TONGA
LAW REPORTS
2000

TONGA
LAW REPORTS
2000

Editor: Ms Janine Ford LLB

A publication of the Ministry of Justice,
Nuku'alofa, Kingdom of Tonga

Printed and published by
Government Printer 2005

Court of Appeal

President:
Hon Justice Gordon Ward, Chief Justice
Hon Justice James Burchett
Justice Sir David Tompkins
Hon Justice Bryan Beaumont

Supreme Court

Chief Justice:
Hon Justice Gordon Ward

Hon Justice Daniel Finnigan (to June)
Hon Justice Anthony Ford (from July)

Land Court

Hon Justice Gordon Ward, Chief Justice
Hon Justice Daniel Finnigan (to June)
Hon Justice Anthony Ford (from July)

Magistrates' Court

Chief Magistrate:
Mr Siaosi Fifita

Principal Magistrate:
Mr Palavi Tapueluelu

Ms Vusenga Helu (to 9 January)
Mr Latu Mohenoa
Mr Samiu Palu
Mr Peau Pifileti
Mr Folau Lokotui
Mr Pita Soakimi
Mr Paula Tatafu

Attorney General

Hon Tevita Tupou

Solicitor General

Mr Aisea Taumoepeau

MODE OF CITATION

The mode of citation of this volume is [2000] Tonga LR

TABLE OF CASES REPORTED

'Akau'ola v Tonga Telecommunications Commission (SC)	263
Allied Foods Co Ltd v Moa (SC)	279
'Ameleki v Nai (LC)	247
'Ameleki v Nai (2) (LC)	258
Attorney General v Namoa (SC)	59
Attorney General v Ulakai (SC)	10
Bank of Tonga v Shell Company (Pacific Islands) Ltd (CA)	329
Commissioner of Inland Revenue v National Pacific Insurance (SC)	392
Edwards v Pohiva (SC)	3
'Epenisa v Tonga Development Bank (SC)	231
Fasi v Fifita (CA)	307
Fifita v R (CA)	289
Finau (Deceased), Re Sela Moimoi (SC)	13
Fonua v MBf Bank Ltd (CA)	319
Fonua v Yeoh (SC)	437
Fund Management Ltd v Fifita (LC)	339
Fund Management Ltd v Fifita (No 2) (LC)	342
Havea v Kingdom of Tonga (SC)	31
Helu v Koloa (CA)	299
His Royal Highness Prince Lavaka v Tafolo (LC)	363
HRH Prince Tu'ipelehake v Lavulavu (LC)	242
Ika v Tuli (SC)	375
Jones, Re Application by (SC)	276
Laidlaw Holdings Ltd v Maxam Gold Bank Ltd (SC)	125
Lasalosi v Hausia (SC)	415
Lavaka v Ministry of Police (SC)	17

Litili v Fifita (SC) 285
Maxam Gold Bank Ltd v Laidlaw Holdings Ltd (CA) 128
Maxam Gold Bank Ltd v Laidlaw Holdings Ltd (No 2) (CA) 131
Misinale v R (CA) 322
Moore Electronic Company Ltd v National Pacific Insurance Company Ltd (SC) 6
Namoa v Attorney-General (CA) 70
Pacific Vendors Ltd v United States of America (SC) 27
Paunga v Paunga (SC) 42
Polynesian Airlines v Kingdom of Tonga (SC) 145
Polynesian Airlines (Investments) Ltd v Kingdom of Tonga (CA) 168
Pozzati v Fumera (SC) 408
Pulu v R (CA) 293
R v Angitoa (SC) 352
R v Fakauho (SC) 50
R v Manu (SC) 386
R v Matangi (SC) 372
R v Motulalo (CA) 311
R v Pongi (SC) 366
R v Puloka (CA) 335
R v Tau'aika (SC) 423
R v Tofavaha (CA) 316
R v Toma (SC) 400
R v Tonga (SC) 40
Saafi v Veikoso (SC) 83
Tapueluelu v Police (SC) 383
Taufa v Police Department (SC) 121
Taumoepeau v Taumoepeau (LC) 236
To'a v National Pacific Insurance (SC) 357
Toafa v Talisi (SC) 53
Tonga, Re Application by (LC) 143
Tonga v Ministry of Police (SC) 111
Tuaimei'uta v Prema (SC) 378

Tu'i'onetoa v Pohiva (SC) 337
Tukuafu v Police (SC) 404
Vaiangina v Police (SC) 360
Vaioleti v Tonga Development Bank (SC) 271
Valikoula v Toa (SC) 397
Vaotangi v Vaotangi (SC) 434
Wilson v Attorney General of Tonga (SC) 1

INDEX OF SUBJECT MATTER

BIRTHS, DEATHS, AND MARRIAGES

Application for registration of birth in Tongan Register — not Tongan parentage — not allowed

