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2012

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Court of Appeal

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Supreme Court

Lord Chief Justice MD Scott
Hon Justice Robert Shuster (until May 2012)
Hon. Justice Charles Cato (from May 2012)

Land Court

Lord Chief Justice MD Scott
Hon Justice Robert Shuster (until May 2012)
Hon Justice Charles Cato (from May 2012)

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Solicitor General

Mr 'Asipeli 'Aminiasi Kefu

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TABLE OF CASES REPORTED

INDEX OF SUBJECT MATTER

INDEX OF CASES CONSIDERED

INDEX OF STATUTES CONSIDERED

RULES AND REGULATIONS CONSIDERED

Mahe v Mafi

Land Court, Nuku'alofa
Scott CJ, Mr Assessor Blake
LA 10/2007

9 January 2012

Land law – action for possession – equity against plaintiff raised – equitable right to be compensated

The land in question was a town allotment at Haveluloto survey plan L 5683 Lot 3 which was registered in the plaintiff's name on 9 April 1992. The plaintiff lived in New Zealand since 1977 and the land was looked after by others until 1995. In 1995 the plaintiff and the defendant's father (Samuela Mafi) had a conversation and the plaintiff said that he was looking for someone to look after the land. The defendant was present at the conversation and it was proposed that he and his recently-married wife would move onto the land. The plaintiff described the house as being in good order when the defendant and his wife took possession but the defendant claimed that the house was in a state of disrepair. The defendant moved into the house and made changes over the years. The plaintiff claimed that in 2005 the plaintiff told the defendant to leave. The plaintiff brought an action for possession. The plaintiff claimed that his permission to the defendant to occupy the land was revoked. The defendant sought dismissal of the claim on the grounds of estoppel, and/or compensation or specific performance, or adverse possession of the allotment for more than 10 years, or that the action was statutorily barred from being heard by the court.

Held:

1. The court found that on the balance of probabilities the plaintiff induced the defendant to take over the land, that he encouraged him to develop the land and the house and that he led them to believe that he would not return to Tonga but instead might visit from time to time. Further, that he gave a copy of the title deed to Latu (Exhibit P8) and that Latu gave the copy to the defendant shortly after he moved onto the land. The house was in a very poor condition when the defendant took it over and substantial repairs and improvements were necessary and were made. The court accepted that the value of these improvements which were fixtures, amounted to approximately TOP$40,000. The court rejected the plaintiff's contention that the improvements to the land were against his stated wishes.

2. The court took the pleadings, exhibits and cross-examination of the plaintiff together and found that the essence of the defendant's case was the claim that the plaintiff had dealt unfairly with him and his family. The court found that the objections did not have sufficient merit to be upheld, although they were not without some substance. The remaining question was whether the court was satisfied, on the evidence, that an equity against the plaintiff was raised.
3. The court was not satisfied that the defendants raised an equitable right unconditionally to remain on the land but was satisfied that they have raised and established the right to be compensated by way of a substantial contribution to the cost of their new home.
4. Upon payment by the plaintiff to the defendant of TOP$38,000 [TOP$40,000 less TOP$2000 received) the defendant shall vacate the land within 28 days.

Cases considered:

Crabb v Arun D. C [1976] 1 Ch 179
Fakatava v Koloamatangai & Anor (1974-1980) To.L.R. 15
Hughes v Metropolitan Rly. Co. (1887) 2 App. Cas. 439
Matavalea v Uata (1989) To.L.R 101 (PC)
Motuliki v Namoa & Ors (1990) To.L.R 61
O'Connell v Adams [1973] Crim. Law R 113
Plimmer v Wellington Corporation (1884) 9 App. Cas. 699
R v Wilson [1977] Crim. L.R 553
Robinson's Settlement [1912] 1Ch 717
Wallis's Ltd v Shell-Mex and BP [1974] 3 All ER 575

Statutes considered:

Evidence Act (Cap 15)
Land Act (Cap 132)

Rules considered:

Supreme Court Rules 2007

Counsel for the plaintiff : L M Niu
Counsel for the defendant : O Pouono

Judgment

1. The Plaintiff and the Defendant are distantly related by marriage. The Plaintiff is the adopted son of Moli Tongatu'a who was the aunt of the Defendant's father.

2. The land in question is a town allotment at Haveluloto survey plan L 5683 Lot 3 which was registered in the Plaintiff's name on 9 April 1992.

3. The Plaintiff has lived in New Zealand since 1977 and prior to its registration in his name the land was apparently "looked after" by Moli Tongatu'a or her daughter. I was not told in whose name it was registered.

4. According to witness Sione Atu Puha Latu who has for many years lived on an allotment across the road from the land, a couple named Silipa lived on the land which they then left and, it appears, left in a very bad state.

5. In 1995, after the Silipa couple had gone the Plaintiff and the Defendant's father (Samuela Mafi) had a conversation. The Plaintiff went to Samuela Mafi's house. He was visiting Tonga and was looking for someone to look after the land. The Defendant told me that he was present at a conversation between the Plaintiff and Samuela Mafi at which it was proposed that he and his recently-married wife would move onto the land. The Defendant's wife Lavinia told me that she and her husband discussed the proposal and went to visit the land.

6. On the land at that time there was a two bedroom house, a square concrete water tank and an outside toilet. The Plaintiff told me that he gave the Defendant $100 to pay for the removal of a wrecked motor vehicle. The Plaintiff described the house as being in good order when the Defendant and his wife took possession but the Defendant told me that the house was in a state of disrepair. His evidence, which was broadly supported by Lavinia, was that the house was uninhabitable. He told me that there were holes in the walls and floors, that much of the house was rotten, that doors were missing, that part of the roof had to be replaced and that the electricity wiring was not usable. Lavinia told me that she was not at all happy with the condition of the house and the land but that she accepted the Defendant's assurances that they would be able to make improvements. Before moving into the house some months after the agreement, they did a "massive cleanup" of the house and compound removing rotten trees, broken vehicles and other rubbish.

7. According to the Plaintiff, he travelled to and from Tonga several times over the next several years after 1995 but he did not actually visit the land again until 2003. He had come over for a church conference with his family but their plan to stay at an hotel had fallen through and so he asked the Defendant if he and his family could stay with them in the house. This was Christmas 2003 and the Defendant agreed.

8. The Plaintiff told me that when he and his family arrived at the land he noticed that there had been a number of changes since his last visit in 1995. Now there was a shop fronting onto the road. The square water tank had gone and the house had been extended. The Plaintiff's evidence was that he was very surprised and disappointed by what he found but, as the families were getting on so well together and were enjoying Christmas so much he was "too embarrassed" to raise the matter. After staying with the Defendant in the house on the land for a few days, the Plaintiff and his family returned to New Zealand.

9. According to the Plaintiff he telephoned the Defendant in 2004 from New Zealand and told him that he was displeased with the changes that had been made without his permission and that he wanted the Defendant to leave the land. According to the Statement of Claim the Plaintiff did not tell the Defendant to leave until 2005 and this is also what Lavinia told me. This is consistent with the Plaintiff's later evidence that he told the Defendant to move in 2005 when he stayed with his brother and noticed that the original concrete tank had gone. A letter from the Plaintiff to the Defendant (P3) which is one of the very few documents available in this case states:

> "We had talked by telephone and I even came to Tonga in December 2005 in my effort that you vacate the allotment."

10. The Defendant and his family are still occupying the land. This is an action for possession. The Plaintiff's case is that his permission to the Defendant to occupy the land has been revoked. The Defendant seeks dismissal of the claim on the following grounds:

> "(i) doctrine of estoppel applies thus defeating the Plaintiff's claim for an eviction order; and/or
> (ii) compensation for the sum of $40,000 or in the alternative to this remedy;
> (iii) specific performance of the agreement by the Plaintiff to provide the Defendant with a container load of timber and corrugated iron to enable him to construct a replacement house on a new piece of land;
> (iv) adverse possession of the allotment for more than 10 years;
> (v) the action is statutorily barred from being heard by this court."

11. As I find it, items (i), (ii), and (iii) can be dealt with together. It will be convenient first to deal with items (iv) and (v).

12. As explained in *Wallis's Ltd v Shell-Mex and BP* [1974] 3 All ER 575 in order to establish adverse possession:

> "The true owner must have discontinued possession or have been dispossessed and another must have taken it adversely to him. There must be something of an ouster of the true owner by the wrongful possessor."

Mr. Pouono told me that the Plaintiff's title to the land was not in issue and paragraph 10 of the Defence is to the effect that in 2005 the Defendant agreed to leave the Plaintiff's land providing that he was properly compensated. The Defendant's evidence was that in 2002 he sought the Plaintiff's permission to build the shop. While it is the Defendant's case that the Plaintiff has broken one or more of his promises, it is not the Defendant's assertion that he was ever on the land except as the Plaintiff's licensee accordingly, there is no question of adverse possession or of section 170 of the Land Act (the Act) having any application.

13. The central question before the court, alluded to in items (i), (ii) and (iii) of the prayer of the Statement of Defence set out in paragraph [10] above, is whether the Plaintiffs right to evict the Defendant and his family from the land should, in equity, be restricted either absolutely or conditionally.

14. In Tonga the equitable doctrine of estoppel has been recognized in Part VIII of the Evidence Act (Cap 15). A straight forward explanation of how the doctrine works is given by Lord Denning in *Crabb v Arun D. C* [1976] 1 Ch 179, 187:

> "The basis of this proprietary estoppel - as indeed of promissory estoppel - is the interposition of equity. Equity

> comes in, true to form, to mitigate the rigours of strict law.... If I may expand on what Lord Cairns LC said in *Hughes v Metropolitan Rly. Co.* (1887) 2 App. Cas. 439, 448 "it is the first principle upon which all courts of equity proceed" that it will prevent a person from insisting on his strict legal rights — whether arising under a contract, or on his title deeds or by statute — when it would be inequitable for him to do so having regard to the dealing which have taken place between the parties."

15. When it is found that what has taken place between the parties has raised an equity against the plaintiff then the court must look at all the circumstances of the case to decide in what way the equity can be satisfied (*Plimmer v Wellington Corporation* (1884) 9 App. Cas. 699, 713, 714 and *Greasley v Cooke* [1980] 3 All ER 710, 713) and see also *Snell: Principles of Equity* 26th Edn. p632.

16. Among several examples of the doctrine being applied in Tonga are *Fakatava v Koloamatangai & Anor* (1974-1980) To.L.R. 15 in which the Plaintiff, having acquiesced in the building of a house on his land was estopped from asserting his right to possession of the land occupied by the house and *Motuliki v Namoa & Ors* (1990) To.L.R 61 in which the appellant was estopped from evicting the respondent by reason of allowing him to remain on the land from many years and build thereon a substantial house.

17. In *Matavalea v Uata* (1989) To.L.R 101 the Privy Council emphasized that because of the restrictions imposed by the Land Act no rights in land can be acquired in Tonga by virtue of an estoppel. In this way the situation is different from that in England.

18. Mr. Niu advanced two procedural arguments against finding an estoppel in this case. The first is that though mentioned in the prayers of the Statement of Defence, no particulars of the claimed estoppel were pleaded. Secondly, no allegations giving rise to the claim were put to the Plaintiff in cross-examination.

19. Order 8 rules 2(b) and 3(2) of the Supreme Court Rules require the Statement of Claim and the Statement of Defence to be pleaded with sufficient particularity to enable the parties and the court to understand the nature of the case. The purpose of these rules is to prevent unfairness by issues being raised of which notice has not previously been given. Similar principles of fairness generally require a party to put to each of his opponent's witnesses so much of his own case as concerns that witness. In criminal proceedings at least, unchallenged evidence cannot be attacked in a closing speech (see *O'Connell v Adams* [1973] Crim. Law R 113).

20. Even in Criminal cases, however, it has been held that the judge has a discretion, if necessary, to allow a witness to be recalled (*R v Wilson* [1977] Crim. L.R 553) and as explained by Buckley LJ in *Robinson's Settlement* [1912] 1Ch 717, 728 the purpose of the rule requiring the matter to be adequately pleaded is:

> "...for reasons of practice and justice and convenience to require the party to tell his opponent what he is coming to the

> Court to prove. If he does not do that the Court will deal with it in one of two ways. It may say that it is not open to him, that he has not raised it and will not be allowed to rely on it, or it may give him leave to amend by raising it and protect the other party if necessary by letting the case stand over. The rule is not one that excludes from the consideration of the court the relevant subject matter for decision simply on the ground that it is not pleaded."

21. In the present case, no particulars of the nature of the estoppel were sought under the provisions of RSC 08 r 6 and no application was made to recall the Plaintiff to deal with matters not raised in evidence until the Defendant and his wife were called.

22. In my view, taking the pleadings, exhibits and cross-examination of the Plaintiff together and as a whole, it was perfectly plain that the essence of the Defendant's case was a claim that the Plaintiff had dealt unfairly with him and his family. In my view Mr. Niu's objections, though not without some substance do not have sufficient merit to be upheld. The remaining question is whether the court is satisfied, on the evidence, that an equity against the Plaintiff has in fact been raised.

23. As has been seen, it is not disputed that the Defendant came on the land after it was agreed that the Defendant would look after the land while the Plaintiff was overseas. It is not disputed that the Defendant came on to the land in 1995 and remains there today. It is accepted that either in 2004 or 2005 the Plaintiff told the Defendant that he wanted him to leave the land. The principal areas of dispute are:

(i) The condition of the land and house when the Defendant went into occupation;
(ii) Whether the alterations to the house, the erection of the shop and the removal of the water tank took place with the encouragement or acquiescence of the Plaintiff or alternatively against his wishes;
(iii) The value of the improvements made to the property;
(iv) Whether the Defendant moved onto the land or alternatively remained on the land as a result of representation made by the Plaintiff to the effect that he would transfer the land to them "one day";
(v) Whether it was agreed between the parties that the Defendant would leave the land after receiving a container load of corrugated iron and timber as compensation.

24. Having seen and heard the witnesses including the independent witness Sione Atu, Puha Latu, I am satisfied, on the balance of probabilities that the Plaintiff induced the Defendant to take over the land, that he encouraged him to develop the land and the house and that he led them to believe that he would not return to Tonga but instead might visit from time to time. I accept that he gave a copy of the title deed to Latu (Exhibit P8) and that Latu gave the copy to the Defendant shortly after he moved onto the land. I accept that the house was in a very poor condition when the Defendant took it over and that substantial repairs and improvements were necessary and were made. I accept that the value of these improvements which are plainly

fixtures, amounts to approximately TOP$40,000. I reject the Plaintiff's contention that the improvements to the land were against his stated wishes. In particular I reject his evidence that he did not complain about the shop because he was embarrassed and I reject his claim to have informed the Defendant to leave as early as 2004. In my opinion, the probability is that the Plaintiff simply changed his mind about returning to Tonga either in late 2004 or in 2005 when he visited his brother and once he had changed his mind he tried to remove the Defendant from the land.

25. In my opinion it is clear that when the Defendant began to complain about being evicted from the house and land upon which he had invested so much effort and expense, the Plaintiff tried to buy him off. I accept the evidence of the Defendant and Lavinia that compensation was discussed and that a container of corrugated iron and timber was agreed to, but was not forthcoming. That the Plaintiff accepted that he owed the Defendant something is clear from the letter already referred to in paragraph [9] above and from the $2000 sent by the Plaintiff to the Defendant.

26. The suggested representation that the land would be transferred to the Defendant is less clear. I believe it may have been hinted at or even mentioned as a possibility when the Defendant was discussing moving onto the land. The parties had little contact between 1995 and 2003 and I doubt whether the matter was raised again in any more defined way. I accept that the Plaintiff did in fact give some form of undertaking to transfer the land to the Defendant when he visited in 2003 but by then they were already well established on the land, with no plans to move, and it has not been shown that the Defendant altered his conduct in any way as a result of the representation made.

27. Mr. Niu suggested that the Defendant and his family had benefitted by living on the land rent-free and that the improvements were for their own benefit. In my view however the Plaintiff took the benefit of having his property looked after for him free of charge and the improvements to the property (with the possible exception of the shop – value approximately TOP $6000) are to his advantage.

28. In my view the Defendant and his family would not have moved onto the land, remained there and in effect made it their own unless they had been led to believe by the Plaintiff either that he would not return to claim it or alternatively, if he did so, that they would be compensated for the improvements they had made.

29. I am not satisfied that the Defendants have raised an equitable right unconditionally to remain on the land but I am satisfied that they have raised and established the right to be compensated by way of a substantial contribution to the cost of their new home.

30. Upon payment by the Plaintiff to the Defendant of TOP$38,000 [TOP$40,000 less TOP$2000 received) the Defendant shall vacate the land within 28 days. I will hear counsel as to costs and any other consequential matters.

Ministry of Prisons anor v Finau

Supreme Court, Nuku'alofa
Scott CJ
CV 44/12

31 January 2012

Evidence – Prisons Appeal Tribunal – Evidence Act provisions did not apply to disciplinary proceedings
Judicial review – Prisons Appeal Tribunal applied Evidence Act provisions to disciplinary proceedings - quashed

The respondent was a Prison Officer Class III employed by the applicants. On 19 November 2011 the respondent was charged with four counts of unprofessional and discreditable conduct contrary to the Prisons Act 2010. On 21 November 2011 the respondent appeared before his officer in charge who referred the charges to the Commissioner of Prisons in view of their seriousness. On 22 November and 6 December 2011 a hearing was held by the Commissioner who found 3 of the 4 charges to have been proved. A penalty of dismissal was imposed. The respondent appealed against the findings of guilt and the penalty to the Prisons Appeal Tribunal. The Tribunal allowed the respondent's appeal on the basis that there was no sufficient evidence established as all the accomplice witnesses were not corroborated. The applicants moved for Judicial Review of the Tribunal's decision on the ground that the Tribunal erred in a holding that either the Evidence Act or common law required the evidence of an accomplice to be corroborated in disciplinary proceedings brought pursuant to the provisions of Part VII division II of the Prisons Act.

Held:

1. Section 126 of the Evidence Act (Cap 15) prohibits conviction without corroboration. This applied only to criminal proceedings where a criminal conviction could be recorded against an accused.
2. The proceedings before the Commissioner of Prisons were disciplinary and not criminal and accordingly section 126 did not apply. Confirmation was found in section 102(a) of the Prisons Act 2010 which provided that the officer in charge was not bound by the rules of evidence but may, subject to any regulation, inform himself about the matter in a way that the officer considered fit.
3. The standard of proof in disciplinary proceedings before a domestic tribunal was the civil standard of proof on the balance of probabilities. The degree of a probability that must be established will however vary from

case to case. Where the allegations are serious and dismissal was likely if they are proved, than a degree of probability was required that was commensurate with the occasion. Where the evidence of a person who should be considered an accomplice was relied on then the officer in charge or Commissioner should warn himself of the dangers of acting on that evidence unless it was corroborated. This was particularly the case where the witness might have a purpose of his own to serve. If satisfied, however, that the evidence was reliable, then there was nothing to prevent a finding of guilty being reached.

4. The Prison Appeals Tribunal erred in applying section 126 of the Evidence Act to the disciplinary proceedings against the respondent. The decision of the Tribunal was quashed and the matter referred back to a differently constituted Tribunal for reconsideration.

Cases considered:

Blyth v Blyth [1996] 1 All ER 524
Davies v DPP [1974] AC 378
R v Baskerville [1916] 2 KB 658
R v Hampshire County Council Ex p. Ellerton [1985] 1 WLR 749

Statutes considered:

Evidence Act (Cap 15)
Prisons Act 2010

Counsel for the applicants	:	Mr 'A Kefu
Counsel for the respondent	:	Mr S Tu'utafaiva

Judgment

[1] The Respondent is a Prison Officer Class III employed by the Applicants.

[2] On 19 November 2011 the Respondent was charged with four counts of unprofessional and discreditable conduct contrary to section 99 (d) of the Prisons Act 2010 (the Act).

[3] On 21 November 2011 the Respondent appeared before his officer in charge who, pursuant to section 106 of the Act, decided to refer the charges to the Commissioner of Prisons in view of their seriousness.

[4] On 22 November and 6 December 2011 a hearing was held by the Commissioner who found 3 of the 4 charges to have been proved. A penalty of dismissal was imposed pursuant to section 107(3)(f) of the Act.

[5] The Respondent appealed against the findings of guilt and the penalty to the Prisons Appeal Tribunal established under section 108 of the Act. The 8 grounds of appeal are listed in Exhibit B to an affidavit of Billy Gefferies Tofavaha sworn on 27 June 2012.

[6] The record of the proceeding before the Appeals Tribunal is Exhibit F to the same affidavit. Although the record has been translated into English it falls some way short of exactly revealing what occurred before the Tribunal. Doing the best that I can, however, it appears reasonably clear that grounds 1, 2, 3, 4, 5, 7 & 8, if proceeded with, did not find favour with the Tribunal which did not mention them in its Ruling allowing the appeal, dated 28 March 2012.

[7] The remaining ground, ground 6, reads as follows:

> "there is no sufficient evidence established to support the witnesses at a stage for the Court to prove allegation beyond reasonable doubt" (sic).

[8] The Tribunal allowed the Respondent's appeal on this ground stating:

> "... on the basis that there is no sufficient evidence as established as all the accomplice witnesses were not corroborated"

[9] There is reference in the Respondent's appeal to the Tribunal to the case of *Davies-v-DPP* [1974] AC 378 and in the Statement of Defence filed herein the Respondent pleaded that the Tribunal:

> "was correct in law to apply section 126 of the Evidence Act because, among other things, the allegations against the Defendant are serious criminal allegations against a civil servant".

In fact, neither *Davies* nor section 126 was specifically referred to by the Tribunal.

[10] Following grant of leave on 29 June 2012, the Applicants now move for Judicial Review of the Tribunal's decision to allow the appeal on the ground that the Tribunal erred in a holding that either the Evidence Act or common law requires the evidence of an accomplice to be corroborated in disciplinary proceedings brought pursuant to the provisions of Part VII division II of the Prisons Act.

[11] The Evidence Act (Cap 15) dates back to August 1926 and is stated to be "an Act to declare the law of evidence". As will be seen it deals with both criminal and civil law; therefore, the wording of each particular section must carefully be considered to ascertain whether it applies to both.

[12] Section 126 reads as follows:

> "An accused person shall not be convicted upon the testimony of an accomplice unless it is corroborated in some material particular by other evidence".

This prohibition is slightly different from the rule that it is the duty of a judge in a criminal trial to warn the jury that although they may convict on the evidence of an accomplice, it is dangerous so to do unless the evidence is corroborated (see *Davies-*

v-DPP [1954] AC 378 and *R-v-Baskerville* [1916] 2 KB 658). Whereas section 126 prohibits conviction without corroboration, the rule in *Davies* only requires the Court to warn the jury, or itself when sitting alone, of the danger of convicting without corroboration.

[13] In my opinion there can be no doubt that both section 126 and the rule in *Davies* only apply to criminal proceedings i.e proceedings which, if resolved against the accused, will result in a criminal conviction being recorded against him.

[14] Section 100 of the Act provides that:

> "1) the Commissioner of Prisons shall immediately inform the Police Commissioner of any instance where a prison officer is *alleged* to have committed a criminal offence;
> 2) Proceedings against a prison officer *alleged* to have committed a criminal offence shall be instituted by the police" (emphasis added)

In my view this section does not curtail the right of the Commissioner of Prisons to elect to treat misconduct which is prima facie both disciplinary and criminal as merely disciplinary. If the Commissioner, having examined all the circumstances, comes to the conclusion that the misconduct ought to be treated as being merely disciplinary, then it is open to him not to "allege" that the misconduct was criminal. If he does not allege criminality then the misconduct does not have to be referred to the Police.

[15] In my view the procedure followed by the officer in charge and by the Commissioner was beyond reproach. The proceedings before them were disciplinary and not criminal and accordingly section 126 did not apply. Further confirmation for this view is to be found in section 102(a) of the Act which provides that the officer in charge (and by application of section 107 (1) — the Commissioner):

> "shall not be bound by the rules of evidence but may, subject to any regulation, inform himself about the matter in a way that the officer thinks fit".

[16] The standard of proof in disciplinary proceedings before a domestic tribunal is the civil standard of proof on the balance of probabilities (*R-v-Hampshire County Council Ex p. Ellerton* [1985] 1 WLR 749).

The degree of a probability that must be established will however vary from case to case. Where the allegations are serious and dismissal is likely if they are proved, than a degree of probability is required that is commensurate with the occasion (see e.g. *Blyth v Blyth* [1996] 1 All ER 524). Where the evidence of a person who should be considered an accomplice is relied on then the officer in charge or Commissioner should warn himself of the dangers of acting on that evidence unless it is corroborated. This is particularly the case where the witness might have a purpose of his own to serve. If satisfied, however, that the evidence is reliable, then there is nothing to prevent a finding of guilty being reached.

[17] The Prison Appeals Tribunal erred in applying section 126 of the Evidence Act to the disciplinary proceedings against the Respondent. The decision of the Tribunal is quashed and the matter referred back to a differently constituted Tribunal for reconsideration in the light of this judgment.

Re Matheny and Matheny

Supreme Court, Nuku'alofa
Scott CJ
FA 121/2011

22 February 2011

Adoption – inter-country adoption application – considered United Nations Convention on the Rights of the Child – granted application

The applicants, Mr and Mrs Matheny, applied to adopt two young children who were born illegitimately in Tonga in September and October 2011. The applicants were both members of the Church of Latter Day Saints and lived in Utah, USA. They were married in 1991, had four children of their own aged 19, 16, 15 and 10 and had adopted another child, aged 7. The applicants came to Tonga to find two babies to adopt. On their second visit they were able to make contact with the natural mothers and obtained their consent for the adoption. Since the decisions to offer for adoption was taken in September and October 2011, the children were in the care of a child minder and were no longer in contact with their mothers.

Held:

1. The court found that the applicants were able to offer the children a secure family environment and a high quality upbringing. By contrast the natural mothers have severed all connections with the children whose future with them was quite uncertain.
2. Article 21(b) of the United Nations Convention on the Rights of the Child recognised that "inter-country adoption may be considered as an alternative means of children's care, if the child cannot be placed in a foster or adoptive family or cannot in any suitable manner be cared for in the child's country of origin". The removal of children from one ethnic environment and their placement in another without the possibility of ever establishing contact with their blood relations could cause problems. The court considered whether those concerns should outweigh the clear advantages which adoption held for the children whose welfare was the paramount consideration.
3. It was made clear that Tonga did not prefer to export its children. The better practice was for children to be locally placed. However, the court was satisfied that the adoption orders should be made. This decision must not be taken as any form of precedent. The particular circumstances of each case will determine its outcome.

Statute considered:
Guardianship Act 2004

Rules considered:
United Nations Convention on the Rights of the Child

Counsel for the Guardian ad litem	:	Ms JL Lutui
Counsel for the applicants	:	Mr T Fakahua

Order

[1] The applicants, Mr and Mrs Matheny are seeking to adopt these two young children who were born illegitimately in Tonga in September and October 2011.

[2] On 28 October 2011 the Solicitor General was appointed the childrens' Guardian ad Litem and a report was prepared and filed on 8 November 2011.

Counsel Juliana Lafaiali'i — Lutui recommended that letters of adoption as sought by the applicants be granted.

[3] Kalalaine's mother is aged 20. The father of the child was said to be a married man who has emigrated to the United States with his family. The mother is unemployed and living with her sister.

[4] William's mother is aged 24. At about the time the child was born his father who was living in a de-facto relationship with his mother, left her. It appears that the mother is attempting to complete a course at the Tonga Institute of Higher Education.

[5] The applicants, both members of the Church of Latter Day Saints, live at Highland, Utah, USA. According to their affidavits they were married in 1991, have four children of their own aged 19, 16, 15 and 10 and have adopted another child, aged 7. Mr Matheny holds a Master's degree in Business. He is aged 42 and is in settled, gainful employment. Mrs Matheny is a registered nurse who presently stays at home. Among other papers filed in support of the application is an "International Adoption Homestudy" prepared by Families for Children which is stated to be a licenced Child Placement Agency.

[6] According to the Homestudy the applicants "are enthusiastic about sharing their love and resources with more children. They have abundant means to successfully adopt and parent them. We find them to be a compassionate, competent couple who can offer additional children a wonderful home and family life".

[7] The Agency states that the applicants "have met the requirements necessary for adoption in Utah and the United States of America". The Agency further agrees to provide post-adoption supervision of the applicants who are willing to make themselves and their prospective adopted children available to an Agency Social Worker to manage any necessary post — Adoption Services.

[8] As emerges clearly from the papers the applicants came to Tonga in search of two babies to adopt. On their second visit they were able to make contact with the natural mothers and to obtain their consent for the adoption.

[9] It is also clear beyond doubt that the applicants are able to offer the children a secure family environment and a high quality upbringing. By contrast the natural mothers feel able to sever all connections with their own children whose future with them is quite uncertain.

[10] When the applications first came before me for directions I raised the two matters which caused me concern. These are:

(a) the requirements of the United Nations Convention on the Rights of the Child (which has been ratified by Tonga) and
(b) the fact that the applicants are both described as "Caucasians" while the children are both full Tongans.

[11] Article 21 (b) of the Convention recognises that:

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

[12] All Pacific Island countries widely practice customary adoption, usually within extended families. The custom is particularly well established in Tonga and is even recognized in law: the Guardianship Act 2004. Very often customary adoptions are formalized by legal adoption or guardianship orders but this is not always the case.

[13] I asked Crown Counsel what alternatives to the proposed adoptions had been considered but was told that since the decision to offer for adoption to the applicants had been taken, no other options had been explored.

[14] At one time anyone suggesting that the ethnicity of the child or prospective parents was a factor to be considered was regarded as having uttered some form of secular blasphemy but in recent years, particularly in New Zealand (with which Tonga has close ties) there has been a growing recognition that the removal of children from one ethnic environment and their placement in another without the possibility of ever establishing contact with their blood relations can cause problems.

[15] In the present case I have had to ask myself whether these concerns should outweigh the clear advantages which adoption holds for the children whose welfare is the paramount consideration.

[16] I was told that since the decisions to offer for adoption had been taken in September and October 2011 the children have been in the care of a child minder, that they are no longer in contact with their mothers (whom they would of course not recognise) and that they have been visited Mrs Matheny who has travelled to Tonga for that purpose. The applicants are paying the child-minder and supporting the children.

[17] I think it right to make it clear that Tonga does not prefer to export its children. As recognised by the Convention, the better practice is for children to be locally placed. In this case, however, the Guardian ad Litem recommended adoption before any investigation of the alternatives was undertaken.

[18] It is also relevant that the Church of Jesus Christ of Latter Day Saints has a major presence in Tonga and has many thousands of Tongan members. There is therefore a real link between the applicants and the country in which the children
120 were born.

[19] In all the circumstances I am satisfied that I should grant the applicants the Orders they seek. This decision must however not be taken as any form of precedent. The particular circumstances of each case will determine its outcome.

Result: Adoption orders as prayed.

Re Saavedra and Saavedra

Supreme Court, Nuku'alofa
Scott CJ
FA 71 and 72/2012

14 December 2012

Adoption – inter-country adoption application for two children (1 year and 5 years) – considered United Nations Convention on the Rights of the Child – also considered age of children – granted application for younger one; refused application for older child

Editor's note: an appeal against this judgment was dismissed on 17 April 2013.

The applicants sought to adopt two Tongan children: a girl aged 1 and her half brother aged 5 years and 7 months. The applicants were aged 29 and 31 and lived in Utah, USA. When the agreement to adopt the girl was reached with the natural mother, the applicants took the girl, Malia, and she has not been with her mother since that date. The mother also agreed that the applicants could adopt the boy, Sima. Since then, the care and control of Sima were relinquished to a friend of the applicants, resident in Tonga.

Held:

1. Inter-country adoption should only be considered if the Court was satisfied that the child could not be cared for properly in the country of his birth (United Nations Convention on the Rights of the Child, Article 21(b)).
2. The material well-being of children was only one of a number of important considerations which must be taken into account before concluding where the child's best interests lay.
3. The court did not accept that Sima could not continue to be looked after perfectly acceptably within the natural mother's extended family. He was coming up to six years old, for the first five years of which he apparently lived with his grandmother and, as late as September 2012 was still very attached to his mother and did not want to go on the aeroplane with the female applicant. The facts that the applicants were non-Tongans and that he would be taken to an environment quite different from that which he had known all his life were relevant. He hardly knew the male applicant, his proposed future father. These considerations had less force in the case of Malia who was only just over 12 months old and who had been living with the female applicant for seven months.

4. The court accepted that the natural mother was not able properly to look after both her children, and looking after two illegitimate children of the natural mother imposed an unfair and unacceptable burden on her extended family. However the court did not accept that she and they were not able to offer the required standard of care to Sima.
5. Ordinarily, the Court would avoid splitting siblings. However, the children have different fathers and Malia hardly knew her mother. It was in the best interests of Malia that adoption order be made. In the case of Sima, however, the court was not satisfied that it was in his best interests to make the order, accordingly the adoption order in his case was refused. By operation of law (Guardianship Act 2004 — Section 4(2)(a)) the natural mother will remain the sole guardian of this child, and he was to be returned to her care.

Cases considered:

Hatch & Anr v Solicitor General [2010] Tonga LR 177
Hatch & Hatch, re FA 75, 76 & 77 of 2010
Matheny & Matheny, re [2012] Tonga LR 13

Statute considered:

Guardianship Act 2004

Rules considered:

United Nations Convention on the Rights of the Child

Counsel for the Guardian ad Litem : Ms Rose L Kautoke
Counsel for the applicants : T Fakahua

Decision

[1] The Applicants are seeking to adopt two Tongan children now aged 1 and 5 years 7 months respectively.

[2] The younger child is a girl while the elder is a boy. Their mother Milika 'I-Vailahi 'Aunofo To Mei Langi Kata is aged 24 and gives her occupation as "domestic duties." The identities of the two different fathers was not revealed.

[3] The Applicants are aged 29 and 31. According to a homestudy report prepared in May and June 2012 by Families for Children, a licensed Child Placement Agency, they were married in 2006 but as yet have no children. Both are in permanent employment and are active members of the Mormon faith. After interview with both Applicants they were approved and recommended as adoptive parents "to one of two healthy children from Tonga six years or younger at the time of referral."

[4] It appears that there may have been some indirect connection between the Applicants and Mr. & Mrs. Matheny whose application to adopt two young Tongan children was granted in February 2012. According to the Applicants, they arrived in Tonga on about 8 May 2012 and made contact with the natural mother two days later.

The natural mother immediately agreed to the proposed adoption of Malia. The Applicants took Malia away on that day since when she has never lived with her mother.

[5] Although the subsequent events are not entirely clear it appears that about four days after taking Malia from her mother the Applicants returned to their home in the United States of America. Before returning they again approached the natural mother and asked for her agreement to adopt Sima also. The natural mother agreed and Sima's care and control were relinquished to a friend of the Applicants, resident in Tonga.

[6] It seems that Mrs. Saavedra returned to Tonga in July 2012 and has spent a substantial amount of the time since in the company of the children. The male Applicant, however, only seems to have spent four days in Tonga and has never appeared at any of the three hearings of this application.

[7] A Guardian ad Litem report was prepared by Ms. Kautoke in September 2012. Ms. Kautoke observed that "it seems as though the natural mother wants to get rid of her children." "She drinks, smokes and believes it is not good for the children. She also informed me that the Applicants are in a better position to care for the children despite knowing them for a few months only."

[8] While Ms. Kautoke did not doubt that "the Applicants are loving and genuine people and simply wish to adopt the children and offer them a better life" she was however "hesitant to recommend that Letters of Adoption be granted until the Applicants fulfil the six month requirement." In paragraph 8 of the Report, Ms. Kautoke recorded that she observed Sima to be attached to his mother and that when asked whether he wanted to go with Mrs. Saavedra he said that he did not.

[9] The six month period referred to by Ms. Kautoke was considered by the Court of Appeal in *Hatch & Anr v Solicitor General* [2010] To. L.R 177 and by this Court in *re Hatch & Hatch* [FA 75, 76 & 77 of 2010]. The Supreme Court explained that the "six month rule" was not an inflexible requirement, particularly in the case of very young children who might never have come to know their natural mothers. The requirement that the Applicants were sufficiently acquainted with the children they were proposing to adopt is only one aspect of the Court's duty to enquire whether the proposed adoption is in the best interests of the child.

[10] On 15 November the applications were called before me for directions only. In view of the reservations exposed by Ms. Kautoke and the fact that the proposed adoptions were by non-Tongans in no way related to the children who were proposing to take them overseas, I referred to the particular concerns which I held in this type of case and which were explained in *re Matheny & Matheny* [FA 121 of 2011]. Mrs. Saavedra questioned the accuracy of the report prepared by Ms. Kautoke. She told me that she loved both children, whereas the natural mother was not a good mother, took drugs and asked the Applicants for money. The application was adjourned to 27 November for Mr. Fakahua to consider the concerns to which I had referred and for the natural mother and the children to attend.

[11] On 27 November Ms. Katoa appeared for the Guardian ad Litem. She advised me that she was seeking an adjournment "to make a further assessment of the

suitability of the Applicants." Before granting the application and adjourning the matter to 12 December for continuation I asked the natural mother about her background and circumstances.

[12] On 23 November, after I had expressed the view (referred to in *Matheny*) that inter-country adoption, at any rate to applicants who were not related in any way to the children, should only:

> "be considered as an alternative...if child cannot be placed in a foster or adoptive family or cannot in any suitable manner be cared for in the child's country of origin" (see United Nations. Convention on the Rights of the Child — Article 21 (b)).

The natural mother filed a second affidavit in which she deposed:

> "I wish to confirm on oath that there is no other close relative or member of my family to take care upon the 2 children." and
>
> "[When] Sima was born and he was living with my mother at Houma and when I gave birth to Malia Kata I stayed with her and I never lived together with Sima and my mother."
>
> "...when my mother returned Sima... we had a conversation with Jenifer Saavedra as the adoption process was already executed and I requested they adopted Sima as well..."

[13] In answer to my questions, the natural mother told me that she had nine brothers and sisters, all living in Tonga, that her mother is aged 52 and remarried in 2004, following which she gave birth to two further children. The natural mother told me that she is living with an aunt at Ma'ufanga. The aunt is a widow with two children now aged 38 and 42, both married.

[14] On 11 December a second Report was filed by Ms. Kautoke. No further report had been requested by the Court and the further report did not add to the information already supplied as to the "suitability of the Applicants."

