidence to mesh with the pathologist's evidence as to the location and force of the lethal blow to the skull. He pointed to the Judge's reliance on the pathologist's evidence as corroborating Mr Manu's account of the incident.

[14] The concern that Mr Manu's evidence could have been designed to protect his son was put to Mr Manu in evidence and raised with the Judge in closing submissions. Mr Manu rejected the suggestion that he bore ill-will towards the

appellant; he said the appellant's brother was his next door neighbour and married to a relative. He went on to specifically address the involvement of his son in the following passage of his evidence:

> "If my son is convicted for this charge of murder or manslaughter he should be going to prison for his crime because the reason we are here is to search for the truth."

[15] In his decision the Judge acknowledged the concern that Mr Manu had a motive to give false evidence. He accepted Mr Manu's evidence that he was not badly disposed towards the appellant and noted his evidence that, if guilty, his son should be punished. In treating the pathologist's evidence as corroborative of Mr Manu's account, he observed that there was no suggestion that Mr Manu knew of the contents of the pathologist's report.

[16] In the absence of any evidence to support the suggestion that Mr Manu may have tailored his evidence to favour his son, the Judge was fully entitled to accept Mr Manu's denial. It seems probable in any event that Mr Manu was not aware of what the pathologist was going to say. As the Judge indicated, it was not suggested otherwise in evidence. And it appears the pathologist's reports (there were two) were produced after Mr Manu made a statement to the police which, we were told, was consistent with his evidence at the trial.

[17] Of relevance too is that the Crown case was not advanced as a choice between two mutually exclusive alternatives - that death was caused by the blow struck by the appellant or as a result of the assault by Mr Manu's son in the cells. It was that the two were either jointly or individually responsible for causing death. By implicating the appellant, Mr Manu was not exonerating his son, as he himself seemed to recognise in his evidence.

Evidence not reliable

[18] In support of his contention that Mr Manu's evidence was not reliable Mr Pouono pointed to four matters:

(a) Mr Manu's evidence was not corroborated by other eye witnesses.
(b) The confined nature of the area in which the assault occurred.
(c) Mr Manu's account was implausible having regard to the number of people in the area.
(d) No police officer saw the appellant hit Mr Fungavaka with a torch.

These criticisms are interrelated and it is convenient to deal with them together.

[19] As previously noted the incident took place in the charge room where Mr Fungavaka was being held, one on either side by Messrs Maile and Faletau. Mr Manu was the only member of the public present, standing as we have said, on the other side of a counter which separated the public area from the charge room itself. At the

other end of the room a passage led to two separate rooms, the charge office on the left and the watchhouse on the right.

[20] There were two other police officers in the charge room proper at the time, Constables 'Aho and Vi. They were sitting at the counter facing the public area with their backs to the area where the assault took place. Mr Manu said there was a third police officer present, Assistant Deputy Commissioner Fua, who was standing next to him in the public area. There were three police officers in the charge office at the time with what the Judge said was a restricted view of the charge room.

[21] It does not seem to have been suggested to the trial Judge that the area was too restricted or too crowded for the incident to occur as described by Mr Manu and there is nothing in the evidence to which we were referred to support the suggestion. The photographs produced in evidence depict a spacious area. The Judge took a view and must be taken to have been satisfied that there was enough room for the assault to have taken place as described.

[22] It is true that none of the police officers present was able to confirm Mr Manu's account. But three officers saw the appellant carrying a torch and the Judge clearly had concerns about the evidence of the three other police officers said to have been present. He described Constables 'Aho and Vi as "rather vague" about what they saw. Mr Kefu, who was senior Crown counsel at the trial had submitted that Assistant Deputy Commissioner Fua, who had claimed to be outside at all material times, had not been frank in his evidence and had seen more than he was prepared to admit. The Judge made no express finding on the issue as Mr Fua had been an early prosecution witness and had not been challenged in cross-examination. However, in preferring the evidence of Mr Manu he implicitly rejected Mr Fua's claim to have seen nothing of the incident in the charge room.

[23] Although Mr Pouono doubted the Judges finding that the officers in the charge office had a restricted view of the area in which the assault occurred, the photographic evidence shows that clearly to be the case. Further, two of the three officers in the charge office had their backs to the charge room at the relevant time.

[24] None of the matters raised by Mr Pouono give any cause for concern about the Judge's view that Mr Manu's evidence was reliable. It was corroborated by the pathologist's evidence, not only in relation to the blow to the head but also as it concerned what Mr Manu had described as the poke to the chest with the torch which followed. There was bruising to the deceased's chest which was consistent with Mr Manu's description of what happened.

[25] In his admirably comprehensive and careful analysis of the evidence Cato J made a convincing case for accepting Mr Manu's evidence. Nothing has been raised which would cause us to doubt his assessment.

Previous Conviction

[26] Mr Manu accepted that he had previous convictions for assault, indecent assault and drug offending. The Judge acknowledged his criminal history and the

consequential need to approach his evidence with caution. As our earlier discussion shows, he plainly did so.