Jones, Re Application by (SC) **276**

CHEQUES

Liability of bank for failing to inform customer promptly of dishonour — damages

Bank of Tonga v Shell Company (Pacific Islands) Ltd (CA) **329**

CHURCH CONSTITUTION

Conduct of worshippers — court would never rule on purely spiritual matters

Saafi v Veikoso (SC) **83**

Trustees acted outside their power — liable

Saafi v Veikoso (SC) **83**

COMPANY LAW

Company failed to follow Act — ordered for company to rectify the share register

Laidlaw Holdings Ltd v Maxam Gold Bank Ltd (SC) **125**

No legal ownership until registration — equitable interest

Maxam Gold Bank Ltd v Laidlaw Holdings Ltd (No 2) (CA) **131**

CONTEMPT OF COURT

Fine should reflect culpability and seriousness

Attorney General v Ulakai (SC) **10**

Real risk of undermining public confidence in the administration of justice

Attorney General v Namoa (SC) **59**

Scandalising the court — freedom of speech no relevant application

Namoa v Attorney-General (CA) **70**

CONTRACT

Proof of agreement — balance of probabilities

Allied Foods Co Ltd v Moa (SC) **279**

COSTS

Awarded to and from litigants — not for barrister to claim

Wilson v Attorney General of Tonga (SC) **1**

Crown liability — incompetence

R v Puloka (CA) **335**

Determination of proportionate liabilities

'Ameleki v Nai (No 2) (LC) **258**

Dismissed charges — costs not awarded against Crown

R v Tonga (SC) **40**

Factors in assessment of quantum

'Ameleki v Nai (No 2) (LC) **258**

Not regarded as penalty

Attorney General v Ulakai (SC) **10**

Solicitor and client basis —exceptional case

Fonua v MBf Bank Ltd (CA) **319**

Taxation of costs — defendant was allowed costs of taxation process

Polynesian Airlines v Kingdom of Tonga (SC) **145**

Taxation of costs — scale charges may be exceeded

Polynesian Airlines v Kingdom of Tonga (SC) **145**

CREDITORS' REMEDIES

Bailiffs — duties do not extend to seizure of company shares

Pozzati v Fumera (SC) **408**

Liability for costs of bailiff — execution creditor personally liable

Valikoula v Toa (SC) **397**

Payment for clear debt — interest ordered

Allied Foods Co Ltd v Moa (SC) **279**

Writ of distress — ranked according to time of delivery of original

Pozzati v Fumera (SC) **408**

CRIMINAL LAW

Appeal against sentence — armed robbery — leave to appeal not granted

Fifita v R (CA) **289**

Assault — proof of participation

R v Angitoa (SC) **352**

Contempt of court — real risk of undermining public confidence in the administration of justice — scandalising the court

Attorney General v Namoa (SC) **59**

Namoa v Attorney-General (CA) **70**

Defamation of the King — conviction upheld

Pulu v R (CA) **293**

Forgery — needed original documents for proof

R v Manu (SC) **386**

Fraudulent conversion as a Government servant — abuse of trust

R v Pongi (SC) **366**

Indecent assault — needs only basic intent — intoxication no defence

R v Toma (SC) **400**

Manslaughter by negligence — suspended sentence was inadequate

R v Tofavaha (CA) **316**

Rape — conflicting evidence — complainant lied — acquitted

R v Tau'aika (SC) **423**

Sentence — whether sentencing provisions are retrospective

R v Fakauho (SC) **50**

Suspended sentence was inadequate — sexual offence

R v Motulalo (CA) **311**

CRIMINAL PROCEDURE

Admissibility of statements

R v Angitoa (SC) **352**

Admissibility of statements — improper advice of accused's rights from police

R v Matangi (SC) **372**

Application for committal — no application to charge that crimes were committed — struck out

Finau (Deceased), Re Sela Moimoi (SC) **13**

Change of plea — not allowed

Vaiangina v Police (SC) **360**

Fresh evidence available — retrial ordered

Tukuafu v Police (SC) **404**

Indictment not bad for duplicity — single criminal enterprise

Misinale v R (CA) **322**

Leave to appeal out of time — not granted

Misinale v R (CA) **322**

Right of appeal from Court of Inquiry — no right

Tapueluelu v Police (SC) **383**

Sentence — imprisonment should be used in default of payment rather than as substitute

Vaiangina v Police (SC) **360**

DAMAGES

Damages at large — not limited to specific pecuniary loss

Havea v Kingdom of Tonga (SC) **31**

Loss of profit claimed — needed proof

'Epenisa v Tonga Development Bank (SC) **231**

Trespass by pigs — damages reduced where crop owner failed to fence

Toafa v Talisi (SC) **53**

Unlawful assault and imprisonment by police officer — exemplary damages allowed

Lavaka v Ministry of Police (SC) **17**

Tonga v Ministry of Police (SC) **111**

DEFAMATION

Application to strike out defence — court ordered defence be amended — application refused

Edwards v Pohiva (SC) **3**

Damages — limited to action pleaded — reduced

Lasalosi v Hausia (SC) **415**

DISCOVERY

Documents sought were claimed to be confidential and not relevant — court directed supervised access

Maxam Gold Bank Ltd v Laidlaw Holdings Ltd (CA) **128**

DISSOLUTION OF MARRIAGE

Petition for divorce — claim of unreasonable conduct — not proved

Litili v Fifita (SC) **285**

EMPLOYMENT LAW

Dismissal — natural justice principles to be observed

'Akau'ola v Tonga Telecommunications Commission (SC) **263**

Suspension — no express power — decision reasonable

Helu v Koloa (CA) **299**

Wrongful dismissal — probationary employment contract —reasonable conduct still required

Helu v Koloa (CA) **299**

Wrongful dismissal — reasonable cause

Vaioleti v Tonga Development Bank (SC) **271**

EQUITY

Equitable licence — no evidence of representation or acquiescence by defendant

Taumoepeau v Taumoepeau (LC) **236**

Prior equitable interest existed — no summary relief could be granted

Maxam Gold Bank Ltd v Laidlaw Holdings Ltd (No 2) (CA) **131**

FAMILY AND DOMESTIC RELATIONSHIPS

Access arrangements — court ordered reasonable access to father

Paunga v Paunga (SC) **42**

Maintenance — evidence of means not heard — new trial ordered

Vaotangi v Vaotangi (SC) **434**

Maintenance — no past maintenance

Paunga v Paunga (SC) **42**

INCOME TAX

Notice of assessment — should contain time within which to object

Commissioner of Inland Revenue v National Pacific Insurance (SC)392

INSURANCE LAW

Balance of probabilities — reckless, dangerous driving — insurers not liable

To'a v National Pacific Insurance (SC) 357

Plaintiff relied on assurance from officer that he was covered — claim not paid

'Epenisa v Tonga Development Bank (SC) 231

INTERIM INJUNCTION

To prevent burial in particular site — issue should be resolved by Tongan negotiation

Tonga, Re Application by (LC) 143

LAND LAW

Equitable licence — no evidence of representation or acquiescence by defendant

Taumoepeau v Taumoepeau (LC) 236

Eviction orders — appeal against

Fasi v Fifita (CA) 307

Failure to consult — did not make registration invalid

'Ameleki v Nai (LC) 247

Later registration ordered to be set aside in favour of earlier one — equitable considerations

'Ameleki v Nai (LC) 247

Preservation of land — estate holder's duty

His Royal Highness Prince Lavaka v Tafolo (LC) 363

Royal Family Estate — sub-lease — whether Cabinet consent required — challenge to validity by non-party — burden of proof

Fund Management Ltd v Fifita (No 2) (LC) 342

Vacant possession sought — defendant had no right to be there or to harvest the crops

HRH Prince Tu'ipelehake v Lavulavu (LC) 242

MAGISTRATES

Clerks — review appointment of clerks in Magistrates' Court — held to comply with legislation

Taufa v Police Department (SC) **121**

MISREPRESENTATION

Nike jeans — reasonable examination would have shown they were not Nike

Tuaimei'uta v Prema (SC) **378**

NEGLIGENCE

Duty of care — reasonable standard —respondent not shown to fall below the standard required