[15] It was evident from the second report that Mrs. Saavedra had again met with Ms. Kautoke whom she had told me on 15 November was unwilling to meet with her again. In my view this was an unsatisfactory development. I do not think it proper for applicants to make further oral representations in private to agents of the Guardian ad Litem during part heard proceedings.

[16] Ms. Kautoke's further submissions were that:

- [i] the Applicants and the application were suitable and appropriate;
- [ii] the children are now familiar with the applicants whom they have come to recognize as their parents. They have

been living with the female applicant for almost six months now and are attached to her. The older child Sima is quickly picking up the English language and is beginning to speak and understand it;

[iii] the natural mother is single and has no stable source of income. "She has confirmed that there is no other person in her family capable of caring for the children";

[iv] "inter-country adoption is not discouraged but should be an alternative means for proper placement of children when the child cannot be placed under the care of any person or family in Tonga."

[17] Mr. Fakahua endorsed these submissions and asked for the adoption orders sought.

[18] On several occasions during the hearings I was assured that the Applicants were in a position to offer the children a better standard of living, of upbringing and of education. I do not doubt that this is the case but the material well-being of children is only one of a number of important considerations which must be taken into account before concluding where the child's best interests lie.

[19] As already pointed out, international experience, embodied in the Convention of the Rights of the Child, suggests that inter-country adoption should only be considered if the Court is satisfied that the child cannot be cared for properly in the country of his birth.

[20] Having seen and heard the natural mother, I do not accept that Sima cannot continue to be looked after perfectly acceptably within the natural mother's extended family. He is now coming up to six years old, for the first five years of which he apparently lived with his grandmother and, as late as September 2012 was still very attached to his mother and did not want to go on the aeroplane with Mrs. Saveedra. I consider the fact that the Applicants are non-Tongans and that he would be taken to an environment quite different from that which he has known all his life to be relevant. It appears that he hardly knows the male applicant, his proposed future father.

[21] These considerations have much less force in the case of Malia who is only just over 12 months old and who has been living with Mrs. Saveedra since last May.

[22] I accept that the natural mother, whose marriage plans have apparently foundered, is not able properly to look after both her children. I also find that looking after two illegitimate children of the natural mother imposes an unfair and unacceptable burden on her extended family. I do not however accept that she and they are not able to offer the required standard of care to Sima.

[23] In *Matheny*, with some reluctance, I granted the adoption orders in respect of two young children, both just a few months old. I stated that I thought it right to make clear that Tonga does not prefer to export its children. While I do not doubt the Applicants' bona fides I am not attracted to a procedure by which applicants arrive from overseas, immediately relieve the natural parents of their children and in this

way create a de facto adoption even before application is made to the Court. The financial advantage possessed by many overseas applicants must not be overlooked.

[24] Ordinarily, the Court will seek to avoid splitting siblings. In this case however, the children have different fathers and Malia hardly knows her mother. I am satisfied that it is in the best interests of Malia that I make the adoption order sought. In the case of Sima, however, I am not so satisfied and accordingly the adoption order in his case is refused. By operation of law (Guardianship Act 2004 — Section 4(2)(a)) the natural mother will remain the sole guardian of this child, and he must be returned to her care as soon as possible.

210

Dataline System v Vea

Supreme Court, Nuku'alofa
Scott CJ
AM 2/2012, CV 28/2011

27 April 2012

Criminal – false pretences – based on facts at time of alleged offence – not proved – appeal dismissed
Magistrates court – needs to provide reasons for decision

The appellant brought a private prosecution against the respondent alleging that the respondent had obtained computer equipment valued at T$8,120 from the appellant by false pretences. The defendant said he did not pay for the equipment because he ran into financial difficulties.

Held:

1. The Magistrate purported to stop the prosecution on the grounds of "autrefois convict" or in other words the principle that a person should not be prosecuted twice for the same offence. However the Magistrate's assessment of the situation was mistaken: there was no principle that a person charged with a criminal offence and convicted may not subsequently be found civilly liable for the same transaction. The current prosecution was for a criminal offence, the earlier was civil.
2. The Magistrate did not give adequate reasons for his decision even though there was a duty to give such reasons.
3. The evidence did not establish that any statement of fact known to be false was made by the respondent at the time the computer equipment was supplied. Therefore there was no case to answer and the case against the respondent should have been dismissed at the close of the prosecution case.
4. The appeal was dismissed.

Cases considered:

DPP v Abouali [2011] NSWSC 110
Funaki Enterprises v Kakala [2010] Tonga LR 197

Statute considered:

Criminal Offences Act (Cap 18)

Counsel for the appellant : K Piukala
Respondent appeared in person

Judgment

1. The Appellant brought a private prosecution against the Respondent alleging that the Respondent had obtained computer equipment valued at T$8,120.00 from the Appellant by false pretences, contrary to section 164 of the Criminal Offences Act (Cap 18) as amended.

2. The only witness called for the Appellant/Plaintiff in the Magistrates' Court was Sosaia Tulua whose evidence was not questioned either by the Respondent/Defendant or by the Magistrate.

3. The Defendant told the Magistrate "all this is true" but said that he had not paid for the equipment as promised as he had run into financial difficulties.

4. The Magistrate then asked the Defendant whether he had already been charged with a similar offence earlier to the current one?" The Defendant told the Magistrate that he had been the defendant in earlier civil proceedings brought by the Plaintiff/Appellant arising out of the same transaction.

5. The precise words used by the Magistrate after the Defendant told him about the earlier proceedings are recorded as being as follows:

> "As I mentioned earlier in this trial and counsel understood I had proposed the same thing earlier, counsel you are misleading the Court hence I will release the Defendant."

6. The Magistrate's meaning is not immediately apparent but having heard both Mr Piukala and the Respondent it seems sufficiently clear that the Magistrate was purporting to stop the prosecution on the grounds of "autrefois convict" or in other words the principle that a person should not be prosecuted twice for the same offence.

7. With respect to the Magistrate, his assessment of the situation appears to have been mistaken: there is no principle that a person charged with a criminal offence and convicted may not subsequently be found civilly liable for the same transaction. It will be remembered that this prosecution was for a criminal offence, the earlier was civil.

8. In my opinion the Magistrate erred in the course he took. He also failed to give adequate reasons for his decision. Magistrates are reminded that there is a duty imposed on them to give reasonably complete reasons for their decisions (see e.g. *D.P.P. v Abouali* [2011] NSWSC 110).

9. Unfortunately, however, for the Appellant, I do not think that the Magistrate's mistake entitles him to succeed on the appeal.

10. As explained in *Funaki Enterprises v Kakala* [2010] Tonga L.R. 197 the position in Tonga is that:

> "a statement of intention about future conduct, whether or not a statement of existing fact, is not a statement that can amount to a false pretence. If however such a statement is accompanied by a statement of fact, such as a statement of ability to repay, which is proved to have been false at the time it was made, then a false, pretence may be found to have been established."

11. I have examined the evidence given by Sosaia Tulua and it is clear that it does not
80 establish that any statement of fact known to be false was made by the Defendant at the time the computer equipment was supplied. It follows that there was no case to answer and the case against the Defendant should have been dismissed at the close of the prosecution case.

12. In my opinion this prosecution was not very well dealt with the Magistrate and I have same sympathy with the Appellant. When however there was no case to answer an acquittal will not be set aside by reason of subsequent procedural error.

13. The appeal is dismissed.

'Aisea v Rex

Court of Appeal, Nuku'alofa
Burchett, Salmon, and Moore JJ
AC 20/2011; CR 208/2010

20 April 2012; 27 April 2012

Sentencing – rape and indecent assault – appeal against sentence of 13 years imprisonment – appeal allowed and replaced with 8 years imprisonment

The appellant was tried in the Supreme Court on a charge of rape and indecent assault. He was convicted and sentenced to 13 years imprisonment on the rape charge with the last 3 years suspended. No separate penalty was imposed on the charge of indecent assault. The appellant was 44 years of age married with four children. He was the victim's uncle. The victim was 19 years of age. The appeal was against sentence on the ground that it was manifestly excessive.

Held:

1. The maximum sentence for rape in Tonga is 15 years imprisonment. A maximum sentence is only appropriate for the very worst offending. The court adopted a starting point of 5 years. After taking into account the mitigating and aggravating factors the court concluded that the appropriate sentence was 8 years imprisonment.
2. In deciding whether to suspend part of the sentence, the court considered that a suspension would likely aid in rehabilitation. Accordingly it suspended the last 2 years of the sentence for 2 years.
3. There should also have been a sentence imposed on the charge of indecent assault. The court imposed a sentence of 18 months imprisonment to be served concurrently with the rape sentence.
4. The appeal was allowed. The sentence imposed in the Supreme Court was quashed and replaced.

Cases considered:

Fa'aoso v R [1996] Tonga LR 42
Mo'unga v R [1998] Tonga LR 154
R v AM [2010] NZCA 114

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

Judgment

[1] The appellant was tried before a Judge and Jury in the Supreme Court on a charge of rape and indecent assault. He was convicted and sentenced to 13 years imprisonment on the rape charge with the last 3 years suspended. No separate penalty was imposed on the charge of indecent assault. The appellant is 44 years of age married with four children. He is the victim's uncle. The victim is 19 years of age. The appeal is against sentence on the ground that it is manifestly excessive.

[2] In sentencing the appellant the Judge took 13 years as his starting point. He did not support this by reference to authority. He correctly noted that a serious aggravating factor was the breach of trust involved as result of the relationship.

Brief Facts

[3] The appellant invited the victim to go for a Sunday drive with him and his family. The victim obtained her mother's consent because she (the mother) trusted the appellant.

When the victim was picked up by the appellant at a prearranged location she asked where his family was and was told he would collect them later. He did not collect his family but drove to a beach location where the offences took place.

The Law

[4] The maximum sentence for rape in Tonga is 15 years imprisonment. A maximum sentence is only appropriate for the very worst offending. This Court in *Fa'aoso v R* [1996] Tonga LR 42 considered the question of the starting point in sentencing for rape.

The Court referred to the practice in New Zealand and the appropriate starting point in that country when the maximum sentence was 14 years. The appropriate starting point selected for Tonga was 5 years. That has not changed since that time and the decision was of course binding on Judges in the Supreme Court.

[5] In *Fa'aoso* the Court also set out examples of mitigating factors which might justify a sentence of less than five years and aggravating factors which might justify an increase. That approach to sentencing has been consistently followed in England, Australia, New Zealand and Tonga.

In New Zealand the starting point is higher than in Tonga because the maximum sentence is higher. In that country the Court of Appeal in *R v AM* [2010] NZCA 114 has revisited the question of sentencing for sexual offending and Counsel and the Court may find assistance in such cases from that very detailed judgment although account must be taken of differences in maximum sentences,

This Case

[6] The appeal has been brought on the grounds that the sentence imposed in the Supreme Court was manifestly excessive. The Crown very properly acknowledges that is so. We agree. Both Mr. Pouono for the appellant and Mr. Kefu for the Crown

presented carefully prepared and very helpful submissions. In particular the Crown presented an analysis of recent sentences in rape cases which we found most useful. Mr. Pouono claimed that the appellant was denied the opportunity of apology and reconciliation by not being allowed bail to enable him to undertake such a course. However the appellant made no request to do so until after he had been convicted, by which time the victim had been through two hearings during which she was, in each case, subjected to detailed cross-examination. The whole experience of rape and trial has been a very traumatic one for her and she is still undergoing counselling. The victim's family have accepted an apology from the appellant's family but have made it clear that they will not accept an apology from the appellant.

[7] Mr. Pouono submitted that the appropriate sentence was 2 years imprisonment with the last 15 months suspended.

[8] Mr. Kefu set out the aggravating and mitigating factors which he considered applied in this case. Mr. Pouono said he agreed with the mitigating factors identified by the Crown and had nothing to add. He did not disagree with the aggravating factors identified by the Crown. Mr. Kefu submitted that a deterrent sentence was needed because rape was becoming more common but he was not able to provide any statistics to support that proposition. He submitted that the sentence should be in the range of 6 to 8 years with no suspension. On the charge of indecent assault he suggested a sentence of 1 to 2 years imprisonment. He noted that the Probation Officer had categorised the appellant as a moderate risk to the community but acknowledged that the officer had taken into account when making that assessment 2 minor previous convictions in 1982 and 1983. Mr. Kefu agreed they should be disregarded and the appellant treated as a first offender. If the appropriate adjustment is made for this item the risk assessment would place the appellant on the borderline between low and moderate risk.

Consideration

[9] In our view the most serious aggravating factor in this offending is the breach of trust. For an uncle to deceive his niece and then offend in the way he did constitutes a gross breach of trust. Other aggravating factors are the age difference and refusing to allow the victim to leave the car when the offending commenced despite her repeated pleas to take her home.

[10] Mitigating factors are that the appellant can be treated as a first offender and now expresses remorse. We note that although he is not the breadwinner for his family he provides support for his wife while she works and he is highly regarded by his community.

[11] We conclude that the appropriate sentence on the rape charge after adopting a starting point of 5 years and taking into account the mitigating and aggravating factors is 8 years imprisonment. We consider it appropriate to suspend a part of the sentence. In terms of this Court's decision in *Mo'unga v R* [1998] Tonga LR 154 a long period free of criminal activity is a qualifying factor but more importantly as that decision observed the major consideration is whether a suspension is likely to aid in rehabilitation. In this case we believe it will. Accordingly we suspend the last 2 years of the sentence for 2 years.

[12] There should also have been a sentence imposed on the charge of indecent assault. We impose a sentence of 18 months imprisonment to be served concurrently with the rape sentence.

120 **Conclusion**

[13] The appeal is allowed. The sentence imposed in the Supreme Court is quashed and replaced with the sentences referred to above.

Lisiate anor v 'Eli anors

Court of Appeal, Nuku'alofa
Burchett, Salmon, and Moore JJ
AC 23/2011; LA 21/2010

17 April 2012; 27 April 2012

Land law procedure - Claim that Minister wrongly granted land – Minister should have been joined in proceedings – Appeal adjourned

There were disputes between members of an extended family over the ownership of approximately 8 acres of land at Ha'ateiho. The claim began with proceedings by the respondents who claim to be the owners of the land seeking an injunction to restrain the second appellant from entering or interfering with the first and third respondents' tax allotments and judgment for damages relating to the actions of the second appellant in entering their land and destroying crops on it. The first appellant was joined by the second appellant as a third-party to the proceedings. The first appellant filed a counterclaim in which he claimed to be the owner of the land and that he had authorized the second appellant to enter upon it and plant crops. He claimed orders directing the Minister of Lands to cancel the grants made to the first and third respondents and for an order directing the Minister of Lands to register and issue a Deed of Grant of the whole of the land to the third party. The claims were heard in the Land Court and the Court found for the plaintiffs, the respondents in the appeal, and directed that matters of damages and further consequential orders would be the subject of further submissions by counsel.

Held:

1. In the case of mortgages and leases there was express provision that they were not effective until they were registered. No such provision existed in the case of grants of land. The provisions of sections 120 and 121 about registration were procedural. The court concluded that Siuaki (the appellant's father) was certainly the holder of the land as that term was defined in the Act and that he was the lawful holder and indeed the owner although not registered in terms of sections 120 and 121 until 1995. It followed that Siuaki "possessed" the allotment in terms of the provision to s 84 at that time.
2. What happened to the Ha'ateiho land in the years following the *"decision to take Kauvai"* was not at all clear and in the absence of any evidence on the question of occupation it was impossible for the court to arrive at any conclusions as to the nature or extent of the occupation claimed by the defendant or third-party. It was clear however that because the third-party

claimed that the Minister wrongly granted the land to the respondents, the Minister must be joined in the proceedings.

3. The Minister should have been joined in these proceedings. The court ordered that he be so joined. The appeal was adjourned to the next sitting of the Court so that the Minister could appear if he wished. The parties have already had their opportunity to call evidence relevant to the issues. If the Minister did not wish to appear he could file a memorandum to that effect and the Court would make final orders. Alternatively the Minister could provide written submissions which, subject to the provision of submissions in response, would enable the matter to be finally determined on the papers. Appeal adjourned accordingly.

Cases considered:

Fifita Manakotau v Vaha'i (Noble) Vol II Tonga LR 121
Folau Tokotaha v Deputy Minister of Lands & Anor [1923-1962] Tonga LR 159
Maamakalafi v Finau Tonga LR 218
Mesiu Moala v Tu'i'afitu & Anor [1956] Vol II Tonga LR 104
Ongosia v Tu'inukuafe and Minister of Lands (1981-1988) Tonga LR 113
Tu'i'afitu and Anor v Mesui Moala (Privy Council 25.1.57)

Statute considered:

Land Act (Cap 132)

Counsel for the appellants : Mr Niu
Counsel for the respondents : Mr Edwards

Judgment

[1] This appeal arises out of disputes between members of an extended family over the ownership of approximately 8 acres of land at Ha'ateiho.

[2] The claim began with proceedings by the respondents who claim to be the owners of the land seeking an injunction to restrain the second appellant from entering or interfering with the first and third respondents' tax allotments and judgment for damages relating to the actions of the second appellant in entering their land and destroying crops on it.

[3] The first appellant was joined by the second appellant as a third-party to the proceedings. The first appellant filed a counterclaim in which he claimed to be the owner of the land and that he had authorized the second appellant to enter upon it and plant crops. He claimed orders directing the Minister of Lands to cancel the grants made to the first and third respondents and for an order directing the Minister of Lands to register and issue a Deed of Grant of the whole of the land to the third party.

[4] The claims were heard in the Land Court presided over by the Lord President with an assessor. For reasons set out in the judgment, which will be discussed later, the Court found for the plaintiffs, the respondents in the appeal, and directed that matters

of damages and further consequential orders would be the subject of further submissions by counsel.

Background

[5] It is necessary to give a history of the ownership of this land, the circumstances leading to its subdivision, the vesting of half of it in each of the first and third respondents and the reasons why the first appellant claims to be entitled to ownership. The story starts in 1963. Around that time the appellants' father Sione Siuaki 'Eli (Siuaki) began occupation of the land. The appellants claim that from that time Siuaki was the rightful owner of the land which had a total area of 8 acres 1 rood and 1 perch.

[6] He was still in occupation in September 1984 when his mother Vika Tupou died. His mother was the widow of Lisiate Tupou who was the owner of a tax allotment at Kauvai. Siuaki was the eldest child. His brother Vaitulala Tauatevalu filed an affidavit in the Land Court and undertook the necessary procedures to enter Siuaki as the eldest son on the Land Register as the holder of the tax allotment at Kauvai.

[7] As will be discussed later it is contrary to the provisions of the Land Act for a person to hold more than one tax allotment. There is a procedure whereby an election can be made as to which of two tax allotments a holder wishes to choose. This will be discussed in more detail later. There is no specific evidence that Siuaki ever made such an election but there is evidence that he continued to occupy the land at Ha'ateiho. It appears that Siuaki despite having occupied the land since 1963 may not have had a Deed of Grant issued to him. There was no clear evidence one way or the other. However in 1995 Siuaki (or his son) paid a survey fee for the land at Ha'ateiho and was issued with a Deed of Grant. He also registered a mortgage over the land at that time which was discharged some months later. So it appears that Siuaki may have remained in occupation of the land at Ha'ateiho at least from 1963 to 1995.

[8] However in his counterclaim the third-party pleads that the second appellant *"continued to occupy and cultivate the Ha'ateiho allotment"* and that in 1995 he (the second appellant) paid the survey fees for that allotment. For his part in his statement of defence the second appellant pleads that he commenced farming the tax allotment in 2008.

[9] In November 1997 the youngest brother of Siuaki, Naulala 'Eli, signed an application form for half of the tax allotment at Ha'ateiho. He paid the survey fee for that allotment. In January 1998 he ordered the second appellant off the land.

[10] Siuaki died in New Zealand in September 1998. In his pleading the first appellant claims that in August 2008 there being no one occupying or cultivating the Ha'ateiho allotment, he instructed the second appellant to enter and occupy it and cultivate it on his behalf and that the second appellant did so without any objection or complaint by any person until June 2010. In August of 1999 the first appellant wrote to the Minister of Lands and claimed the tax allotment at Ha'ateiho. The Minister advised that the question of a grant of the tax allotment could only be resolved through court action.

[11] Naulala "Eli died in April 2008 and his widow the first respondent claimed the allotment for which Naulala 'Eli had applied. In 2010 a Deed of Grant was issued to the third respondent for the northern half of the Ha'ateiho tax allotment and later in the same year a Deed of Grant was issued to Naulala 'Eli posthumously for the southern half and transferred to the first respondent.

[12] Meanwhile after the death of Siuaki his widow Kolosia Lisiate who was the second wife of Siuaki claimed the tax allotment at Kauvai. It seems that she still holds that land.

The Relevant Provisions of the Land Act

[13] Section 43 provides for the Grant of allotments:

> "(1) Every male Tongan subject by birth of 16 years of age not being in possession of a tax or town allotment shall be entitled to the grant of a tax or town allotment or if in possession of neither to the grant of a tax and town allotment.
>
> (2) The grant shall be subject to the provisions of this Act and shall be made in accordance with the following rules-
>
> (a) the applicant shall make an application on the prescribed form to the Minister;
>
> (b) the applicant shall produce for the inspection of the Minister his birth certificate or some other proof of the date of his birth;
>
> (c) The applicant shall pay the prescribed fees."

[14] Sections 120 and 121 relate to the registration of allotments and provide as follows:

> "120. All deeds of grants of allotments shall be in duplicate and in the form prescribed in Schedule V and in addition to proper words of description shall contain a diagram of the land.
>
> 121. The Minister shall sign and deliver to the grantee one duplicate and shall register the other by binding up the same in a book to be called the register of allotments."

[15] Part IV of the Act deals with tax and town allotments. Division VII of that part makes provision for the devolution of allotments. Section 80 provides that the widow is entitled to a life estate. Section 82 sets out the rules of succession subject to the life estate of the widow. Section 84 provides for election by a son or grandson of a deceased holder when that son or grandson already possesses an allotment of the same kind. Sections 85 and 86 make further provision for this eventuality. Where a son or grandson elects to take the allotment of the deceased father or grandfather and

to surrender the allotment of the same kind already held by him the allotment so surrendered *"shall be granted to any son of the person surrendering it who does not already hold an allotment of the same kind"*.Section 86 goes on to provide that as between 2 or more such sons the oldest shall be preferred. Section 85 makes provision for the circumstance where the son or grandson of the deceased holder elects to retain the allotment he already holds.

[16] Section 87 provides as follows:

> "If no claim to a tax or town allotment has been lodged by or on behalf of the heir or widow with the Minister or his Deputy within 12 months from the death of the last holder, such allotment if situate on Crown Land shall revert to the Crown and if situate on an hereditary estate shall revert to the holder."

[17] Other relevant provisions include section 48:

> "Where any tax or town allotment shall revert to the Crown under the preceding provisions of this Division, such allotment unless required for Government purposes shall be granted out by the Minister in accordance with such regulations as may be made under this Act"

[18] Section 122 requires any person entitled under the rules governing the devolution of allotments contained in Division VII of Part IV to present the Deed of Grant formerly in the possession of his predecessor in title for endorsement. That step is required to be taken within one month of becoming entitled.

[19] Section 123 provides that where the successor is unable to produce the relevant Deed of Grant he is to produce such evidence as the Minister may require to prove his title and if the Minister is satisfied as to the entitlement he may register that person as the holder of the allotments and issue a new Deed of Grant.

The Proceedings in the Land Court

[20] The parties agreed that there were principal issues which should be tried first. Those issues were set out in paragraph 12 of the judgment as follows:

1) whether Siuaki became the registered owner of the Ha'ateiho land either in 1963 or in 1995.
2) the consequences, if any, of the third party's failure to apply for the registration of the Ha'ateiho land in his name,
3) the consequences, if any, of not joining the Minister as a party to the proceedings.

[21] Before addressing these questions the court noted that where cancellation of a grant is sought, there is a rebuttable presumption that the registration was validly made; that the court will only overturn the grant if the person challenging the grant

establishes that the Minister has acted contrary to statute or in breach of the rules of Natural Justice, or in breach of a clear promise by the Minister; and that the burden of proof is upon the challenger to produce sufficient evidence to establish that the minister has indeed breached one or more of these principles. No challenge was made in the hearing before us to these propositions.

[22] We consider it convenient to address the same three issues in the same order as was done in the Land court.

Did Siuaki Become the Registered Owner of the Ha'ateiho Land either in 1963 or in 1995?

[23] The Court held, citing the Privy Council decision of *Folau Tokotaha v Deputy Minister of Lands & Anor* [1923-1962] Tonga LR 159 that for the title of an allotment holder to be complete it is necessary for him to be issued with a Deed of Grant and for that Deed of Grant to be registered. Registration is not complete until the Deed of Grant is prepared and a duplicate signed by the Minister and handed to the applicant and the original registered and bound up. In the present case the Court said that Siuaki did not become the registered owner of the Ha'ateiho land at any time prior to 1995. That appears to be correct. The court then went on to consider whether Siuaki was the "lawful holder" of the land and if so what the consequence was when his mother died in 1984. The court concluded that when, following the death of his mother, Siuaki purported to exercise the right conferred by section 84 to choose between the Ha'ateiho land and Kauvai, that while he may have been the lawful occupier of the Ha'ateiho land he did not *"possess"* it within the meaning of the proviso to section 84. It followed that the decision to take Kauvai did not result in any surrender of the title to the land as envisaged by section 86 because no title was available to be surrendered.

Our Conclusions on this Issue

[24] We first set out our understanding of the facts relating to this issue. Mr. Niu explained to us, and there was no dispute as to what he said, that the books of Deeds of Grant have no index and that as a consequence finding any particular deed is a very difficult exercise. The books of Deeds are referred to in section 121 of the Land Act as the Register of Allotments. However the volumes of deeds are labelled Deeds of Grant and it is by that name that they are known in the Ministry. The Minister keeps two other books labelled Register of Town Allotments and Register of Tax Allotments. There are separate books for each of the Islands of Tonga and there are pages within the books for particular villages. Those pages record the names of the Grantees to whom an allotment has been granted, the area of the allotment and the page number in the Deeds of Grant volumes where the deed is to be found. These register books also record the map in which the allotment may be found and the date of the Grant. The books record the names of persons to whom an allotment is transferred upon death of the Grantee or of a subsequent holder. So effectively the Register is an index to the Deeds of Grant which have been made.

[25] A copy of the relevant page from the Register of Tax Allotments is contained in the appeal booklet. There is an entry for Siuaki which indicates a date of registration

on 6 June 1963. It records the area of the allotment, a reference to the map upon which the allotment can be found and a reference, made in 1995, to Deed of Grant 67/71. A copy of the Deed of Grant is also contained in the appeal booklet. It is apparent that the written content of that Deed has been made by two different people. Mr. Niu submitted and we accept that some of the writing was included at the time of the survey In the 1950s. However the name of the Grantee and the date of the Grant were included in 1995 when Siuaki visited the Lands office and paid or arranged payment of the survey fee and was issued with a copy of the Deed of Grant. The Deed also shows an endorsement for a mortgage registered on the 24 July 1995 and the discharge of that mortgage on the 18 December 1995, There is no dispute that Siuaki occupied the land at least up until the death of his mother in 1985 and there is no evidence to suggest that he did not continue in occupation until 1995.

[26] We now turn to the law relevant to the issue. The Land Court judgment relied upon the Privy Council decision of *Folau* in 1958. At that time the only right of appeal against Land Court decisions was to the Privy Council. The decision is that of a single judge. Appeals in respect of Land Court decisions, except in the case of disputes concerning nobles, have for many years now been determined by the Court of Appeal whose determination is final. Although the *Folau* decision has been relied upon in subsequent Land Court decisions there is other authority which took a different view. The starting point is the Act itself. The Act in s.2 contains a definition of "landholder" or "holder". There are several clauses in that definition. The relevant ones in this case are:

> "..... (b) any Tongan subject holding... A tax allotment or town allotment;
>
> (c) any Tongan subject claiming to be interested in land which he is legally capable to hold; .....
>
> (f) any person who claims to be entitled to any land or interest in land whether in actual possession or occupation or otherwise."

[27] In the case of mortgages and leases there is express provision (section 103(4) and section 126) that they will not be effective until they have been registered. No such provision exists in the case of grants of land. In our opinion the provisions of sections 120 and 121 are procedural. That has also been the view of other courts. In 1956 in the case of *Mesiu Moala v Tu'i'afitu & Anor* [1956] Vol II Tonga LR 104, Hunter J at page 106, referring to these sections said:

> "It is interesting to note that in this division of the act which is headed "Registration of Allotments", it is not stated nor do I think it is implied, that the registration is the test of "ownership" and that unless a person is registered he cannot be regarded as the holder."

[28] That decision was appealed to the Privy Council. In his judgment Hammett CJ [1956] Vol II Tonga LR 153 upheld the decision of Hunter J and agreed with the statement of law set out above.

[29] The question was considered again by the Privy Council in 1985 in the case of *Ongosia v Tu'inukuafe and Minister of Lands* (1981-1988) Tonga LR 113. In the Judgment appealed against the decision in *Folau* was relied upon. The Privy Council noted (at p115) that what Harwood appeared to be saying in the *Folau* case was that a plaintiff claiming an allotment could only succeed if he could prove registration and the issue of the grant. The Council went on to note that there was ample authority to the contrary, including at least one decision of the Privy Council. The Council then referred to a passage from the judgment of Hunter J in *Fifita Manakotau v Vaha'i (Noble)* Vol II Tonga LR 121 at page 123:

> "Although registration is very strong evidence of ownership I can find nothing in the Act to say that a person claiming an allotment must be able to show he is registered as the holder of that allotment. Nowhere does the Act make registration the test of ownership. The Intention of the Act is that registration will be a method of proof, nothing more. This was the view taken by the Privy Council in *Tu'i'afitu and Anor v Mesui Moala* (Privy Council 25.1.57). The Privy Council in the course of their judgment said: It was one of the main contentions of the Appellant both in the Land Court and on the hearing of this appeal that the Respondent was not entitled to succeed in his claim because of his failure to become registered as the holder of these allotments. The learned trial judge held that the Respondent had taken all steps required by the Land Act Section 76 and that whilst registration is evidence of ownership it is not always necessary to prove registration before ownership can be established. With this statement of the law we agreed."

[30] The court then noted that each case must be decided on its own facts and the *Fotau* case can be distinguished on its facts. We agree with this analysis. We conclude that Siuaki was certainly the holder of the land as that term is defined in the Act and that he was the lawful holder and indeed the owner although not registered in terms of sections 120 and 121 until 1995.

[31] It is true that the Minister must grant an application. It may in our view be properly inferred that the Minister did so in or around 1963. The evidence that supports this conclusion is the detail included in the register of tax allotments which is a register kept by the Ministers department. In fact the very existence of the record in this register along with the inclusion of the uncompleted deed in the Register of deeds suggests strongly that a deed may have been issued at that time and subsequently lost. Whether or not that was the case we are satisfied that Siuaki was the lawful holder within any of the 3 meanings set out in para 26 above at the time of the death of his mother in 1984. It follows that Siuaki "possessed" the allotment in terms of the provision to s.84 at that time.

[32] Further support for the conclusion can be gained from the fact that when he did apply for a Deed of Grant in 1995 it was issued to him.

What was the Consequence, if any of the Third Party's Failure to Apply for the Registration of the Ha'ateiho Land in his Name

[33] The first question is whether Siuaki made an election at the time of his mother's death to take the Kauvai land and to surrender the Ha'ateiho land. There is no doubt that he became the registered owner of the Kauvai land and it is a reasonable inference that the affidavit made by his brother which resulted in that registration was made with his approval or at his request. This conclusion is supported by the fact that Siuaki's widow believed that his eldest son was entitled to the Ha'ateiho allotment and wrote to the Minister after Siuaki's death asking for that land to be transferred to the third party. It is inconceivable that Siuaki was not aware that the Kauvai land had been granted to him. Given the well known prohibition on the holding of more than one allotment of the same kind he must be taken to have surrendered the Ha'ateiho allotment. The fact that he continued to occupy the land is not inconsistent with this conclusion, nor is the obtaining of the Deed of Grant which may have been obtained so that the third party could have evidence of his entitlement.

[34] We proceed on the basis that there was an effective surrender in 1985. Mr. Niu argued that the effect of section 86 of the Act was that the third-party became the Grantee of the surrendered allotment. The relevant words of section 86 are: *"Where a son or grandson elects to take the allotment of his deceased father or grandfather as the case may be and to surrender the allotment of the same kind already held by him, the allotment so surrendered shall be granted to any son of the person surrendering it who does not already hold an allotment of the same kind....As between two or more such sons the eldest shall be preferred."* Thus there is a requirement to grant the allotment to the eldest son, in this case the third party.

[35] The provisions of s.87 are relevant:

> "If no claim to a tax or town allotment has been lodged by or on behalf of the heir or widow with the Minister or his Deputy within 12 months from the death of the last holder, such allotment if situate on Crown Land shall revert to the Crown and if situate on an hereditary estate shall revert to the holder."

Mr Niu argued that s.86 created an entitlement to the grant and that he was not required to make a claim in respect of the allotment. He submitted that s.87 did not apply to the case of an heir taking land under the provisions of s.86

[36] We do not accept this submission. Although s.86 provides the third party with an entitlement to the land, the words *"shall be granted"* refer to a process which requires a claim to be made. In our view s.87 applies to all types of devolution referred to in Division VII of Part IV.

[37] However the Last holder was Siuaki. He died on the 18th September 1998. The third party made his claim on the 30th August 1999. A claim on his behalf was made

earlier by Siuaki's widow in May 1999. So the claim was made within 12 months of Siuaki's death. It may be that s.87 was not intended to apply to a grantee under s.86 but if it was then it has been complied with. The claim having been made the allotment in terms of s.86 *"shall be granted"* to the third party.

[38] Section 122 is also relevant. That section provides that 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..."* Section 123 provides that if that person is unable to produce the relevant Deed of Grant he is to produce such evidence as the Minister may require to prove his title. Obviously the third-party did not follow that procedure within one month of the surrender. We do not regard that failure as fatal to his claim. We regard this as a procedural requirement. Failure to comply with it would not invalidate his grant if it otherwise existed (see *Maamakalafi v Finau* Tonga LR 218 at 223). He did however make a claim to the land prior to the issue of Deeds of Grant to the respondents. The evidence called does not clearly establish who was in possession of the land at various points in time. The third-party in his pleading says that his brother the second appellant "continued" to occupy and cultivate the Ha'ateiho allotment but it is not clear as to the period of time over which this occurred. Nevertheless we are satisfied that the effect of s.86 is that the third party is entitled to be granted the Ha'ateiho land.

What is the Consequence of not Joining the Minister

[39] As the Lord President said in the Land Court decision what happened to the Ha'ateiho land in the years following the *"decision to take Kauvai"* is not at all clear and in the absence of any evidence on the question of occupation it is impossible for the court to arrive at any conclusions as to the nature or extent of the occupation claimed by the defendant or third-party. It is clear however that because the third-party claims that the minister wrongly granted the land to the respondents the Minister must be joined in the proceedings (see eg. *Mamakalafi* at p223). The consequence of this is referred to in the conclusion.

Limitations

[40] The Land Court held that the third party's claim was statute barred. Presumably this was based upon the provisions of section 170 which provides:

> "No person shall bring in the court any action but within 10 years after the time at which the right to bring such action shall have first accrued to some person through whom he claims, or if such right shall not have accrued to any person through whom he claims then within 10 years next after that time at which the right to bring such action shall have First accrued to the person bringing the same."

[41] The first order sought against the Minister is the cancellation of the Grants to the first and third respondents. Those grants were made in 2010 so clearly that claim is not statute barred. The second order sought is for a direction that the Minister issue a

Deed of Grant for the whole of the allotment to the third-party with effect from April 1985.

[42] Section 86 is the important section in this subject. The relevant part of it is set out in para 34 of this judgment. It provides for a statutory grant to the third party so that he has an ongoing entitlement. Until that entitlement is challenged he can, at any time up to one year after the death of Siuaki ask for the issue of his deed. There may be other ways in which his entitlement could be lost but in this case Deeds to the respondents were not issued until after the third party's claim had been lodged. The consequence is that the claim is not statute barred. It is important to note that the Minister at the time, recorded that the dispute as to the title to the Ha'ateiho land could only be resolved through Court action. The findings in this judgment are subject to the right of the Minister to challenge them in the manner recorded in the final paragraph.

Conclusion

[43] We have held that the Minister should have been joined in these proceedings. We order that he be so joined. We adjourn this appeal to the next sitting of the Court so that we can hear from the Minister if he wishes to appear. We would be prepared to hear evidence called by him if necessary but we suspect that the evidence already given may suffice for his purposes. The parties have had their opportunity to call evidence relevant to the issues so that it is only the Minster who needs to be heard although of course counsel for the parties will have the opportunity to make submissions in response to the Minister's case. If the Minister does not wish to appear he may file a memorandum to that effect and the Court will make final orders. Alternatively the Minister may wish to provide written submissions which, subject to the provision of submissions in response, would enable the matter to be finally determined on the papers.

[44] Appeal adjourned accordingly.

Lisiate anor v 'Eli anors

Court of Appeal, Nuku'alofa
Salmon, Moore, and Handley JJ
AC 23/2011; LA 21/2010

3 October 2012; 12 October 2012

Land law – surrendered allotment could be claimed by son at any time after surrender – orders made by consent

In the judgment of the Court of Appeal of 27 April 2012 (at page 30 of this report) the court made findings in relation to the argument presented on behalf of the appellants and the respondents. However the court also held that the Minister should have been joined in the proceedings and made an order that he be so joined. The appeal was adjourned so that the Minister could be heard and the other parties could make submissions in response to the Minister's case.

Held:

1. The court agreed with the Minister and the lower court that despite the wording in section 86 of the Land Act to the effect that a surrendered allotment "shall" be granted to the son of the person surrendering, the son must submit a claim and in fact did so in 1999. The claim could have been lodged at any time after the date of surrender.
2. The parties consented to the following orders of the Court: the appeal was allowed and the judgment of the Land Court was set aside. The Minister of Lands was to cancel specified deeds of grants, and should issue and register a deed of grant of the whole of the area of 8 acres 1 rood and 0 perch of the tax allotment, purported to have been granted to Sione Siuaki 'Eli to 'Aivenihou Lisiate (the first appellant). All claims of the first, second and third respondents against the second appellant (Lautaimi Lisiate) for damages were dismissed. The interim orders of injunction of the Land Court against the second appellant dated 23 September 2010 were recalled and cancelled. The interim orders allowing the second appellant to enter the tax allotment and tend and harvest the crops therein from time to time dated 16 February 2011 were recalled and cancelled. All sums of money which were paid from time to time by the second appellant into Court in pursuance of the abovestated interim orders of 16 February 2011 should be returned and repaid to the second appellant. There was no order for costs against the first, second and third Respondents. However

the costs of the appellants in the in the sum of $7,000, should be paid by the Minister of Lands.