[27] We are left in no doubt that the Judge was fully entitled to accept Mr Manu's version of the events that took place in the charge room and to prefer his evidence where it conflicted with the evidence of police officers also present.

Sentence Appeal

[28] There was no criticism of the term of imprisonment imposed by the Judge. The sole ground of appeal is that the period of suspension was inadequate. Mr Pouono submitted that having regard to the appellant's previous good character and family responsibilities – he is a 44 year old man with a young family – the period of suspension should have been 3 years.

[29] In sentencing the appellant, Cato J adopted a starting point of 13 years imprisonment which he reduced by 2 years to take account of his previous good character. The period of suspension gave further recognition to his good character. The Judge regarded that as appropriate. The appellant had not co-operated with the authorities or shown remorse. There was no basis for a longer period of suspension.

[30] We find no error in the Judge's approach. His reasons for limiting the period of suspension to one year in the exercise of his discretion are cogent and persuasive.

Result

[31] The appeal against conviction and sentence is dismissed.

Langi v Lavaki anors

Court of Appeal, Nuku'alofa
Salmon, Handley, Hansen, and Tupou JJ
AC 22/2013

27 October 2014; 31 October 2014

Civil procedure – leave to withdraw appeal – appeal dismissed – no costs sought

The appellant sought leave to withdraw the appeal. The respondent did not oppose the application and did not seek costs.

10 Held:

1. Appeal was dismissed and there was no order for costs.

Counsel for the respondents : Mr Kefu

Memorandum of the Court

[1] When this case was called the appellant appeared in person and sought leave to withdraw the appeal. For the Respondents Mr Kefu did not oppose the application and did not seek costs. He advised the Court that the Respondents would not be pursuing the costs awarded in the Supreme Court.

[2] The appeal is dismissed. There will be no order for costs.

Strauss anor v Warner anors

Court of Appeal, Nuku'alofa
Salmon, Handley, Hansen, and Tupou JJ
AC 12/2014

27 October 2014; 31 October 2014

Civil procedure – appeal against conflicting provisions in order – resolved using slip procedure – appeal dismissed

The Lord Chief Justice made an order on 8 April 2014 which brought to an end a receivership which resulted in the sale of the shares in Seaview Lodge to repay a judgment debt. The appellant appealed on the ground that the order had two conflicting provisions. The conflict was resolved using the slip provisions but the appellants were not aware of the corrected order.

Held:

1. The court was satisfied that there was no ground on which the appeal could succeed and it was accordingly dismissed. There was no order for costs.

Counsel for the appellants : Mr O Pouono
Counsel for the respondents : Mr L Niu SC

Judgment

[1] This is an appeal against an order of the Lord Chief Justice made on 8 April 2014 bringing to an end a receivership which resulted in the sale of the shares in Seaview Lodge to repay a judgment debt.

[2] The complaint made in the appeal was that the order had two conflicting provisions – one extending the receivership for one week and then terminating it, the other terminating it immediately. The conflict was resolved by using the slip provisions in the Supreme Court Rules and deleting the clause providing for immediate termination.

[3] The appellants were not aware of the corrected order until it was brought to counsel's attention by this Court. However it seems that the extension of the order was unnecessary anyway because the order creating the receivership seems to have no termination date.

[4] When the appeal was called Mr Pouono advised the Court that he had no instructions to withdraw the appeal but could make no submissions to support it. Mr Niu for the Respondents sought that the appeal be dismissed but did not seek costs.

[5] We are satisfied that there is no ground on which the appeal could succeed and it is accordingly dismissed. There will be no order for costs.

'Unuaki 'O Tonga Royal University of Technology anor v Kingdom of Tonga

Court of Appeal, Nuku'alofa
Salmon, Handley, Hansen, and Tupou JJ
AC 21/2014

28 October2014; 31 October 2014

Civil procedure – appeal withdrawn by consent – memorandum of the court varying the order

25th July 2014 the Lord Chief Justice made an interlocutory order in proceedings brought by the respondent, that required that vacant possession be given within 28 days, of the Tonga National Centre occupied by the appellants. The appellant appealed but later advised that the appeal was withdrawn by consent.

Held:

1. The order of the Chief Justice was varied accordingly. The appellants must vacate the Tonga National Centre on or before 12 December 2014. The appeal was otherwise dismissed.

Counsel for the appellants	:	Mr Piukala and Mr Pouono
Counsel for the respondent	:	Mr Kefu

Memorandum of the Court

[1] On the 25th July 2014 the Lord Chief Justice made an interlocutory order in proceedings brought by the respondent, that required that vacant possession be given within 28 days, of the Tonga National Centre occupied by the appellants. On the 13th August 2014 the Chief Justice granted leave to appeal and stayed the possession order until further order.

[2] When the appeal was called Mr Piukala for the appellants advised that by consent the appeal was withdrawn. Mr Kefu for the respondent confirmed his consent and did not seek costs. The parties agreed to an extension of time to vacate the building to the 12th December 2014.

[3] The order of the Chief Justice is varied accordingly. The appellants must now vacate the Tonga National Centre on or before 12 December 2014. The appeal is otherwise dismissed.