Polynesian Airlines (Investments) Ltd v Kingdom of Tonga (CA) **168**

PRACTICE AND PROCEDURE

Amendment of particulars during trial — allowed

Pulu v R (CA) **293**

Application for 'unless' order to be brought into effect — set aside

Moore Electronic Company Ltd v National Pacific Insurance Company Ltd (SC) **6**

Application to strike out defence — court ordered defence be amended — application refused

Edwards v Pohiva (SC) **3**

Challenge to accuracy of court record — needs affidavit evidence — challenge failed

Vaotangi v Vaotangi (SC) **434**

Costs — against the Crown for acquittal— declined

R v Tonga (SC) **40**

Costs — Crown liability — incompetence

R v Puloka (CA) **335**

Costs — determination of proportionate liabilities

'Ameleki v Nai (No 2) (LC) **258**

Costs — factors in assessment of quantum

'Ameleki v Nai (No 2) (LC) **258**

Costs — not regarded as penalty

Attorney General v Ulakai (SC) 10

Costs — solicitor and client basis —exceptional case

Fonua v MBf Bank Ltd (CA) 319

Costs — taxation of — defendant was allowed costs of taxation process

Polynesian Airlines v Kingdom of Tonga (SC) 145

Costs — taxation of — scale charges may be exceeded

Polynesian Airlines v Kingdom of Tonga (SC) 145

Inadequate answers to interrogatories — if plaintiff did not answer adequately action would be struck out

Moore Electronic Company Ltd v National Pacific Insurance Company Ltd (SC) 6

Injunction — high risk of injustice — refused

Fund Management Ltd v Fifita (LC) 339

Interim injunction — no writ filed and no undertaking as to damages — court refused

Tonga, Re Application by (LC) 143

Leave to appeal — filed out of time

R v Puloka (CA) 335

Leave to appeal out of time — granted

Fasi v Fifita (CA) 307

Leave to commence action out of time — legislation clear so refused

His Royal Highness Prince Lavaka v Tafolo (LC) 363

Magistrate's signature on summons is purely administrative — not a conflict

Taufa v Police Department (SC) 121

Preliminary questions — not appropriate

Tu'i'onetoa v Pohiva (SC) 337

Setting aside interim order — damages would be sufficient remedy — order set aside

Pacific Vendors Ltd v United States of America (SC) 27

Strike out application — cause of action disclosed — application refused

Ika v Tuli (SC) 375

Summons need not contain precise date

Taufa v Police Department (SC) **121**

'Unless' order not complied with — not extended

Fonua v Yeoh (SC) **437**

SENTENCING

Imprisonment should be used in default of payment rather than as substitute

Vaiangina v Police (SC) **360**

Suspended sentence inadequate — manslaughter by negligence

R v Tofavaha (CA) **316**

Suspended sentence inadequate — sexual offence

R v Motulalo (CA) **311**

Suspended sentence triggered

Fifita v R (CA) **289**

Whether sentencing provisions are retrospective

R v Fakauho (SC) **50**

TORT

Defamation — can be publication to one person only

Lasalosi v Hausia (SC) **415**

Trespass by pigs — owner liable for damage to crops

Toafa v Talisi (SC) **53**

Trespass to land — unlawful conversion — damages

Havea v Kingdom of Tonga (SC) **31**

Unlawful imprisonment and assault by police — vicarious liability — damages

Lavaka v Ministry of Police (SC) **17**

Tonga v Ministry of Police (SC) **111**

INDEX OF CASES CONSIDERED

Advanced Exports NZ Ltd v Sione Tupouniua (A No 749/94, Ward CJ)
Pozzati v Fumera (SC) **408**
Akau'ola v Attorney General [1997] Tonga LR 36 (CA)
Attorney General v Namoa (SC) **59**
Namoa v Attorney-General (CA) **70**
'Akau'ola v Fungalei [1991] Tonga LR 22
Tonga v Ministry of Police (SC) **111**
Allison v Rank City Wall Canada Ltd (1984) 6 DLR (4th) 144; (1984) 29 CCLT 50
Polynesian Airlines (Investments) Ltd v Kingdom of Tonga (CA) **168**
Ambard v Attorney General for Trinidad and Tobago [1936] AC 322; [1936] 1 All ER 704 (PC)
Attorney General v Namoa (SC) **59**
American Cyanamid Co v Ethicon Ltd [1975] AC 396; [1975] 1 All ER 504
Fund Management Ltd v Fifita (LC) **339**
Anns v Merton London Borough Council [1978] AC 728; [1977] 2 All ER 492
Ika v Tuli (SC) **375**
Ashmore v British Coal Corpn [1990] 2 QB 338; [1990] 2 All ER 981
Edwards v Pohiva (SC) **3**
Attorney General v Ulakai [1999] Tonga LR 259
Attorney General v Namoa (SC) **59**
Attorney-General (Duchy of Lancaster) v London and North Western Railway [1892] 3 Ch 274
Edwards v Pohiva (SC) **3**
Bekker v Wrack [1937] NZLR 549
Lasalosi v Hausia (SC) **415**
Birkett v James [1978] AC 297; [1977] 2 All ER 801
Fonua v Yeoh (SC) **437**
Bolton v Stone [1951] AC 850; [1951] 1 All ER 1078
Polynesian Airlines (Investments) Ltd v Kingdom of Tonga (CA) **168**
Bondurant v Mastin, 2522 NC 190, 113 SE2d 292 [1960]
Polynesian Airlines (Investments) Ltd v Kingdom of Tonga (CA) **168**
Bradbury v Enfield London Borough Council [1967] 1 WLR 1311; [1967] 3 All ER 434
Taufa v Police Department (SC) **121**
Byrne v Boadle (1863) 2 H&C 722; 159 ER 299
Polynesian Airlines (Investments) Ltd v Kingdom of Tonga (CA) **168**