Statute considered:
Land Act (Cap 132)

Counsel for the appellants	:	Mr Niu
Counsel for the respondents	:	Mr Edwards

Judgment

[1] In our judgment of 27 April 2012 we made findings in relation to the argument presented on behalf of the above named appellants and the First, Second and Third Respondents. However we also held that the Minister should have been joined in the proceedings and we made an order that he be so joined (Para. 43). We adjourned the appeal to this sitting of the Court so that the Minister could be heard and the other parties could make submissions in response to the Minister's case.

[2] At the resumed hearing Mr. Kefu appeared for the Minister. No further evidence was called on the Minister's behalf he being satisfied that all the relevant material was before the Court. All parties consented to the resumed hearing continuing with Handley J sitting in the place of Burchett J.

[3] The Minister agreed with the essential conclusions reached by this Court and recorded in the earlier judgment. There are a few matters raised in Mr. Kefu's submissions in respect of which some comment is appropriate. Despite the wording in section 86 of the Land Act [Cap 132] to the effect that a surrendered allotment "shall" be granted to the son of the person surrendering, the Minister agrees with the finding of this Court that the son must submit a claim and in fact did so in 1999. The Minister's submission goes on to point out that the claim could have been lodged at any time after the date of surrender. We agree that is so.

[4] We also wish to clarify an apparent inconsistency in our earlier judgment. In paragraph [36] we comment on a submission made by Mr. Niu and we express the view that section 87 of the Act applies to all types of devolution referred to in Division VII of Part IV. In the following paragraph [37] we say "It may be that section 87 was not intended to apply to a grantee under section 86 but if it was then it has been complied with."

[5] It is in fact not necessary for the purpose of this judgment to make any conclusory finding as to the application of section 87 and indeed Mr. Kefu on behalf of the Minister has expressed doubts as to the correctness of our approach. Accordingly, we now prefer to rely on the statement in paragraph [37] to the effect that if section 87 does apply then it has been complied with. The question of the effect of section 87 should wait for a case where it is directly in issue.

[6] The Parties have now consented to the following orders of this Court:

1. The appeal is allowed and the judgment of the Land Court is set aside.

2. The Fourth Respondent (Minister of Lands) shall cancel the following deeds of grants:
   (a) Book 67 Folio 71 to Sione Siuaki 'Eli dated 12 June 1995;
   (b) Book 395 Folio 100 to Tapa'atoutai 'Eli (Third Respondent) dated 30 June 2010; and
   (c) Book 302 Folio 78 to Niulala 'Eli (now registered in First Respondent as widow) date 26 August 2010;

   And shall issue and register a deed of grant of the whole of the area of 8 acres 1 rood and 0 perch of the tax allotment, purported to have been granted to Sione Siuaki 'Eli in the abovestated deed of grant book 67 Folio 71 dated 12 June 1995, to 'Aivenihou Lisiate (First Appellant).
3. All claims of the First, Second and Third Respondents against the Second Appellant (Lautaimi Lisiate) for damages are dismissed.
4. The interim orders of injunction of the Land Court against the Second Appellant dated 23 September 2010 are recalled and cancelled.
5. The interim orders allowing the Second Appellant to enter the tax allotment and tend and harvest the crops therein from time to time dated 16 February 2011 are recalled and cancelled.
6. All sums of money which have been paid from time to time by the Second Appellant into Court in pursuance of the abovestated interim orders of 16 February 2011 shall be returned and repaid to the Second Appellant.
7. There shall be no order for costs against the First, Second and Third Respondents in this Court and in the Land Court. But the costs of the Appellants in the Land Court and in this Court, in the sum of $7,000, shall be paid by the Fourth Respondent (the Minister of Lands).

Moala v Public Service Commission anor

Court of Appeal, Nuku'alofa
Burchett, Salmon, and Moore JJ
CV 72/2011; AC 22/2011

16 April 2012; 27 April 2012

Civil procedure – appeal against decision to refuse leave to apply for judicial review – discretionary power to refuse leave – power was not exercised on wrong principles – appeal dismissed

The appellant was employed in the Office of the Prime Minister and had responsibility for managing aspects of the finances of the Office. On 30 April 2010 he was suspended and charged with misconduct. On 13 October 2010 he was dismissed effective from the date of his suspension. The misconduct was said to have been the theft by the appellant of $7000 from a safe in the Office. In addition to the disciplinary charges, the appellant was charged with theft under the Criminal Offences Act. The criminal charges were dismissed in the Magistrate's Court. On 30 June 2011 an ex parte application for leave to apply for judicial review of the decision of 13 October 2010 to dismiss the appellant, was filed in the Supreme Court. On 23 September 2011 the Lord Chief Justice dismissed the plaintiff's application and indicated that he was satisfied no good reason for extending the three month time had been advanced and the appellant had not demonstrated that he had an arguable case for judicial review. The appellant appealed that decision.

Held:

1. This was an appeal from the exercise of a discretionary power to refuse leave to apply for judicial review. For an appellant to succeed in an appeal from the exercise of a discretionary power, it was necessary to demonstrate that the discretion was exercised on wrong principles, involved some fundamental misapprehension of the facts or involved taking into account irrelevant considerations or failing to take into account relevant ones.
2. The court was not satisfied the Lord Chief Justice erred in the exercise of the discretionary power to refuse leave in any way which might attract appellate intervention.
3. The court went on to note that a claim for damages was made in the proposed application for judicial review. It did not appear that the plaintiff would be precluded from suing for damages for wrongful dismissal.
4. The appeal was dismissed.

Cases considered:

'Asitomani v Superintendant of Prison [2003] Tonga LR 84

Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223

Faleola v Kingdom of Tonga [1999] Tonga LR 114 (CA)

Fonua v Tonga Communications Corporation Ltd [2002] Tonga LR 29

House v R [1936] HCA 40; (1936) 55 CLR 499

Palu v Kingdom of Tonga, unreported, Supreme Court, 11 May 2005

Pohaha and Tauelangi v Kinikini (1981-1988) Tonga LR 116

Tapueluelu v Soakimi [2001] Tonga LR 105

Vaiolete v Tonga Development Bank [1999] Tonga LR 57

Statute considered:

Criminal Offences Act (Cap 18)

Rules considered:

Supreme Court Rules 2007

Counsel for the appellant	:	Mr Fa'otusia
Counsel for the respondent	:	Mr Kefu

Judgment

[1] This is an appeal against a judgment of the Lord Chief Justice refusing to grant leave to the appellant to seek judicial review of a decision to dismiss him from the Public Service.

[2] It is convenient first to refer to the background which was uncontroversial. For some period prior to April 2010, the appellant was employed in the Office of the Prime Minister and had responsibility for managing aspects of the finances of the Office. On 30 April 2010 he was suspended and charged with misconduct. On 13 October 2010 he was dismissed effective from the date of his suspension. The misconduct was said to have been the theft by the appellant of $7000 from a safe in the Office. In addition to the disciplinary charges, the appellant was charged (apparently in March 2010) with theft under the Criminal Offences Act CAP 18. On either 7 December 2010 or 7 January 2011 those criminal charges were dismissed in the Magistrate's Court.

[3] On 17 January 2011, the appellant's solicitor wrote to the Public Service Commissioner seeking the review of the earlier decision to dismiss the appellant and his reinstatement. On 9 March 2011, the Public Service Commissioner wrote to the appellant's lawyer indicating the matter had been considered by the Commission on 4 March 2011 and the decision to dismiss had been affirmed.

[4] On 30 June 2011 an ex parte application for leave to apply for judicial review of the decision of 13 October 2010 to dismiss the appellant, was filed in the Supreme Court. This application was accompanied by a draft statement of claim and draft writ. This was done pursuant to Order 39 of the Supreme Court Rules 2007. The application was also accompanied by a short affidavit from the appellant's lawyer.

The following day a writ was issued by the Registrar of the Supreme Court though the issue of the writ was in error because, at that point, no leave had been given to make the application.

[5] On 3 August 2011 the defendants filed an application seeking an order striking out the plaintiff's claim or, in the alternative, an order requiring the plaintiff to replead so as to remove from the draft statement of claim paragraphs which the defendants asserted were scandalous and vexatious. Without descending into detail, those paragraphs alleged serious financial impropriety on the part of consultants and senior officers working for, or in association with, the Prime Minister. The focus of the allegations of impropriety was travelling expenses and the use of credit cards. The strike out application was accompanied by an affidavit of the Solicitor-General. The strike out application was made under Order 8 rule 8. It was almost certainly premature as leave had not then been given to the appellant to make the application for judicial review. It would only be when leave was given that the draft statement of claim would become a pleading in a proceeding.

[6] There was a hearing before the Lord Chief Justice on 10 August 2011 at which the appellant and the defendants were represented. After a preliminary ventilation of the question of whether leave to make the application should be granted (the grant of leave was opposed by the defendants), the matter was adjourned part heard until 12 September 2011.

[7] On 31 August 2011 the appellant filed an amended draft statement of claim. There was then the further hearing. On 23 September 2011 the Lord Chief Justice ordered that the plaintiff's application be dismissed. The Lord Chief Justice also published reasons for judgment. The grant of leave to apply for judicial review may often involve consideration of the timeliness of the application and sometimes, in addition, the merits of the application in a preliminary way. Before referring to the reasons of the Lord Chief Justice, it is convenient to set out the terms of O 39.

> "O.39 Rule 1. When remedy available
>
> This order applies to any action against an inferior Court, tribunal or public body (including an individual charged with public duties) in which the relief claimed includes an order of mandamus, prohibition or certiorari, or a declaration or injunction (in this order referred to as "judicial review").
>
> O.39 Rule 2. Leave of Court required
>
> (1) No application shall be made for judicial review unless the leave of the Court has been obtained in accordance with this rule.
>
> (2) An application for leave to apply for judicial review shall be made promptly and in any event within three months from the date when grounds for the application first arose unless

the Court considers that there is good reason for extending that period.

(3) An application for leave shall be made ex parte by filing;

(a) an application notice which is to set out concisely the relief claimed and the grounds therefore;

(b) a copy of the proposed writ and statement of claim; and

(c) an affidavit verifying the facts relied on.

O.39 Rule 3. Court's powers

(1) The Court may grant the application without a hearing, but shall not refuse it without hearing the applicant,

(2) The Court shall not grant leave unless satisfied that the applicant has a sufficient interest in the matter to which the application relates.

....."

[8] In his reasons, the Lord Chief Justice proceeded on the footing that the "date from when grounds for the application first arose" was the time of the dismissal in October 2010 and, accordingly, the three-month period referred to in O 39 r 2 (2) ran from that date. The Lord Chief Justice accepted the defendants' submission that the application was well out of time but acknowledged that the consequences for the appellant of the decision to dismiss him were obviously very serious and indicated that if good grounds suggestive of error were placed before the court, the three month period might well be extended.

[9] Ultimately, however, the Lord Chief Justice indicated he was satisfied no good reason for extending time had been advanced and the appellant had not demonstrated that he had an arguable case for judicial review. Earlier in his reasons, the Lord Chief Justice indicated he had studied the amended draft statement of claim of 31 August 2011 and concluded that it did not disclose any shortcomings in the procedures preceding the decision to dismiss nor did it establish that it was arguable that the decision taken was wholly unreasonable.

[10] We turn now to consider the appeal. The starting point is to note that this is an appeal from the exercise of a discretionary power to refuse leave to apply for judicial review. For an appellant to succeed in an appeal from the exercise of a discretionary power, it is necessary to demonstrate that the discretion was exercised on wrong principles, involved some fundamental misapprehension of the facts or involved taking into account irrelevant considerations or failing to take into account relevant ones: *Pohaha and Tauelangi v Kinikini* (1981-1988) Tonga LR 116 and *House v R* [1936] HCA 40; (1936) 55 CLR 499.

[11] Order 39 follows the English RSC Order 53: see *'Asitomani v Superintendant of Prison* (2003) Tonga LR 84. The English provisions, though sometimes criticised, were intended to create a speedy and efficient mechanism for the application of public law in the judicial review of administrative decisions. Accordingly, an applicant must move promptly and within the specified limit of three months. In the present case, the Lord Chief Justice was correct in identifying the three month period as commencing from the time of dismissal and in concluding that the application was "well out of time". That is not to say, in appropriate cases, intervening events might not reasonably explain delay including time taken in pursuing alternative legal remedies: *Judicial Review of Administrative Action, de Smith,* Woolf & Jowell, 5th ed, 1995 at 15-021. However the delay in the present case was sought to be explained by the time taken in making representations to the Public Service Commission in January 2011 and, following their rejection in March 2011, the lawyer representing the applicant being distracted by other legal commitments and the difficulty in getting instructions. No error of principle is disclosed in the circumstances in the Lord Chief Justice not accepting these explanations for the lengthy delay.

[12] The central focus of the appellant's case in the appeal was that the Lord Chief Justice was in error in concluding that no arguable grounds were disclosed in the appellant's case for challenging the decision to dismiss. At least before the Court of Appeal, the challenge to the decision to dismiss was advanced on the basis that the decision to dismiss was manifestly unreasonable. That is, the decision was infected with what is often described as *Wednesbury* unreasonableness: *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223. However it must be borne in mind that in relation to this ground of judicial review, there is a very high threshold for establishing the requisite unreasonableness. Lord Greene MR described the test and threshold in the following way in *Wednesbury* at 230:

> "It is true to say that, if the decision on a competent matter is so unreasonable that no reasonable authority could ever have come to ft, then the courts can interfere [and later] to prove the case of that kind would require something overwhelming."

[13] In the present case there are two matters referred to in the appellant's amended draft statement of claim which are particularly relied on by the appellant's counsel in this appeal. We assume, without deciding, that at the stage of deciding whether to grant leave, the merits of the applicant's case can be assessed by the Court simply by reference to facts the applicant asserts are true. The first matter is the acquittal of the appellant in the Magistrates Court and the second is the asserted exoneration of the appellant by the Auditor-General.

[14] As to the first matter, it must be borne in mind that the standard of proof in criminal matters is beyond reasonable doubt. This is not a standard which, at least in the ordinary course, would be applied in administrative decision-making including the making of a decision to dismiss a public servant. In other words, facts established in criminal proceedings might not prove the commission of a crime beyond reasonable doubt. However those same facts could well provide a sufficiently firm

factual foundation for a decision to dismiss which was reasonable or, putting it slightly differently, reaching a decision that an employee should be dismissed on those same facts does not demonstrate, of itself, that the decision is unreasonable in a *Wednesbury* sense.

[15] The second matter is the asserted exoneration of the appellant by the Auditor-General. We should emphasise that any report which the Auditor-General may have prepared, was not in evidence before the Lord Chief Justice nor in evidence before us. However the asserted fact (in the amended draft statement of claim) that the Auditor-General exonerated the appellant must be balanced with the admission in the same draft statement of claim that the appellant confessed to stealing the money. It is true that in the amended draft statement of claim the appellant said the confession was not true and recounted facts explaining why he had made the false confession. However the fact that the confession was made places the exoneration by the Auditor-General in a slightly different light. Also, in the appellant's written submissions in the appeal, the finding or ruling of the Auditor-General was said to be that "there was not enough evidence to indicate that the appellant was responsible to (sic) the $7000 that went missing from the PM's Office safe". There is a material difference, in our opinion, between a conclusion that there was not enough evidence to prove particular conduct and exonerating a person from that conduct. In our opinion, the mere fact that the Auditor-General appears, at best for the applicant, to have had real reservations about whether the appellant stole the money would not constitute something which was even arguably "overwhelming", to use the language of Lord Greene, so as to demonstrate the appellant had an arguable case that the decision to dismiss was manifestly unreasonable in the *Wednesbury* sense.

[16] In the result, we are not satisfied the Lord Chief Justice erred in the exercise of the discretionary power to refuse leave in any way which might attract appellate intervention.

[17] We conclude by noting that a claim for damages was made in the present case in the proposed application for judicial review. It does not appear to us, as presently advised, that the plaintiff would be precluded from suing for damages for wrongful dismissal. This observation should not be taken to be an invitation to the plaintiff to commence such proceedings nor a suggestion that any such proceedings would be likely to bear fruit.

[18] However it is possible that those advising the appellant were not (and perhaps the legal profession more generally is not) entirely sure what are appropriate procedures. It is, we apprehend, an emerging legal issue in the Kingdom. Some decisions addressing aspects of this are *Vaiolete v Tonga Development Bank* (1999) Tonga LR 57 (Ward CJ - private rights in relation to a dismissal should not be pursued in judicial review proceedings) and to similar effect see *'Asitomani v Superintendent of Prisons* (2003) Tonga LR 84 and the decision of Thomas J in *Palu v Kingdom of Tonga*, unreported, Supreme Court, 11 May 2005; *Faleola v Kingdom of Tonga* (1999) Tonga LR 114 (Court of Appeal - the mere fact that judicial review proceedings concerning a dismissal had failed did not preclude the prosecution of an action for wrongful dismissal); *Tapueluelu v Soakimi* (2001) Tonga LR 105 (Ford J - proceedings concerning the misconduct of a public servant which truly raise public

law issues should be commenced by way of judicial review); and *Fonua v Tonga Communications Corporation Ltd* (2002) Tonga LR 29 (Ward CJ - it is not necessary to bring judicial review proceedings to challenge a dismissal by a public authority even though the decision is otherwise amenable to judicial review).

[19] The appeal is dismissed with costs.

Leong v Fusimalohi anor

Supreme Court, Nuku'alofa
Scott CJ
CV 119/09

18 May 2012

Defamation – defences of fair comment and qualified privilege pleaded – not accepted – judgment for the plaintiff

The plaintiff rented a dwelling from the defendants in March 2009 and moved out after 13 days claiming that he was not satisfied with the condition of the flat. The defendants were not happy and co-authored a letter and sent it to the general manager of the plaintiff's employer, Total Fiji Limited. The plaintiff claimed that the letter contained a number of false, derogatory and defamatory statements about him. The plaintiff commenced an action in defamation in May 2009. The defendants denied that the letter contained derogatory remarks about the plaintiff and denied that it was defamatory. In the first alternative, the defendants pleaded that the words complained of were fair comment on a matter of public interest. In a second alternative defence it was pleaded that the letter was published in circumstances of qualified privilege.

Held:

1. The first question was whether the words in the letter were defamatory. The court found that it was clear that the defendants, by publishing the letter, intended it to be damaging to the plaintiff's reputation. The court found that the words were defamatory. Having found that the words complained of were defamatory they were presumed by law to be untrue. No attempt was made by the defendants to rebut that presumption. The focus rather was on the defences of fair comment and qualified privileged.
2. It was a complete defence to establish that the words complained of were fair comment on a matter of public interest. In order to succeed in that defence the onus rested on the defendants to show: that the words were comment and not statements of fact; that there was a basis in fact for the comments contained or referred to in the matter complained of; and that the comment was on a matter of public interest. Since no attempt was made by the defendants to prove the basis of any of the facts to which the comments allegedly referred, the defence of fair comment inevitably failed.
3. When the defence of qualified privilege was pleaded it was for the defendant to allege and prove all such facts and circumstances as were

necessary to bring the words complained of within the privilege unless such facts were admitted before or at the trial of the action. No evidence was called by the defendants and no attempt was made to prove that the defendants acted bona fide or that the General Manager of Total Fiji Ltd had any interest in receiving the letter which he was sent. The plaintiff's evidence was that the letter was actuated by the defendants' anger and ill-will towards him and the court accepted that evidence. The defence of qualified privilege failed.

4. Judgment was for the plaintiff against both defendants with damages to be assessed.

Statute considered:
Defamation Act (Cap 33)

Counsel for the plaintiff	:	Mrs Stephenson
Counsel for the defendants	:	Mr Tu'utafaiva

Judgment

1. This is an action in defamation commenced in May 2009. The Plaintiff says that the Defendants co-authored a letter containing a number of false, derogatory and defamatory statements about him and then, actuated by malice, published the letter by sending it to the general manager of Plaintiff's employer, Total Fiji Limited.

2. The publication of the letter and the circumstances leading to the publication are largely agreed and may briefly be stated. The only witness was the plaintiff. At the request of the parties the hearing took place without a jury.

3. The Plaintiff told me that he joined Total in 2007. Previously, he had worked in various senior positions for companies in the Pacific. In March 2009 he was posted to Tonga as Marketing and Operations Manager for Tonga with overall responsibility for Total's operations in the Kingdom. He reported directly to the Managing Director of Total Fiji Ltd.

4. The Plaintiff arrived in Tonga on 10 March 2009. He needed somewhere to live and shortly after his arrival he was taken to see an apartment at Halaleva owned by the Defendants. The apartment had previously been inspected by Total employees. The Plaintiff agreed to rent the apartment and a tenancy agreement (document P1) was signed by the Plaintiff and the second Defendant on 14 March 2009.

5. The agreement is quite short and is apparently "home-made". It does not describe the demised premises and does not contain a number of the usual covenants. It does however provide that the tenant will pay a bond of $800 and pay "one month rent in advance, the amount of $800." The agreement was stated to be "effective for 24 months and can be renewed another ..... months upon mutual agreement". There is no termination clause. The Plaintiff told me that he had paid $800 on or about the day that the agreement was signed, but whether this was by way of bond or rent I was not told. The Plaintiff moved in on the same day.

6. On 26 March 2009 the Plaintiff wrote to the second Defendant. A copy of the letter is document P2. Among other matters, the Plaintiff complained that the apartment was infested with insects, that he was awoken by barking dogs and church bells, that the television did not work and that the flat was poorly ventilated. The "last straw" was the appearance of a "fairly large rat" which he discovered consuming a packet of his breakfast cereals. In these circumstances, the Plaintiff advised the second Defendant that he intended to vacate the flat on 31 March. He raised the question of a refund of part of the $800 pointing out that he had only resided at the flat for 13 days.

7. The Plaintiff told me that after delivering the letter at the second Defendant's office, he returned to the office a few hours later and spoke to the second Defendant. He thought that this would be courteous but unfortunately the second Defendant looked at the matter very differently. He was extremely annoyed: he accused the Plaintiff of breaching a signed agreement; he made a number of threats including a threat to have the Plaintiff deported from Tonga and a threat to tell the Tongan government Minister what had happened "to affect the operations of Total in Tonga".

8. The Plaintiff told me that he was shocked and embarrassed by the second Defendant's reaction. In his view the problems arising from the conditions of the flat were personal between the Plaintiff and the Defendant and had nothing to do with Total.

9. On 3 April 2009 the Defendants replied to the Plaintiff's letter of 26 March. A copy of the reply is exhibit P4 and it is the document which contains the material which the Plaintiff says defamed him. Despite suggestions to the contrary in the letter, it is accepted that the letter was in fact only sent to the General Manager of Total Fiji Ltd. The other named addressees did not receive copies.

10. On 15 July 2009 a statement of defence and counterclaim was filed. The Defendants do not deny authoring P4 and neither did they deny sending a copy of the letter to the General Manager of Total Fiji Ltd. The Defendants however denied that the letter contained derogatory remarks about the Plaintiff and denied that it was defamatory. In the first alternative, the Defendants pleaded that the words complained of were fair comment on a matter of public interest. In a second alternative defence it was pleaded that the letter was published in circumstances of qualified privilege. The counterclaim was not pursued.

11. The only challenge to the Plaintiff's evidence was a suggestion that he had concocted his complaints since he wished to move to premises previously occupied by his predecessor. This was denied. The Plaintiff told me that he had moved to premises which were not premises which had previously been occupied by his predecessor. I was generally impressed by the Plaintiff who gave his evidence clearly and without hesitation. I found him to be a witness of truth and accept his denial. I also accept his assertion that the complaints made about him about the condition of the flat and set out in his letter were entirely untrue.

12. At the conclusion of the short trial both counsel asked to file written submissions. Helpful submissions were in due course filed by counsel for which I am grateful.

13. The first question is whether the words complained of in letter P4 were defamatory. Half way down the first page of the letter the Defendants wrote:

> "We will also be providing a copy of this with the appropriate authorities and officials in Tonga, as well as your staff here so that they know how unprofessional you behave and how poor your conduct is."

From this it is clear that the Defendants, by publishing the letter, intended it to be damaging to the Plaintiff reputation. Given this clearly expressed intention, denial that the intention was achieved does not seem to be an attractive option. Intention apart, there cannot, in my view, be any doubt that each of the phrases complained of and set out in paragraph 7 of the statement of claim in their ordinary and natural sense describe what was said individually and collectively to be the Plaintiff's reprehensible attitudes and conduct. The Defendants did not attempt to prove that the words, when read by Total's General Manager, would not have been understood in their ordinary and natural way.

14. Having found that the words complained of are defamatory they are presumed by law to be untrue. No attempt was made by the Defendants to rebut that presumption. The focus rather was on the defences of fair comment and qualified privileged.

15. It is a complete defence, in an action for defamation, to establish that the words complained of are fair comment on a matter of public interest. In order to succeed in that defence the onus rests on the defendants to show:

(i) that the words are comment and not statements of fact;
(ii) that there is a basis in fact for the comments contained or referred to in the matter complained of; and
(iii) that the comment is on a matter of public interest.

Since no attempt was made by the Defendants to prove the basis of any of the facts to which the comments allegedly referred, the defence of fair comment must inevitably fail.

16. The remaining argued defence was qualified privilege. Section 10 of the Defamation Act (Cap 33) is as follows:

> "No criminal or civil proceedings for defamation of character shall be maintainable in respect of any communication made bona fide by any person in discharge of a legal, moral or social duty or in reference to a matter in which he has an interest and the person to whom such communication is made has an interest in hearing it unless it is proved that the person making such communication was actuated by anger, ill will or other improper motive."

When this defence is set up it is for the Defendant to allege and prove all such facts and circumstances as are necessary to bring the words complained of within the privilege unless such facts are admitted before or at the trial of the action.

17. It has already been found as a fact that the words complained of were untrue and defamatory. The intention of publishing letter P4 is stated on its face to be damaging to the Plaintiffs reputation and that of his company. No evidence was called by the

Defendants and no attempt was made to prove that the Defendants acted bona fide or that the General Manager of Total Fiji Ltd had any interest in receiving the letter which he was sent. The Plaintiff's evidence was that the letter was actuated by the Defendants anger and ill will towards him and I accept that evidence. In these circumstances the Defence of qualified privilege must fail.

18. The Plaintiff is seeking general damages which are quantified at $300,000 plus aggravated damages of $200,000. These are very substantial amounts. Mr. Tu'utafaiva says they are excessive. Neither party cited any authority in support. Mrs. Stephenson suggested that further submissions might be made. I accept that suggestion.

19. There will be judgment for the Plaintiff against both Defendants with damages to be assessed. The question of costs will be reserved for argument.

Leong v Fusimalohi anor

Supreme Court, Nuku'alofa
Scott CJ
CV 119/09

18 July 2012

Damages – successful claim of defamation – awarded amount incorporating both general and aggravating matters

For the facts, see the judgment reported at page 51.

The court assessed the damages to be awarded to the plaintiff. The plaintiff sought general damages in the sum of $300,000 and aggravated damages in the sum of $200,000.

Held:

1. The principal factors which tended to aggravate the damages were the particularly nasty tone of the defamatory letter, the demeaning allegations contained in the letter, the defendants' express intention to damage the plaintiff's reputation both personal and professional, and the letter's publication to the plaintiff's employer which latter fact caused the plaintiff to be summoned to Suva to offer an explanation. However, there was no evidence that the "likely result" of the publication of the letter was that "the plaintiff's chances of further promotion at Total may well have been compromised". On the contrary, the Court's vindication of the plaintiff and its award of damages to him should wholly restore his good character in the eyes of his employer.
2. The appropriate award, incorporating both general and aggravating matters, was $10,000.

Counsel for the plaintiff : Mrs D Stephenson
No appearance by the defendants

Assessment of damages

1. On 18 May 2012 I found for the Plaintiff in his action in defamation against the Defendants. This is my assessment of the damages to be awarded to the Plaintiff.

2. The facts and matters complained of by the Plaintiff are set out in sufficient detail in the judgment of 18 May and need not now be repeated.

3. Mrs Stephenson filed helpful written submissions on 13 June which explained the general principles relating to the award of damages in defamation and which referred me to three local authorities. Mrs Stephenson concluded by submitting:

> "that the nature of the defamatory statements (personal insults) — specifically intended to harm the Plaintiff's reputation (which he had worked hard over the years to earn), the overall conduct of the Defendants and their refusal to compromise or apologize, as well as their failure to present a substantive defence at trial warrant a substantial award of damages (including an element of aggravated damages) in favour of the Plaintiff".

4. In sub paragraphs A and B of the prayer for relief in the Statement of Claim the Plaintiff had sought :

> "A General damages in the sum of $300,000;
> B Aggravated damages in the sum of $200,000".

Mrs Stephenson conceded that this claim had been calculated on the basis that, as alleged in paragraph 8 of the Statement of Claim, publication of the defamatory material had not only, as turned out to be the case, been to the General Manager of Total Petroleum in Suva Fiji but had also been to :

(1) Tonga Electricity Commission;
(2) Public Service Commission ;
(3) Ministry of Labour Commerce and Industries ;
(4) Tonga Immigration ;
(5) Tonga Police ; and
(6) Ministry of Public Enterprises.

5. Even acknowledging a degree of artificiality in excising the originally pleaded publications, it is plain that the extent of the damage to the Plaintiff's reputation was very much reduced by the much more limited extent of the actual publication and Mrs Stephenson did disagree.

6. In my view, the principal factors which tend to aggravate the damages are first, the particularly nasty tone of the defamatory letter — P4, secondly the demeaning allegations contained in the letter, thirdly the Defendants' express intention to damage the Plaintiffs reputation both personal and professional and fourthly the letter's publication to the Plaintiff's employer which latter fact caused the Plaintiff to be summoned to Suva to offer an explanation. On the other hand, I do not think there is any material before me to justify Mrs Stephenson's suggestion that the "likely result" of the publication of the letter is that "the Plaintiff's chances of further promotion at Total may well have been compromised". On the contrary, the Court's vindication of the Plaintiff and its award of damages to him should wholly restore his good character in the eyes of his employer.

7. Although separate awards have sometimes been made for "general" and "aggravated" damages in my view then is no advantage in subdividing the total award

in this case. Taking all the circumstances into account including those referred to Mrs Stephenson's submissions, I find that an appropriate award, incorporating the aggravating matters, to be $10000. The Plaintiff will also have his costs, to be taxed if not agreed.

80

Tonga v Vaitohi

Supreme Court, Nuku'alofa
Scott CJ
AM 33/11, CV 79/11

18 May 2012

Appeal – Magistrate's Court decision addressed wrong question – matter remitted back to Magistrate's Court for reconsideration on different question

The plaintiff/appellant claimed $1900 which was the cost of repairing a motor car which was imported on his behalf by the defendant/respondent from New Zealand but which was found on arrival in Tonga to be damaged. The defendant denied having "anything to do" with the damage to the car. The focus in the Magistrate's Court was whether the plaintiff and the defendant had agreed that the car could be repaired in a garage of the plaintiff's choice with the cost of $1900 being met by the defendant. The magistrate was not satisfied on the balance of probabilities that the plaintiff had proved his case and dismissed the claim. The plaintiff appealed.

Held:

1. The appeal succeeded because the case was decided on the wrong question, not because the wrong question was wrongly decided.
2. The matter was remitted to the Magistrate's Court for retrial on the question: "Was the plaintiff's car damaged while in the defendant's care and after it had been consigned to the defendant by the plaintiff in order for it to be transported from New Zealand to Tonga?" If the answer to that question was in the affirmative then the defendant would be responsible for the reasonable cost of its repair.

Case considered:

Benmax v Austin Motor Co Ltd [1955] 1 All ER 326

Counsel for the appellant : Fa'otusia
Counsel for the respondent : Piukala

Judgment

1. The plaintiff/Appellant claimed $1900 which he stated was the cost of repairing a motor car which was imported on his behalf by the Defendant/Respondent from New Zealand but which was found on arrival in Tonga to be damaged.

2. Apparently, a statement of defence was filed but despite the hearing of the appeal being adjourned part-heard in order to allow the papers to be put in order, I was not supplied with a copy. According to Mr. Piukala the Defendant denied having "anything to do" with the damage to the car.

3. The Plaintiff gave evidence but unfortunately counsel, the witnesses and the magistrate, rather than focusing on the central question, which was whether the Defendant was liable for the damage or not, turned their attention to a secondary question which was whether the Plaintiff and the Defendant had agreed that the car could be repaired in a garage of the Plaintiff's choice with the cost $1900 (which it was not disputed was actually incurred by the Plaintiff in having the car by repaired — see Exhibit 1) being met by the Defendant.

4. After hearing both parties the magistrate decided that he was not satisfied on the balance of probabilities that the plaintiff had proved his case. Accordingly, the claim was dismissed.

5. Mr. Fa'otusia says that the magistrate erred in his evaluation of the evidence and that the transcript of the proceedings in the magistrates' Court was fundamentally incorrect. He asks for the judgment to be set aside and for the matter to be remitted to the magistrates' Court for retrial before another magistrate. Mr. Piukala did not accept that the magistrate had erred and asked for the appeal to be dismissed.

6. In my view, neither of Mr. Fa'otusia's arguments can succeed. An appeal court is slow to reverse findings of fact by a lower court, including evaluations of credibility (*Benmax v Austin Motor Co Ltd* [1955] 1 All ER 326) and while a transcript may contain errors, the appeal court will find itself bound by the transcript in fact produced unless it is agreed to be faulty or there is some evidence to show that it is in fact faulty. In the present case Mr. Piukala did not agree that the record was incorrect and there was no evidence, beyond Mr. Fa'otusia's assertion, that it was not accurate.

7. In my opinion, the appeal must succeed because the case was decided on the wrong question, not because the wrong question was wrongly decided.

8. The matter will be remitted to the Magistrate's Court for retrial on the following question:

> "Was the Plaintiff's car damaged while in the Defendant's care and after it had been consigned to the Defendant by the Plaintiff in order for it to be transported from New Zealand to Tonga?"

70 If the answer to that question is in the affirmative then the Defendant will be responsible for the reasonable cost of its repair. In my opinion the Plaintiff would be fully entitled to take the car to be repaired by a garage of his choice, whether or not the Defendant agreed.

Pohiva anors v Edwards

Supreme Court, Nuku'alofa
Scott CJ
AM 24/11; CV 201/10

5 June 2012

Civil procedure – application to strike out appeal – no grounds of appeal stated and delay – appeal struck out

On 17 June 2011 judgment was entered in favour of the respondent in the Nuku'alofa Magistrates' Court. On 20 June 2011 a notice of appeal was filed. The grounds of appeal were that the Magistrate was wrong in allowing the claim, alternatively, that the learned Magistrate was wrong in allowing the full claim of $10,000, and it was wrong to allow all the costs. On 10 February 2012 the respondent filed an application to strike out the appeal on the grounds that the appellants failed to comply with the requirements of section 75(1) of the Magistrates' Courts Act (Cap 11) and that they failed to prosecute the appeal with reasonable despatch.

Held:

1. Rights of appeal are statutory creations and therefore the conditions imposed by statute must be complied with. Section 75(1) of the Magistrates' Courts Act required an appellant to state his "general grounds of appeal". The mere statement that the Magistrate "was wrong" did not comply with that requirement.
2. There was inordinate and inexcusable delay in the prosecution of the appeal and it has caused substantial prejudice to the respondent. Despite being given more than enough time to comply with the directions given by consent on 22 February there was a complete failure by the appellants to comply.
3. The appeal was struck out.

Case considered:

National Telephone Co. Ltd v Postmaster General [1913] 2 KB 614

Statute considered:

Magistrates' Courts Act (Cap 11)

Counsel for the appellant : Ms Kioa
Counsel for the respondent : W Edwards

Judgment

1. On 17 June 2011 judgment was entered in favour of the Respondent in the Nuku'alofa Magistrates' Court. On 20 June 2011 a notice of appeal was filed. The grounds of appeal were stated to be as follows:

> "1. The Magistrate was wrong in allowing the claim
> 2. Alternative – the learned Magistrate was wrong in allowing the full claim of $10,000.
> 3. It was wrong to allow all the costs."

2. On 10 February 2012 the Respondent filed the present application to strike out the appeal. Among a grounds advanced in support of the application the Respondent submits a) that Appellants have failed to comply with the requirements of Section 75 (1) of the Magistrates' Courts Act (Cap 11) and b) that they have failed to prosecute the appeal with reasonable despatch.

3. In his supporting affidavit the Respondent also avers that the Appellants, taking advantage of the delay in disposing of the appeal are repeating the defamations complained of in the Magistrates' Court.

4. The application first came before me on 22 February 2012. After discussion it was agreed that detailed and adequate grounds of appeal would be filed without delay and that translation of the relevant pages of the transcript would be undertaken by the Appellants. The strike out application was adjourned generally.

5. On 26 April the Respondent wrote to the Court seeking restoration of the application. The Court was advised that no particulars of the grounds of appeal had been provided. Today I was advised by Ms Kioa that she did not know whether any of the appeal papers had been translated.

6. It is worth remembering that rights of appeal are statutory creations (see e.g. *National Telephone Co. Ltd v Postmaster General* [1913] 2KB 614) and therefore the conditions imposed by statute must be complied with.

7. Section 75(1) requires an appellant to state his "general grounds of appeal". The mere statement that the Magistrate "was wrong" does not comply with this requirement (see Supreme Court Practice 1988 paragraph 59/3/5).

8. Section 78 requires the Registrar "as soon as possible" (after receipt of the appeal documents) to give notice of the date fixed for the hearing of the appeal. This requirement can only be satisfied if in fact the appeal is ready for hearing. In the present case, nearly 12 months have elapsed without the Appellants having ensured that the appeal was ready for disposal.

9. In my opinion the principles which require appeals to be lodged in time also govern the requirement that once lodged, appeals must be prosecuted in a timely manner. This is especially the case when, as is the case in appeals from Magistrates' Courts in Tonga, the filing of an appeal is accepted as staying the judgment under appeal.

10. In my view there has been inordinate and inexcusable delay in the prosecution of this appeal and it has caused substantial prejudice to the Respondent. Despite being given more than enough time to comply into the directions given by consent on 22 February there has been a complete failure by the Appellants to comply.