Castorina v Chief Constable of Surrey [1988] NLJR 180 (CA)
Lavaka v Ministry of Police (SC) **17**
Cinnamond v British Airports Authority [1980] 1 WLR 582; [1980] 2 All ER 368 (CA)
Polynesian Airlines (Investments) Ltd v Kingdom of Tonga (CA) **168**
Clarke v Edinburgh Tramways Co [1919] SC (HL) 35
Polynesian Airlines (Investments) Ltd v Kingdom of Tonga (CA) **168**
Cocker v Police Department (Supreme Court, Cr App 1251/98, 5 March 1999, Ward CJ)
Lasalosi v Hausia (SC) **415**
Collins v Wilcock [1984] 1 WLR 1172; [1984] 3 All ER 374
Lavaka v Ministry of Police (SC) **17**
Courtaulds Northern Spinning Ltd v Sibson [1988] ICR 451; [1988] IRLR 305 (CA)
Helu v Koloa (CA) **299**
Darbishire v Warran [1963] 1 WLR 1067; [1963] 3 All ER 310 (CA)
Havea v Kingdom of Tonga (SC) **31**
David v Da Silva [1934] AC 106
Commissioner of Inland Revenue v National Pacific Insurance (SC) **392**
Director of Public Prosecutions v Majewski [1977] AC 443; [1976] 2 All ER 142
R v Toma (SC) **400**
Director of Public Prosecutions v Merriman [1973] AC 584; 1972 2 All ER 42
Misinale v R (CA) **322**
Dulhunty v JB Young Ltd (1975) 7 ALR 409; 50 ALJR 150
Polynesian Airlines (Investments) Ltd v Kingdom of Tonga (CA) **168**
Edwards v Kingdom of Tonga [1994] Tonga LR 62 (CA)
Jones, Re Application by (SC) **276**
Polynesian Airlines v Kingdom of Tonga (SC) **145**
Everett v The Queen (1994) 181 CLR 295
Fifita v R (CA) **289**
Fardon v Harcourt-Rivington (1932) 146 LT 391; [1932] All ER Rep 81 (HL)
Polynesian Airlines (Investments) Ltd v Kingdom of Tonga (CA) **168**
Fatai v Fakaulu (Supreme Court, C 956/99)
Valikoula v Toa (SC) **397**
Fie'eiki v Ilavalu (No 2) [1995] Tonga LR 192
Taumoepeau v Taumoepeau (LC) **236**
Fifita v Fakafanua [1998] Tonga LR 127 (CA)
Lavaka v Ministry of Police (SC) **17**
Films Rover International Ltd v Cannon Film Sales Ltd [1987] 1 WLR 670; [1986] 3 All ER 772
Fund Management Ltd v Fifita (LC) **339**
Flint v Lovell [1935] 1 KB 354; [1934] All ER Rep 200
Lavaka v Ministry of Police (SC) **17**
Fonua v MBf Bank Ltd [1999] Tonga LR 4
Polynesian Airlines v Kingdom of Tonga (SC) **145**
Fred Olsen Flyselskap A/S v Norwich City Council (High Court, 27 July 1979)
Polynesian Airlines (Investments) Ltd v Kingdom of Tonga (CA) **168**

Gallagher v Durack (1983) 152 CLR 238; 45 ALR 53
Namoa v Attorney-General (CA) **70**
GJ Coles & Co Ltd v Federal Commissioner of Taxation (1975) 49 ALJR 188; 6 ALR 83
Fund Management Ltd v Fifita (No 2) (LC) **342**
Goldman v Hargrave [1967] 1 AC 645; [1966] 2 All ER 989 (PC)
Polynesian Airlines (Investments) Ltd v Kingdom of Tonga (CA) **168**
Hampton Court Ltd v Crooks (1957) 97 CLR 367; [1957] ALR 1201
Polynesian Airlines (Investments) Ltd v Kingdom of Tonga (CA) **168**
Harlingdon and Leinster Enterprises Ltd v Christopher Hull Fine Art Ltd [1991] 1 QB 564; [1990] 1 All ER 737 (CA)
Tuaimei'uta v Prema (SC) **378**
Havea v Tu'i'afitu [1974 – 1980] Tonga LR 55
'Ameleki v Nai (LC) **247**
Haynes v Harwood [1935] 1 KB 146; [1934] All ER Rep 103 (CA)
Polynesian Airlines (Investments) Ltd v Kingdom of Tonga (CA) **168**
Hedley Byrne & Co Ltd v Heller & Partners Ltd [1964] AC 465; [1963] 2 All ER 575
Ika v Tuli (SC) **375**
Home Office v Dorset Yacht Co Ltd [1970] AC 1004; [1970] 2 All ER 294
Ika v Tuli (SC) **375**
Polynesian Airlines (Investments) Ltd v Kingdom of Tonga (CA) **168**
Hough v London Express Newspaper Ltd [1940] 2 KB 507; [1940] 3 All ER 31 (CA)
Lasalosi v Hausia (SC) **415**
Hough v Windus (1884) 12 QBD 224 (CA)
Commissioner of Inland Revenue v National Pacific Insurance (SC) **392**
Hsu & Hsu v Latu [1991] Tonga LR 25 (CA)
Tonga v Ministry of Police (SC) **111**
Hughes v Lord Advocate [1963] AC 837; [1963] 1 All ER 705
Polynesian Airlines (Investments) Ltd v Kingdom of Tonga (CA) **168**
Hussien v Chong Fook Kam [1970] AC 942 (PC)
Lavaka v Ministry of Police (SC) **17**
Ireland v Gray [1902] 1 Ch 522
Maxam Gold Bank Ltd v Laidlaw Holdings Ltd (No 2) (CA) **131**
Johnson v Lamb 273 NC 701, 710, 161 SE2d 131, 139 (1968)
Polynesian Airlines (Investments) Ltd v Kingdom of Tonga (CA) **168**
Jokai Tea Holdings Ltd, Re [1992] 1 WLR 1196; [1993] 1 All ER 630
Fonua v Yeoh (SC) **437**
Jolley v Sutton London Borough Council [2000] 1 WLR 1082; [2000] 3 All ER 409 (HL)
Polynesian Airlines (Investments) Ltd v Kingdom of Tonga (CA) **168**
Joyce v Director of Public Prosecutions [1946] AC 347; [1946] 1 All ER 186
Jones, Re Application by (SC) **276**
Kaufusi v Lasa (SC & CA) [1990] Tonga LR 39 & 139
Lavaka v Ministry of Police (SC) **17**
Keneti 'Otuafi v Sipa (Court of Appeal, CA 19/90, 24 March 1992)
Tonga v Ministry of Police (SC) **111**