11. I am satisfied that it is right and proper that this appeal be struck out. In exercise
80 of the inherent jurisdiction of the Court I so order.

Tonga v Tonga Water Board

Supreme Court, Nuku'alofa
Scott CJ
CV 291/2009

15 June 2012

Employment law – redundancy – question as to amount of entitlement – held to be correctly calculated

The plaintiff began working for the defendant in 1988 as a labourer. By January 2008, the plaintiff had risen to the level of Supervisor Mechanic. Before 2007 the Production Section at Mataki'eua relied on about 30 diesel pumps to extract underground water. The plaintiff and his colleagues were employed to service these pumps. In 2007 the Board began experimenting with electric pumps that needed no servicing and, after a grant was received from the European Union, all but seven of the diesel pumps were replaced. On about 14 January 2008, the plaintiff and three of his fellow-workers were told to attend a meeting, where they were told that their jobs had come to an end. The plaintiff's case was that the Board did not comply with its own redundancy policy; the plaintiff and his colleagues were not in fact made redundant but were actually compulsory dismissed; the plaintiff was not paid such sums as were due to him under the voluntary redundancy policy which in fact applied to him; and additionally or in the alternative, that the plaintiff was not paid the acting allowances which were due to him following his assumption of increased responsibilities.

Held:

1. The acceptance by the plaintiff and his colleagues of the decision to terminate them had the effect of waiving the defects in the manner in which the decision was implemented. The plaintiff became redundant because of the adoption of new work methods following the installation of electric pumps.
2. The court found that the real issue was not whether the termination was a compulsory dismissal dressed up as a redundancy but whether the plaintiff received the correct compensation after he accepted his termination.
3. Over the years there were several re-arrangements of positions, duties and responsibilities. Titles of positions were changed as new methods of working were introduced and old methods phased out. While it may have been the case that the plaintiff sometimes acted in positions without receiving any acting allowance, the court did not accept his claim that he

acted for 10 years without receiving any allowance for performing these duties.

4. The basis on which the plaintiff's redundancy entitlement was calculated correctly reflected the circumstances in which he ceased employment with the defendant and were correctly calculated to correspond to the plaintiff's service to the defendant. Accordingly the plaintiff's claim failed and judgment was entered for the defendant.

Counsel for the plaintiff : Mr Tu'utafaiva
Counsel for the defendant : Mrs Taumoepeau

Judgment

[1] The Plaintiff began working for the Defendant in 1988 as a labourer. He told me that when he started he did not sign any document. He was not familiar with the Water Board Act or with the policies or directions of the Board.

[2] By January 2008, the Plaintiff had risen to the level of Supervisor Mechanic. He was working at Mataki'eua Production Section. On about 14 January 2008 he and three of his fellow-workers were told to attend a meeting, chaired by the Defendant's Chief Accountant. At that meeting they that their job had come to an end. They were not told why. They were each given a memorandum signed by the Defendant's Personnel Officer and Acting Secretary to the CEO. The Memorandum (Document P16) advised that:

> "On 10th January 2008 [the Board] approved ... for the following staff [including the plaintiff] of Mataki'eua Production Section to be made redundant w.e.f. 8th January 2008 and all posts to be abolished".

[3] On 16th January 2008 the Plaintiff and his colleagues replied (Document P17). They wrote:

> "We hereby give notice of our acceptance of the decision by the Board to make us redundant from work which was conveyed to us at the meeting held and the letter distributed to us on Tuesday 14 January 2008."

[4] On 28 January the Plaintiff and his colleagues again wrote to the Defendant (Document P18) asking:

> " ... in this letter to advise us of all the entitlements that we should receive from our redundancy from work ... including to be received before the end of work on Wednesday 30 January 2008 including the following:
>
> 1. Redundancy payment
> 2. Superannuation, transfer value, TWB contributions
> 3. Vacations leave due and casual leave due

4. Overtime working hours
5. And any other entitlements".

[5] On 11 February the Defendant's Personnel Officer replied (Document P22). He advised that the Plaintiff was entitled to receive:

1. Superannuation - $19447.30
2. Redundancy - $12918.00
3. Leave - $1274.10
4. Overtime - $1 1.05
   Total = $33,650.45

This sum was paid to the Plaintiff by two equal payments made on 12 February 2008 and 15 February 2008.

[6] The Plaintiff's case is that:

(a) The Board did not comply with its own redundancy policy.
(b) That the Plaintiff and his colleagues were not in fact made redundant but were actually compulsory dismissed.
(c) That the Plaintiff was not paid such sums as were due to him under the voluntary redundancy policy which in fact applied to him; and
(d) Additionally or in the alternative, that the Plaintiff was not paid the acting allowances which were due to him following his assumption of increased responsibilities.

[7] Documents P49 to P74 include the Defendant's Policy Manual dated May 2007. At page P58 is the section dealing with compulsory termination of service. As will be seen, compulsory termination only "may become necessary when an officer has been judged no longer able to discharge his duties efficiently or when he is incapacitated by reasons of physical or mental illness". Neither party contended that these circumstances applied in this case. If in fact the Plaintiff was not made redundant then it appears that there was no scope within the terms of the Policy Manual for him to be compulsorily dismissed (and see also paragraph 8.5 of the Manual "Cessation of Employment").

[8] Pages P69 and P70 are entitled "Redundancy Policy prior to 17 November 1999" and "Redundancy Policy after 1999". The same policies are reproduced at P73. These documents confirm that redundancy will only be found to occur when it is "attributable wholly or mainly to one or more of the following circumstances:

(i) the Board has ceased or intends to cease to carry on the business for which the employee was employed; -
(ii) the Board has ceased or intends to cease to carry on its business in the place where the employed (sic);
(iii) the requirements of the Board for employees to carry out work of a particular kind have ceased or diminished or are expected to cease or diminished;

> (iv) the requirements of the Board for employees to carry out work of a particular kind in the place where they were employed have ceased or diminished, or are expected to cease or diminished".

[9] It was the Defendant's case that (iv) above applied. The Defendant's CEO Saimone Helu told me that before 2007 the Production Section at Mataki'eua relied on about 30 diesel pumps to extract underground water. It was to service these pumps that the Plaintiff was employed. In 2007 the Board began experimenting with electric pumps that needed no servicing and, after a grant was received from the European Union, all but seven of the diesel pumps were replaced; this was why the Plaintiff and his colleagues were made redundant.

[10] It was suggested in cross-examination that after the Plaintiff and his colleagues were terminated, daily-paid workers were recruited in their place. It was not disputed that daily paid workers were taken on but the Plaintiff himself accepted that the work that they performed was different from the work on the diesel pumps for which he had been employed. His own evidence was that he had not been able to work since his termination as he had only been trained for one thing: servicing diesel pumps, and could do no other work. In my view, the recruitment of daily paid workers to perform different tasks from those performed by the workers declared redundant did not affect the integrity of the redundancy decision.

[11] Having heard the Plaintiff himself and the two Defendant's witnesses I am satisfied that the Plaintiff's redundancy was a genuine redundancy caused by a change in work methods. The next question is whether the redundancy policy procedures were properly followed.

[12] As will be seen from the final paragraphs of P69 and P70 and from the two paragraphs 4 on Document P73:

> "Before any employee is made redundant in accordance with this policy, he/she must be informed of such intention and given the opportunity to comment, at least one month before a decision is made by the Board."

[13] The evidence of Saimone Helu, was that:

> "We thought we only had to give one month's notice *after* the decision was taken, by way of appeal". (emphasis added).

Furthermore, it is plain from the Minutes of the Board Meeting on 10 January 2008 (item 9.6) at which the redundancy decision was reached and from document P16, that the final decision was taken by the Board *before* a response from the employees had been obtained, not *after* the response, as was required by the Redundancy Policy. The question that then arises is whether the failure to follow the proper procedure invalidated the termination.

[14] In my view, the acceptance by the Plaintiff and his colleagues of the decision to terminate them had the effect of waiving the defects in the manner in which the

decision was implemented. As already noted, I accept that in fact the Plaintiff had become redundant because of the adoption of new work methods following the installation of electric pumps. Additionally, the Plaintiff told me:

> "I understood we were being told to resign. We were just told we were redundant. I do not know what redundant means. I do not know the difference from being dismissed. I just know my job had come to an end."

Later he told me:

> "I was happy that I was going to receive some money. I willingly signed the letter (Document P17)".

However:

> "I was not really content with the amount as I was told later that I was entitled to more. Mosese Latu told me it was not enough. I sought advice from Mosese Latu, the Chief Administrator. I understood from him that the Board had not acted justly. "

[15] As I find it, the real issue in this case is not whether the termination was a compulsory dismissal dressed up as a redundancy (as is pleaded in paragraph 8 of the Statement of Claim) but whether the Plaintiff received the correct compensation after he accepted his termination, howsoever it was described.

[16] Mosese Latu, who had advised the Plaintiff, gave evidence on his behalf. He referred me to document P2 paragraph (iii) dated 6 November 2006 in which it is stated:

> "The Board approved the Government's Redundancy Policy as Tonga Water Board's new redundancy policy (refer attachment) BD0973".

The date of the Board's approval was 24 October 2006 as may be seen from Exhibit D1. On that date, the Board approved the new Policy which was stated to be:

> a) An employee who has worked for more than 24 months, payment of 3 months basic salary plus 5% of basic salary for each completed year of service paid at the employees substantive appointed level up to a maximum of 12 months pay;
> b) An employee who has worked for less than 24 months will be paid on a pro-rata basis".

[17] It is important to understand that what was approved by the Board was not an entirely new redundancy policy but was rather a further variation of Clause 2 of the

policy (the entitlements clause) which was brought into being in 1995, was revised in 1999 (see Exhibit P1) and which was now being revised again.

[18] It was the Plaintiff's case, based principily on Mosese Latu's advice, that the policy which had been adopted by the Defendant Board was not the revised existing policy but was in fact an entirely new policy, the details of which are set out at Exhibits P3, 4 and 5, a letter from the Public Service Commission addressed to the Defendant's General Manager, dated 16 November 2006.

[19] As I find it, there are three major problems with these contentions. First, the part of the policy set out in Exhibit D1 (see paragraph 16 above) is not consistent with the Policy set out in the letter of 16 November. Secondly, the evidence was that the Defendant is not part of the Civil Service, is a government owned business entity and as such is not subject to arrangements made by the Public Service Commission. Thirdly, the PSC's policy applied to a programme of *voluntary* redundancy, not, as in this case, compulsory redundancy.

[20] From the evidence, not least that of the Plaintiff, it is clear to me that although he accepted the decision to terminate him, the termination was compulsory and was not voluntary. The fact that he agreed for accept the terms of compensation offered to him does not mean that the decision to terminate the Plaintiff was made with consent. In my opinion, the argument that the Plaintiff was entitled, upon his termination from the Defendant to the entitlements available to those who had accepted the offer of voluntarily redundancy governed by the policy adopted by the Public Service Commission in about November 2006 cannot succeed.

[21] As has already been noted (in paragraph 5 above) the Defendant calculated the Plaintiff's entitlements under the Redundancy Policy adopted in October 2006 to be $33650.45. It was not the Plaintiff's case that these calculations were incorrect but in paragraph 15 of the Statement of Claim it was stated that the payments made did not reflect his promotion to acting foreman in 1997. It was argued that if acting promotion had been taking into account the Plaintiff would have been entitled to an additional $21,151.00.

[22] The evidence on this issue was somewhat unsatisfactory. The Plaintiff told me that despite receiving a number of promotions, among them Leading Hand Mechanic and Supervising Mechanic, he never received the appropriate acting allowance. In reply to my question the Plaintiff told me that he began acting as Foreman in 1997 but despite holding the post for over 10 years until his employment was terminated he never received any acting allowance. On the other hand, he never raised the matter with his employer either.

[23] The Plaintiff's claim to have acted for 10 years without receiving an acting allowance was supported by Mosese Latu who was for at least part of the time the Defendant's Chief Administrative Officer. His evidence was that the acting appointment was not approved by the CEO even though the Plaintiff was performing the duties of the position.

[24] The Defendant's Personnel Officer at the time 'Elisiva Tapueluelu confirmed that the Plaintiff was not paid any acting allowances but she did not know whether he was authorised to act in the positions as claimed.

[25] Unfortunately Saimone Helu, who told me that there was a Personal File for the Plaintiff in existence, was not asked to produce it and was not questioned in any detail about acting appointments that might have been held by the Plaintiff.

[26] The only material which appears to provide any reliable evidence on this question is two personnel lists for the years 2006 to 2007 (Documents P35 and P43). These documents show that the Plaintiff was promoted to Foreman Mechanic in July 2004 and that he was again promoted to Supervisor Mechanic in July 2007. These personnel lists are inconsistent with the Plaintiff's evidence that he acted as Foreman from 1997 to 2008 without ever being formally promoted.

[27] It seems clear from all the evidence that during the years under consideration there were several re-arrangements of positions, duties and responsibilities. Titles of positions were changed as new methods of working were introduces and old methods phased out. While it may have been the case that the Plaintiff sometimes acted in positions without receiving any acting allowance, I do not accept his claim that he acted for 10 years without receiving any allowance for performing these duties.

Result

[28] In my opinion the basis on which the Plaintiff's redundancy entitlements was calculated correctly reflected the circumstances in which he ceased employment with the Defendant and were correctly calculated to correspond to the Plaintiff's service to the Defendant. Accordingly the Plaintiff's claim fails and judgment will be entered for the Defendant.

Uhi anor v Toloke anor

Supreme Court, Nuku'alofa
Scott CJ
CV 37/2010

22 June 2012

Contract law – terms not certain – reasonable opportunity to redeem not provided – judgment for plaintiff

On 11 September 2008, the defendants (motor vehicle dealers) entered into a conditional sale agreement with the plaintiffs in respect of a Toyota Hiace (Registration number L13053). The purchase price of the vehicle was T$20,000. On the date of the agreement the first plaintiff paid T$7000 towards the purchase price while sums of T$1300 specified to be "10% interest" and T$1400 specified to be "insurance payment" were added to the sum owed. On 16 March 2010 the defendants repossessed the vehicle on the grounds that the plaintiffs had failed to make all repayments as required by the agreement. It was accepted that on the date of repossession a balance of T$4800 remained to be paid. On about 17 March 2010 the defendants re-sold the vehicle for T$9000. After deductions for the cost of the repossession, cleaning and servicing the vehicle and the balance of the debt, the defendants pleaded in the Statement of Defence that they held the sum of T$2476 which they admitted owing to the plaintiffs. The plaintiffs claim for damages was the value of the repossessed vehicle plus general damages for "anguish and loss". The central question before the Court was what were the exact terms of the conditional sale agreement?

Held:

1. It was accepted that out of a total sum of T$21,300 owing on the vehicle, only T$4800 remained to be repaid and that sum was offered to the defendants at most two days after the vehicle was repossessed and resold. The defendants suggested that they were within their contractual rights to act as they did. The court found that there was real doubt as to the precise terms of the conditional sale agreement between the parties, whether as originally agreed or as subsequently varied. The rule was that the contract is should be constructed against the grantor.
2. The court was not satisfied that the defendants acted as was permitted by the agreement, either in the two page or the four page version. The sale of the vehicle without allowing the plaintiffs a reasonable opportunity to

redeem was not provided for in the agreement and as a result caused the plaintiffs' loss.

3. The court found that by reason of the defendants' activities the plaintiffs lost a vehicle for which they had paid $16,500. Judgment was for the plaintiffs in that amount. Although these events were undoubtedly distressing to the plaintiffs, in applying established principles for the award of damages, the court declined to award any damages for anxiety and suffering.

Counsel for the plaintiffs : K Piukala
Counsel for the defendant : L Niu

Judgment

[1] The Defendants who are dealers in motor vehicle entered into a conditional sale agreement with the Plaintiffs in respect of a Toyota Hiace (Registration number L13053) on 11 September 2008. The purchase price of the vehicle was T$20,000. The First Plaintiff paid T$7000 towards the purchase price on 11 September while sums of T$1300 specified to be "10% interest" and T$1400 specified to be "insurance payment" were added to the sum owed. The balance remaining to be paid was therefore T$14,300.00.

[2] On 16 March 2010 the Defendants repossessed the vehicle on the grounds that the Plaintiffs had failed to make all repayments as required by the agreement. It is accepted that on the date of repossession a balance of T$4800 remained to be paid.

[3] On about 17 March 2010 the Defendants re-sold the vehicle for T$9000. After deductions for the cost of the repossession, cleaning and servicing the vehicle and the balance of the debt, the Defendants pleaded in the Statement of Defence that they held the sum of T$2476.00 which they admitted owing to the Plaintiffs.

[4] The Plaintiffs claim for damages is not very clearly pleaded however, it is sufficiently clear that they claim the value of the repossessed vehicle plus general damages for "anguish and loss".

[5] The central question before the Court is what were the exact terms of the conditional sale agreement?

[6] The Plaintiff told me that the agreement which he signed was a two page agreement, a copy of which he produced as Exhibit P-1. A translation of that agreement was produced by the Defendants as Exhibit D-3/4. The first page shows that the details of a purchaser named "Soakai/Tatau Teaupa of Malapo telephone number 31-108/48-630" have been deleted and replaced by the First Plaintiffs' name and details. Further down the page the words "Mitsubishi Pajero" have been deleted together with the purchase price, deposit, interest, insurance and balance and have been replaced with "Toyota Hiace" and the details cost, balance etc. already referred to in paragraph [1] above.

[7] The second page of the agreement contains the signatures of the First Plaintiff and First Defendant. Beneath the date the following endorsement appears, signed by the First Defendant:

> "This vehicle $200.00 per month will be paid but he will travel overseas and will bring a substantial sum to pay the vehicle in December".

[8] The First Defendant told me that these two pages were only the first and fourth pages of a four page agreement, the second and third pages of which have been misplaced. It was pointed out that paragraph 3 of the agreement, commencing on the first page is obviously not complete. The First Defendant produced Exhibits D-4, 5, 6 & 7 (English translation D-9, 10, 11 & 12] which, although copies of another agreement with another person not connected with this case were said to be copies of the standard form of conditional sale agreement used by the Defendants. All that was required, the First Defendant explained, was for the name of the individual purchaser and the terms of the purchase to be entered into the blank form.

[9] Relying on this form of agreement, the First Defendant referred me to paragraphs 8, 16 and 19.

[10] Paragraph 8 of the Form makes it clear that the total amount owed by the purchaser is to be repaid by 12 monthly equal installments over the course of one year. Paragraph 16 provides that if the purchaser breaches any clause of the agreement then the Second Defendant "will contact him to return the vehicle ... without question or dispute and without any need for a Court order". Paragraph 19 provides that following the return of the vehicle pursuant to paragraph 16 the purchaser will have seven days to repay the outstanding balance. In the event of failure to repay within this period "the purchaser will then no longer have any right to the vehicle and it shall be allowed for the [Second Defendant] to please itself with its vehicle to re-sell or do any other thing as [the Second Defendant] may decide".

[11] The first question for decision is whether the contract actually entered into between the parties was the two page version or whether it was a four page version following the form of Exhibit D-5, 6, 7 & 8. It has been noted that the First Plaintiff's case was that he only signed the two page version. The First Defendant told me that the four page version was the one that he signed in her presence. She explained that the deletions were the result of adapting a form which had already been used once. This had been done because the printer which printed out the blank forms had broken down on the day that the agreement was reached. When the Defendants looked for their copy of the agreement after the legal proceedings were commenced, they could only find the two pages D1 and D2 [P1 or P2]. The First Defendant did not know why the other two pages of the agreement were missing.

[12] Part of an explanation for the disappearance of pages 2 and 3 was offered by the Defendant's first witness Simaima Afungia who told me that she was working for the Defendants in 2008 when the agreement was signed. As she remembered it, it had four pages. She did not know what had happened to the two missing pages, however, since the Defendants only used paper clips to clip the four pages of the agreements together, perhaps pages 2 and 3 had become detached.

This witness also explained that the Defendants sometimes had to use forms which had already been used once when the forms "ran out".

[13] In my view the Defendants' assertion that the agreement was contained in a four page version faces two fundamental difficulties. The first is that the endorsement on D2 would be inconsistent with the figure of $1191.67 which Mr Niu told me would have been the figure inserted in paragraph 8(a) of the four page agreement. The First Defendant told me that the First Plaintiff agreed to repay the whole sum in twelve months by twelve equal monthly payments (i.e. of T$1191.67) however shortly after signing the agreement he returned to the Defendant's office and explained that he could only in fact pay T$200 per month until he would be able to pay a lump sum in December. This account of what occurred was never put to the First Plaintiff and I do not accept it. I find it inconceivable that the Plaintiff, who struck me as an honest straightforward witness, would have agreed to pay a sum six times greater than he realised shortly afterwards he could in fact afford.

[14] The First Defendant appeared unsure whether the endorsement meant that the whole sum owed was to be paid off by the end of December 2008 however we know, as a fact, that it was not. Document P2, a record of repayments made by the Plaintiffs to the Defendants shows that as a 12th December 2008, the balance owed was, T$13,900 while by February 2009 it had only reduced by a further sum of T$200.

[15] The second difficulty is the fact that, with only four exceptions, the First Plaintiff only ever repaid sums of T$200, T$300 or T$350 and not even once repaid the sum (T$1191.67) which on the Defendant's case he was supposed to repay according to the alleged written terms of the agreement. This, coupled with the fact that these payments continued to be accepted by the Defendants for well over a year after the date that the full amount was supposedly to have been repaid, suggests either that the contract did not in fact specify that the whole amount was to be repaid within 12 months (which is consistent with the endorsement) or that a variation of the contract was agreed to by the Defendants.

[16] The First Defendant's evidence on this point was that she allowed the First Plaintiff to pay only T$200 or so each month because he was from the same village as she was and she felt sorry for him. I accept that this may well have been the case but do not accept that once the Defendants had allowed the contract to be varied it was open to them unilaterally and without notice or, at the very least, reasonable notice to revert to the original terms.

[17] The First Defendant told me that she spoke to the First Plaintiff by telephone seven days before the vehicle was repossessed and warned him that unless the full amount was repaid within seven days it would be repossessed. This was not put to the First Plaintiff who told me that the first he knew of the seizure was on 16 March when his wife telephoned him to tell him what had happened. He then rushed back to Tonga. It was not disputed that the repossession took place on or about 16 March and that a final payment of T$600 was received from the Plaintiffs and accepted by the Defendants only the day before (see Exhibit P2). Even had the First Defendant given the First Plaintiff seven days notice to repay the whole amount failing which repossession would occur, that is not consistent with the procedure specified in the alleged Clause 8 of the agreement upon which the Defendants rely. Under that clause,

the seven days notice runs from the repossession, not before it, thereby allowing the debtor a final opportunity to redeem. In the present case, the First Plaintiff came to the Defendants the day after the vehicle was seized and offered the whole amount owing, $4800 in cash. By that time, however, the vehicle had already been sold.

[18] Put very simply, it is now accepted that out of a total sum of T$21,300 owing on the vehicle, only T$4800 remained to be repaid and that sum was offered to the Defendants at most two days after the vehicle was repossessed and resold. The Defendants suggested that they were within their contractual rights to act as they did. In my opinion there is a real doubt as to the precise terms of the conditional sale agreement between the parties, whether as originally agreed or as subsequently varied. In these circumstances the rule is that the contract is constructed against the grantor. Adopting this approach to the facts before me as I find them, I am not satisfied that the Defendants acted as was permitted by the agreement, either in the two page or the four page version. In my view, the sale of the vehicle without allowing the Plaintiffs a reasonable opportunity to redeem was not provided for in the agreement and as a result caused the Plaintiffs loss.

[19] The First Defendant told me that the vehicle (which had been worth T$20,000 in September 2008) was resold for only T$9000 in March 2010, 18 months later, after it had been cleaned and serviced. There was no claim by the Defendants that the vehicle had suffered any damage or significant deterioration after the time of its purchase. The First Defendant admitted that when she offered the vehicle for sale and successfully concluded a sale not more than two days after the repossession, her first concern had been to recover the amount still owed. In all the circumstances it is plain to me that the vehicle was sold at a substantial under value. In the absence of any evidence on the point I find no reasons to discount the value of the vehicle at all.

[20] The result is that I find that by reason of the Defendants' activities the Plaintiffs have lost a vehicle for which they had paid $16,500. There will be judgment for the Plaintiffs in that amount. Although these events were undoubtedly distressing to the Plaintiffs, applying established principles for the award of damages, I decline to award any damages for anxiety and suffering. I will hear counsel as to costs.

Taufa v Fifita

Supreme Court, Nuku'alofa
Scott CJ
CV 2/12

29 June 2012

Tort – negligence alleged – intentional therefore not negligent – no judgment even though no defence

The plaintiff was assisted to open an internet account by the defendant who was part-owner of the Info-Tech Internet Cafe at Fanga 'o Pilolevu. Some time after the internet account was opened, and without the authority of the plaintiff, the defendant made use of his personal details to send "abusive" messages not only to third parties, including the plaintiff's wife and children, but also to the plaintiff's mobile phone. On 31 January 2012 the plaintiff applied ex-parte for and obtained an order against the defendant restraining her from accessing or using his internet account. The defendant was also ordered to delete all messages which she had sent in the plaintiff's name and without his authority. No application was made to set aside the interim order. The plaintiff claimed that the defendant was negligent in that she had breached her duty of care to the defendant. The plaintiff sought judgment in default of defence with damages to be assessed.

Held:

1. Negligence would not be found where the matter complained of occurred intentionally. It was not, for example, negligence intentionally to assault someone any more than it was negligence deliberately to defame.
2. There was no explanation why the plaintiff was not able to mitigate the consequences of the defendant's actions by simply closing the internet account or changing its password. There was no satisfactory explanation on the papers for the need to commence the action or to travel to Tonga.
3. The fact that no defence was entered was not ground enough to award judgment to the plaintiff. The plaintiff's claim was not maintainable. Accordingly, the application failed.

Counsel for the plaintiff : SV Fa'otusia
No appearance for the defendant

Judgment

[1] The writ was issued on 27 January 2012. The statement of claim is, so far as I know unprecedented in Tonga. The Plaintiff's case is that he was assisted to open an internet account by the Defendant who is part owner of the Info-Tech Internet Cafe at Fanga 'o Pilolevu. It is said that some time after the internet account was opened, and without the authority of the Plaintiff, the Defendant made use of his personal details to send "abusive" messages not only to third parties, including the Plaintiff's wife and children, but also to the Plaintiff's mobile phone. This conduct, it is said, was negligent and has caused the Plaintiff damage.

[2] On 31 January the Plaintiff applied ex-parte for and obtained an order against the Defendant restraining her from accessing or using his internet account. The Defendant was also ordered to delete all messages which she had sent in the Plaintiff's name and without his authority.

[3] No application has been made to set aside the interim order and it is not known by me whether the order has been complied with.

[4] The Plaintiff now seeks judgment in default of defence with damages to be assessed.

[5] When the present application came before me, I expressed some doubts about it. I wondered what cause of action the Plaintiff had and asked Mr Fa'otusia to assist with authority.

[6] On 22 June Mr Fa'otusia filed his helpful submissions. It is argued that the Defendant owed the Plaintiff a duty of care when she set up the Plaintiff's internet account. It is further argued that by subsequently using the account in the manner alleged, that duty was breached. Finally, it is said that as a consequence the Plaintiff has suffered damage.

[7] With the great respect, I find the claim of negligence to be misconceived. In my view, negligence will not be found where the matter complained of occurred intentionally. It is not, for example, negligence intentionally to assault someone any more than it is negligence deliberately to defame.

[8] In the *Law of Torts in New Zealand*, Todd, 3rd Edition, there is an interesting discussion on the existence of the torts of misappropriation of personality and invasion of privacy. The law however is far from straightforward and neither of these possible torts was pleaded.

[9] In the present case, a repetition of the matters complained of would amount to a breach of the order made by the Court on 31 January even if judgment is not now given for the Plaintiff.

[10] In paragraph 15 of his written submissions, Mr Fa'otusia set out the Plaintiff's claim for damages. It is clear from that paragraph that the principal sums claimed are costs, not damages and indeed it is conceded that "a moderate sum of $200" would suffice to compensate for "shame and anguish".

[11] What is unexplained by the Plaintiff is why he apparently was not able to mitigate the consequences of the Defendant's actions by simply closing the internet account or changing its password. In my view there is no satisfactory explanation on the papers before me for the need to commence the action or to travel to Tonga.

[12] The fact that no defence has been entered is not ground enough to award judgment to the Plaintiff. For the reasons given I am not satisfied that the Plaintiff's
80 claim as presently pleaded is maintainable. Accordingly, the application fails.

Naufahu anor v 'Uta'atu anor

Supreme Court, Nuku'alofa
Scott CJ
CV 70/10

15 June 2012

Negligence – damage to property – question as to amount of damages

The first plaintiff was the owner and sole director of the second plaintiff company, Zuvva Company Limited. The first defendant was the Chief Executive Officer and a director of the second defendant, Tonga Investment Limited, which was a company wholly owned by the Government of Tonga and which was formed in order to sell off the assets of the defunct Commodities Board. In 1999 the second plaintiff bought two pipelines from the second defendant, one for transferring diesel oil and the other for transferring coconut oil. On 25 August 2007 one Peni Vea went to a pipeline running along Vuna Road and cut it into 1.5 metre pieces, effectively destroying its use as a pipeline. The plaintiffs claimed that the pipeline that was destroyed by Peni Vea was the diesel line and that the destruction was the direct result of the first defendant's negligence. The first defendant was negligent in that she authorised Peni Vea to remove the pipeline when, had she taken due care before granting authority, she would have discovered that the true position was that the pipeline was owned by the second plaintiff. The plaintiffs sought damages for the loss of the pipeline and consequential loss. The defendants did not deny that Peni Vea had cut up a pipeline but they denied that it was the diesel line and they denied that he had been authorised to cut the pipeline by the first defendant. The defendants denied that the pipeline cut by Peni Vea was worth $132,000 and they denied consequential loss.

Held:

1. The court found as fact that the pipeline that was cut up by Peni Vea on 25 August 2007 was a stretch of the coconut oil line and not the diesel line. The court further found that by the time Peni Vea came to cut up the oil line, the diesel line, which had previously run alongside the oil line on posts 2, had disappeared.
2. As to the question was Peni Vea authorised to cut the pipeline by the first defendant, the court found that the first defendant did not exercise due care when handling Peni Vea's query and therefore must be held responsible for what later occurred. Peni Vea was misled into the belief that he could help himself to the pipeline.

3. In assessing the value of the oil pipeline, the court estimated the value of the pipeline to be $5 per metre and the length cut to be 60 metres. Therefore, the value of the pipeline lost by reason of the first defendant's negligence was assessed at $300.
4. There was no evidence of default on the part of the second defendant. Judgment was for the plaintiffs against the first defendant in the amount of $300.

Case considered:

Hedley Byrne & Co. Ltd v Heller & Partners Ltd [1964] AC 465

Counsel for the plaintiffs	:	S V Fa'otusia
Counsel for the defendants	:	L M Niu

Judgment

Introduction

[1] The First Plaintiff is the owner and sole director of the Second Plaintiff. The First Defendant is the Chief Executive Officer and a director of the Second Defendant which is a company wholly owned by the Government of Tonga and which was formed in order to sell off the assets of the defunct Commodities Board.

[2] Among the assets was Coconut Oil Mills Limited which ceased trading in 1993. The company owned an oil mill at Touliki which included some tanks for holding the oil and a warehouse. The oil was exported and when, from time to time, a ship arrived to take on the oil, it was transferred to the ship via a pipeline. In 1999 the Second Plaintiff bought this pipeline (but not the other assets of the Company) from the Second Defendant for T$5000. [Exhibit P-H].

[3] Also at Touliki there was a diesel tank farm known as the Touliki Tank Farm which was then owned by Triad Petroleum Tonga Limited. In 1999 the Second Defendant purchased the tank farm from Triad. According to Exhibit P-E the assets of the tank farm included an 880 metre long pipeline which was valued at T$132,000. This pipeline was used to transfer diesel oil from the tank farm to Queen Salote Wharf.

[4] The position at the end of 1999 was therefore that the Second Plaintiff was the owner of two pipelines, one for transferring diesel oil and the other for transferring coconut oil. It will be convenient to refer to these two pipelines as the diesel line and the coconut line.

[5] On 25 August 2007 one Peni Vea went to a pipeline running along Vuna Road in front of the 'Apifo'ou College rugby field and cut it into 1.5 metre pieces, effectively destroying its use as a pipeline.

[6] The Plaintiffs' case is that the pipeline that was destroyed by Peni Vea was the diesel line and that the destruction was the direct result of the First Defendant's negligence. It is said that the First Defendant was negligent in that she authorised

Peni Vea to remove the pipeline when, had she taken due care before granting authority, she would have discovered that the true position was that the pipeline was owned by the Second Plaintiff. [see *Hedley Byrne & Co. Ltd v Heller & Partners Ltd* [1964] AC 465].

[7] In the alternative it was said that by authorizing Peni Vea to remove the pipeline, the First Defendant had converted the same. Although this claim was referred to by Mr Fa'otusia in his opening, it was not again mentioned. Since the pipeline was not removed either by or at the direction of the First Defendant, my view is that the alternative claim was unarguable.

[8] The Plaintiffs seek damages for the loss of the pipeline as well as consequential loss.

[9] The Defendants did not deny that Peni Vea had cut up a pipeline but they denied that it was the diesel line and they denied that he had been authorised to cut the pipeline by the First Defendant. The Defendants denied that the pipeline cut by Peni Vea was worth T$132,000 and they denied consequential loss.

[10] The first question is which pipeline was cut; was it the oil line or the diesel line? The second question is whether Peni Vea cut the pipeline after being authorised to do so by the First Defendant. Depending on the answer to these two questions the third and fourth questions arise: what was the value of the pipeline cut and did this cutting result in consequential loss?

First question: which pipeline did Peni Vea cut?

[11] During the course of the trial a plan (Plan A) of the area in question was prepared by Mr Niu and was tendered by consent. This plan shows the Tonga Oil Mills Site and, marked "Zuvva Company" shows the site of the Touliki Tank Farm. The plan also shows the route of two pipelines, the diesel line and the oil line. The route of the former was not disputed but the First Plaintiff, in her evidence, told me that the oil line, after running along the (unnamed) Side Road towards the sea, did not turn left along Vuna Road as shown on the plan but went under the road to the shore on the other side of Vuna Road.

[12] Peni Vea told me, and it was not disputed, that when he cut the pipeline running along Vuna Road there was only one pipeline there. He told me that he did not know whether it was the oil line or the diesel line. He did, however, identify the pipeline that he cut as being the one depicted in the lower photograph in Exhibit P-G. He explained that when he arrived at the site to cut the pipe it was already partially cut at both ends as partially depicted in Exhibit P–G. He also told me that as he remembered it, the oil from the Coconut Mill ran along a pipeline which, after following the Side Road, turned left and then ran along Vuna Road until it went under the road before emerging on the other side of the road and running on to Queen Salote Wharf.

[13] The third plaintiff witness was Paula Taulafo Taufa who is the Manager of Pacific Energy Tonga and who has worked in Energy Distribution for over 10 years. He told me that at point "X" marked on Plan A there are the remains of two sections of pipe running under Vuna Road. One is a 4 inch while the other is a 6 inch pipe. In

his opinion the 4 inch section is a segment of the diesel line while the 6 inch section is a segment of the oil line. As he remembered it, the oil line ran along Vuna Road on concrete supports while the diesel line ran along beside and below it.

[14] The first defence witness was Pesi Kaulave, now retired, who told me that he worked for the Tonga Oil Mill from 1978 to 1993. He told me that he remembered the oil line since he used to work on it. It was a 6 inch line which ran along the Side Road on concrete posts before turning left and continuing along Vuna Road, again on concrete posts. Eventually, it went under Vuna Road before emerging on the other side and continuing on to Queen Salote Wharf. He also remembered that there was another pipeline which ran along Vuna Road, below the oil line. In cross examination Pesi accepted that he did not know whether the pipeline depicted in the lower photograph was the oil pipeline that used to run there or whether it had been replaced.

[15] The second defence witness was Sione Tafolo who told me that from about 2003 to 2008 he had operated a bowser from the Zuvva Company Site on the corner of Vuna Road and the Side Road. In 2005 he cut pieces from both ends of a 6 inch pipe that ran along Vuna Road. At that time there was only one pipeline running along the road.

[16] On the morning of 23 May the Court went to inspect the site. We started at point "X" on Plan A and walked east along Vuna Road to the corner and then south along Side Road to the site of the former Tonga Oil Mill. We also went onto the Zuvva Company site. About half way down the Side Road we stood at the approximate point from which the First Plaintiff told us that the right hand photograph in Exhibit P-1 had been taken. In her evidence the First Plaintiff had explained that this showed the oil line and that had been removed and disposed of after Zuvva purchased it in 1999. On the Zuvva Company site we located about 6-8 concrete posts which were plainly similar to those depicted in the two photographs in Exhibit P-1. These posts are square, about 1 metre in height above the ground and have four bolts embedded in them to secure the metal arch above from which it appears that the pipe was suspended. There was no sign of any of these posts standing along the side road and it seems that the posts dumped on the Zuvva Company Site formerly stood along that road.

[17] In Vuna Road the Court found a number of similar posts. Next to these posts (Post 1) were round posts (Post 2) supporting a metal bracket and a third type of posts (Post 3) the purpose of which was not identified. A photograph of the posts is Exhibit D2, produced by consent on 28 May. It will be noted that while Exhibit P-G depicts posts similar to Post 1 (together with what appears to be one example each of Posts 2 & 3) none of the posts in Exhibit 2 now supports the metal arches depicted in Exhibit P-G and in Exhibit P-I. Two of the posts closest to point X do, however, have these metal arches.

[18] Since it was crucial to the Plaintiffs' case that the pipeline cut up by Peni Vea was the diesel line and not the oil line I asked the First Plaintiff what the foundation was for her belief that this was the case. She was unable to provide any more firm foundation than her strong belief that the line that was cut was the diesel line that the Second Plaintiff had purchased in 1999.

[19] As I find it, the evidence before me leaves no doubt that the Plaintiff was the mistaken in her belief. Her belief that the oil line ran along Vuna Road was contradicted not only by one of her own witnesses but also by two others. From the site inspection it is plain that the pipe supports (Post 1) running along Vuna Road are identical to those which, until removed, supported the oil line along the Side Road. The First Plaintiff suggested (& see paragraph 46 of the Statement of Claim) that the diesel line had been "fully renewed" in 2000. This renewal, it was argued, might have involved rehanging it on the posts previously used to support the oil line. There was, however, nothing apart from the suggestion and some hearsay to support the possibility, no witness to say that he had actually carried the work, no invoices, no details of what "full renewal" entailed.