Kingdom of Tonga v Mokofisi [1990] Tonga LR 58 (PC)
Tonga v Ministry of Police (SC) **111**
Kuwait Asia Bank EC v National Mutual Life Nominees Ltd [1991] 3 NZLR 457; (1991) 3 PRNZ 571 (CA)
Polynesian Airlines v Kingdom of Tonga (SC) **145**
Laino Latu v The Police (Supreme Court, Cr App 673/96, 5 March 1997, Lewis J)
R v Tonga (SC) **40**
Lavaka v Ministry of Police [2000] Tonga LR 17
Tonga v Ministry of Police (SC) **111**
Liversidge v Anderson [1942] AC 206; [1941] 3 All ER 338
Lavaka v Ministry of Police (SC) **17**
Lloyd v Grace Smith & Co [1912] AC 716; [1911-13] All ER Rep 51
Tonga v Ministry of Police (SC) **111**
Lonitenisi v Tu'i'onetoa [1997] Tonga LR 161
Toafa v Talisi (SC) **53**
Lowe v The Queen (1984) 154 CLR 606; 54 ALR 193
Fifita v R (CA) **289**
M'Alister (or Donoghue) v Stevenson [1932] AC 562; [1932] All ER Rep 1
Ika v Tuli (SC) **375**
Mann v O'Neill (1997) 191 CLR 204; 145 ALR 682
Namoa v Attorney-General (CA) **70**
Ma'umalanga v Tupou [1994] Tonga LR 30
Fund Management Ltd v Fifita (No 2) (LC) **342**
Minister of Lands v Nai [1999] Tonga LR 135 (CA)
Misinale v R (CA) **322**
Mokofisi v The Kingdom of Tonga (Supreme Court, C111/88, Webster J, 13 June 1989)
Havea v Kingdom of Tonga (SC) **31**
Morgan v Odhams Press Ltd [1971] 2 All ER 1156 (HL)
Lasalosi v Hausia (SC) **415**
Motuliki v Pohahau (Land Court, L 670/97, 12 May 1999, Finnigan J)
'Ameleki v Nai (LC) **247**
Taumoepeau v Taumoepeau (LC) **236**
Mo'unga v R [1998] Tonga LR 154 (CA)
R v Motulalo (CA) **311**
Mummery v Irvings Pty Ltd (1956) 96 CLR 99; [1956] ALR 795
Polynesian Airlines (Investments) Ltd v Kingdom of Tonga (CA) **168**
Murray v Ministry of Defence [1988] 2 All ER 521 (HL)
Lavaka v Ministry of Police (SC) **17**
Nationwide News Pty Ltd v Wills (1992) 108 ALR 681
Namoa v Attorney-General (CA) **70**
OG Sanft & Sons v Johnson [1991] Tonga LR 1
'Ameleki v Nai (2) (LC) **258**
Polynesian Airlines v Kingdom of Tonga (SC) **145**

OG Sanft & Sons v Tonga Tourist and Development Co Ltd, Hamilton and the Minister of Lands [1981-88] Tonga LR 26
Fund Management Ltd v Fifita (No 2) (LC) **342**
Taumoepeau v Taumoepeau (LC) **236**
'Otuafi v Sipa (Supreme Court, C42/89, Webster J, 3 August 1990)
Lavaka v Ministry of Police (SC) **17**
Overseas Tankship (UK) Ltd v Miller Steamship Co Pty [1967] 1 AC 617; [1966] 2 All ER 709 (PC)
Polynesian Airlines (Investments) Ltd v Kingdom of Tonga (CA) **168**
Piukana v Akeripa (Supreme Court, C App 47/99, 3 March 1999, Finnigan J)
Lasalosi v Hausia (SC) **415**
Plewes v Lancaster 171 Pa.Super. 312, 90 A. 2d 279 [1952]
Polynesian Airlines (Investments) Ltd v Kingdom of Tonga (CA) **168**
Polynesian Airlines v Kingdom of Tonga [2000] Tonga LR 145
'Ameleki v Nai (2) (LC) **258**
Powell v Streatham Manor Nursing Home [1935] AC 243; [1935] All ER Rep 58
Polynesian Airlines (Investments) Ltd v Kingdom of Tonga (CA) **168**
Primary Produce Exports Ltd v Masima [1996] Tonga LR 234
Attorney General v Namoa (SC) **59**
Practice Direction 02/92 [1992] Tonga LR 2
'Ameleki v Nai (2) (LC) **258**
Polynesian Airlines v Kingdom of Tonga (SC) **145**
R v Deakin [1972] 3 All ER 803
R v Pongi (SC) **366**
R v Gray [1900] 2 QB 36
Attorney General v Namoa (SC) **59**
R v Gregory [1972] 2 All ER 861
R v Pongi (SC) **366**
R v Kopyto (1987) 47 DLR (4th) 213 (Ontario CA)
Attorney General v Namoa (SC) **59**
Namoa v Attorney-General (CA) **70**
R v Medical Appeal Tribunal, ex parte Gilmore [1957] 1 QB 574
Tapueluelu v Police (SC) **383**
R v Misinale (Court of Appeal, CA 779/97, 23 July 1997)
R v Motulalo (CA) **311**
R v O'Connor (1980) 146 CLR 64; 29 ALR 449
R v Toma (SC) **400**
R v Palanite (Supreme Court, Cr 126/93, 28 April 1993, Dalgety J)
Taufa v Police Department (SC) **121**
R v Petersen [1994] 2 NZLR 533 (CA)
R v Motulalo (CA) **311**
R v Sione Foueti (Cr 933/92, 20 April 1995, Ward CJ)
R v Tonga (SC) **40**

Rae v International Insurance Brokers (Nelson Marlborough) Ltd [1998] 3 NZLR 190 (CA)
Polynesian Airlines (Investments) Ltd v Kingdom of Tonga (CA) 168
Robinson v Jenkins (1890) 24 QBD 275 (CA)
Pozzati v Fumera (SC) 408
Rookes v Barnard [1964] AC 1129; [1964] 1 All ER 367
Lavaka v Ministry of Police (SC) 17
Tonga v Ministry of Police (SC) 111
Russ & Brown's Contract, In re [1934] Ch 34 (CA)
Fund Management Ltd v Fifita (No 2) (LC) 342
Salmond & Spraggon (Aust) Pty Ltd v Joint Cargo Services Pty Ltd (the "New York Star") [1977] 1 Lloyd's Rep 445
Polynesian Airlines (Investments) Ltd v Kingdom of Tonga (CA) 168
Samuels v Linzi Dresses Ltd [1981] QB 115; [1980] 1 All ER (CA)
Fonua v Yeoh (SC) 437
Moore Electronic Company Ltd v National Pacific Insurance Company Ltd (SC) 6
Schellenberg v Tunnel Holdings Pty Ltd (2000) 200 CLR 201; 74 ALJR 743
Polynesian Airlines (Investments) Ltd v Kingdom of Tonga (CA) 168
Scott v London and St Katherine Docks Company (1865) 3 H & C 596; 159 ER 665; [1861-73] All ER Rep 246
Polynesian Airlines (Investments) Ltd v Kingdom of Tonga (CA) 168
Screaming Eagle Air Limited v Airport Commission of Forsyth County (387 SE 2d 1990)
Polynesian Airlines (Investments) Ltd v Kingdom of Tonga (CA) 168
Secretary of State for the Home Office v Harman [1983] 1 AC 280; [1982] 1 All ER 532
Attorney General v Ulakai (SC) 10
Severo Dossi v The King (1918) 13 Cr App R 158
Taufa v Police Department (SC) 121
Shepherd Homes Ltd v Sandham [1971] Ch 340; [1970] 3 All ER 402
Fund Management Ltd v Fifita (LC) 339
Simpsons Motor Sales [London] Limited v Hendon Corporation [1964] 3 All ER 833 (ChD)
Polynesian Airlines v Kingdom of Tonga (SC) 145
Smith v Buller (1875) LR 19 Eq 473; [1874-80] All ER Rep 425
Polynesian Airlines v Kingdom of Tonga (SC) 145
Smith v Leurs (1945) 70 CLR 256; [1945] ALR 392
Polynesian Airlines (Investments) Ltd v Kingdom of Tonga (CA) 168
Smith v Littlewoods Organisation Ltd [1987] AC 241; [1987] 1 All ER 710
Polynesian Airlines (Investments) Ltd v Kingdom of Tonga (CA) 168
Soakai v Taulua (Privy Council, No 6/1983, 6 May 1983)
Lavaka v Ministry of Police (SC) 17
Société Anonyme Pêcheries Ostendaises v Merchants' Marine Insurance Co [1928] 1 KB 750; [1928] All ER Rep 174
Polynesian Airlines v Kingdom of Tonga (SC) 145

Solicitor-General v Radio Avon Ltd [1978] 1 NZLR 225 (CA)
Attorney General v Namoa (SC) **59**
Stansbie v Troman [1948] 2 KB 48; [1948] 1 All ER 599 (CA)
Polynesian Airlines (Investments) Ltd v Kingdom of Tonga (CA) **168**
State Rail Authority of New South Wales v Earthline Constructions Pty Ltd (1999) 160 ALR 588; 73 ALJR 306
Polynesian Airlines (Investments) Ltd v Kingdom of Tonga (CA) **168**
Tafolo v Vete [1998] Tonga LR 164 (CA)
Taumoepeau v Taumoepeau (LC) **236**
Talakai v 'Aipolo and Toe'api (Supreme Court, C 178/97, 22 August 1997, Lewis J)
Saafi v Veikoso (SC) **83**
Taufa v Kupu [1996] Tonga LR 3
'Ameleki v Nai (LC) **247**
Taufa v Ma'u [1994] Tonga LR 97
Vaotangi v Vaotangi (SC) **434**
Taufa v Veamatahau [1999] Tonga LR 200
Taumoepeau v Taumoepeau (LC) **236**
Teisina v R [1999] Tonga LR 145 (CA)
Lavaka v Ministry of Police (SC) **17**
R v Matangi (SC) **372**
Theophanous v Herald & Weekly Times Ltd (1994) 182 CLR 104; 124 ALR 1
Namoa v Attorney-General (CA) **70**
Tonga Development Bank v Niu (Supreme Court, C231/92, 6 November 1992, Ward CJ)
Polynesian Airlines v Kingdom of Tonga (SC) **145**
Tu'itupou v Tonga Water Board [1990] Tonga LR 99
'Akau'ola v Tonga Telecommunications Commission (SC) **263**
Tupou'ahome'e v Talau (Supreme Court, C 762/97, 4 April 1998, Lewis J)
Toafa v Talisi (SC) **53**
'Uhila v Tatola [1992] Tonga LR 9
Tonga v Ministry of Police (SC) **111**
United Bank Ltd v Akhtar [1989] IRLR 507, EAT
Helu v Koloa (CA) **299**
Vai v 'Uliafu & Anor [1989] Tonga LR 56
Taumoepeau v Taumoepeau (LC) **236**
Viliama Hema v Fatani Tavake Hema and Minister of Lands (Supreme Court, L 48/57, 13 Feb 1959, Hunter J)
Fund Management Ltd v Fifita (No 2) (LC) **342**
Walsh v Tattersall (1996) 188 CLR 77; 139 ALR 27
Misinale v R (CA) **322**
Watt (or Thomas) v Thomas [1947] AC 484; [1947] 1 All ER 582
Lasalosi v Hausia (SC) **415**
Polynesian Airlines (Investments) Ltd v Kingdom of Tonga (CA) **168**
Tukuafu v Police (SC) **404**

Western Excavating (ECC) Ltd v Sharp [1978] QB 761; [1978] ICR 221 (CA)
Helu v Koloa (CA) **299**
Whistler v Hancock (1878) 3 QBD 83
Fonua v Yeoh (SC) **437**
White v Dickerson, Inc, 248 NC 723, 105 SE2d 51 [1958]
Polynesian Airlines (Investments) Ltd v Kingdom of Tonga (CA) **168**
White v Reflecting Roadstuds Ltd [1991] ICR 733; [1991] IRLR 331, EAT
Helu v Koloa (CA) **299**
Williams v Boulerice, 268 NC 62, 149 SE 2d 590 [1966]
Polynesian Airlines (Investments) Ltd v Kingdom of Tonga (CA) **168**
Williams v Williams (1882) 20 Ch D 659; [1881-5] All ER Rep 840
Ika v Tuli (SC) **375**
Wraith v Sheffield Forgemasters Ltd [1998] 1 All ER 82
Polynesian Airlines v Kingdom of Tonga (SC) **145**
Young v Holloway [1895] P 87
Edwards v Pohiva (SC) **3**