[20] I find as a fact that the pipeline there was cut up by Peni Vea on 25 August 2007 was a stretch of the oil line running from the western corner of the Zuvva Company compound to point 'X' marked on Plan A. I further find as a fact that by the time Peni Vea came to cut up the oil line the diesel line which had previously run alongside the oil line on posts 2 had disappeared.

Second Question: was Peni Vea authorised to cut the pipeline by the First Defendant?

[21] The only admissible evidence given on this question was by Peni Vea and by the First Defendant.

[22] Peni Vea told me that he had known the First Defendant since they worked together at Tonga Development Bank. In April 2010 he swore an affidavit which was Exhibit P-S in the Plaintiff's production of documents. This affidavit explained the background to Peni Vea's interest in the pipeline on Vuna Road. It is consistent with the fact, already noted, that the Second Defendant sold the oil pipeline separately from the rest of the Oil Mill assets, to the Second Plaintiff.

[23] Peni Vea told me that in 2007 he again expressed an interest in the pipeline: "I spoke to the First Defendant and said I was interested in the pipeline in front of 'Apifo'ou College. She said she would talk to Frank to see if it was included in the [Oil Mill] tender. Later, she said it was not included in the tender so I could go ahead and remove it". "I had no reason to doubt the information given to me by the First Defendant". "After I spoke to the First Defendant about the letter I received threatening legal action, she denied that she had authorised me to cut the pipeline." Peni Vea told me that his conversation with the First Defendant took place about two weeks before he cut the pipeline.

[24] The First Defendant's evidence was somewhat different. She told me that she had been in charge of the tendering for the Oil Mill assets. The Second Plaintiff bought the oil line in 1999. In 2007, after he was appointed CEO of MAFF, Peni Vea was investigating the possibility of MAFF taking over the land previously occupied by the Oil Mill but that the plan was not pursued. Around that time, Vea first asked the First Defendant whether the oil pipeline was included in the Oil Mills assets. After checking the position she told him that the oil pipeline had been sold previously and was not part of the tender. "I told him I did not know who had bought it. He said it was just lying there. I had previously told him I could not sell him any pipe". After

the pipe had been cut, the First Defendant, who was at home ill in bed, had received a telephone call from an agitated First Plaintiff asking her "why I had authorised someone to cut her pipe." "I told her I remembered someone. I said I would try to remember who it was. After the police got in touch I recalled that I had spoken to Peni Vea about pipes and they should ask him". "If I thought we owned the pipes we would have sold them, not given them away". In cross-examination the First Defendant agreed that she had spoken to Peni Vea many times but that she told the First Plaintiff that she could not remember who had asked about the pipe. She thought that Peni Vea may have misunderstood her: she did not authorise him to remove the pipe, she merely told him that the Second Defendant did not own it but she did not know to whom it now belonged.

[25] Both Peni Vea and the First Defendant are respected persons of good standing in Tonga. I do not think either told me any deliberate untruths. Peni Vea's evidence was clear and consistent, the First Defendant's evidence less so. Even allowing for her illness at the time, I do not think that she was entirely straightforward when she told the First Plaintiff that she could not remember who had inquired about the pipeline as we now know, a mere two weeks before.

[26] I find the First Defendant's suggestion that the Second Defendant would not have given away anything that it thought it owned consistent with Peni Vea's evidence that the First Defendant told him that the Second Defendant did not own the pipeline. I do not accept that the First Defendant told Peni Vea that she did not know who had bought the oil line. Exhibit P–H clearly sets out the position. A copy would presumably be easily available from the Oil Mill file. I do not think Peni Vea misunderstood the First Defendant. As I find it, the First Defendant gave Peni Vea the impression that the pipeline was not something that the Defendants were interested in and as far as they were concerned he could go ahead and help himself. In my view, by conveying that message, the First Defendant, a person upon whose skill and knowledge Peni Vea could reasonably depend, was misled into the belief that he could help himself to the pipeline. While not directly "authorised" to cut the pipeline I find that the First Defendant, perhaps because of her illness, did not exercise due care when handling Peni Vea's query and therefore must be held responsible for what later occurred.

Third Question: what was the value of the destroyed pipeline?

[27] The oil line was bought for T$5000 in 1999. It had not been used since 1993. The portion along the Side Road was dismantled by the Second Plaintiff shortly after its purchase. In 2005 portions of the line were cut off at each end by Sione Tafolo. The substantial piece that was removed at one end can be seen from Exhibit P-G. What became of the section from Vuna Road to Queen Salote Wharf, I was not told. The diesel line which I find as a fact ran alongside the oil line was 880 metres in length from Zuvva Company to Queen Salote Wharf. Peni Vea told me that he thought he had cut no more than 60 metres of pipe "which we all was left". The First Plaintiff told me that she had measured what was cut and put it at 160 metres. The problem is that the original length of the oil line is not known.

[28] Taking the length of the diesel line to be 880 metres, then by comparing the routes of the two lines as depicted in Plan A (which of course is not to scale) then it seems reasonable to assume that the oil line was not less than 120 metres longer since it did not originate at the Zuvva Company compound but instead came from the Tonga Oil Mill further down the Side Road. Doing the best I can, I estimate that the length of the oil line to have been 1000 metres. On this basis it was purchased by Zuvva for T$5 per metre. I do not include the value of the concrete posts upon which it ran as these plainly have no scrap value.

[29] I found Peni Vea's evidence to be credible and accurate. I do not know how the First Plaintiff carried out her measurements after the case adjourned following the first day of the trial. I accept Peni Vea's evidence that he cut 60 metres of pipeline which I have found was the oil line and (generously) valued at T$5 per metre. I assess the value of the pipeline lost by reason of the First Plaintiff's negligence at T$300.

Fourth Question: was there any consequential loss to the Defendant?

[30] As will be seen from the Statement of Claim, the Plaintiffs' claim for consequential loss was based on two assumptions. The first was that the pipeline which was destroyed in August 2007 was the diesel line. It was said that Second Plaintiff had lost the opportunity to lease the pipeline for T$2000 per month to Reef Bulk Fuels and had also lost the opportunity to make further substantial profits from the Touliki Tank Farm.

[31] As was accepted by the First Plaintiff, Exhibit P-M, stated to be a copy of an agreement with Reef Bulk Fuels to rent the "pipeline facility" (a phrase not explained) is actually only part of a proposal (the first page of which is missing) and was not in fact a concluded agreement. Secondly, it is clear that the purpose of the proposal was to store and supply diesel, not coconut oil. The pipeline that was cut has been found as a fact to have been the oil line, not the diesel line. The cutting of the oil line could not in any way cause damage to a proposed diesel - based operation. As I find it, there was no consequential loss to the Plaintiffs as a result of the loss of part of the oil line cut by Peni Vea.

Result

There was no evidence of default on the part of the Second Defendant however there will be judgment for the Plaintiffs against the First Defendant in the amount of T$300. I will hear counsel as to costs.

Naufahu anor v 'Uta'atu anor

Supreme Court, Nuku'alofa
Scott CJ
CV 70/2010

14 September 2012

Civil procedure – application for costs by unsuccessful defendant – no fraud found – rule that costs follow event should not be displaced

For the full facts, see the report at page 80.

Editor's note: an appeal and cross appeal was allowed on 17 April 2013.

The defendants filed an application for costs. The defendants submitted that notwithstanding the success of the plaintiffs in the action, there should be no order for costs against the first defendant and the plaintiffs should be ordered to pay the costs of the second defendant, to be taxed if not agreed.

Held:

1. The question was whether the plaintiff's claim that the diesel pipe had been destroyed which after investigation was found not to be correct, was "improperly or unreasonably" raised. The court was satisfied that the confusion between the two pipelines was unintentional. The court did not accept that the claim that the diesel pipeline was removed was made "most unjustifiably", let alone "fraudulently".
2. The central issue was whether the first defendant's negligence had led to the plaintiff's suffering damage caused by interference to a pipeline owned by them. That issue was resolved in favour of the plaintiffs. It was not shown that the usual rule that costs follow the event should be displaced. Accordingly the application fails. The plaintiffs were awarded the reserved costs.

Case considered:

Elgindata Ltd (No 2), In re [1992] 1 WLR 1207

Rules considered:

Civil Procedure Rules 1998
Supreme Court Rules (English)

Counsel for the plaintiffs : S V Fa'otusia
Counsel for the defendants : L M Niu

Decision

[1] The detailed facts of this case, together with my findings in law, sufficiently appear from the Judgment dated 15 June 2012 and need not now be repeated.

[2] Put very briefly, the Plaintiffs complained that as a result of the First Defendant's negligence (for which the Second Defendant as the First Defendant's employer was vicariously liable) they suffered damages caused by the destruction of a diesel pipeline which they owned.

[3] The Defendants denied negligence and put the Plaintiffs to proof of the damages claimed.

[4] The trial lasted two days. In my judgment, the Plaintiffs had proved negligence however I found that the pipeline which had in fact been destroyed was not actually a diesel pipeline (the destruction of which would have at least been a first step towards founding the claims for substantial consequential loss) but was in fact a disused coconut oil pipeline which was worth far less and the loss of which did not result in any consequential damage. The Plaintiffs had claimed a total of T$872,000 by way of general and special damages but in the result were only awarded T$300. Costs were reserved for further argument.

[5] This is an application for an order for costs filed by the Defendants. Mr Niu submits that notwithstanding the success of the Plaintiffs in the action, there should be no order for costs against the First Defendant while the Plaintiffs should be ordered to pay the costs of the Second Defendant, to be taxed if not agreed.

[6] In Mr Niu's submission, the Plaintiff's claim that their diesel pipeline had been destroyed was made "most unjustifiably" and "even fraudulently" and that no claim was made by them that the coconut oil pipeline had been destroyed. In these circumstances the Plaintiffs should "properly bear the costs of the Defendants in defending the claim".

[7] Mr Fa'otusia opposed Mr Niu's submission. He pointed out that the First Defendant's denial of negligence had been rejected and that the Court had found that as a result of the negligence damages, albeit much reduced from the amount claimed, had been found to have been occasioned. In Mr Fa'otusia's submission the costs should, as is usual, follow the event.

[8] The only Rules of the Supreme Court which deal with costs are Orders 46 and 47 but these Orders do not deal with the principles guiding the exercise of the discretion to award or refuse costs. In these circumstances the Court is referred by Order 2 Rule 3 to the English Rules of the Supreme Court which existed prior to the Civil Procedure Rules 1998 which came into force on 26 April 1999. The relevant English Rule is Order 62 r (3) which reads as follows:

> "If the Court in the exercise of its discretion sees fit to make any order as to the costs of any proceedings, the Court shall

> order the costs to follow the event except where it appears to the Court that in the circumstances of the case some other order should be made as to the whole or any part of the costs".

[9] The way in which this Rule was applied was considered in *In re Elgindata Ltd (No 2)* [1992] 1 WLR 1207 Nourse L.J. explained that:

> "Where the successful party raises issues or makes allegations improperly or unreasonably the Court may not only deprive him of his costs but may order him to pay the whole or a part of the unsuccessful party's costs" ... [this principle] "implies that a successful party who neither improperly nor unreasonably raises issues or makes allegations on which he fails ought not to be ordered to pay any part of the unsuccessful party's costs".

The question therefore is whether the Plaintiff's claim that the diesel pipe had been destroyed which after investigation was found not be correct, was "improperly or unreasonably" raised.

[10] Having heard and seen the First Plaintiff I was satisfied that the confusion between the two pipelines was unintentional. The First Plaintiff's late husband was the engineer, she merely helped out in the office. I do not accept that the claim that the diesel pipeline was removed (which was not met by any counterclaim by the Defendants that in fact it was only the coconut pipeline that was involved) was made "most unjustifiably", let alone "fraudulently".

[11] I accept Mr Fa'otusia's argument that the central issue in the case was whether the First Defendant's negligence had led to the Plaintiff's suffering damage caused by interference to a pipeline owned by them. That issue was resolved in favour of Plaintiffs.

[12] In my view it has not been shown that the usual rule that costs follow the event should be displaced. Accordingly the application fails. The Plaintiffs are awarded the reserved costs and the costs of this application to be taxed if not agreed.

Kama v Kama

Land Court, Nuku'alofa
Scott CJ and Assessor Mrs L Koloamatangi
LA 3/2012

29 June 2012

Land law – request to determine life estate due to fornication by widow – not defended – interim judgment for the plaintiff

The plaintiff claimed that land at Ma'ufanga (the land) was granted to his father, Titie Lolomana'ia, in May 1983 (Exhibit C). Upon his father's death on 9 February 1991 the land devolved upon his father's eldest son, his brother Visesio Kavulu and was registered in Visesio's name on 11 April 1991. Visesio died in August 1994 and, by operation of Section 80 of the Land Act (the Act) his widow, the defendant, became entitled to a life estate in the land. The plaintiff said that after the death of her husband, the defendant committed fornication with one of her husband's nephews, Savelio Visesio Save, between August 1994 and August 1995 and that therefore the Land Court should terminate the defendant's estate in accordance with s 81 of the Act.

Held:

1. The continued presence of a *dum casta* provision in Tonga's laws might be considered anachronistic but the job of the Court was to apply the law, not to reform it. The removal of a person's right to land was clearly a very serious step and one which should not be taken lightly. There was not any local authority on the standard of proof required by section 81 of the Act but in two cases the Supreme Court held that adultery, as a ground for divorce, required "a significant body of evidence".
2. The only evidence was the eyewitness evidence of the plaintiff and a copy of the affidavit evidence of Mr Savelio Save. However, the action was undefended.
3. Interim judgment was entered for the plaintiff with conditions that a copy be served on the defendant by an independent process server at her address in Australia and that the defendant had 60 days to send a reply to the Chief Registrar of the Supreme Court indicating whether she wished to contest the allegations against her. If no reply was received or if the defendant indicated that she did not wish to defend, final judgment would be entered. If the defendant indicated that she wished to defend, then the Court would give further directions for the disposal of the action.

Cases considered:
Briginshaw v Briginshaw [1938] HCA 34; (1938) 60 CLR 336
Sugar v Fatafehi & Taholo [1993] To LR 4
Ualesi v Tukutoa & Ngalu [1974-1980] To LR 83

Statute considered:
Land Act (Cap 132)

Rules considered:
Land Court Rules 2007

Counsel for the plaintiff : ST Fonua
No appearance by the defendant

Interim Judgment

1. This matter proceeds by way of formal proof under the provisions of Order 6 Rule 1 (3) of the Land Court Rules.

2. The writ was issued on 17 February 2012. The Statement of Claim relates to a town allotment Tohi 253 Folio 100 Lot 1 on Plan 3789 at Ma'ufanga (the land).

3. According to the Plaintiff's evidence, the land was granted to his father, Title Lolomana'ia, in May 1983 (Exhibit C). Upon his father's death on 9 February 1991 the land devolved upon his father's eldest son, his brother Visesio Kavulu and was registered in Visesio's name on 11 April 1991. Visesio died in August 1994 and, by operation of Section 80 of the Land Act (the Act) his widow, the Defendant, became entitled to a life estate in the land.

4. There was no evidence that the Defendant had ever actually claimed her estate as is required by Section 87 of the Act and Exhibit C is not endorsed with any registration in her favour. On the other hand, it does not appear that the land has reverted. For the purpose of this action, it will be presumed that the Defendant is, as pleaded, the holder of a life estate in the land.

5. The Plaintiff brings this action under the provisions of Section 81 of the Act. The Plaintiff says that after the death of her husband, the Defendant committed fornication with one of her husband's nephews, Savelio Visesio Save, between August 1994 and August 1995.

6. The only oral evidence of the alleged fornication was given by the Plaintiff himself who told the Court that after his brother's death he came to Tonga and stayed in a house next to the Defendant's house for about two weeks. He discovered that the Defendant and Savelio were living together in one room. On one occasion he saw Savelio in the shower next to the bedroom with the door wide open while the Defendant was present in the room. It was perfectly plain to him that the Defendant and Savelio were living together as husband and wife "all the village knew it".

7. A witness called by the Plaintiff, Pasifiki Tonga, a former legal practitioner, produced a copy of a writ and statement of claim which he had filed in August 1995 on behalf of the present Plaintiff. According to Mr Tonga the action was not pursued, because he, Mr Tonga, succumbed to ill-health.

8. Somewhat strangely, the Statement of Claim filed in 1995 referred to and had attached to it a number of documents including an affidavit apparently made by Savelio Save, aged 19 years, on 29 August 1995 in which he deposed that he had sexual intercourse with the Defendant "most of the night" between the date of the Defendant's husband's death and the date on which the affidavit was sworn.

9. Mr Fonua told me that it had been hoped to have Savelio present to give evidence in person at this hearing but "there has been difficulty locating (Savelio) in California USA and it was not until 5 days ago that he was located and he could not attend at the hearing".

10. An alternative ground, alleging that the Defendant is no longer a Tongan citizen, was not pursued.

11. The continued presence of a *dum casta* provision in Tonga's laws might be considered anachronistic but the job of the Court is to apply the law, not to reform it. The removal of a person's right to land is clearly a very serious step and one which should not be taken lightly.

12. There does not seem to be any local authority on the standard of proof required by Section 81 but in two cases the Supreme Court has held that adultery, as a ground for divorce, requires "a significant body of evidence" (*Sugar v Fatafehi & Taholo* [1993] To.L.R.4) or "like a crime [proof] beyond all reasonable doubt" (*Ualesi v Tukutoa & Ngalu* [1974-1980] To. L.R.83). Although *Ualesi* appears to raise the standard rather too high there is no argument that:

> "upon an issue of adultery in a matrimonial cause the importance and gravity of the question make it impossible to be reasonably satisfied of the truth of the allegation without the exercise of caution and unless the proofs survive a careful scrutiny and appear precise and not loose and inexact" (see *Briginshaw v Briginshaw* [1938] HCA 34; (1938) 60 CLR 336, 368).

I see no reason to apply a different standard in this Court.

13. In the present case the only evidence is the eyewitness evidence of the Plaintiff himself and a copy of the affidavit evidence of Mr Savelio Save. On the other hand, the action is undefended.

14. In all the circumstances I am of the view that judgment should conditionally be entered for the plaintiff. The conditions are: (1) that a copy of this interim judgment is to be served on the Defendant by an independent process server at her address in Australia (2) the Defendant will have 60 days to send a reply to the Chief Registrar of the Supreme Court indicating whether she wishes to contest the allegations against her. In the event that no reply is received within the 60 day period or alternatively that

the Defendant indicates that she does not wish to defend, final judgment will be entered. In the event that the Defendant indicates, within the 60 day period, that she does wish to defend, then the Court will give further directions for the disposal of the action.

120

Crown v Schaumkel

Court of Appeal, Nuku'alofa
Burchett, Salmon, and Moore JJ
AC 19/11

16 April 2012; 9 July 2012

Citizenship – child born outside Tonga before 2007 – question as to whether amendment passed in 2007 which would make the child a Tongan citizen applied to child – held that child was Tongan citizen

Statutory interpretation – should "born" be interpreted to mean born either prior to or after the commencement of the amendment, or only after the commencement – referred to birth whenever it occured

The respondent was the father of a legitimate male child (Peter Denzel Paul Schaumkel, the child) born outside the Kingdom of Tonga on 23 December 2002 in Auckland, New Zealand. The respondent, who was born on 19 December 1958, was a Tongan also born in New Zealand, but he was unquestionably born a Tongan subject because at that date the legislation provided the first generation born abroad of Tongan parentage, were Tongan nationals. Therefore, the male child was a person born abroad of a Tongan father. The respondent claimed that his child was a Tongan citizen on the basis of s 2 of the Nationality Act as amended in 2007. The Chief Justice sitting as the Registrar General upheld the status of the child as being a Tongan citizen. The Crown applied to review the ruling claiming that that the 2007 amendment was not retrospective and so did not apply to the child who was born in 2002.

Held:

1. In so far as the 2007 amendments may confer nationality on a class of individuals born before 2007 who hitherto had not been Tongan nationals, it was in substance beneficial or remedial legislation. The same can be said about the conferring of nationality on individuals of this wider class born after 2007, about whom there was no doubt that the Act, as amended, applied. In relation to legislation of the type presently under consideration, the presumption against retrospectively was, at best, a weak presumption.
2. Should the word "born" be interpreted to mean born either prior to or after the commencement of the amendment, or only after the commencement. The court found that the ordinary meaning of the word, supported by dictionary definitions, was that it referred to a birth whenever it occurred.

The court carefully considered the provisions of the amendment, its place in the Act and the history of the legislation. The clear purpose of the Act was to enlarge the class of those identified as Tongan subjects. There was no rule of construction that would require that the word have a restricted meaning. If Parliament had intended that the word apply only to births occurring after the amendment it could have used words such as "born after the enactment of this amendment".

3. The ruling of the Registrar General upholding the status as a subject of the Kingdom of Tonga of Peter Denzel Paul Schaumkel was affirmed with costs.

Cases considered:

Australian Education Union v General Manager of Fair Work Australia [2012] HCA 19

Edwards v Kingdom of Tonga [1994] Tonga LR 62

George Hudson Ltd v Australian Timber Workers' Union [1923] HCA 38; (1923) 32 CLR 413

L'Office Cherifien des Phosphates v Yamashita-Shinnihon Steamship Co Ltd, the Boucraa [1994] 1 All ER 20

McKenzie v Attorney General [1992] 2 NZLR 14

Polyukhovich v Commonwealth [1991] HCA 32; (1991) 172 CLR 501

R v Inhabitants of St Mary, Whitechapel (1848) 12 KB 120

Solicitor's Clerk, re A [1957] All ER 617

Yew Bon Tew v Kenderaan Bas Mara [1983] 1 AC 553

Statutes considered:

Nationality Act (Cap 59)

Nationality (Amendment) Act 1959

Nationality (Amendment) Act 2002

Nationality (Amendment) Act 2007

Regulations considered:

Registrar General's Births and Deaths Regulations 1979

Counsel for the appellant : Mr Kefu

Counsel for the respondent : Mr Fa'otusia

Judgment

1. This is an application to review a ruling of the Lord Chief Justice sitting as the Registrar General, in proceedings commenced as an application for an order approving the registration of birth of a legitimate child which occurred outside the Kingdom of Tonga. Provision for registration is made by Regulation 7 of the Registrar General's Births and Deaths Regulations 1979. It is essential to the success of an application for the registration of an overseas birth that the person to be registered be found to be in law a Tongan.

2. The ruling concerns a claim to Tongan citizenship made on the basis of s.2 of the Nationality Act [Cap.59] as amended by the Nationality (Amendment) Act 2007, which received the royal assent on 14 August 2007. Relevantly, this section provides:

> "2. The following persons shall be deemed to be Tongan subjects —
>
> .....
>
> (b) any person born abroad of a Tongan father ..."

3. The circumstances in relation to which this provision comes to be considered may be stated briefly. The Respondent is the father of a legitimate male child (Peter Denzel Paul Schaumkel, the child) born outside the Kingdom of Tonga on 23 December 2002 in Auckland, New Zealand, that is to say, nearly five years before s.2 of the Nationality Act was amended to its present form. The Respondent, who was born on 19 December 1958, was a Tongan also born in New Zealand, but he was unquestionably born a Tongan subject because at that date s.2(a) of the Nationality Act provided the first generation born abroad of Tongan parentage, were Tongan nationals. The terms of the section are set out shortly. Thus the male child was a person born abroad of a Tongan father, to use the language of s 2(a) in its present form.

5. In his very careful submissions, Mr Kefu, for the Crown, emphasised that the construction of the 2007 amendments, and the amendments to s.2 in particular, adopted by the Lord Chief Justice involved their retrospective operation. He pointed to the established principle that there was a presumption against the retrospective operation of legislation. He made a number of subsidiary and related submissions which we discuss later.

6. Before dealing with this central submission concerning the presumption against retrospectivity, it is convenient to describe in a little more detail the effects of the 2007 amendments. It is apparent from the text of the amendments they were directed to achieving two principal objectives. The first was to broaden significantly the class of individuals who would become Tongan nationals having regard to, amongst other things, the status of the individual's parents at the time of the individual's birth. The second was to enable Tongan nationals to become nationals of another country without forfeiting their Tongan nationality. In effect, the 2007 amendments recognised and accepted, for the first time in Tongan legislation, the notion of dual nationality.

7. The broadening, in 2007, of the class of individuals who would become Tongan nationals should be seen in its historical context. Before 1935, Tongan nationality was determined by applying the common law. Thereafter it was addressed legislatively. This was achieved in 1935 by an amendment to the Nationality Act inserting a new s.2 as follows:

> The following persons shall be deemed to be Tongan subjects –

(a) any person born in Tonga of Tongan parentage and the first generation born abroad:

Provided however that the child of an illegitimate union born abroad shall only be deemed to be a Tongan subject where the parents of such child are Tongan subjects and the father acknowledges the paternity of the child or in the event of dispute where the paternity is established by process of Law;

(b) any person naturalised under this Act;

(c) any person born out of wedlock in Tonga whose father is a Tongan subject and whose mother is an alien; and

(d) any person born out of wedlock in Tonga whose mother is a Tongan subject and whose father is an alien.

8. In 1959, s.2 of the Nationality Act was amended a second time by the Nationality (Amendment) Act 1959, and a third version of s.2 was as follows:

The following persons shall be deemed to be Tongan subjects —

(a) any person born in Tonga whose father is a Tongan;

(b) any person born abroad of a Tongan father who was born in Tonga;

(c) any person born out of wedlock in Tonga whose mother is a Tongan;

(d) any alien woman who marries a Tongan provided that within 12 months from the date of her marriage she-

(i) lodges with the Minister of Police a written declaration that she wishes to assume Tongan nationality; and
(ii) takes the oath of allegiance prescribed by this Act;

(e) any person naturalised under this Act.

9. In 2000, there was a minor amendment made by the Nationality (Amendment) Act 2002 changing the authority from the Minister of Police to the Minister of Foreign Affairs.

10. In 2007, s.2 was amended for the fourth time and resulted in the current version as follows:

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

11. Comparing the 1959 version and the 2007 version of s.2 of the Nationality Act it can be seen that in relation to each of the paragraphs there is an expansion (on the regime operating between 1959 and 2007 of the class of people entitled to nationality.

12. Looking at the 1959 version, s.2(a) concerned a person born in Tonga whose father is a Tongan. The 2007 amendment was plainly intended to confer Tongan nationality on any person born in Tonga whose mother (picked up by the word "parent") was Tongan, a class excluded by the 1959 legislation.

13. As to s.2(b), the 1959 legislation concerned the son or daughter born abroad, of a Tongan father born in Tonga. The 2007 amendment was intended to remove the qualification that the father had to have been born in Tonga. So a class excluded by the 1959 legislation, namely a person born abroad who had a Tongan father who had not been born in Tonga, was included by the 2007 amendments.

14. As to s.2(c), the 1959 legislation picked up a person born out of wedlock in Tonga when the mother was Tongan, in effect, this class was expanded significantly by the 2007 amendments (relating as this class does in the 2007 amendments, to the Tongan nationality of the mother) abandoning any limiting criterion referable to birth in Tonga as well as birth outside the marriage.

15. As to s 2(d), the 1959 legislation only applied to women marrying a Tongan whereas the 2007 amendments applies to both men and women marrying a Tongan.

16. In relation to dual nationality, since at least 1935, the Nationality Act declared that a person who voluntarily became a naturalised citizen of another country ceased to be a Tongan national. The 2007 amendments allowed for dual citizenship. The

2007 amendments also contained a provision (which became s.17) allowing a person who had lost Tongan nationality to apply for "re-admission to Tongan nationality" though this was subject to a power vested in the Minister for Foreign Affairs to grant or withhold "a certificate of re-admission".

17. We now deal with the argument central to Mr Kefu's submissions, namely that the amendment to s 2.(b) as construed by the Lord Chief Justice had retrospective operation. The first point to be made is that even on the construction adopted by his Lordship, the amendment will only take effect from the date on which it was passed and thus a person affected by it will only become a Tongan subject from that date, Although Mr Kefu seems to accept this, he nevertheless expresses concern about the retrospective effect of the amendment. In our opinion, the better view is that the amendment will have no retrospective effect. It has long been accepted that the presumption against retrospective legislation does not necessarily apply to an enactment merely because, "a part of the requisites for its action is drawn from time antecedent to its passing" (see *R v Inhabitants of St Mary, Whitechapel* (1848) 12 KB 120 at 127).

18. There are a number of illustrations of this principle. One of the best known is that cited in the judgment of the Lord Chief Justice *re A Solicitor's Clerk* [1957] All ER 617. One statement of the common law position was by the Privy Council in *Yew Bon Tew v Kenderaan Bas Mara* [1983] 1 AC 553 at 558 where Lord Brightman delivering the advice of the Judicial Committee said:

> "A statute is retrospective if it takes away or impairs a vested right acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability, in regard to events already passed."

By that formulation the Nationality Act as amended in 2007 is not retrospective. However we accept that there is no universally accepted bright line enabling a ready classification of legislation as retrospective or not retrospective. This is illustrated by recent discussion by French CJ, Crennan and Kiefel JJ of the High Court of Australia in *Australian Education Union v General Manager of Fair Work Australia* [2012] HCA 19 who said (at [26]):

> The common law principles of interpretation require careful consideration of the adjective "retrospective" in its application to statutes. [At this point the Justices footnote a book that addresses definitional difficulties — Sampford, Retrospectively and the Rule of Law, (2006) at 17-23]. Interference with existing rights does not make a statute retrospective. Many if not most statutes affect existing rights. As Fullagar J said in *Maxwell v Murphy*:
>
> > "I think that the word 'retrospective' has acquired an extended meaning in this connexion. It is not synonymous with 'ex post facto', but is used to describe the operation of any statute which affects the legal character,

> or the legal consequences, of events which happened before it became law."

In *Chang Jeeng v Nuffield (Australia) Pty Ltd* Dixon CJ referred to "the rules of interpretation affecting what is so misleadingly called the retrospective operation of statutes." Repeating a passage from his judgment in *Maxwell v Murphy*, the Chief Justice said:

> "The general rule of the common law is that a statute changing the law ought not, unless the intention appears with reasonable certainty, to be understood as applying to facts or events that have already occurred in such a way as to confer or impose or otherwise affect rights or liabilities which the law had defined by reference to the past events."

There have been many formulations of the common law principle in the decisions of this Court and of other common law courts to which this Court has referred from time to time. It is not necessary to travel beyond the general statement by Dixon CJ, save to consider its application in relation to legislation said to affect prior judicial decisions. In the end, the Court must construe statutes by reference to their text, context and purpose.

19. For the purposes of argument we are prepared to proceed on the basis that arguably the 2007 amendments might be characterised as, at least potentially, retrospective in their operation. Accordingly it is necessary to consider the principles which apply in determining whether the legislation is to be given, as a matter of construction, that retrospective operation.

20. The modern approach to the question whether legislation should be construed in the light of an apparent effect of retrospectivity is clearly stated by Lord Mustill in a passage of his speech in *L'Office Cherifien des Phosphates v Yamashita-Shinnihon Steamship Co Ltd, the Boucraa* [1994] 1 All ER 20, 29-30 which is set out in Craies on Legislation 9 ed. (2008) at 925:

> "My Lords, it would be impossible now to doubt that the court is required to approach questions of statutory interpretation with a disposition, and in some cases a very strong disposition, to assume that a statute is not intended to have retrospective effect. Nor indeed would I wish to cast any doubt on the validity of this approach for it ensures that the courts are constantly on the alert for the kind of unfairness which is found in, for example, the characterisation as criminal of past conduct which was lawful when it took place, or in alterations to the antecedent natural, civil or familial status of individuals. Nevertheless, I must own to reservations about the reliability of generalised presumptions and maxims when engaged in the task of finding out what Parliament intended by a particular form of words, for they too readily confine the court to a perspective which treats all statutes, and

> all situations to which they apply, as if they were the same. This is misleading, for the basis of the rule is no more than simple fairness, which ought to be the basis of every legal rule. True it is that to change the legal character of a person's acts or omissions after an event will very often be unfair; and since it is rightly taken for granted that Parliament will rarely wish to act in a way which seems unfair it is sensible to look very hard at a statute which appears to have this effect, to make sure that this is what Parliament really intended. This is, however, no more than common sense, the application of which may be impeded rather than helped by recourse to formulae which do not adapt themselves to individual circumstances, and which tend themselves to become the subject of minute analysis, whereas what ought to be analysed is the statute itself"

21. Similarly, in *George Hudson Ltd v Australian Timber Workers' Union* [1923] HCA 38; (1923) 32 CLR 413 at 434 Isaacs J said, discussing the disinclination of courts to give retrospective effect to Acts:

> "But its application is not sure unless the whole circumstances are considered, that is to say, the whole of the circumstances which the Legislature may be assumed to have had before it What may seem unjust when regarded from the standpoint of one person affected may be absolutely just when a broad view is taken of all who are affected. There is no remedial Act which does not affect some vested right, but, when contemplated in its total effect, justice may be overwhelmingly on the other side."

22. The three Justices of the High Court in *Australian Education Union v General Manager of Fair Work Australia* mentioned earlier (French CJ, Crennan and Kiefel JJ) also referred to the judgments of Lord Mustill and Isaacs J and then said:

> Consistently with its underlying rationale, the resistance of the common law to construing statutes as taking effect before the dates of their enactment is graduated according to the extent of their propounded effects. In *R S Howard & Sons Ltd v Brunton*, Griffith CJ said:
>
> > "it is a settled rule of construction of Statutes that a law is not to be construed as retrospective in its operation unless the Legislature has clearly expressed that intention, and a further rule that it is not to be construed as retrospective to any greater extent than the clearly expressed intention of the Legislature indicates."

That graduated response was also reflected in the quotation by Lord Mustill in *L'Office Cherifien* from the judgment of Staughton LJ in *Secretary of State for Social Security v Tunnicliffe*:

> "It is not simply a question of classifying an enactment as retrospective or not retrospective. Rather it may well be a matter of degree – the greater the unfairness, the more it is to be expected that Parliament will make it clear if that is intended."

In *Attorney-General (NSW) v World Best Holdings Ltd* Spigelman CJ referred to the judgments of Staughton LJ and Lord Mustill and said:

> "This approach requires the court to determine the scope and degree of the unfairness or injustice that is applicable in the particular case. The greater the unfairness or injustice, the less likely it is that Parliament intended the Act to apply. Where Parliament has used general words the courts will apply the well established technique of reading them down."

While "fairness" and 'justice" denote values underlying the relevant common law principles, it is neither necessary nor desirable, as a general rule, that the task of construction be mediated by broad evaluative judgments invoking that terminology. They carry the risk that the courts may then exceed their proper constitutional function. It is sufficient to focus upon the constructional choices which are open on the statute according to established rules of interpretation and to identify those which will mitigate or minimise the effects of the statute, from a date prior to its enactment, upon pre-existing rights and obligations.

23. Ultimately, of course, our task is to construe the Nationality Act as amended by the 2007 amendments. In so far as the 2007 amendments may confer nationality on a class of individuals born before 2007 who hitherto had not been Tongan nationals, it is in substance beneficial or remedial legislation. The same can be said about the conferring of nationality on individuals of this wider class born after 2007, about whom there is no doubt that the Act, as amended, applies. One way of approaching the construction of such beneficial or remedial legislation when issues of retrospectively might arise, is described in the following passage of the judgment of Dawson J in *Polyukhovich v Commonwealth* [1991] HCA 32; (1991) 172 CLR 501. We agree with his Honour's observations which were:

> But Blackstone was not denying the capacity of Parliament to pass ex post facto laws, however undesirable they may be: see Commentaries, 16th ed. (1825), vol. 1, p 90. The resistance of the law to retrospectivity in legislation is to be found in the rule that, save where the legislature makes its intention clear, a statute ought not be given a retrospective operation where to do so would be to attach new legal consequences to facts or events which occurred before its commencement: *Fisher v.*

> *Hebburn Ltd.* per Fullagar J. at p 194; see also *Maxwell v. Murphy* at p 267; *Geraldton Building Co. Pty, Ltd. v. May; Rodway v. The Queen*, at p 518. However, the injustice which might be inflicted by construing an enactment so as to give it a retrospective operation may vary according to its subject matter. Indeed, justice may lie almost wholly upon the side of giving remedial legislation a retrospective operation where that is possible: see *George Hudson Ltd. v. Australian Timber Workers' Union*, at p 434. With legislation of that character, if the ordinary rule be couched in terms of a presumption against retrospectivity, it must, at best, be a weak presumption: see *Dora v. Victorian Railways Commissioners*, at pp 85-86. With a criminal law, where the injustice of giving it an ex post facto operation will ordinarily be readily apparent, the presumption must be at its strongest.

24. We agree that in relation to legislation of the type presently under consideration, the presumption against retrospectively is, at best, a weak presumption.

25. One particular contextual matter relied upon by Mr Kefu needs to be considered. He points to the fact that the 2007 amendments introduced a process whereby an individual who had been a Tongan national but had lost that nationality by becoming a national of another country, could apply to become, again, a Tongan national notwithstanding that individual remained a national of another country. As we understood Mr Kefu's argument this aspect of the 2007 amendments (together with later regulations concerning the same issue of dual nationality) pointed to the amendments made in 2007 to s.2 (expanding the class of people who would be Tongan nationals) operating only on individuals born after the 2007 amendments came into force. That would be because the special provisions enabling an individual to apply for Tongan nationality when the individual had earlier lost, by acquiring another nationally, Tongan nationality, would be unnecessary. They would be unnecessary because Tongan nationality would be acquired automatically by the retrospective operation of s.2 as amended in 2007 (if the section operated retrospectively). This apparent absurdity, as Mr Kefu appears to have argued, would not arise if s.2 had no retrospective operation.

26. However the answer to this argument is, in our opinion, that the provisions concerning Tongan nationals having to apply for nationality if they had earlier lost it in the way we are presently discussing, are special provisions intended to operate to the exclusion of the general provisions in s.2. That is, s.2 has no automatic application to individuals who have to apply for Tongan nationality because they had earlier lost it by becoming nationals of another country. This is understandable because the special provisions concern individuals who had taken a positive step which resulted, under the law at the time, in the loss of Tongan nationality. It is understandable that such individuals be required to actually apply for Tongan nationality and to have that application considered and, if appropriate, approved.

27. We now address some other matters raised by Mr Kefu. He expressed concern that if the amendments were to apply to persons born prior to 2007, they would have

nationality imposed upon them which they might not want for personal reasons or for reasons of loss or benefit from their current nationality. Such a disability, if it existed, could be overcome by a formal rejection of the Tongan nationality.