INDEX OF STATUTES CONSIDERED

Bailiffs Act 2000
Pozzati v Fumera (SC) **408**
Valikoula v Toa (SC) **397**
Bills of Exchange Act 1882 (UK)
Bank of Tonga v Shell Company (Pacific Islands) Ltd (CA) **329**
Bills of Exchange Act (Cap 108)
Bank of Tonga v Shell Company (Pacific Islands) Ltd (CA) **329**
Charging Orders Act 1979 (UK)
Pozzati v Fumera (SC) **408**
Civil Law Act (Cap 25)
Polynesian Airlines v Kingdom of Tonga (SC) **145**
Companies Act 1995
Laidlaw Holdings Ltd v Maxam Gold Bank Ltd (SC) **125**
Maxam Gold Bank Ltd v Laidlaw Holdings Ltd (No 2) (CA) **131**
Constitution of Tonga (Cap 2)
His Royal Highness Prince Lavaka v Tafolo (LC) **363**
Namoa v Attorney-General (CA) **70**
R v Fakauho (SC) **50**
Taufa v Police Department (SC) **121**
Taumoepeau v Taumoepeau (LC) **236**
Court of Appeal Act (Cap 9)
'Ameleki v Nai (2) (LC) **258**
Misinale v R (CA) **322**
R v Puloka (CA) **335**
Court of Appeal (Amendment) Act 1997
Misinale v R (CA) **322**
Criminal Offences Act (Cap 18)
Fifita v R (CA) **289**
Finau (Deceased), Re Sela Moimoi (SC) **13**
Lavaka v Ministry of Police (SC) **17**
Misinale v R (CA) **322**
R v Fakauho (SC) **50**
R v Manu (SC) **386**
R v Pongi (SC) **366**
R v Tau'aika (SC) **423**
R v Toma (SC) **400**

Criminal Offences Act (Cap 18) *(cont)*
Tonga v Ministry of Police (SC) **111**
Criminal Offences (Amendment) Act 1997
Misinale v R (CA) **322**
Criminal Offences (Amendment) Act 1999
Fifita v R (CA) **289**
Customs and Excise Act (Cap 67)
R v Manu (SC) **386**
Defamation Act (Cap 33)
Lasalosi v Hausia (SC) **415**
Pulu v R (CA) **293**
Tu'i'onetoa v Pohiva (SC) **337**
Evidence Act (Cap 15)
'Ameleki v Nai (LC) **247**
Income Tax Act 1976
Commissioner of Inland Revenue v National Pacific Insurance (SC) **392**
Interpretation Act (Cap 1)
Fund Management Ltd v Fifita (No 2) (LC) **342**
Taufa v Police Department (SC) **121**
Judgments Act 1838 (UK)
Pozzati v Fumera (SC) **408**
Land Act (Cap 132)
'Ameleki v Nai (LC) **247**
Attorney General v Namoa (SC) **59**
Fund Management Ltd v Fifita (No 2) (LC) **342**
His Royal Highness Prince Lavaka v Tafolo (LC) **363**
Namoa v Attorney-General (CA) **70**
Taumoepeau v Taumoepeau (LC) **236**
Law Practitioners Act No 21/1989
Polynesian Airlines v Kingdom of Tonga (SC) **145**
Magistrates' Courts Act (Cap 11)
Lasalosi v Hausia (SC) **415**
Lavaka v Ministry of Police (SC) **17**
Pozzati v Fumera (SC) **408**
Taufa v Police Department (SC) **121**
Tukuafu v Police (SC) **404**
Nationality Act (Cap 59)
Taumoepeau v Taumoepeau (LC) **236**
Naturalization Act 1915
Jones, Re Application by (SC) **276**
Police Act (Cap 35)
Lavaka v Ministry of Police (SC) **17**
R v Angitoa (SC) **352**
R v Matangi (SC) **372**
Taufa v Police Department (SC) **121**

Police Act (Cap 35) *(cont)*
Tonga v Ministry of Police (SC) **111**
Pounds and Animals Act (Cap 147)
Toafa v Talisi (SC) **53**
Prisons Act (Cap 36)
Fifita v R (CA) **289**
Tapueluelu v Police (SC) **383**
Probate Act (Cap 16)
Re Sela Moimoi Finau (Deceased) (SC) **13**
Supreme Court Act (Cap 10)
Tapueluelu v Police (SC) **383**
Tonga Telecommunications Commission Act (Cap 96)
'Akau'ola v Tonga Telecommunications Commission (SC) **263**
Tongan Nationality Act 1935
Jones, Re Application by (SC) **276**
Traffic Act (Cap 156)
Vaiangina v Police (SC) **360**

RULES CONSIDERED

Land Court Rules 1991
'Ameleki v Nai (2) (LC) **258**
Rules of the Supreme Court (UK)
Valikoula v Toa (SC) **397**
Supreme Court Rules 1991
'Ameleki v Nai (2) (LC) **258**
Edwards v Pohiva (SC) **3**
Ika v Tuli (SC) **375**
Polynesian Airlines v Kingdom of Tonga (SC) **145**
Pozzati v Fumera (SC) **408**
Wilson v Attorney General of Tonga (SC) **1**

Wilson v Attorney General of Tonga

Supreme Court, Nuku'alofa
Ward CJ
C 1021/99

7 January 2000; 11 January 2000

Practice and procedure — costs — awarded to and from litigants
Costs — costs are awarded to and from litigants — not for barrister to claim

By a writ issued on 29 September 1999, the plaintiff who had acted as barrister for a successful plaintiff in an action against the defendant on behalf of the Crown heard in the Supreme Court in 1996, sought to recover in his own right the amount awarded in the original case for costs. The defendant applied to have the action struck out under Order 8, Rule 6(1)(i) on the ground that it disclosed no cause of action against the defendant. By Rule 2, no evidence may be heard on such an application and it must be decided on the pleadings alone.

Held:

1. Costs were awarded to and against litigants. If the costs awarded had not been paid it was up to the successful party to bring an action to recover them, not the lawyer representing him.
2. The action was struck out with costs to the defendant.

Rules considered:
Supreme Court Rules 1991

Counsel for plaintiff : Ms Manavahetau
Counsel for defendant : Mr Kefu

Judgment

By a writ issued on 29 September 1999, the plaintiff seeks payment of costs awarded against the defendant on behalf of the Crown in a case heard in the Supreme Court in 1996. The defendant now applies to have the action struck out under Order 8 rule 6(1)(i) on the ground that it discloses no cause of action against the defendant. By rule 2, no evidence may be heard on such an application and it must be decided on the pleadings alone.