28. Mr Kefu then submitted that the effect of the interpretation proposed by the Lord Chief Justice is that a new birth certificate will be issued to state that the individual was born a Tongan since the date of his birth. We are not aware of any legislative provision that would have that effect. There is, of course, the provision that is contained in Regulation 7 of the Registrar General's Births and Deaths Regulations 1979 but that refers to registration in a special register. It cannot affect the country of birth. That must remain as it has always been.

29. The question then becomes one of conventional statutory interpretation. Should the word "born" be interpreted to mean born either prior to or after the commencement of the amendment, or only after the commencement. In our view, the ordinary meaning of the word, supported by dictionary definitions, is that it refers to a birth whenever it occurred. For example the Shorter Oxford English Dictionary defines the word as "to be brought forth as offspring" But as Cooke P said in *McKenzie v Attorney General* [1992] 2 NZLR 14 at 17,

> "... in the end the issue, like most issues of statutory interpretation, is the natural and ordinary meaning of the words of the Act read in their context and in the light of the purpose of the Act"

And later:

> "... strict grammatical meaning must yield to sufficiently obvious purpose."

30. We have carefully considered the provisions of the amendment, its place in the Act and the history of the legislation, but can find no justification for departing from the ordinary meaning of the word. The clear purpose of the Act is to enlarge the class of those identified as Tongan subjects. Of course the restrictive interpretation referred to above would do that, the ordinary interpretation more so. We are aware of no rule of construction that would require that the word have a restricted meaning. If Parliament had intended that the word apply only to births occurring after the amendment it could have used words such as "born after the enactment of this amendment".

31. The Crown's construction of the amendment would read it as subject to an unexpressed qualification that it applies only to persons born after the amended Act came into force. But the language can be given a plain effect as relating to persons then living or thereafter born. In our opinion it should be so read. So to read it is not to affect any settled right, in a brother or other person, such as an inheritance right, which had already accrued before the Act (as amended) commenced - at a time when a child, born in the same circumstances as the subject child, was outside the scope of the Nationality Act.

32. It was suggested in argument that this Court had held in *Edwards v Kingdom of Tonga* [1994] Tonga LR 62, as a general proposition of law, that the question of citizenship was determined at the date of a person's birth. But so to understand the decision is to ignore its context. Mr Edwards was born before the enactment of the Nationality Act's provisions governing the acquisition of citizenship were adopted. At his birth, his status as a subject to the Kingdom was established by the principles of the common law, which gave him, the rights of a citizen.

33. It was also suggested that the rights of inheritance of land of brothers of a child born abroad in circumstances such as those in this case would be affected if the amended s.2 applied to an existing family. But inheritance and nationality are different issues. And in any case, the eventual accrual of an inheritance may be affected in many ways. The argument really treats a mere potentiality (of its nature capable of being defeated) as if it were an actual right. Nor is any unfairness apparent in the application of s.2 to an existing family. It may rather be thought it would be unfair to perpetuate the exclusion of one brother because he happened to have been born abroad.

34. The ruling of the Registrar General upholding the status as a subject of the Kingdom of Tonga of Peter Denzel Paul Schaumkel should be affirmed with costs.

Australia and New Zealand Banking Group Ltd v Moala anor

Supreme Court, Nuku'alofa
Scott CJ
CV 273/2009

24 August 2012

Civil procedure – application for summary judgment – uncertainty as to amount owed – application refused

The plaintiff bank and the defendants entered into an agreed personal loan facility but the defendants failed to comply with the repayment terms of the facility. The plaintiff claimed that the defendants, as at 28 November 2009, owed the sum of $72,729.50 with interest accruing at the rate of 16%. There was also said to be a smaller amount outstanding in a current account. The defendants claimed that two vehicles that belonged to them were repossessed without their value being credited to them. The plaintiff applied for summary judgment.

Held:

1. The purpose of the summary judgment procedure was to enable a plaintiff to obtain summary judgment without having to go to trial if he could prove his claim clearly and if the defendant was unable to set up a *bona fide* defence or raise an issue against the claim which ought to be tried. Where there were circumstances which should be closely investigated there ought to be a trial and summary judgment was not appropriate. In addition, where there was uncertainty as to the amount actually due, summary judgment should be refused.
2. The court was not convinced that the effect of the repossession of the vehicles by the guarantor was correctly assessed.
3. The application for summary judgment was refused.

Cases considered:

Lynde v Waithman [1895] 2 QB 180
Miles v Bull [1969] 1 QB 258
Roberts v Plant [1895] 1 QB 597

Rules considered:

Supreme Court Rules 2007

Counsel for the plaintiff : Mrs P Tupou
Counsel for the defendant : Mr L Niu

Decision

[1] This is an application by the Plaintiff for summary judgment against the Defendants on the ground that they have no defence to the claim against them filed on 28 November 2009.

[2] The Statement of Claim is to the effect that the Plaintiff and the Defendants entered into an agreed personal loan facility but that the Defendants have failed to comply with the repayment terms of the facility. The Plaintiff says that the Defendants, as at 28 November 2009, owed the sum of $72,729.50 with interest accruing at the rate of 16%. There is also said to be a smaller amount outstanding in a current account.

[3] In January 2010 the Defendants filed a Defence and Counterclaim. Among other matters raised, the Defendants say that two vehicles belonging to them were repossessed without their value being credited to them. As to the current account debt it is said that the Plaintiff negligently transferred a sum of $6000 into the Defendants' current account. In the Counterclaim conversion of the vehicles is alleged and damages are claimed for "wrongly instituting these proceedings".

[4] In a Reply and Defence to Counterclaim filed in July 2010 it is pleaded that the vehicles were repossessed by the guarantor of the loan and without the Plaintiff's knowledge. An "oversight" in regard to the current account is admitted. The Defence to the Counterclaim amounts to a series of bare denials.

[5] Applications for summary judgment are brought subject to the provisions of RSC O15 and the principles governing such applications are well known and are conveniently set out and explained in the commentary to Order 14 contained in the 1988 Edition of the White Book.

[6] The purpose of the procedure is to enable a Plaintiff to obtain summary judgment without having to go to trial if he can prove his claim clearly and if the Defendant is unable to set up a *bona fide* defence or raise an issue against the claim which ought to be tried (*Roberts v Plant* [1895] 1 QB 597). Where there are circumstances which require to be closely investigated there ought to be a trial and summary judgment is not appropriate (*Miles v Bull* [1969] 1 QB 258). In addition, where there is uncertainty as to the amount actually due, summary judgment should be refused (*Lynde v Waithman* [1895] 2 QB 180).

[7] In the present case among other matters, it is not clear to me that the effect of the repossession of the vehicles by the guarantor has been correctly assessed. I do not find myself sufficiently satisfied that the Plaintiff has established that the whole amount claimed is actually owed. It is only in clear and straightforward cases that a defendant should be deprived of the right to go to trial. I do not find this to be such a case and accordingly the application is refused.

Vete v Chuan

Land Court, Nuku'alofa
Scott CJ
LA 13/12

6 September 2012

Land law – mandatory injunction sought – no exceptional circumstances – application failed

The plaintiff was the registered owner of a town allotment situated at Fatafehi Road, Kolofo'ou (the land). The defendant occupied part of the premises erected on the land since about 1997. In 1999 the plaintiff and the defendant entered into a written agreement, stated to be a "tenancy agreement", which permitted the defendant to operate a motel, restaurant, bar and store on the premises. The plaintiff claimed that when the five year tenancy agreement expired it was succeeded by an oral agreement between the parties that restricted the defendant's operations to a two storey building on the northern side of the land. The plaintiff claimed that the defendant breached the terms of the oral agreement and sought an order for vacant possession of the premises occupied and sub-let by the defendant, damages and costs. The plaintiff also filed an application for an injunction expelling the defendant from the land. In the Statement of Defence the defendant claimed that in reliance on the oral agreement reached between the parties he spent about $200,000 on renovating those parts of the premises that he occupied and controlled. The defendant stated that in all the circumstances the plaintiff was estopped from seeking vacant possession of the disputed premises.

Held:

1. The usual purpose of an interlocutory injunction was to preserve the status quo until the rights of the parties were determined in the action. Injunctions were most usually in negative form, to restrain the defendant from doing some act. Very exceptionally a mandatory injunction will be granted but only if the principles governing such grants are satisfied.
2. There was nothing to show that the circumstances suddenly and recently altered so as to present a "strong probability that grave damage will accrue" to the plaintiff if the defendant was not summarily removed from the land. If it was correct that the defendant was operating a business from the premises then there would be no advantages to him resulting from causing any damage to the premises which he was occupying.

3. The court was not satisfied that the plaintiff had shown that the mandatory injunction sought should be granted. The application failed and was dismissed.

Cases considered:

Canadian Pacific Railway Ry v Gaud [1949] 2 KB 239

Redland Bricks Ltd v Morris & Anor [1969] 2 All ER 576

Rules considered:

Land Court Rules 2007

Supreme Court Practice (English)

Supreme Court Rules 2007

Counsel for the plaintiff : T Fakahua

Counsel for the defendant : S Tu'utafaiva

Decision

1. The Writ and Statement of Claim were issued on 22 August 2012. The Plaintiff is the registered owner of a town allotment situated at Fatafehi Road, Kolofo'ou (the land).

2. The Defendant has occupied part of the premises erected on the land since about 1997. In 1999 the Plaintiff and the Defendant entered into a written agreement, stated to be a "tenancy agreement" which permitted the Defendant to operate a motel, restaurant, bar and store on the premises.

3. According to paragraph 6 of the Statement of Claim, when the five year tenancy agreement expired it was succeeded by an oral agreement between the parties that restricted the Defendant's operations to a two storey building on the northern side of the land.

4. The Plaintiff complains that the Defendant has breached the terms of the oral agreement between them by sub-letting part of the premises, by failing to insure the premises and by destroying useful trees which used to grow on the land.

5. The Statement of Claim seeks an order for vacant possession of the premises occupied and sub-let by the Defendant, damages and costs.

6. On the same day the writ was issued, the Plaintiff filed an application for an injunction expelling the Defendant from the land. In the affidavit filed in support of the application, the Plaintiff rehearsed the allegations contained in the Statement of Claim and exhibited a copy of the 1999 agreement together with other correspondence.

7. On 31 August the application was mentioned; the Defendant was given leave to file an affidavit in answer and the hearing of the application was adjourned to 5 September.

8. On 5 September the Defendant filed his defence. The Defendant admitted occupying parts of the premises. He claimed that following the expiry of the 1999 agreement the parties orally agreed that the Defendant would be permitted to continue his occupation of a room in the motel "for life" and that he would be permitted to continue the occupation and control of the restaurant, shop "and other rooms at the main building of the motel". The Defendant also claimed that it was expressly agreed that he would pay no rent for the parts of the premises occupied and controlled by him. The Defendant also claimed that it was an implied term of the agreement that he would be permitted to "sublet those parts of the premises that he continues to occupy and control".

9. In paragraph 3(d) of the Statement of Defence the Defendant claims that in reliance on the oral agreement reached between the parties he has expended about $200,000 on renovating those parts of the premises that he occupies and controls. In paragraph 11 the Defendant states that in all the circumstances the Plaintiff is estopped from seeking vacant possession of the disputed premises.

10. No affidavit was filed by the Defendant in support of his Statement of Defence and he was not called to testify.

11. Applications for injunctive relief in the Land Court are governed by the procedures set out in Order 22 of the Supreme Court Rules which are applied by Order 2 Rule 2 of the Land Court Rules. The principles governing the exercise of the discretion to grant or refuse injunctive relief are conveniently set out and explained in the commentary to Order 29 of the English Supreme Court Practice (the White Book) 1988 Edition.

12. The usual purpose of an interlocutory injunction is to preserve the *status quo* until the rights of the parties have been determined in the action. Injunctions are most usually in negative form, to restrain the Defendant from doing some act. Very exceptionally (see *Canadian Pacific Railway Ry v Gaud* [1949] 2 KB 239) a mandatory injunction will be granted but only if the principles governing such grants are satisfied. These principles are fully explained in *Redland Bricks Ltd v Morris & Anor* [1969] 2 All ER 576. In the words of Lord Upjohn (at page 579):

> "A mandatory injunction can only be granted where the Plaintiff shows a very strong probability on the facts that grave damage will accrue to him in the future" if the injunction is not granted.

Secondly:

> "Damages will not be a sufficient or adequate remedy if such damage does happen".

13. As already pointed out, the Defendant has been in occupation of part of the premises on the land since about 1997. In my view there is nothing on the papers before me to show that the circumstances have suddenly and recently altered so as to present a "strong probability that grave damage will accrue" to the Plaintiff if the Defendant is not now summarily removed from the land. If it is correct that the

Defendant is operating a business from the premises then I can see no advantages to him resulting from causing any damage to the premises which he is occupying.

14. In all these circumstances I am not satisfied that the Plaintiff has shown that the mandatory injunction sought should be granted. The application fails and is dismissed.

15. I will hear counsel before giving directions for the further conduct of the action.

120

Apex Insurance Brokers Ltd v Finau

Court of Appeal, Nuku'alofa
Salmon, Moore, and Handley JJ
AC 21/2011; CV 193/2010

3 October 2012; 12 October 2012

Civil procedure – application to set aside judgment – court has inherent jurisdiction – not limited to Supreme Court Rules – appeal allowed – judgment set aside

On 9 December 2009 the appellant issued a policy of fire insurance to the respondent covering the respondent's retail store for $40,000, and his stock in trade there to a value of $160,000. On 28 December the premises were totally destroyed by fire. The respondent made a claim under his policy which the appellant rejected. The respondent commenced proceedings on 23 September 2010 to which the appellant did not respond. On 11 November judgment was entered for the respondent and the assessment of damages was delivered on 6 June 2011. On 28 June 2011 the appellant filed an application to set aside the judgment in default of defence, and the assessment of the respondent's damages. The respondent filed a notice of opposition on 26 August. The application was dismissed but a stay of execution was granted. The appellant appealed the judgment dismissing the application. The General Manager of the appellant company claimed that he was not aware that a defence had not been filed, that he had engaged a named lawyer to act for the appellant and to file a defence, and that for some reason not known to him a defence had not been filed.

Held:

1. Proof by an insurer that a claim by its insured was fraudulent leads to the forfeiture of the entire claim including the residue which may be genuine. There was in addition the appellant's claim that, in answer to a specific question when he was seeking cover from the appellant, the respondent denied having other insurance on the property. Proof of another policy with another insurer was said to avoid the appellant's policy independent of any non-disclosure or misrepresentation. In any event there was a genuine dispute as to the true value of the respondent's claim which may be considerably less than $200,000.
2. A default judgment could be set aside on proof of the matters referred to in the Supreme Court Rules: there was good reason for the failure to file a defence in time; there was an arguable defence; and the plaintiff would not suffer irreparable injury if the judgment was set aside. There was no

prohibition setting aside in other circumstances, for example in the exercise of the Court's inherent jurisdiction.

3. The appeal should be allowed, the orders of the primary judge should be set aside, and in lieu thereof orders should be made setting aside the default judgment of 11 November 2010, and the ex parte assessment of the respondent's damages of 6 June 2011. The appellant should be ordered to file its defence within 28 days.

4. The appellant must pay the respondent's costs of the proceedings in the Supreme Court up to and including the delivery of judgment on 2 September 2011 and there should be no order as to the costs in this Court. The appellant, other insurance companies and other large businesses, need to carefully and continually monitor the cases they bring and the cases brought against them. The order for costs should emphasize the need for appropriate systems and staff training to ensure that Court documents received by junior staff are promptly referred to senior management.

Cases considered:

Currie v Tokoroa Earthmovers Ltd [1966] NZLR 989 (CA)
Evans v Bartlam [1937] AC 473
Jonesco v Beard [1930] AC 298
Manifest Shipping Co Ltd v Universal Polaris Insurance Ltd [2003] 1 AC 469
MBf Bank v Mangisi [2005] Tonga LR 397
Strachan v The Gleaner Co. Ltd [2005] 1 WLR 3204
Taylor v Taylor (1979) 143 CLR 1
Wyatt v Palmer [1899] 2 QB 106 CA

Rules considered:

Supreme Court Rules 2007

Counsel for the appellant	:	Mr Edwards
Counsel for the respondent	:	Mr T Fifita

Judgment

[1] This is an appeal from a judgment on 2 September 2011 which dismissed the appellant's application dated 28 June 2011 to set aside the interlocutory judgment for damages to be assessed, in default of a defence, entered on 11 December 2010, and the assessment of the plaintiff's damages on 6 June 2011.

[2] The proceedings arose out of a policy of fire insurance issued by the appellant to the respondent on 9 December 2009 covering the respondent's retail store at Nualei for $40,000, and his stock in trade there to a value of $160,000.

[3] On 28 December the premises were totally destroyed by fire.

[4] The respondent made a claim under his policy which the appellant rejected.

[5] The respondent commenced proceedings in the Supreme Court on 23 September 2010, and according to the certificate of service on the file, the writ, statement of

claim and directions notice were served on the appellant at its office at Nuku'alofa on 30 September.

[6] The writ notified the appellant that if it wished to defend the claim it must file a written defence within 28 days. Under the procedure in the Supreme Court a defendant is not required to file and serve a notice of appearance otherwise than in its defence.

[7] The appellant did not file and serve a defence within time and on 5 November the respondent filed an ex parte application under the Rules for judgment in default of defence.

[8] On 11 November the primary judge entered judgment for the respondent for damages to be assessed and directed service of his order on the appellant within 14 days of the issue of the order and service of the respondent's bill of costs.

[9] According to the certificates of service on the file the appellant was served with a copy of the default judgment on 16 November and on 7 December it was served with the respondent's itemised bill of costs claiming $2735.

[10] On 26 May 2011 the assessment of the respondent's damages was heard ex parte by the primary judge and judgment was reserved. This was delivered on 6 June when the respondent was awarded $200,000 with interest at the rate of 10% from 28 May 2010.

[11] According to the respondent's affidavit of 24 August 2011 the appellant was served with a copy of the final judgment on 10 June 2011.

[12] Service of this judgment finally stirred the appellant into action, and on 28 June it filed an application under Order 14 r. 4 to set aside the judgment in default of defence, and the assessment of the respondent's damages, supported by a 5 page affidavit of Peseti Ma'afu its General Manager with 10 pages of annexures.

[13] The respondent filed a notice of opposition on 26 August, supported by an affidavit of the respondent of 24 August. The application was heard by the primary judge on 30 August. His reserved judgment, dismissing the application but granting a stay of execution, was delivered on 2 September 2011.

[14] In his affidavit Mr. Ma'afu said that he was not aware that a defence had not been filed, that he had engaged a named lawyer to act for the appellant and to file a defence, that for some reason not known to him a defence had not been filed. He became aware of the default judgment when the judgment of 6 June 2011 was served upon him.

[15] He continued "I cannot say with any certainty as to why the defence was not filed in time, nor can I ascertain why judgment was granted, when at all material times it was the intention of the Defendant to file a defence." He added that he had gathered "sufficient evidence in this case prior to judgment being ordered on 6 June 2011 that questions the validity of the Plaintiff's claim."

[16] The last statement is clearly correct in view of the information in his affidavit and the documents annexed to it.

[17] The primary judge noted the submission of counsel for the respondent that the appellant "though served with all relevant papers and orders, took no part in the proceedings until 3 weeks after judgment had been delivered." This of course was perfectly true as the history of the proceedings demonstrates.

[18] The primary judge also noted that on the appellant's case the failure to file a defence was the result of its previous legal adviser's failure to follow instructions; that the respondent had insured the same property with another office which would avoid both policies, that there was an action pending against the other insurer, and this claim was fraudulent.

[19] The respondent admitted in his affidavit of 24 August that he had also insured the property with Dominion Insurance, but the sum insured and the amount claimed by the respondent in his then pending action against that Company does not appear.

[20] The primary judge referred to his judgment on the ex parte assessment when as he said, he "expressed some doubts about the Plaintiff's credibility." Later in his judgment of 2 September 2011 he said "The Plaintiff's claim against this Defendant and the admitted fact that he has also insured elsewhere give rise to disquiet."

[21] In his judgment in the assessment the primary judge had noted that the respondent calculated his stock losses at $514,847.94. The judge recorded that the respondent had not offered "any supporting evidence" in his case in chief. In answer to questions from the Court a handwritten stock list (Ex 3) was produced covering half the respondent's loss despite the document concluding with a "grand total" of $365,733.27.

[22] In answer to a request for supporting evidence a bundle of invoices was produced. The judge said that "Comparison of these invoices with Exhibit 2 [a typographical error for Exhibit 3] revealed immediate anomalies. The invoices "bear all the signs of having been prepared on the same day. The serial numbers are inconsistent with their dates."

[23] The judge continued: "The Plaintiff's attempts to explain to me why he had, according to the invoices, purchased several items of stock when, according to earlier invoices he must have had very large amounts of the items already in stock did not impress me." He said that the plaintiff's explanation that he had stocked up for the busy Christmas and New Year period only made his claim to have lost stock worth $514,847.94 in the fire on 28 December, after the Christmas rush, "all the less plausible".

[24] The judge concluded by recording that he was not "very favourably impressed by the Plaintiff's evidence", and he suspected that the claim "was inflated", but nevertheless gave judgment for the sum insured.

[25] Additional information in Mr. Ma'afu's affidavit makes the respondent's claim to have lost stock worth $514,847.94 even more incredible.

[26] A valuation of the building dated 24 September 2007 showed that the ground floor shop was only 12 meters by 5 meters. Mr. Ma'afu noted the existence of a shop

counter and the presence of refrigerators and said that the stock allegedly lost in the fire "could not possibly fit into the small size of the store."

[27] The statement of claim (para 13) alleged that the plaintiff had an overdraft of $115,000 from the ANZ Bank "which purchased" goods that were destroyed in the fire. In the course of investigating the respondent's claim the appellant obtained copies of the respondent's bank statements with the ANZ Bank covering the period from early September to 31 December 2009. The respondent's overdraft at the start of the period was $39.054.61 and at the end was $121,145. 90.

[28] Mr. Ma'afu stated that the withdrawals and cheque payments shown in the statements "do not follow the amounts purchased from the invoices...submitted". For instance the respondent provided a carbon copy invoice dated 4 November for stock to the value of $241, 384 including 800 50kg bags of sugar ($ 54,400), 350 cartons of tomato ketchup ($19,600), 850 25kg bags of flour ($29,750), 1500 cartons of soft drink ($25,500), and 500 cartons of Mortein ($27,000).

[29] It is highly unlikely that the respondent could have obtained stock on credit to this value, but the bank statements reveal no cheque for this amount, and Mr. Ma'afu stated that the withdrawals from the ANZ account totalled $18,118.18 in October, $85,857.07 in November and $18,054.74 in December.

[30] During this period the respondent's overdraft which fluctuated between $39,054.61 in early September and $38,248.74 on 16 November (AB 62) increased to $121,145.90 at the end of December.

[31] The bank statements contain no debit entry for more than $4,000 until a debit of $5,000 on 18 November 2009 and then debits of $10,000 on 19, 20 and 27 November. Thereafter there were withdrawals of $7,500 for a loan repayment, a cash withdrawal of $6,500 on 7 December but all other withdrawals were for amounts of $3,750 or less.

[32] On their face, the ANZ bank statements contradict the respondent's claim to have lost stock to a total value of $514,847.94 in the fire, and in particular they contradict the copy invoice for $241,384 dated 4 November.

[33] These matters may be capable of explanation. The respondent said in his affidavit in opposition to the application to set aside the judgment that his building had been extended before the fire and was three or four times bigger. He also said that the money he used to buy goods also came from the Westpac Bank. However the statement of claim only referred to goods purchased with money from the ANZ Bank, and the Westpac statements were not produced.

[34] The respondent filed a further affidavit in this Court dated 27 September 2012 but no further explanation was offered for the inconsistencies noted by the primary judge or those relied on by Mr. Ma'afu, and the Westpac statements were not produced.

[35] A further difficulty with the respondent's claim hinted at by the primary judge, is that the respondent's evidence that stock to the total value of $514,847.94 was destroyed in the fire was based on what were said to be his total purchases over the period from 16 July 2009 to 16 December 2009 including one invoice in September and four in October, making no allowance at all for his sales during this period.

[36] The appellant's purchases, for which he produced invoices from wholesalers, totalled only $77,903.93. The highest amount in any of these invoices was $16,110. None of the attached invoices referred to terms of credit, and those from Punjas and Pactrade stated that they were cash sales. The respondent could produce what appeared on their face to be genuine original invoices from wholesalers for goods to the value of $77,903.93, but could not produce such documents for purchases to the value of $241,384 from unidentified wholesalers.

[37] The respondent in his affidavit of 24 August 2011 offered no explanation for having invoices to support a claim for $77,903.93 but no explanation, except a carbon copy, to support his claim to $241,384. The explanation in his later affidavit of 27 September 2012 was that "the originals" were destroyed in the fire, and the wholesale stores could not find copies to give to him for the trial. However he had what appeared to be original invoices for $77,907.97.

[38] The evidence available to this Court raises a prima facie case that the respondent's claim in Court that the stock to the "grand total" of $365,733.27 (Exhibit 3 not in the appeal booklet) and his claim under the policy for $200,000 were grossly exaggerated and fraudulent.

[39] Proof by an insurer that a claim by its insured was fraudulent leads to the forfeiture of the entire claim including the residue which may be genuine: *Manifest Shipping Co Ltd v Universal Polaris Insurance Ltd* [2003] 1 AC 469. There is in addition the appellant's claim that, in answer to a specific question when he was seeking cover from the appellant, the respondent denied having other insurance on the property. Proof of another policy with Dominion Insurance is said to avoid the appellant's policy independent of any non-disclosure or misrepresentation. In any event there is a genuine dispute as to the true value of the respondent's claim which may be considerably less than $200,000.

[40] Clearly there are a number of serious issues to be tried, and a prima facie case of fraud.

[41] In his judgment of 2 September 2011, the primary judge did not refer expressly to the criterion in O 14 r 4 of the *Supreme Court Rules* which identifies the matters about which the Court should be satisfied before setting aside a default judgment. This rule provides:

> "(1) A judgment entered under rule 1 may be set aside if the defendant satisfies the Court that:
> (a) there was good reason for the failure to file a defence in time;
> (b) there is an arguable defence; and
> (c) the plaintiff will not suffer irreparable injury if the judgment is set aside.

(2) Application notice under paragraph (1) shall be supported by an affidavit."

[42] Ordinarily the Court would consider the criteria identified in the rule before determining whether the judgment should be set aside. The rule contemplates that each criterion must be satisfied.

[43] In dismissing the application to set aside the default judgment the primary judge explained:

> In my opinion the Defendant has advanced no good reason for setting the judgment aside, and for ignoring the proceedings pending against it (see e.g. *Currie v Tokoroa Earthmovers Ltd* [1960] NZLR 611, 614). On the other hand, the Plaintiff's claim against this Defendant and the admitted fact that he has also insured elsewhere give rise to disquiet.

[44] The first sentence in the passage from the judgment quoted earlier could fairly be viewed as addressing the question of whether there was a good reason for Apex failing to file a defence in time. The primary judge uses the expression "no reason" and the New Zealand authority referred to concerns a case where lawyers had failed to act.

[45] The case of *Currie v Tokoroa Earthmovers Ltd* cited by the primary judge in the passage quoted earlier (there appears to be a typographical error in that the year in the citation should be 1966 not 1960) is the judgment of Woodhouse J of 17 December 1965. That judgment was, in fact, the subject of an appeal to the Court of Appeal whose judgment is reported at [1966] NZLR 989. The judgment of Woodhouse J was relied upon by Ford ACJ in *MBf Bank v Mangisi* [2005] Tonga LR 397 in refusing to set aside a default judgment (on an application made over 2 years later) in circumstances where the explanation for failing to file a defence was a generalised allegation that two solicitors, who had been asked to file a defence, had failed do so.

[46] The case of *Currie v Tokoroa Earthmovers Ltd* concerned a case where the plaintiff, a "somewhat unsophisticated and elderly farmhand", had been injured in a motor vehicle accident and retained solicitors to commence proceedings on his behalf. The limitation period for commencing such proceedings was two years. A writ was filed on the last day of that period but not served within the ensuing 12 months, as it should have been. Woodhouse J found that during the two-year period:

> "the plaintiff made a numbers of enquiries from his solicitor as to the progress being made with his intended action, and it is clear that on each of these occasions he was given some sort of assurance that his interests were being watched and that the matter was progressing slowly."

His Honour also found that similar enquiries were made and responses given after the writ was filed.

[47] His Honour made two observations relevant to this matter. The first was:

> In general a party cannot disclaim responsibility for the acts of a solicitor appointed to act for him.

The second concerned a particular category of potential litigant who:

> Having given some broad instructions to a solicitor, is then content to lie back for an extended period of time leaving everything with nonchalant confidence to his professional adviser

[48] Woodhouse J concluded that the cause of the delay in that case should not be attributed to the plaintiff at all. His Honour granted leave to bring the proceedings out of time. The overriding requirement was that leave should not be granted unless the Court thought it was "just" to do so.

[49] Each of the three judges of the Court of Appeal published separate reasons and each generally agreed with the approach of Woodhouse J. They emphasised that each case had to be decided on the particular facts. However they adverted to situations where the solicitor had been inactive as had been the client. In such a case the client might be said to have "inexcusably slept on his rights". That was to be contrasted with the facts of that particular case, where the client had been active notwithstanding the inactivity of his solicitors.

[50] In the present case the evidence only discloses that Apex, at some stage, retained a lawyer to act for it and nothing was done by the lawyer to defend the proceedings. There is no evidence to suggest Apex took any steps itself to ascertain, from time to time, the progress of the matter and, in particular, what the lawyer had done. It is surprising that an insurance company, having rejected a claim which was arguably fraudulent and faced with a suit by the disaffected insured, would not monitor what was happening in the litigation. Apex was in the category described by Woodhouse J in the second passage set out above.

[51] It was open to the primary judge, in the exercise of a discretionary power, to conclude that Apex had not established a good reason for its failure to file a defence in time.

[52] However this is not the end of the appeal. Order 14 r.4 permits a default judgment to the set aside on proof of the matters referred to in the rule. It does not purport to prohibit setting aside in other circumstances, for example in the exercise of the Court's inherent jurisdiction.

[53] *Halsbury's Laws of England (4th Edition) Volume 37: Practice and Procedure* states the relevant principles in paragraph 14

> "...the Court may exercise its inherent jurisdiction even in respect of matters which are regulated by statute or rule of court. The jurisdiction of the Court...within the term 'inherent' is that which enables it to fulfil itself, properly and effectively

> as a Court of law...it may be exercised even in circumstances governed by rules of Court...the inherent jurisdiction of the Court is a virile and viable doctrine, and has been defined as...a residual source of powers, which the Court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them".

[54] Courts have exercised their inherent jurisdiction to set aside default judgments in a number of situations referred to in *Halsbury* (above) at paragraphs 38 n.10 and 403 n. 8. To the cases there referred to can be added *Taylor v Taylor* (1979) 143 CLR 1 where the High Court of Australia exercised the inherent jurisdiction of the Family Court to set aside ancillary orders in an ex parte decree nisi in circumstances where as Gibbs J said at p 3

> "The appellant promptly consulted his solicitors and instructed them to defend the petition. Through their neglect no answer was filed, and the appellant was never informed of the date fixed for the hearing of the petition."

Gibbs J said at p. 5 that "the real ground on which application was made to set aside [the orders] was that the party affected by it had not been given an opportunity to present his case." The inherent jurisdiction of the Court was referred to by the judges at pp7, 8, 10, 16, and 22.

[55] There is no good reason why this aspect of the inherent jurisdiction should not extend to setting aside a default judgment to enable a trial on the merits where there is a prima facie case of fraud and a substantial sum is involved.

[56] In *Evans v Bartlam* [1937] AC 473, 480 Lord Atkin said, in the context of Order XXVII r. 15 which gave the Court a discretion, untrammelled in terms, to set aside default judgments:

> "The Courts, however, have laid down for themselves rules to guide them in the normal exercise of their discretion. One is that...there must be an affidavit of merits...It was suggested...that there is another rule that the applicant must satisfy the Court that there is a reasonable explanation why judgment was allowed to go by default...I do not think that any such rule exists, though obviously the reason, if any, for allowing judgment and thereafter applying to set it aside is one of the matters to which the Court has regard. If there was a rigid rule...the two rules [of Court] would be deprived of most of their efficacy...Even the first rule as to affidavit of merits could, in no doubt rare but appropriate cases, be departed from. The supposed second rule does not in my opinion exist."

[57] Lord Atkin also said at p. 480

> "The principle obviously is that unless and until the Court has pronounced a judgment upon the merits, or by consent, it is to have the power to revoke the expression of its coercive power where that has only been obtained by a failure to follow any of the rules of procedure."

[58] Lord Wright said in the same case at p. 489

> "The primary consideration is whether he has merits to which the Court should pay heed; if merits are shown the Court will not prima facie desire to let a judgment pass on which there has been no proper adjudication."

[59] Lord Atkin's statement of principle quoted in paragraph 58 was recently reaffirmed by the Privy Council in *Strachan v The Gleaner Co. Ltd* [2005] 1 WLR 3204, an appeal from Jamaica, in the judgment of Lord Millett at p. 3211. In that case the Courts in Jamaica had set aside a judgment in default of defence for damages to be assessed, after the assessment had taken place. The plaintiff's appeal to the Privy Council was dismissed.

[60] A further relevant factor is that the Supreme Court has jurisdiction, in a properly pleaded action, to revoke a judgment that has been obtained by the fraud of the successful party by perjury or otherwise, even after a trial on the merits: *Jonesco v Beard* [1930] AC 298, 301. This jurisdiction enables the Court to set aside a default judgment: *Wyatt v Palmer* [1899] 2 QB 106 CA. In our opinion this is another reason for exercising the inherent jurisdiction in this case.

[61] There is a further reason. The primary judge granted the appellant a stay of execution for 3 months. Mr. Ma'afu referred, in support of the appellant's alternative application for a stay, to the proceedings pending against the other insurer. He sought a stay to avoid double recovery if the respondent succeeded in that case, and if he failed "as a matter of fairness and justice the judgment in this matter could not stand where the Plaintiff would be seen to have obtained judgment by fraud."

[62] The Court has been informed that the case against the other insurer has been settled for $10,000, a modest amount in the circumstances.

[63] The primary judge in granting the stay must have contemplated that the judgments might later be set aside or amended in some way.

[64] The appeal should be allowed, the orders of the primary judge should be set aside, and in lieu thereof orders should be made setting aside the default judgment of 11 November 2010, and the ex parte assessment of the respondent's damages of 6 June 2011. The appellant should be ordered to file its defence within 28 days.

[65] The appellant must pay the respondent's costs of the proceedings in the Supreme Court up to and including the delivery of judgment on 2 September 2011 and there should be no order as to the costs in this Court.

[66] It is to be hoped that these orders for costs will bring home to the appellant, other insurance companies and other large businesses, the need to carefully and continually monitor the cases they bring and the cases brought against them. The order for costs will also emphasize the need for appropriate systems and staff training to ensure that
410 Court documents received by junior staff are promptly referred to senior management.

Dandin Group Ltd v Ministry of Police anor

Court of Appeal, Nuku'alofa
Salmon, Moore, and Handley JJ
AC 3/2012; CV 118/2011

8 October 2012; 12 October 2012

Civil procedure – claim struck out because no reasonable cause of action disclosed – appeal – dismissed

Constitutional law – liability claimed to be on the Kingdom to compensate persons who suffered loss during breakdown in law and order – no duty – claim dismissed

The statement of claim was issued on 16 November 2011 and sought damages of $700,000 for the loss of the plaintiff's trading stock and business during and as a result of the riots in Nuku'alofa on 16 November 2006 when Tungi Arcade was burnt down. The statement of claim alleged that the first defendant, the Ministry of Police, had a statutory duty to maintain law and order at all times throughout Tonga and that the second defendant, the Kingdom of Tonga, was vicariously liable for any civil wrongs committed by the first defendant. On 24 February 2012 the primary judge held that the plaintiff's case disclosed no reasonable cause of action and should be struck out. The plaintiff appealed the decision. The statement of claim relied on clause 18 of the Constitution and section 6 of the Police Act as the source of absolute statutory duties which on breach imposed liabilities on the Ministry and the Kingdom to compensate persons or companies which suffered loss during a breakdown in law and order.

Held:

1. Clause 18 may arguably create legally enforceable rights in citizens if the Government took property in time of war or land or houses were taken for public works. In those cases the clause may arguably impose on the Government a legally enforceable duty to pay the fair value of the property taken. However in those cases the clause provided that "the Government shall pay". There was no such language in the earlier part of the section. It did not impose any duty on the Government to pay for property which it did not acquire that was lost or damaged during a breakdown of law and order.
2. Section 6 of the Police Act defined the functions of the Police Force. It did not create legally enforceable statutory duties co-extensive with those functions. Its language was quite inadequate for that purpose.

3. The judge was clearly correct and the appeal was dismissed.

Statutes considered:
Constitution of Tonga Act (Cap 2)
Police Act (Cap 35)

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

Judgment

[1] This is an appeal by the Plaintiff from the decision of the primary judge on 24 February 2012 when he held that the Plaintiff's case disclosed no reasonable cause of action and should be struck out under Order 8 r 8(1) (a) and (b) of the *Supreme Court Rules*.

[2] The statement of claim which was issued on 16 November 2011 sought damages of $700,000 for the loss of the Plaintiff's trading stock and business during and as a result of the riots in Nuku'alofa on 16 November 2006 when Tungi Arcade was burnt down.

[3] The statement of claim alleged (para 3) that the first defendant, the Ministry of Police, had a statutory duty to maintain law and order at all times throughout Tonga and that the second defendant, the Kingdom of Tonga, is vicariously liable for any civil wrongs committed by the first defendant (para 4).

[4] The statutory duty was alleged to arise under clause 18 of the Constitution (para 6) and section 6 of the Police Act.

[5] Clause 18 of the *Constitution* provides:

> "All the people have the right to expect that the Government will protect their life, liberty and property and therefore it is right for all the people to support and contribute to the Government according to law. And if at any time there should be a war in the land and the Government should take the property of anyone, the Government shall pay the fair value of such property to the owner. And if the Legislature shall resolve to take from any person or persons their premises or part of their premises or their houses for the purpose of making Government roads or other work of benefit to the Government, the Government shall pay the fair value."

[6] Section 6 of the Police Act, as in force in 2006, provided, so far as relevant;

> "The Force shall be employed in and throughout the Kingdom for the maintenance of law and order, the preservation of the peace, the protection of life and property, the prevention and

> detection of crime and the enforcement of all laws and regulations with which it is directly charged.."

[7] The statement of claim alleged (para 8) that the Police Act "strengthens" the defendants' duties under clause 18 of the Constitution.

[8] It further alleged (para 9) that on 16 November 2006 when Tungi Arcade was burnt down "the defendant (sic) did fail to perform its constitutional and lawful obligations set out" in clause 18 of the Constitution and section 6 of the Police Act, and "the defendant is in breach of those obligations."

[9] The particulars to para 9 alleged (sub-para (c)) that the Police Force was not able to maintain law and order on the afternoon of 16 November 2006 and as a result, Tungi Arcade was burnt down and (sub-para (d)) this was a breach of clause 18 of the Constitution.

[10] Thus the statement of claim relied on clause 18 of the Constitution and section 6 of the Police Act as the source of absolute statutory duties which on breach imposed liabilities on the Ministry and the Kingdom to compensate persons or companies which suffered loss during a breakdown in law and order.

[11] On 4 January 2012 the defendants applied for an order that the Plaintiff's action be dismissed because it disclosed no reasonable cause of action and was vexatious.

[12] The judge held [8] that the first sentence in clause 18 of the Constitution "is...aspirational", recognizing the primary responsibility of a Government. He continued:

> "It does not however...impose a strict liability upon Government to protect all life, all liberty and all property in each and every circumstance. It would be wholly unreasonable to expect Government to compensate all those who have lost their lives, liberty or property in any and all circumstances...To suggest that clause 18 gives each victim the right to be indemnified, to my mind, makes no sense."

[13] The judge noted (para 5) that there was no allegation that the police were negligent in the performance of their duties.

[14] The opening sentence of clause 18 of the Constitution is in the nature of a recital (a "whereas" clause) which explains why the people should support and contribute to the Government according to law. It states that the people have "the right to expect" the Government to protect their life, liberty and property. In terms the sentence creates no more than "a right to expect", but an expectation is not a legal right enforceable by an action for damages.

[15] Clause 18 may arguably create legally enforceable rights in citizens if the Government takes property in time of war or land or houses are taken for public works. In those cases the clause may arguably impose on the Government a legally enforceable duty to pay the fair value of the property taken. However in those cases the clause provides that "the Government shall pay".

[16] There is no such language in the earlier part of the section. It does not impose any duty on the Government to pay for property which it does not acquire that is lost or damaged during a breakdown of law and order.

[17] Section 6 of the Police Act defines the functions of the Police Force. It does not create legally enforceable statutory duties co-extensive with those functions. Its language is quite inadequate for that purpose.

[18] In our opinion the judge was clearly correct and the appeal must be dismissed.

[19] Having ruled that the statement of claim did not disclose a reasonable cause of action and should be struck out, the judge made this order and dismissed the action under the powers conferred by Order 8 r8 (1). The Plaintiff had not sought leave to amend during the hearing and did not seek such leave on 24 February 2012 after the judge published his reasons for judgment.

[20] The Plaintiff's notice of appeal filed on 4 March 2012 did not allege that leave to amend had been wrongly refused or seek leave to amend. That claim was first made on 9 March. However it was then too late as the action had been dismissed on 24 February.

[21] The appeal is dismissed with costs.

Finau v Minister of Lands anor

Court of Appeal, Nuku'alofa
Salmon, Moore, and Handley JJ
AC 9/2012; LA 25/2010

2 October 2012; 12 October 2012

Land law – allotment reverted to Crown – Minister made grant – appeal against the grant – appeal dismissed

The most recent holder of the allotment was a widow who held it under s 80 of the Land Act (Cap 132). She died in 1994. There was no heir. The allotment thereafter reverted to the Crown. In purported exercise of the powers under s 88, the Minister of Lands made the grant in 2007 to the second respondent, Sione Heimuli. The appellant sought an order cancelling that grant to the second respondent. The Land Court dismissed her claim. The appellant's first argument was based on the fact that no regulations were made as contemplated in the concluding words of s 88. Therefore in the absence of regulations, the power to grant an allotment could not be exercised under that section and any grant had to be made under s 50. The second argument imported into s 88 a requirement that the power to grant an allotment which had reverted to the Crown could not be exercised if the allotment was not "available" in the way that was envisaged in s 50.

Held:

1. From time to time legislation conferred power on a person or body and expressly provided for the making of regulations regulating or dealing with the exercise of the power, but no regulations were made. The legal issue which then arose was whether the making of regulations was an essential condition for the exercise of the power.
2. There was nothing about the nature of the power conferred which suggested that regulations would be necessary in order to perfect the description of the power or further identify the nature of the power. Nor would regulations be necessary to identify procedural steps to be taken before or following the power's exercise. The power was completely described, namely to grant out the allotment and there was no particular reason why it was necessary to have specified procedures as long as common law requirements (for example, providing interested parties with an opportunity to be heard) were met. The first argument of the appellant was rejected.

3. There was nothing in the language or context of section 88, or having regard to the Act as a whole, which justified the implication of a precondition for grant under that section that the land is "available" in the sense in which the word is used in s 50. The land could not be granted under s 88 unless it was available. However, under s 88, land was available if it had reverted to the Crown and there was no existing heir who might claim the land and, additionally, the land was not required for Government purposes. Given these express preconditions to the making of a grant under s 88 there was no warrant to imply a precondition arguably arising under another section, namely s 50. Accordingly the second argument of the appellant must also be rejected.
4. The appeal was dismissed with costs.

Cases considered:

Browne v Commissioner for Railways (1935) 36 SR (NSW) 21

Colpitts v Australian Telecommunications Commission (1996) 70 ALR 554

Tafa v Viau [2006] Tonga LR 287

Statute considered:

Land Act (Cap 132)

Counsel for the appellant	:	Mr Niu
Counsel for the first respondent	:	Mr Kefu
Counsel for the second respondent	:	Mrs Vaihu

Judgment

[1] This is an appeal by Seini Finau from the judgment of the Land Court of 22 June 2012 dismissing her claim seeking, amongst other things, an order cancelling the grant of a town allotment in 2007 to the second respondent, Sione Heimuli. Many of the facts canvassed by the Land Court in its reasons for judgment, and particularly those concerning the family tree of the appellant and the second respondent, are not relevant to the issues raised in the appeal.

[2] It is sufficient to note a limited number of uncontentious facts. Before the grant in dispute and other earlier dealings with the allotment favouring the second respondent, the most recent holder of the allotment, a widow holding the allotment under s 80 of the Land Act (Cap 132) ("the Act"), died in 1994. There was no heir. It was common ground in this appeal that the allotment thereafter reverted to the Crown. In purported exercise of the powers under s 88, the Minister of Lands made the grant in 2007 to the second respondent. In so doing, the Minister heard from interested parties including the appellant about what should be done in relation to the allotment. The grant was preceded by an application lodged by the second respondent using Form 9, designed for use in an application under s 43 of the Act.

[3] The appellant had been living on the land in 1994. Thereafter, her connection with the land was affected by orders of the Land Court in earlier litigation involving the same parties. The connection included an interest the appellant had in a house and a

concrete water tank erected on the allotment. For reasons which will emerge shortly, it is unnecessary to explore the nature of that connection and, in any event, no detailed findings were made by the Land Court concerning that connection.

[4] The arguments advanced by the appellant in this appeal, were similar to the arguments advanced by her before the Land Court, which it rejected. It is unnecessary to summarise the reasons of the Land Court which broadly accord with our reasons for rejecting the appellant's arguments in this appeal.

[5] It is convenient to set out, at this point, several sections of the Act. Section 43 provides:

> "Tongan subject may apply for allotment
>
> (1) Every male Tongan subject by birth of 16 years of age not being in possession of a tax or town allotment shall be entitled to the grant of a tax or town allotment or if in possession of neither to the grant of a tax and town allotment.
>
> (2) The grant shall be subject to the provisions of this Act and shall be made in accordance with the following rules-
>
> (a) the applicant shall make an application on the prescribed form to the Minister;
>
> (b) the applicant shall produce for the inspection of the Minister his birth certificate or some other proof of the date of his birth;
>
> (c) the applicant shall pay the prescribed fees."

Section 50 provides:

> "Rules for taking land to allotments
>
> Land for allotments shall be taken from the hereditary estates in accordance with the following rules —
>
> (a) an applicant for an allotment lawfully resident in an hereditary estate shall have his allotments out of land available for allotments in that estate;
>
> (b) where there is no land available in the estate in which the applicant is resident, then the allotment shall be taken out of some other estate held by the noble or matapule in one of whose estates the applicant is resident;
>
> (c) if no land is available in any hereditary estate held by the noble or matapule in one of whose estates the applicant is resident then the allotment shall be taken out of the hereditary

estate of any other noble who is willing to provide such allotment;
(d) if no land is available under rule (c) then the applicant may have his allotment from Crown Land;
(e) an applicant for an allotment to be granted out of Crown Land shall have his tax and town allotments from such particular portion of Crown Land as the Minister may decide:

Provided that an applicant already resident on Crown Land shall where possible be granted the allotments from the particular area of Crown Land in which the applicant is resident."

Both these sections are in Division 1, Grant of Allotments, of Part IV, Tax and Town Allotments, of the Act.

[6] Section 88, which is in Division VII, Devolution of Allotments, of Part IV, provides:

"Where any tax or town allotment shall revert to the Crown under the preceding provisions of this Division, such allotment unless required for Government purposes shall be granted out by the Minister in accordance with such regulations as may be made under this Act."

Reference should also be made to s 22 which provides:

"Power to make regulations

(1) The King with the consent of the Privy Council may, from time to time, make regulations providing for all purposes whether general or to meet particular cases that may be convenient for the administration of this Act or that may be necessary or expedient to carry out the objects and purposes of this Act and where there may be in this Act no provision or no sufficient provision in respect of any matter or thing necessary or expedient to give effect to this Act, providing for or supplying such omission or insufficiency and without prejudice to the foregoing powers, providing for all or any of the matters following, that is to say—

(a) prescribing and defining the manner of doing or performing any act or thing under or for the purposes of this Act, and the time when or within which it shall be done or performed;

(b) prescribing forms of registers, books, documents, instruments and writings, and the conditions, stipulations, reservations and exceptions that shall be inserted or that shall be implied in grants, leases, permits, and other instruments;
(c) defining the duties of officers;
(d) regulating the procedure in applications to the Minister of Lands;
(e) regulating the cutting, getting, and removal of timber, sand, stone, metals, and material on and from Crown Land or any holding;
(f) regulating commons and public reserves in cases not otherwise provided by law.

(2) The regulations may impose fees in respect of any inspection, survey, lease, licence, registration, certificate, permit or other matter granted or made by any officer or other person under this Act; and in respect of any application made to any officer or other person under this Act:

Provided that the fees set out in Schedule IV shall be the fees imposed until the same have been varied or revoked in pursuance of the authority given by this section.

(3) The regulations may impose royalties to be paid to the Crown in respect of timber, stone, sand, and metals or other material cut, got and removed pursuant to any permits, issued under this Act.

(4) Any person who offends against any regulation shall be liable to a penalty not exceeding $100."

[7] The appellant's first argument in this appeal is based on the fact that no regulations have been made as contemplated in the concluding words of s 88. The gist of the argument is that in the absence of regulations, the power to grant out an allotment cannot be exercised under that section and any grant has to be made under s 50.

[8] It happens from time to time that legislation confers power on a person or body and expressly provides for the making of regulations regulating or dealing with the exercise of the power, but no regulations are made. This case is an example. The legal issue which then arises is whether the making of regulations is an essential condition for the exercise of the power.

[9] A commonly cited case concerning this issue is *Browne v Commissioner for Railways* (1935) 36 SR (NSW) 21. A helpful discussion of this authority is found in the judgment of Burchett J in *Colpitts v Australian Telecommunications Commission*

(1996) 70 ALR 554 at 566. In that latter case a statutory authority had a power to decide to compulsory retire an employee if, in its view, the employee was inefficient, incompetent or unable to discharge the duties of the position. The section conferring the power also provided that the regulations "shall make provision for and in relation to the review of a decision". There were no regulations making provision for a review of a decision to compulsorily retire an employee. Burchett J decided that the provision of a right of review "must be regarded, upon the proper construction of the section, as an essential condition of action under it". Accordingly the statutory authority had no lawful right to retire the employee who had challenged the statutory authority's decision in the proceedings.

[10] The effect of regulations not being made in these situations is a question of statutory construction of the provision conferring power that also contemplates the making of regulations concerning its exercise. Did Parliament intend that the power conferred by the statutory provision could only be exercised if regulations had been made concerning or relating to the exercise of the power? In the present case, it is difficult to discern such an intention. The section speaks of "such regulations as may be made". The use of the formulation "such...as may..." suggests the possibility that regulations might be made but equally contemplates the possibility they might not. The regulation making power in s22 is expressed in extremely wide terms. However there is nothing about the nature of the power conferred by s 88 which suggests that regulations would be necessary in order to perfect the description of the power or further identify the nature of the power. Nor would regulations be necessary to identify procedural steps to be taken before or following the power's exercise. The power is completely described, namely to grant out the allotment and there is no particular reason why it is necessary to have specified procedures as long as common law requirements (for example, providing interested parties with an opportunity to be heard) are met. The first argument of the appellant should be rejected.

[11] The second argument involves importing into s 88 a requirement that the power to grant an allotment which has reverted to the Crown cannot be exercised if the allotment is not "available" in the way that concept is embodied in s 50. This argument, in turn, relies on what was said by the Court of Appeal in *Tafa v Viau* [2006] Tonga LR 287. In that matter there had been a determination at trial that land granted by the Minister under s 50 had been lawfully occupied by two of the parties to the proceedings who were residing in a substantial house they had built on the land. A finding of fact was made at trial that the land was not available for grant. The Land Court decided that as this fact had not been considered by the Minister, the decision to grant the land to another party was vitiated.

[12] In the Court of Appeal, the issue was centrally whether the Minister had failed to take reasonable steps to acquaint himself with relevant information before making the decision to grant the allotment to the appellant. The Court of Appeal accepted that the Minister had not taken such steps and indicated (at [14]) that in the result "a most material factor, the occupation of the land by the respondents together with the erection of a house on it, was not taken into account". Importantly, the Court of Appeal did not endorse the ultimate finding at trial that because of these circumstances, the land was not "available" for grant. Indeed the Court of Appeal noted in its concluding paragraph that the dismissal of the appeal "leaves the ultimate

decision upon the question of the issue of a grant to the Minister". If the Court of Appeal had accepted the finding that the land was not "available", it is difficult to see how the Minister could, as the Court of Appeal contemplated, reconsider the decision to grant the allotment.

[13] It is true that the Court of Appeal said (at [11]) that "the scheme, as a whole, seems to us to make availability an essential requirement before a grant can be made." However that observation followed immediately after the terms of ss 43 and 50 were set out. While there is a certain ambiguity arising from the use of the word "scheme", that sentence cannot be taken to be a declaration that any provision in the Act, other than possibly s 50, which authorises the making of a grant is subject to a condition precedent that the land is available in whatever sense that word is used in s 50.

[14] That said, almost self evidently, something cannot be granted (or otherwise dealt with) unless it is available. But in this sense, the word "available" is used in its ordinary meaning and does not have a particular legal meaning. In our opinion, *Tafa v Viau* is not authority for the cumulative propositions that the statutory requirement in s 50 that land be available is, as a matter of law, a precondition to grant and that lawful occupation by someone other than the potential grantee, renders the land unavailable. The case only establishes an element of the first proposition, namely that the Minister must consider whether the land is available before making a grant. A failure to do so vitiates the grant.

[15] Returning to s 88, there is nothing in the language or context of the section, or having regard to the Act as a whole, which justifies the implication of a precondition for grant under that section that the land is "available" in the sense in which the word is used in s 50. As just noted, having regard to the ordinary meaning of the word "available", the land could not be granted under s 88 unless it was available. However, under s 88, land is available if it has reverted to the Crown and there is no existing heir who might claim the land and, additionally, the land is not required for Government purposes. Given these express preconditions to the making of a grant under s 88 there is no warrant, in our opinion, to imply a precondition arguably arising under another section, namely s 50. Accordingly the second argument of the appellant must also be rejected.

[16] In these reasons we have not sought to determine what "available" means for the purposes of s 50 and we note there may have been an expectation, having regard to the parties' submissions, that we might resolve this question. However it is not an issue that arises in this appeal. Also, there is a real question which may have to be determined in another case at a later time. It is whether the Act entrusts to the Minister the determination of the question of whether land is "available" as a matter of fact for the purposes of s 50 having regard to the circumstances of any particular case, or whether "available" has a legal meaning to be determined by a Court in any challenge to a Minister's decision which would be of general application or to be determined and applied by a Court on a case by case basis.

[17] The appeal is dismissed with costs.

Lasike v Rex

Court of Appeal, Nuku'alofa
Salmon, Moore, and Handley JJ
CR 285/2012; AC 11/2012

5 October 2012; 12 October 2012

Criminal appeal – Crown failed to make out case on basis it elected – miscarriage of justice — appeal allowed and verdict of acquittal entered

The appellant was charged and convicted of possession of ammunition contrary to section 4(2)(b) of the Arms and Ammunition Act which makes it an offence *(inter alia)* to possess ammunition without a licence. The appellant was the owner of the Sandyboyz Motel and the bullets were found in a room which the court held was occupied by the appellant jointly with a woman (Sandra) who later became his wife. It was found as a fact proved beyond reasonable doubt that the room in which the box was found was a room regularly used and occupied by the appellant; that the box was in plain sight of anyone using the room; and that the appellant had the box in his possession and under his control. The appeal had two principal contentions: the first that it appeared to have been common ground, as between prosecution and defence, that a required element of the charge was knowledge on the part of the accused that the thing possessed by him was an arm or ammunition in terms of s 4 of the Act. Despite that common ground it was the contention on behalf of the appellant that the trial judge did not find that the appellant possessed the requisite knowledge of the presence of the two .22 rounds. Rather he was found guilty as a consequence of the application of the reverse onus provision of section 47. The second contention was that the judge's application of section 47 involved a crucial legal error in that rather than holding that the section required the appellant to raise a real doubt that he was ignorant of the presence of the ammunition he was required to prove affirmatively that he had no reason to suspect that the contents of the box contained illicit material or that he had assumed control or received possession of the box innocently and had no reasonable opportunity, since receiving the box, of acquainting himself with its contents.

Held:

1. It was clear that the prosecution accepted the burden of establishing beyond reasonable doubt that the appellant possessed the ammunition. This was apparent from the opening and closing submissions of the Crown, from the closing submissions for the defence and from an

exchange between the judge and the prosecutor towards the conclusion of the Crown's closing submissions where the judge asked the prosecutor to confirm that it was the prosecution case that it needed to establish beyond reasonable doubt that the accused was aware that there were bullets inside the box. The prosecutor confirmed that that was the Crown's position.

2. In the light of the Crown's approach to the matter there was a miscarriage of justice in that the defence was denied the opportunity of calling additional evidence to rebut the presumption. The Crown suggested that there was no evidence that could have been called that was not in fact called by the defence but it was not appropriate for the court to make such an assumption.

3. The court allowed the appeal because a miscarriage of justice had occurred. The Crown failed to make out its case on the basis it elected therefore it would be unjust for the appellant to face a retrial. Accordingly the court granted leave and allowed the appeal. The conviction and sentence were set aside and it was directed that a judgment and verdict of acquittal be entered in relation to the charge.

Cases considered:

R v Lewis 87 Cr App R 270
R v McNamara 87 Cr. App. R 246
R v Motuliki [2002] Tonga LR 124
R v Singh [2003] Tonga LR 13
Warner v Metropolitan Police Commissioner [1969] 2 AC 256

Statutes considered:

Arms and Ammunition Act (Cap 39)
Court of Appeal Act (Cap 9)

Counsel for the appellant	:	Mr Harrison QC and Mr Bloomfield
Counsel for the respondent	:	Mr Kefu and Mr Sisifa

Judgment

[1] This case illustrates the difficulties of defining the word possession in the varying contexts in which it is used.

[2] The appellant was convicted after a trial before a judge alone in the Supreme Court. He seeks leave to appeal against conviction on questions of mixed fact and law. The Crown does not oppose the grant of leave.

[3] The appellant was charged with possession of ammunition contrary to section 4(2)(b) of the Arms and Ammunition Act [the Act] which makes it an offence *(inter alia)* to possess ammunition without a licence. The judge found him guilty of possession of two live .22 bullets without holding a valid licence.

[4] The appellant was the owner of the Sandyboyz Motel and the bullets were found in a room which the court held was occupied by the appellant jointly with a woman

(Sandra) who later became his wife. In reaching his decision to convict the appellant, the judge relied upon the reverse onus provisions of section 47 of the Act. That section provides as follows:

> "Every person who is proved to have had in his possession or under his control anything whatever containing any arm or ammunition shall, unless the contrary is proved, be deemed to have been in possession of such arm or ammunition."

[5] The two bullets were found in a cardboard box which had been brought by Sandra to the motel some two weeks earlier. The box was on a shelf beside the bed. It was in full view of anyone entering the room. The police searched the room pursuant to a search warrant. The judge accepted the evidence of the police to the effect that the appellant told them that the room in which the bullets were found was his room. The appellant claimed that it was Sandra's room and denied that he had told the police that it was his.

[6] The cardboard box was open at the top but it was possible by pushing in the sides to hide some of the contents. The bullets were on top of the contents of the box but, when the police entered the room, could not be seen because the sides of the box had been pushed in. There was a bathroom which had access from the bedroom. It was accepted that the bathroom was not used other than for storage. Inside the bathroom was a full height cupboard. On the floor of the cupboard immediately visible once the door was opened there was a gun holster. It was not claimed that there was any direct connection between the bullets and the holster.

THE JUDGES FINDINGS

[7] As already indicated the judge accepted the evidence of the police to the effect that the appellant told them that the room in which the bullets were found was his room. The judge held that where the evidence of the police conflicted with that of the appellant he preferred that of the police. He made a similar finding in relation to the evidence of Sandra.

[8] The judge found as a fact proved beyond reasonable doubt that the room in which the box was found was a room regularly used and occupied by the appellant. He held that the box was in plain sight of anyone using the room. He found it proved beyond reasonable doubt that the appellant had the box in his possession and under his control. Mr. Harrison QC who appeared for the appellant in the hearing before us conceded that this finding was open on the facts.

[9] The judge went on to say that given his finding of fact, the second step in the two-stage process required by section 47 of the Act came into consideration. That question is whether the accused, on the balance of probabilities, has shown that he had no reason to suspect that the contents of the box contained illicit material or that he had assumed control or received possession of the box innocently and had no reasonable opportunity since receiving the box of acquainting himself with its contents. In describing the test in this way the judge was relying on the decision of the former Chief Justice Ford in *R v Motuliki* [2002] Tonga LR 124.

[10] The judge went on to reject the evidence of Sandra that she had no idea where the bullets came from. The judge held that this was inconsistent with what the appellant had told him. The appellant had said that Sandra told him, after the search had taken place, that her former husband had a licence to keep a .22 weapon. This fact, if accepted, provided a highly plausible explanation for the appearance of the bullets in a box received from premises occupied by the former husband.

[11] He went on to say that he thought it probable that the appellant would have come to know what was in the box, which suddenly appeared in the room and was sitting on a shelf beside the bed on the day the room was searched. He said he was not satisfied that the accused had shown that he had no reasonable opportunity to open the box and inspect its contents. He then addressed the argument that there was no reason for the accused to suspect that the box contained any illicit material. He referred to the gun holster and said that would put an innocent person on notice that something unusual had entered the room. He said it was highly unlikely that the accused did not know of the existence of the gun holster and was not put on notice of its possible ramifications.

[12] He concluded that having seen and heard the accused and his witness he did not believe his claim to know nothing of the contents of the box and that he had no reasonable opportunity to discover what those contents were. He found that the accused had not discharged the onus on the balance of probabilities, which was placed upon him by section 47 of the Act. It followed that he was satisfied that the Crown had proved that the accused was in possession of the 2 bullets in question and that being the only issue before him he must be convicted as charged.

THE ARGUMENTS IN THIS COURT

[13] The two principal contentions for the appellant were first that it appears to have been common ground, as between prosecution and defence, that a required element of the charge was knowledge on the part of the accused that the thing possessed by him was an arm or ammunition in terms of s 4 of the Act. Despite that common ground it is the contention on behalf of the appellant that the trial judge did not find that the appellant possessed the requisite knowledge of the presence of the two .22 rounds. Rather he was found guilty as a consequence of the application of the reverse onus provision of section 47.

[14] The second contention on behalf of the appellant is that the judge's application of section 47 involved a crucial legal error in that rather than holding that the section required the appellant to raise a real doubt that he was ignorant of the presence of the ammunition he was required to prove affirmatively, as the judge described it, "that he had no reason to suspect that the contents of the box contained illicit material or that he had assumed control or received possession of the box innocently and had no reasonable opportunity, since receiving the box, of acquainting himself with its contents".

[15] In our view it is clear that the prosecution did accept the burden of establishing beyond reasonable doubt that the appellant possessed the ammunition. This is apparent from the opening and closing submissions of the Crown, from the closing submissions for the defence and from an exchange between the judge and the

prosecutor towards the conclusion of the Crown's closing submissions where the judge asked the prosecutor to confirm that it was the prosecution case that it needed to establish beyond reasonable doubt that the accused was aware that there were bullets inside the box. The prosecutor confirmed that that was the Crown's position.

[16] That position was confirmed at the hearing before us. Mr. Kefu told us that as a matter of practice the Crown does not rely on sections 35 and 47 of the Act and that in this case the Crown disclaimed reliance on those provisions and in particular on section 47. Mr. Kefu submitted that defence counsel heard the comments made by the judge during closing addresses on section 47 and could have claimed the right to call further evidence or make further submissions if he considered his client prejudiced by the possible application of the section.

[17] We do not accept this latter proposition. The judge did not say that he intended to apply the reverse onus and the Crown's general practice and its specific approach in this case would reasonably lead defence counsel to accept that the Crown was carrying the full burden of proof without recourse to section 47. As a matter of law the judge was of course entitled to include section 47 in his reasoning. It is a section of the Act that is intended to apply in all relevant circumstances. However in the light of the Crown's approach to the matter there has been a miscarriage of justice in that the defence has been denied the opportunity of calling additional evidence to rebut the presumption. The Crown has suggested that there is no evidence that could have been called that was not in fact called by the defence but we do not think it appropriate for us to make such an assumption.

[18] There are two further points that should be made about this aspect of the matter. The first is that in our view it is not appropriate for the Crown to effectively ignore the provisions of sections 35 and 47 of the Act. They are there for a purpose and the Crown should present its case in accordance with the provisions of the Act and it should make it clear in opening and closing submissions that it is doing so. If after having made it clear that it does rely on the provisions of the Act, the Crown elects to proceed by calling evidence which includes matters to which the reverse onus applies, that is entirely a matter for it.

[19] Secondly we wish to make reference to the judge's and the prosecution's reliance on *Motuliki*. It was that case that the judge and previous judges before him have relied upon in describing the burden placed upon an accused seeking to rebut the reverse onus of section 47. That case relied upon an extract from the 2001 edition of Archbold's *Criminal Pleading, Evidence and Practice*. As the decision itself notes the extract appears in a section dealing with the English legislation relating to drug offences. Mr Harrison advised us that the extract relied upon does not appear in the current edition of Archbold. In the later case of *R v Singh* [2003] Tonga LR 13 (also a case of possession of ammunition) the court pointed out the importance in possession cases of having regard to all the relevant circumstances and referred to the passage from *R v Lewis* 87 Cr App R 270 where May LJ said at p275:

> "But as has so often been said in different contexts, particularly in criminal jurisprudence, the question of what constitutes "possession" is an illusive concept at common law.

> It depends so much on the circumstances of the particular case, as well as the wording and intent, for instance, of the particular statute creating the offence under consideration."

[20] In *R v McNamara* 87 Cr. App. R 246, the English Court of Appeal acknowledged the difficulty in expressing the concept of "possession" and in extracting the ratio from the speeches in *Warner v Metropolitan Police Commissioner* [1969] 2 AC 256 (the drugs case which is the source of the Archbold comment referred to in *Motuliki*). In para [4] of his judgment, the trial judge sets out the following passages from the judgment of Lord Lane CJ at p249 of *McNamara*:

> First, "a man does not have possession of something which has been put into his pocket, or into his house, without his knowledge; in other words something which is "planted" on him".
>
> Secondly, "a mere mistake as to the quality of the thing under the defendant's control is not enough to prevent him being in possession".
>
> Thirdly, "if the defendant believes that the thing is of a wholly different nature from that which in fact it is, then the result would be otherwise".
>
> Fourthly, "in the case of a container or box, the defendant's possession of the box leads to the strong inference that he is in possession of the contents or whatsoever is inside the box. But if the contents are quite different in kind from what he believed, he is not in possession of it".
>
> "...the prima facie assumption is discharged if he proves (or raises a real doubt in the matter) *either* (a) that he was a servant or bailee who had no right to open it and no reason to suspect that its contents were illicit...*or* (b) that although he was the owner he had no knowledge of (including a genuine mistake as to) its actual contents or of their illicit nature and that he received them innocently and also that he had no reasonable opportunity since receiving the package of acquainting himself with its actual contents."

[21] The following comments need to be made about this passage. First it related to prosecutions under the English drugs legislation so that before applying the propositions in Tonga a comparison of that legislation with the Tongan legislation under consideration must be made. Secondly, the comment in the fourth proposition seems obviously to apply to a container in the sole possession of an accused. In the present case the container must have been in the joint possession of the appellant and Sandra which must raise further matters for consideration.

[22] Having determined that the judge's reliance on s 47 in the circumstances of this case has resulted in a miscarriage of justice we move to consider whether the conviction can stand on the basis advanced by the Crown at trial. The Crown's position was that it had been proved beyond reasonable doubt that the appellant knew of the contents of the box, including the bullets, and was therefore in possession of them. The appellant denied he had any knowledge of them. The judge made no finding that knowledge of the bullets was proved beyond reasonable doubt. He said he thought it was probable that the accused would have come to know what was in the box and that he did not believe his claim to know nothing of the contents. He found that the appellant had not discharged the onus under s 47. There being no finding that knowledge of the bullets had been proved beyond reasonable doubt the conviction cannot stand on that ground. We are confident that if the judge had been satisfied of such proof he would have so held.

[23] For the sake of clarity we emphasise that the discussion of "possession" in this judgment is in the context of the Act with its presumption and what we say applies only to offences under the Act.

CONCLUSION

[24] Having found that there has been a miscarriage of justice the question arises as to whether we should order a new trial or direct that a judgment and verdict of acquittal to be entered. The Crown's position is that the matter should be ended in this Court and that in the event of us not dismissing the appeal it would not be in the interests of justice for the Crown to re-prosecute the charge because the evidence in its entirety, from appellant and the Crown, is before the court. As already indicated we do not think that presumption can made with regard to the appellant.

[25] S 17 of the Court of Appeal Act requires us to allow the appeal where a miscarriage of justice has occurred unless it is an appropriate case for the application of the proviso which contains an exception to the general rule against double jeopardy. We do not consider that this is such a case. The Crown having failed to make out its case on the basis it elected, it would in our view be unjust for the appellant to face a retrial. Accordingly we grant leave and we allow the appeal. The conviction and sentence are set aside and we direct that a judgment and verdict of acquittal be entered in relation to the charge.

Rex v Tau'alupe

Court of Appeal, Nuku'alofa
Salmon, Moore, and Handley JJ
CR 271/11; AC 5/2012

4 October 2012; 12 October 2012

Sentencing – non-custodial sentence for driving while intoxicated causing death – allowed in exceptional circumstances

The respondent was a young man who was convicted of manslaughter by negligence after pleading guilty. He drove a vehicle while intoxicated and caused the death of another. He was sentenced on 6 December 2011. The sentence contained a number of elements and included a sentence of three years imprisonment which was wholly suspended for three years. The Crown contended the custodial sentence should not have been wholly suspended, therefore it was inappropriate and manifested a miscarriage of the sentencing discretion. However the Crown conceded during the hearing of the appeal that in the extremely unusual circumstances of this case (where the judge had imposed elements of a sentence without lawful foundation which had the effect of depriving the respondent of his liberty), no actual custodial sentence was necessary.

Held:

1. The sentencing judge imposed 1000 hours community service which had been agreed to by the respondent, and noted the statutory maximum of 120 hours. However his Honour failed to recognize a fundamental legal principle, namely that parties cannot by agreement confer jurisdiction on a Court which the Court otherwise does not have. There was no power to make the order even if it reflected an agreement.
2. The judgment should not be understood as condoning a sentence on a young first offender who has brought about the death of another by driving a motor vehicle while drunk, which did not involved a period of actual imprisonment.
3. The court allowed the appeal in part. The order of the sentencing judge ordering 1000 hours of community service was set aside. The order of the sentencing judge imposing the curfew was set aside. The order of the sentencing judge which suspended the respondent's licence for a period of 7 years was varied to 5 years. The appeal was otherwise dismissed.

Cases considered:
Hala v R [1992] Tonga LR 7
R v Holani [2001] Tonga LR 161
R v Tofavaha [2000] Tonga LR 316

Statute considered:
Criminal Offences Act (Cap 18)

Counsel for the appellant	:	Mr Kefu
Counsel for the respondent	:	Mrs Taumoepeau

Judgment

[1] This is a Crown appeal against sentence. The respondent is a young man who was convicted, on a plea of guilty, of manslaughter by negligence. He was sentenced on 6 December 2011. The sentence contained a number of elements and included a sentence of 3 years imprisonment which was wholly suspended for 3 years. As a result of a concession made by the Crown during the hearing of the appeal, the issues to be resolved by this Court narrowed considerably.

[2] The incident which gave rise to the charge involved alcohol, a car, excessive speed and ultimately the tragic death of a young woman. The respondent was 20 years old. On 3 September 2011 the respondent had been consuming alcohol at a party at his home. At about 11:30 pm he agreed to drive a friend, Makalita Taulahi, home after another person who was to give her a lift home, failed to materialise. Makalita sat in the rear of the vehicle though she did not put on her seatbelt. The respondent drove the vehicle at high speed along Vuna Road. He lost control of the vehicle. It hit an electric power pole and smashed into a pine tree. At the time the vehicle was travelling at approximately 100 km/hr. Makalita was thrown from the vehicle and suffered fatal injuries. The respondent and another passenger were able to get out of the vehicle and stop a passing vehicle. Makalita was rushed to hospital but pronounced dead on arrival. A breath test reading established the respondent had, at the time, 760 mg of alcohol per litre of breath, approximately four times the legal limit.

[3] Before this incident, the respondent appeared a responsible young man who had commenced to study law in New Zealand in 2009. He was an only child. His studies were interrupted in the year of the accident by the untimely death of his mother which had a major impact on him. He returned to Tonga in February 2011 and suspended his studies.

[4] Makalita and the respondent were good friends and after her death he apologised to her family in the customary way and the apology was accepted. The respondent's family paid restitution to Makalita's family and provided offerings including mats, food and money for her funeral. There was a letter before the Court from Makalita's mother and father asking the court to exercise leniency in sentencing and not send the respondent to prison.

[5] At the commencement of the hearing the appeal, the Crown's position was that the sentencing judge should not have, as a matter of sentencing discretion, suspended the whole of the custodial sentence. The Crown contended the sentence, in this respect, was inappropriate and manifested a miscarriage of the sentencing discretion. However for reasons which we will explain shortly, the Crown was prepared to accept towards the conclusion of the hearing of the appeal that the sentence, in this respect, could stand.

[6] In its submissions, the Crown identified a number of aggravating features in this case which included the level of the respondent's intoxication, driving while heavily intoxicated, doing so with passengers and at an excessive speed. The Crown also identified a number of mitigating factors which including that the respondent was young, a first-time offender and had potential in the future. Other mitigating factors identified by the Crown were that the respondent remained at the scene of the accident and provided assistance to the victim, co-operated with the police and pleaded guilty at the first opportunity. Also identified by the Crown as a mitigating factor was the respondent's recent loss of his mother.

[7] None of this appeared controversial, though counsel for the respondent had, as the centrepiece of her submissions, the need for restorative justice. In support of that argument, counsel relied on a report by a social worker who had, among other things, conducted a family conference involving the respondent, his relatives and the mother of Makalita. The Crown's approach was more orthodox, pointing to a fairly consistent line of authority in the Supreme Court and this Court that a case of this type involving driving a vehicle while intoxicated and the death of another required a period of actual incarceration. That, the Crown contended, was so in this case notwithstanding the mitigating factors it conceded. Those authorities included *R v Holani* (2001) Tonga LR 161 and *R v Tofavaha* (2000) Tonga LR 316. The Crown prepared a very helpful booklet of authorities illustrating this approach which, in this Court, commenced with *Hala v R* (1992) Tonga LR 7.

[8] It is necessary to detail the other elements of the sentence imposed by the sentencing judge. The sentence can be summarised in the following way:

1. The respondent was sentenced to 3 years imprisonment, suspended in total for 3 years;
2. The respondent was to comply with a home curfew for 6 months and to remain in his home from 6 pm to 6 am;
3. The respondent was to carry out 1000 hours of community work educating students in various schools of the dangers of drinking and driving, as well as encouraging them to wear their seat belts;
4. The respondent was to enrol in and complete the Salvation Army's Drugs and Alcohol Awareness program; and
5. The respondent's drivers' licence was suspended for a period of 7 years and the respondent was banned from driving any kind of motor vehicle in the Kingdom.

[9] The Crown contended there was no statutory basis to impose a curfew, the 1000 hours exceeded the statutory maximum of 120 hours in s 25A(2) of the Criminal

Offences Act (Cap 18) and similarly the seven-year suspension of the licence exceeded the statutory maximum of 5 years in s 29(3) of that Act.

[10] Understandably, the respondent did not contest those propositions. They are correct and these elements of the sentence cannot stand. In imposing, by order, the 1000 hours community service, the sentencing judge noted the statutory maximum of 120 hours but also noted that the 1000 hours had been agreed to by the respondent. However his Honour failed to recognize a fundamental legal principle, namely that parties cannot by agreement confer jurisdiction on a Court which the Court otherwise does not have. There was no power to make the order even if it reflected an agreement.

[11] But the effect of these orders was, in substance, to deprive the respondent of his liberty in two respects. The first was the requirement to devote the specified time to community service activities which otherwise the respondent might have chosen to use for other purposes. The second was to confine him to his home for half the 24 hour day for a period of 6 months. As was discussed in Court in this appeal, the periods in question (hours on community service and hours of confinement) can be notionally treated as days in which the respondent's liberty was constrained. One such calculation would be to treat these periods in which his liberty was constrained as confinement for 21 weeks or approximately 5 months. There is no science in this calculation but it did have an impact, during the hearing the appeal, on the Crown's approach.

[12] The Crown's position was initially that an actual custodial sentence was appropriate and various estimates were given including between 3 and 6 months. This would be achieved, in the Crown's submission, by maintaining the sentence of 3 years imprisonment but suspending only part of it and certainly not all of it. However the Crown was prepared to concede during the hearing of the appeal that in the extremely unusual circumstances of this case (where the judge had imposed elements of a sentence without lawful foundation which had the effect of depriving the respondent of his liberty), no actual custodial sentence was necessary. The concession was both a fair and appropriate one.

[13] In the result, it is unnecessary for us to deal with the arguments advanced by the Crown and the respondent about the custodial sentence. However this judgement should not be understood as condoning a sentence on a young first offender who has brought about the death of another by driving a motor vehicle while drunk, which did not involved a period of actual imprisonment.

[14] We propose to allow the appeal in part. We set aside the order of the sentencing judge ordering 1000 hours of community service. We set aside the order of the sentencing judge imposing the curfew. We vary the order of the sentencing judge and suspend the respondent's licence for a period of 5 years from 6 December 2011.

[15] We otherwise dismiss the appeal.

Rex v Vake

Court of Appeal, Nuku'alofa
Salmon, Moore, and Handley JJ
CR 69/2011; AC 4/2012

4 October 2012; 12 October 2012

Sentencing – incest and indecent assault – Crown appealed against suspended sentence – appeal allowed

The respondent was convicted on 18 January 2012 on one count of incest with his natural daughter contrary to section 172 of the Criminal Offences Act, and on one count of indecent assault on his adopted daughter contrary to section 124(1) of the Act. The offences were committed on the same day in June 2008. The former carried a maximum penalty of 10 years imprisonment, the latter 5 years. On 3 February 2012, the sentencing judge imposed sentences of 3 and 2 years for these offences which were wholly suspended conditional upon the offender being of good behaviour and committing no further offending during the suspension period. On 16 March 2012, the Crown sought leave to appeal from these sentences on the grounds of their manifest inadequacy. Leave to appeal was granted.

Held:

1. Sentencing involved the exercise of a discretionary judgment, and in general more than one sentence would be available, legally, to the sentencing judge. An appellate court does not substitute its view for that of the sentencing judge. The appellant must identify some error of fact or principle, or a disparity between the facts and the sentence that demonstrates that the latter was not a sound exercise of the discretion.
2. The court reviewed sentencing principles and considered the objective gravity of both offences, and the presence of aggravating factors. It concluded that the judge's sentencing discretion seriously miscarried and that the court must intervene and re-exercise the discretion.
3. The sentences of 3 years and 2 years were to be served consecutively, but the sentence of 2 years imprisonment was suspended for 3 years conditional upon the offender committing no further offence during the period of suspension. The sentence of 2 years imprisonment was made consecutive because the relevant offence involved a different victim, and it was suspended for the maximum period allowed by law as a deterrent for the protection of the offender's other daughter who may still be living at home when he would be released.

Cases considered:
Mo'unga v R [1998] Tonga LR 154
R v Misinale (unreported)
R v Motulalo [2000] Tonga LR 311
R v Petersen [1994] 2 NZLR 577 (CA)

Statute considered:
Criminal Offences Act (Cap 18)

Counsel for the appellant	:	Mr Kefu
Counsel for the respondent	:	Mr Tu'utafaiva

Judgment

[1] This is an appeal by the Crown from the sentences imposed on the respondent. He was convicted on 18 January 2012 on one count of incest with his natural daughter contrary to section 172 of the Criminal Offences Act, and on one count of indecent assault on his adopted daughter contrary to section 124(1) of the Act. The offences were committed on the same day in June 2008. The former carried a maximum penalty of 10 years imprisonment, the latter 5 years.

[2] The respondent pleaded not guilty and his daughters had to give evidence against him in open Court. His plea of not guilty is not an aggravating factor because he was entitled to defend the charges but he has not earned the discount allowed for an early plea of guilty where the offender demonstrates genuine remorse. This offender has shown no remorse for these crimes.

[3] On 3 February 2012, the sentencing judge imposed sentences of 3 and 2 years for these offences which were wholly suspended conditional upon the offender being of good behaviour and committing no further offending during the suspension period. On 16 March 2012, the Crown sought leave to appeal from these sentences on the grounds of their manifest inadequacy.

[4] On 21 March 2012, the Lord Chief Justice granted leave to appeal pursuant to sections 17B and 28 of the Court of Appeal Act. The offender has not attempted to challenge the convictions.

[5] The offences were committed in circumstances of aggravation. They were to some extent premeditated and pre-planned as the offender purchased hard liquor which he supplied to the victims. They did not consent to his sexual advances and he knew that they did not. The offences involved the use of some force against the victims, both involved gross breaches of trust, and there was a significant disparity in their ages, the offender then being 48, the victims 21 and 19.

[6] The sentencing judge referred to "the difficulties in the case...due to significant delay in reporting" the crimes to the competent prosecution authorities. However, the offender knew about these allegations almost immediately because his daughters reported them to their mother who confronted the offender with them. The victims also left the offender's house the same day.

[7] He could not therefore have been surprised when the complaints were later reported to the police. The judge found that there was a valid reason for the delay because the victims were scared of the offender, and the delay did not affect their credit.

[8] On 18 January 2012 after the judge had convicted the offender, he adjourned the case for submissions on sentence. The offender and his wife were interviewed by the Probation Service and on 24 January 2012 its report was filed. It recommended a custodial sentence to reflect the gravity of the offences. The proceedings on sentence took place on 3 February 2012 when the judge passed the sentences previously referred to.

[9] He said that incest crimes were becoming more frequent, that this type of offending must be stopped, and that the way to do this was by the imposition of appropriate sentences to deter others from such offending. He noted that the second charge involved a clear breach of the trust owed to the second victim.

[10] By way of mitigation, the judge took into account glowing testimonials about the offender's previous good character and community work. He also took into account what he described as the inordinate delay in reporting these allegations to the police but in view of his earlier findings this could not be a mitigating factor.

[11] The glowing testimonials are entitled to little weight and cannot justify the suspension of these sentences because, regrettably, offences involving sexual abuse within the family are all too frequently committed by persons of otherwise good character.

[12] Moreover, and with great respect, the judge failed to explain how the total suspension of these sentences would help stop "this type of offending" and "deter others". In our view the suspension of the sentences would have the opposite effect, and send the wrong message to the community. The victims must have wondered why they had bothered to put themselves through the trauma of the trial.

[13] The explanation for these sentences appears from the transcript, although not from the judge's formal remarks on sentence. The offender is the sole breadwinner for his family which includes his wheelchair bound mother, his wife, his bedridden son who was disabled in an accident and another daughter.

[14] A sentence of full time custody will inevitably impose significant hardship on the other members of the offender's family, particularly his wheelchair bound mother and disabled bedridden son. Such hardship cannot be an overriding mitigating factor in cases where the objective gravity of the offences and the presence of aggravating factors call for a custodial sentence.

[15] Sentencing involves the exercise of a discretionary judgment, and in general more than one sentence will be available, legally, to the sentencing judge. An appellate court does not substitute its view for that of the sentencing judge. The appellant must identify some error of fact or principle, or a disparity between the facts and the sentence that demonstrates that the latter was not a sound exercise of the discretion.

[16] The sentencing judge had the decisions of this Court in *Mo'unga v R* [1998] Tonga LR 154, *R v Misinale* (unreported) and *R v Motulalo* [2000] Tonga LR 311 to guide him in the exercise of his power to suspend the sentences of imprisonment he had imposed.

[17] In *Mo'unga*, the Court at p. 157 having referred to s 24 (3) of the *Criminal Offences Act* adopted the principles formulated by Eichelbaum CJ in *R v Petersen* [1994] 2 NZLR 577 CA who said that a suspended sentence is intended to have a strong deterrent effect on the offender, so that if the offender is incapable of responding to a deterrent, it should not be imposed. This consideration does not appear to be relevant in this case. This Court continued:

> "...the Court suggested a number of situations, intended to be neither exhaustive nor comprehensive, in which the suspension of the sentence may be appropriate:
>
> (i) Where the offender is young, has a previous good record, or has had a long period free of criminal activity.
>
> (ii) Where the prisoner is likely to take the opportunity offered by the sentence to rehabilitate himself or herself.
>
> (iii) Where, despite the gravity of the offence, there is some diminution of culpability through lack of premeditation.
>
> (iv) Where there has been cooperation with the authorities.
>
> We see no reason why this approach should not be followed in Tonga."

[18] In *R v Misinale* (above) the Court quoted this passage from *Mo'unga v R* and continued:

> "Also relevant may be the seriousness of the offending, the need for an effective deterrence, the effect on the complainant, and the personal circumstances of the offender or those dependent on him."

[19] In *R v Motulalo* (above), a Crown appeal against the suspension of a sentence of 2 years imprisonment for attempted carnal knowledge of the offender's 9 year old daughter, the Court at p.313 reaffirmed the principles in *Mo'unga v R* (above) and *R v Misinale* (above). At p. 314, the Court continued:

> "Later in that judgment the Court observed that the fact that the offender was the breadwinner for his family, was not, and is rarely likely ever to be, on its own proper reasons for suspending a sentence."

[20] The Court in *Motulalo* at p. 314 said that the only reason the primary judge gave for suspending a sentence was that the offender's wife had asked that he, as the breadwinner of the family, not be sent to prison, the Court continued:

> "The approach the judge adopted takes no account of the devastating effect that these events, and the sentence the judge imposed, is likely to have had on the complainant...We doubt that much weight should be placed on representations made by the respondent's wife. We accept that, if the respondent goes to prison, the family will suffer. That unfortunately is an all too frequent consequence of criminal offending. When regard is had to these factors, as well as the aggravating and mitigating features...we are satisfied that there can be no justification for suspending any part of the relatively short sentence of imprisonment..."

[21] In light of these principles, and given the objective gravity of both offences, and the presence of aggravating factors, it is clear that the judge's sentencing discretion seriously miscarried and this Court must intervene and re-exercise the discretion.

[22] The Crown did not challenge the sentences of 3 and 2 years imposed by the judge. Following a successful Crown appeal, this Court has generally imposed a sentence at the lower end of the available range because of the element of double jeopardy involved.

[23] The sentences of 3 years and 2 years will therefore be confirmed to date from today to be served consecutively, but the sentence of 2 years imprisonment is suspended for 3 years conditional upon the offender committing no further offence during the period of suspension. The sentence of 2 years imprisonment has been made consecutive because the relevant offence involved a different victim, and it has been suspended for the maximum period allowed by law as a deterrent for the protection of the offender's other daughter who may still be living at home when he is released.

To'a v Rex

Court of Appeal, Nuku'alofa
Salmon, Moore, and Handley JJ
CR 294/2011; AC 12/2012

8 October 2012; 12 October 2012

Criminal appeal – against conviction of obtaining money by false pretence – no unfairness to appellant from the procedures at the trial – appeal dismissed

The appellant was a scrap metal dealer. In April 2011, he entered into a contract with Asia Pacific Engineering Ltd to sell scrap metal belonging to him to Asia Pacific for $1000 per container. The Crown alleged that included in one of the containers was metal belonging to Vete Holdings Ltd which Mr. To'a knew he was not authorised to sell. The false pretence alleged was that he sold that metal to Asia Pacific on the basis that it was his to sell. The appellant was convicted of obtaining money by false pretence contrary to s 164 of the *Criminal Offences Act* [CAP 18] and was fined $750. The appeal was against conviction only on the grounds that the trial judge erred in fact and law in requesting the defence not to require a prosecution witness to return for further cross examination and that there was no evidence that the appellant paid for a container with Vete's metal in it.

Held:

1. The judge made findings of fact and credibility adverse to the appellant and on the basis of those findings, determined that the elements of the offence charged had been proved beyond reasonable doubt. The appellant did not persuade the court that the judge was in error in any of the findings he made. The lower court found as a fact that Mr. To'a was paid by Asia Pacific for the container which held the metal which did not belong to him. The appeal court was not persuaded that the procedures followed at the trial resulted in any unfairness to the appellant.
2. The appeal was dismissed.

Statute considered:
Criminal Offences Act (Cap 18)

Mr To'a appeared in person
Counsel for the respondent : Mr Kefu

Judgment

[1] The appellant was convicted after trial before a judge alone of obtaining money by false pretence contrary to s 164 of the *Criminal Offences Act* [CAP 18]. He was fined $750. The appeal is against conviction only.

[2] Mr. To'a appeared in person to conduct his appeal although he told us that he had been assisted in the preparation of his submissions by Mr. Fifita who represented him at trial.

[3] His grounds of appeal were that the trial judge erred in fact and law in requesting the defence not to require a prosecution witness, Joeli Kalou to return for further cross examination and that there was no evidence that the appellant paid for a container with Vete's metal in it.

[4] He later added a further ground of appeal to the effect that the complainant, Asia Pacific Engineering Ltd, did not lose any money because it was paid for the metal.

BRIEF FACTS

[5] Mr. To'a is a scrap metal dealer. In April 2011, he entered into a contract with Asia Pacific Engineering Ltd to sell scrap metal belonging to him to Asia Pacific for $1000 per container.

[6] The Crown alleged that included in one of the containers was metal belonging to Vete Holdings Ltd which Mr. To'a knew he was not authorised to sell. The false pretence alleged was that he sold that metal to Asia Pacific on the basis that it was his to sell.

THE APPELLANT'S SUBMISSION

[7] Mr. To'a maintained to us as he did in the court below that all the scrap sold to Asia Pacific belonged to him.

[8] The allegation concerning the further cross-examination of Joeli Kalou arose in the following way. Mr. Kalou is a director of Asia Pacific. He was called by the Crown and gave his evidence on the second day of the trial which was a Friday. During cross-examination, he was questioned about a bill of lading which had been produced earlier in the trial. It concerned two containers of scrap metal shipped on the 2 May 2011. He expressed uncertainty as to whether the bill of lading was the one relevant to the shipment, the subject of the charge, and said he would like to check it against records in his office. The judge noted that the hearing would be continuing on Monday and the witness agreed to return then with the material from his office.

[9] Cross-examination continued and was completed except for any questions arising from additional material Mr. Kalou was able to provide.

[10] When the hearing resumed on Monday, Mr. Kalou was unable to attend due to illness. The judge had by that time formed the view that not a great deal turned on the bill of lading and his judgment records that the defence indicated that Kalou would not be required to give further evidence at the hearing. Before us, Mr. To'a helpfully

provided us with copies of the relevant bill of lading and we were also able to conclude that it was not an essential part of the Crown's proof of the offence charged nor could we ascertain that it assisted the defence.

[11] Mr. To'a submitted to us that the concession from defence counsel was obtained when counsel was not well and at the end of the hearing. Mr. Kefu was able to provide us with a record of the progress of the hearing which showed that after defence counsel had agreed to Mr. Kalou not returning, the defence called evidence from Mr. To'a and another witness. That was followed by counsel's addresses. We do not accept Mr. To'a's suggestion that his counsel's concession was made as a result of illness.

[12] Mr. To'a submitted that had Mr. Kalou been recalled, he would have requested production of a letter from Mr. Vete which he had given to Mr. Kalou. However he acknowledged that no request for this had been made earlier at the trial.

[13] Apart from these issues, Mr. To'a's submission to us consisted of protestations of his innocence and a suggestion that the accusation against him had arisen as a result of a dispute between Vete and Asia Pacific. Insofar as such matters were relevant, they were issues to be brought before and determined by the trial judge.

[14] The judge made findings of fact and credibility adverse to Mr. To'a and on the basis of those findings, determined that the elements of the offence charged had been proved beyond reasonable doubt. The appellant has not persuaded us that the judge was in error in any of the findings he made. We accept his credibility findings. In particular, he found as a fact that Mr. To'a had been paid by Asia Pacific for the container (contrary to Mr. To'a's claim) which held the metal which did not belong to him. We have not been persuaded that the procedures followed at the trial have resulted in any unfairness to the appellant.

[15] For those reasons, the appeal is dismissed.

Church of the Latter Day Saints in Tonga Trust Board v Kivalu

Land Court, Nuku'alofa
Scott CJ
LA 15/2012

7 December 2012

Employment law – claim for possession of house after termination of employment contract – order granted

On 21 March 2011 the defendant employee accepted a written offer of temporary employment with the plaintiff employer, commencing on 4 April 2011. One of the terms of the contract was that the "offer of temporary employment may be terminated at the will of the Seminaries and Institutes by providing you 30 days written notification." On the following day, a rental agreement was entered into between LDS Church Schools Tonga and the Defendant in respect of House No 10 which he moved into on the same day. That agreement states that "It is expected that SAI employees will vacate SAI housing upon termination of employment with SAI." On 11 October 2011 the plaintiff and the defendant entered into an "Employment Agreement" which provided that the employment could be terminated by either party on written notice with or without cause. On 16 February 2012 the plaintiff advised the defendant that his employment was terminated from that day. On 22 February 2012 the plaintiff wrote to the defendant and gave him 30 days notice to vacate House No. 10. On 9 October 2012 the plaintiff commenced proceedings and sought an order evicting the defendant and his family from House No. 10, mesne profits for the period of 23 March 2012 to date of delivery, and damages for "electricity used." The defendant stated that he incurred substantial removal expenses when taking up his employment with the plaintiff in the expectation that he would continue in that employment until reaching the age of 60, that his dismissal was wrongful and/or unfair, that he and his family have no other home to move to and that in any event house no. 10 is not immediately required by the plaintiff which was in possession of' other vacant premises.

Held:

1. The defendant would have considerable difficulty in establishing wrongful dismissal while in Tonga there was no law of unfair dismissal. The defendant may be able to establish that he was treated ungenerously but such conduct alone would not result in the relief that he sought. His chances of obtaining an order for reinstatement were very slim.

2. The court made an order for possession of house no. 10 in favor of the plaintiff to take effect 28 days from the date of the decision.

Case considered:

The Church of Jesus Christ of Latter Day Saints in Tonga Trust Board v Toki (2007) Tonga LR 70

Counsel for the plaintiff : Mr Niu
Counsel for the defendant : O Pouono

Judgment

[1] On 21 March 2011 the Defendant accepted a written offer of temporary employment with the Plaintiff, commencing on 4 April 2011. One of the terms of the contract (Exhibit A to the affidavit of Inoke Kupu dated 25 September 2012) was that the "offer of temporary employment may be terminated at the will of the Seminaries and Institutes by providing you 30 days written notification."

[2] On the following day, a rental agreement (Exhibit B to the same affidavit) was entered into between LDS Church Schools Tonga and the Defendant in respect of House No 10 which he moved into on the same day. Section 5(a) of the rental agreement states:

> "It is expected that SAI employees will vacate SAI housing upon termination of employment with SAI."

[3] On 11 October 2011 the Plaintiff and the Defendant entered into an "Employment Agreement". Paragraph 5.1 of the agreement is as follows:

> "This Employment Agreement recognizes the employee's employment starting on 14 September 2011. Either Employer or Employee may terminate this Agreement at any time upon written notice to the other, with or without cause. Thus, Employee's employment with the Employer is at-will. Neither this Agreement, nor any oral or written representation or Employee policy may be considered a contract of employment for any specific period of time."

[4] Paragraph 5.2 of the Agreement is as follows:

> "Unless otherwise agreed in writing between the Employer and the Employee, the Employee's employment with Employer will cease on 31 December of the year in which the Employee attains age 60."

[5] Paragraph 13.8 of the Agreement is as follows:

> "This Agreement, including any Exhibits, constitutes the only and entire agreement between the Parties on the subject

> matter of the Agreement. It replaces and cancels all other verbal or written agreements, express or implied, which may have existed in the past between the Parties and which deal with the subject matter of the Agreement."

[6] On 16 February 2012 the Manager of the Tonga Service Center of the Plaintiff wrote to the Defendant (Exhibit E). Invoking paragraph 5.1 of the Agreement he advised the Defendant that:

> "The Employer hereby terminates this Agreement and consequently your employment as teacher thereunder forthwith as from today."

[7] On 22 February 2012 the Manager wrote to the Defendant (Exhibit G) giving him 30 days notice to vacate House No. 10.

[8] On 9 October 2012 the Plaintiff commenced proceedings in this Court. The Statement of Claim, dated 25 September, sought:

a) an order evicting the Defendant and his family from House No. 10;
b) mesne profits for the period of 23 March 2012 to date of delivery; and
c) damages for "electricity used."

[9] On 3 October 2012 an inter parte application for the eviction of the Defendant from house no. 10 by 30 November 2011 was filed.

[10] On 8 November 2012 a statement of defense and counterclaim were filed. Put briefly, the Defendant states that he incurred substantial removal expenses when taking up his employment with the Plaintiff in the expectation that he would continue in that employment until reaching the age of 60, that his dismissal was wrongful and/or unfair, that he and his family have no other home to move to and that in any event house no. 10 is not immediately required by the Plaintiff which is in possession of' other vacant premises.

[11] On 27 November 2012 the Defendant sought directions for the proper pursual of his claim for breach of contract against the Plaintiff.

[12] On 30 November 2012 the Plaintiff filed a reply and defence to the counterclaim. The Plaintiff pleaded that the Defendant's termination was according to contract and that accordingly his right to remain in house no. 10 had also been terminated. The claim for reimbursement of the removal expenses was rejected as was the suggestion that the Defendant and his family were not able to remove from house no. 10.

[13] On 5 December both counsel agreed that the fundamental question, which was the lawfulness of the termination of the contract of employment, was within the jurisdiction of and could most conveniently be dealt with by this Court. Neither counsel nor the Court saw any advantage in staying the Land Court proceedings while the Supreme Court (in all probability presided over by the same judge) considered the validity of the termination.

[14] Mr. Niu then sought a ruling on the eviction application. After citing the various documents already referred to, he pointed out that it is now over 9 months since the Defendant's employment was terminated. He suggested that there was nothing to show that the Defendant had sought alternative accommodation while more than enough time had been given to him by the Plaintiff to make alternative arrangements. His instructions were that the Plaintiff needed house No 10 to provide accommodation for visiting teachers. Mr. Niu referred to *The Church of Jesus Christ of Latter Day Saints in Tonga Trust Board v Toki* (2007) Tonga LR 70 in which the Court decided that this was "one of those-rare cases where the Court is justified in making a mandatory injunction at this interim stage."

[15] In opposition Mr. Pouono again emphasized the Defendant's expectation that he would continue in employment; the hardship that his removal would entail and the doubts about the legitimacy of his termination. Those, he suggested, needed first to be resolved before the decision to evict was taken.

[16] The general principles governing the grant of interlocutory injunctive relief are well known and conveniently set out in the commentary to Order 29 in the 1988 Edition of the White Book. As pointed out in *Toki* mandatory injunctions are rather rarely granted at the interlocutory stage. However, as will be seen from the former Order 113 of the English Supreme Court Rules and from the present CCR Order 24 of the 1998 English Rules (both of which are referred to in our rules by 02 R3) the principles are somewhat different when, as in this case, possession is sought from a licensee whose licence to occupy has *prima facie* been determined.

[17] In my opinion the Defendant will have very considerable difficulty in establishing wrongful dismissal while in Tonga there is no law of unfair dismissal. It may well be that the Defendant will be able to establish that he has been treated rather ungenerously but such conduct alone will not result in the relief that he is seeking. His chances of obtaining an order for reinstatement seem to me to be very slim.

[18] In all circumstances I am satisfied that there must be an order for possession of house no. 10 in favor of the Plaintiff to take effect 28 days from the date of delivery of this decision.

Fukofuka v Public Service Commission anor

Supreme Court, Nuku'alofa
Scott CJ
CV 121/11

18 December 2012

Employment – terms of contract amended unilaterally by applying amended statute – held to be breach

Editor's note: an appeal against this judgment was allowed on 9 April 2014.

On 17 January, 2007, the plaintiff was appointed by contract as the Chief Executive Officer, Ministry of Education. On 23 January 2009 the defendant Public Service Commission advised the plaintiff that his appointment was extended for a period of three years ending on 1 January 2012. The plaintiff accepted this extension on 29 January 2009. The plaintiff registered as a candidate in the General Election in 2010. On 29 October 2010 the Commission accepted that the plaintiff had "ceased" his contract of employment. The plaintiff sought damages for "unlawful termination" of his contract. The defendant claimed that the 2010 amendment to section 20 of the Public Service Act 2002 provided that a Chief Executive Officer had to resign upon registering as a candidate in a General Election. The plaintiff did not believe that applied to him because his contract was signed well before the passing of the amendment. The defendant also pleaded that acceptance by the plaintiff of gratuity amounting to $19,200 together with leave payments together totalling $12,472.31 which sums were only payable upon cessation of contract, amounted to an acceptance by the plaintiff that his contract had been lawfully terminated. In the circumstances the plaintiff was "estopped from making this claim".

Held:

1. Before a compromise or waiver could be relied upon, the precise terms of such agreements must be satisfactorily proved. While acceptance of the payments was not disputed, there was no evidence from the defendants to contradict the plaintiff's assertion that he accepted what he was offered because he needed the money which he thought was anyway owed to him. The defendants failed to show that the plaintiff's acceptance of these moneys followed any agreement reached between the parties and in particular, any agreement by the plaintiff to forbear.

2. The central issue was whether the defendants were entitled to amend the terms and conditions of the plaintiff's service by applying the amended section 20 of the Act.
3. The terms of the plaintiff's contract were clear and the provisions governing its variation equally so. Clause 21 incorporated the provisions of the Public Service Act 2002 into the contract. The requirement being for the terms of a contract to be certain, the Act as incorporated could only be in the form in which it stood prior to any amendment made subsequent to the formation of the contract. The contract could only be amended (clause 3.2) by agreement in writing between the parties.
4. It was not doubted that Parliament may, by Act, alter the terms of contracts freely entered into. In Tonga, Acts of Parliament were subject to Clause 20 of the Constitution which provided that "It shall not be lawful to enact any retrospective laws in so far as they may curtail or take away or offer rights or privileges existing at the time of the passing of such laws."
5. The unilateral amendment of the plaintiff's contract by the application to him of the requirements of section 20 as amended, was a breach of his contract, and entitled him to damages. Judgment was for the plaintiff with damages to be assessed following further submissions.

Cases considered:

Fulivai v Kainuanu [1962] 2 To.L.R 178
L'Office Cherifien v Yamashita Ltd [1993] 3 WLR 266
Republic of Costa Rica it Evianger (1876) 3 Ch D 62
Storey v Graham [1899] 1 QB 406
Wright v Hale (1860) 6 H&N 227

Statutes considered:

Constitution of Tonga Act (Cap 2)
Evidence Act (Cap 39)
Public Service Act 2002
Public Service (Amendment) Act 2010

Counsel for the plaintiff : Mr Niu
Counsel for the defendants : Mr Kefu

Judgment

[1] On 17 January, 2007, the Plaintiff was appointed by contract as the Chief Executive Officer, Ministry of Education. A copy of the contract is Documents P1-29. Certain provisions of the contract may be noted:

a) Clause 3.2 "Variation of contract benefits, terms and/or conditions:"
"The terms of the Contract may be varied at any time by agreement between the Commission and the Appointee but no

variation of this Contract will be binding on the parties unless it is made in writing, signed by both parties and approved by Cabinet."

b) Clause 5.3 "Salary and benefits:"
"The Commission is currently revising salaries, gratuity arrangements and other benefits and conditions, with implementation of changes planned for 1 July 2007. Any changes made to such items will not result in overall remuneration and benefits which are in any way less favorable to the Appointee.

c) Clause 17.3 "Renewal of Contract:"
"Where the Contract is to be renewed, it is a requirement that a new contract document be prepared, under conditions no less favorable than the existing Contract to be duly signed by both parties. This new Contract is to be agreed and signed prior to the expiration of the existing contract."

d) Clause 19.2 "Early cessation of contract by the Appointee:"
"When the Appointee wishes to bring about the cessation of this employment contract, prior to the normal contract expiry date as specified in Clause 1, he/she will be required to provide a minimum of three (3) months notice in writing, or provide payment of an amount equivalent to three months total remuneration value in lieu thereof unless such requirement is waived by the Commission."

e) Clause 19.3 "Early cessation of Contract by the Commission:"
"When the Commission elects to bring about the cessation of this employment Contract, prior to the normal contract expiry date as specified in Clause 1, it will be required to provide three (3) months notice in writing to the Appointee..."

f) Clause 19.5 "Summary Termination:"
"Where the Appointee's Contract is brought to an end by reason of an offence characterized as a breach of the Public Service Code of Conduct [etc] ...There will be no obligation on the Commission to provide the period of notice defined in Clause 19.3."

g) Clause 21 "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."

[2] On 6 November 2008 (Document P31-36) a number of variations to the Contract were agreed as was provided for in Clause 3.2 of the Contract.

[3] On 23 January 2009 (Document P38-39) the Commission advised the Plaintiff that following "a job well done during the first two years of [his] contract" his appointment was extended for a period of three years ending on 1 January 2012. The Plaintiff accepted this extension on 29 January 2009 (Document P-37).

[4] The relevant part of the Public Service Act 2002 which was applied to the Contract by Clause 21 was Section 20 which is as follows:

> "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 20 September 2010, the Public Service Act 2002 was amended by the Public Service (Amendment) Act 2010. Section 4B stated the objects of the Amendment Act to include the establishment of "an apolitical public service that is effective and efficient in serving the Government and the public." Section 43 enumerated the "Principles of the Public Service" including (a) "the Public Service is apolitical, performing its functions in an impartial professional and competent manner." The term "apolitical" was defined to mean:

> "employees performing their duties in an impartial, ethical and professional manner without involving any political activities including not associating with any association that has a political mandate which is or may be contrary to Government policy."

[6] By Section 18 of the 2010 Act, Section 20 of the 2002 Act was deleted and replaced with the following new Section 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."

[7] About one month prior to the passage of the Amendment Act notice was given by the Second Defendant that a General Election for representatives to the Legislative Assembly was to be held on 25 November 2010 and that candidates for election were required to register on 21 October 2010.

[8] It appears that following its passage the Amendment Act prompted a number of questions to be asked about its consequences. On 14 September 2010 the Commission wrote to all Heads of Department (Document P-40) advising them 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."

It is clear that the period of notice in question was that required by Clause 19.2 of the contract.

[9] On 27 September 2010 the Plaintiff wrote to the Commission (document D-6) advising them:

> "I have issue with your instructions given in [Document P-40] I believe that the Public Service (Amendment) Bill does not apply to my case as my current contract was signed well before the said Bill was passed by the Legislative Assembly. Since the Constitution prohibits the enactment of any retrospective laws that "may curtail or take away or affects rights or privileges existing at the time of the passing of such laws" the Public Service Commission's requirement looks to me to be unlawful."

[10] On 15 October the Commission replied. It advised the Plaintiff that it did not agree with him that the amended Section 20 did not lawfully apply to him and further advised him that upon registration as a candidate, whether or not at the time he was on annual leave, he would be deemed to have resigned from the public service.

[11] The Plaintiff registered as a candidate and on 29 October 2010 the Commission decided that it be accepted that the Plaintiff had "ceased" his contract of employment (see Document D-18). This decision was approved by Cabinet on 11 November 2010 (document D-29).

[12] The writ was issued on 1 December 2011. The Plaintiff sought damages for "unlawful termination" of his contract.

[13] The Statement of Defence was filed on 14 May 2012. On the question of liability there are no factual issues. It was however pleaded:

> [i] that the Contract was "frustrated by law" specifically by the amendment to Section 20 of the 2012 Act which came into force on 27 September 2010;
> [ii] that the amended law was not challenged in the Courts;
> [iii] that the Plaintiff was aware of and understood the amendment;
> [iv] that the Plaintiff was free to decide whether or not to register; and
> [v] "Knowing the amendment and its consequences, the Plaintiff nevertheless went ahead with his registration.

In the alternative, it was pleaded that acceptance by the Plaintiff of gratuity amounting to $19,200 together with leave payments together totalling $12,472.31 which sums were only payable upon cessation of contract, amounted to an acceptance by the Plaintiff that his contract had been lawfully terminated. In the circumstances the Plaintiff was "estopped from making this claim."

[14] On 25 October 2012 there was a very short hearing at which the only evidence was that of the Plaintiff and all the documents disclosed were admitted by consent.

[15] The Plaintiff told me that he wanted to register as a candidate but did not want to resign and did not resign. In his view the amended section 20 did not apply to him and there was no need for him to comply with it. After he received document P-43 he accepted that his contract had been terminated and although he was not successful in the General Election he did not attempt to return to work.

[16] The Plaintiff agreed that he had accepted gratuity and leave payments because he thought he was entitled to them, whether or not he had been validly terminated. Since the termination he has not found gainful employment and his decision to accept the payments offered reflected his concerns about his financial situation. It was never his intention to give the impression that by accepting these payments he was accepting that his contract had been validly determined.

[17] Written submissions were filed by both counsel shortly after the hearing and I am grateful to counsel for their assistance. As will be seen from the submissions, Mr. Kefu suggested that the central questions were whether Section 20 was applied retrospectively to the Plaintiff and whether his acceptance of perquisites following his deemed cessation of employment estops him from bringing the present action. Mr. Niu also focussed on the applicability of the amended Section 20 to the Plaintiff and suggested that the new section not only did not apply to the Plaintiff but was in fact unconstitutional. So far as the acceptance of leave and gratuity payments were concerned, Mr. Niu submitted that there was nothing to show that the parties had agreed that payment and acceptance would constitute settlement of the Plaintiff's claim.

[18] The consequences of the acceptance of perquisites by the Plaintiff can conveniently be taken first. Although the Defendants say that the Plaintiff is estopped as a result it is not clear to me on what precise ground that argument is advanced. Part VII of the Evidence Act (Cap 39) provides four statutory definitions of estoppel but each involves a representation of fact, father than a mere representation of intention (eg not to sue). It might be suggested that by accepting these payments the Plaintiff agreed to waive his rights under the contract or alternatively the compromise his claim, but the Plaintiff denied having entered into any such agreements with the Defendants. Before a compromise or waiver can be relied upon the precise terms of such agreements must be satisfactorily proved. In the present case while acceptance of the payments is not disputed, there is no evidence at all from the Defendants to contradict the Plaintiffs assertion that he accepted what he was offered because he needed the money which he thought was anyway owed to him. In my view the Defendants have failed to show that the Plaintiff's acceptance of these moneys followed any agreement reached between the parties and in particular, any agreement by the Plaintiff to forbear.

[19] As has been seen in paragraph [9] above, the Plaintiff suggested, when he wrote to the Commission, that the requirement that he resign upon registration "unlawful". As has also been seen, Mr. Mu suggested (in paragraphs 27-30 of has written submissions) that section 20 as amended was unconstitutional. That second suggestion was never pleaded and was not the subject of full argument and therefore I do not think it was properly before me. In my view, the central issue in this case is

whether the Defendants were entitled to amend the terms and conditions of the Plaintiffs service by applying the amended section 20 of the Act.

[20] In the absence of any supervening legislation, the terms of the Plaintiff's contract seem clear and the provisions governing its variation equally so. Clause 21 incorporated the provisions of the Public Service Act 2002 into the contract. In my view, the requirement being for the terms of a contract to be certain, the Act as incorporated could only be in the form in which it stood prior to any amendment made subsequent to the formation of the contract. The contract could only be amended (clause 3.2) by agreement in writing between the parties. Apart from the amendments referred to in paragraph [2] above, no relevant agreement was ever reached to alter the contract, let alone to allow it to be amended by incorporating a new section 20.

[21] While it is not to be doubted that Parliament may, by Act, alter the terms of contracts freely entered into, in Tonga, Acts of Parliament are subject to Clause 20 of the Constitution:

> "It shall not be lawful to enact any retrospective laws in so far as they may curtail or take away or offer rights or privileges existing at the time of the passing of such laws."

[22] In *Storey v Graham* [1899] 1 QB 406, 411 it was explained that by a "right" is meant "a specific right which in one way of another has been acquired by an individual, and which some persons have got and others have not got." In *Fulivai v Kainuanu* [1962] 2 To.L.R 178, 183 the Privy Council expressed the view that the (Clause) "only refers to vested and not contingent rights."

[23] In *L'Office Cherifien v Yamashita Ltd* [1993] 3 WLR 266, 273 Sir Thomas Bingham quoted *Craies on Statute Law* 7th Ed. (1971) at p 387. A statute is retrospective if it:

> "takes away or impairs any vested right acquired under existing laws, or creates a new obligation, or imposes a new duty or attaches a new disability in respect of transactions or considerations already past."

This definition was described as having received "high judicial endorsement" as representing the modern law by the House of the Lords [1994] 1 AC 486, 524.

[24] In my opinion among other rights secured by the contract to the Plaintiff included the right to "take leave of absence upon registering as a candidate for election to the Legislative Assembly", i.e without having to resign from the service "unless elected". That right, to remain employed within the service despite standing for Parliament, was taken away by the decision to apply the terms of section 20, as amended, to the Plaintiff. It was a right taken away, or in other words, a variation of a contractual term, without obtaining the Plaintiff's agreement as was required by Clause 3.2.

[25] Mr. Kefu argued that nothing that was done had removed the Plaintiffs constitutional right to stand for election and that he remained as free as before to decide whether or not to exercise that right. It is not however, the right which is here in issue, it is the dramatic alteration of the consequences of its exercise. It could not plausibly be argued that a paratrooper whose parachute had been confiscated had not had his freedom to jump curtailed.

[26] Although a number of other submissions were made on behalf of the Defendants, I did not find that they advanced their case. In particular the suggestion made at the end of his submission by Mr. Kefu, that Section 20 was procedural rather than substantive (as to which see *Wright v Hale* (1860) 6 H&N 227, 232 and *Republic of Costa Rica v Evianger* (1876) 3 Ch D 62, 69) did not find impress me and had not been pleaded.

[27] In my view, the unilateral amendment of the Plaintiffs contract by the application to him of the requirements of section 20 as amended, was a breach of his contract, entitling him to damages. Although both counsel addressed me on the quantum of damages, unfortunately, I still do not find the figures and calculations clear. Accordingly there will be Judgment for the Plaintiff with damages to be assessed following further submissions.