The statement of claim is short. The plaintiff is a barrister practicing principally in New Zealand. In October 1996 he was instructed by his present solicitor to appear

in an application for a writ of habeas corpus in this court. The case was heard by the, then, Chief Justice and the application was successful.

I set out paragraphs 6, 7 and 8 of the statement of claim in full.

> "6 ON the 21st day of January 1997 following hearing of a written application for costs by the Plaintiff (as Applicant) and the Crown (as Respondent) the then Chief Justice made an award of costs in the following terms:
>
> 'IT IS ORDERED that there be an award of costs in favour of the Applicants against the Respondents in the sum of $6,500.00 (such figure being a global sum and being in effect an award towards the fees of both counsel for the Applicants and their disbursements).'
>
> 7 THAT the arrangement between counsel was in line with the recognised practice that Plaintiff as senior counsel would receive two thirds of the costs involved while the Defendant as junior counsel would receive one third of such costs award namely the sum of $4,333.00.
>
> 8 THAT despite written and oral demand the Defendant has refused to pay such costs award by the Supreme Court to the Plaintiff."

Counsel for the defendant relies on those paragraphs to support his application to strike out. He is on very firm ground.

Costs are awarded to and against litigants. Almost inevitably, they will include counsel's and solicitor's fees so the successful litigant can pay then out of the award. They may, in practice, be paid to the lawyer through whom the litigation was conducted but it is a remarkable claim that the award of costs was made by the court to him in his personal capacity. No authority was advanced to suggest this could have been the basis of such an award neither do I know of any.

The statement of claim shows that the applicant for the writ of habeas corpus was Eakalafi Moala. He was the party to whom the costs were awarded. If they have not been paid, he is the person entitled to bring an action to recover them, not the lawyer representing him.

The suggestion in paragraph 7 that there is some recognised practice that the defendant, who was the losing party against whom the costs order was made, should receive one third of the winner's costs is as startling as it is incomprehensible.

The action is struck out with costs to the defendant.

Edwards v Pohiva

Supreme Court, Nuku'alofa
Ward CJ
C 1165/99

24 January 2000; 28 January 2000

Practice and procedure — application to strike out defence — court ordered defence be amended — application refused
Defamation action — application to strike out defence — court ordered defence be amended — application refused

The Plaintiff brought an action for defamation against both defendants in relation to an article in their newspaper. The statement of defence filed raised a number of defences which included fair and accurate reports of proceedings in the Legislative Assembly, fair comment, and truth. The plaintiff moved to strike out the defence on the grounds that it was frivolous, vexatious and an abuse of the process of the court.

Held:

1. The power of the Court to strike out was limited and should only be exercised in the plainest cases.
2. The pleadings as they stood did not give the plaintiff sufficient indication of the defences relied upon. The Court ordered that an amended defence be filed within 28 days particularising the defence or defences to defamation upon which the defendants relied in relation to each passage cited in the statement of claim. The plaintiff had a further 28 days to file a reply and the Court would then consider the matter again in chambers.
3. Costs were ordered to be paid by the defence.

Cases considered:

Ashmore v British Coal Corpn [1990] 2 QB 338; [1990] 2 All ER 981
Attorney-General (Duchy of Lancaster) v London and North Western Railway [1892] 3 Ch 274
Young v Holloway [1895] P 87

Rules considered:

Supreme Court Rules 1991

Counsel for plaintiff : Mr Paasi
Counsel for defendants : Mr Tu'utafaiva

Judgment

The Plaintiff has brought an action for defamation against both defendants in relation to an article in their newspaper. The statement of defence filed raises a number of defences including fair and accurate reports of proceedings in the Legislative Assembly, fair comment and truth.

The plaintiff moved to strike out the defence on the grounds that it is frivolous, vexatious and an abuse of the process of the court. I refused the application and said I would give brief written reasons later. I now do so.

The main thrust of the challenged article was that the conduct of the plaintiff had lead to the defeat of the Tonga National rugby team in the World Cup competition held in the United Kingdom in 1999. The article states that it was based on a story published over the Internet.

In the defence it is claimed that the article had been referred to in the Legislative Assembly and this was therefore simply a report of those proceedings. It also asserts the article is true.

The plaintiff asserts that the article in the newspaper makes no reference to the parliamentary proceedings and simply quotes the article in extenso. The suggestion it is protected by the reference in the Legislative Assembly is, he suggests, simply a bogus attempt to excuse a plainly defamatory publication. The claim it is true is made as a bald assertion with no basis suggested in the defence. In addition, it is suggested the article is not an accurate report of the Internet article in any event.

I have some sympathy with the plaintiff. The defence is poorly drafted and fails to set out clearly which defence is being relied upon and in relation to which part of the published article. If the purpose of written pleadings is to alert the other side to the case he will have to face, it has failed miserably. However, the power of the court in such circumstances to strike out is limited and should only be exercised in the plainest cases.

It has long been established that the court will only strike out where the case is obviously frivolous or vexatious. As long ago as 1892, Lindley LJ suggested that the object of a similarly worded English rule "is to stop cases which ought not to have been launched - cases which are obviously frivolous or vexatious, or obviously unsustainable"; *Attorney-General (Duchy of Lancaster) v London and North Western Railway* [1892] 3 Ch 274.

Our Order 8, Rule 6 allows the court to strike out any pleading that is frivolous or vexatious or if it is otherwise an abuse of the process of the court. In relation to the first ground, English authorities suggest that the pleading must be so clearly frivolous that it also would amount to an abuse of the process to allow it to proceed. I consider the inclusion of the word 'otherwise' in rule 6(1)(iv) supports the interpretation of rule 6(1)(ii) in the same way. Short of that, if there may be a proper case to be tried the court should allow it to proceed.

In *Young v Holloway* [1895] P 87 when considering an application to strike out a claim challenging the validity of a will, Jeune P said:

> "If, however, there be any truth in the statement that such a will was prepared in the manner alleged, it may possibly be that further details of its contents may come to light. It is so important not to shut out a litigant from what may, even possibly, be the assertion of a just right, that I cannot take on myself, at this stage,

> to say that this part of the case is so clearly frivolous that I should stop the proceedings."

That principle has been re-asserted many times (see, for example, *Ashmore v British Coal Corpn* [1990] 2 QB 338; [1990] 2 All ER 981) and is still the test the court must apply when deciding whether to exercise its discretion under this rule.

I need go into no more detail. The assertion by the plaintiff that the impugned article never mentioned the proceedings in Parliament and the suggestion that it included matter that did not come from the article put out over the internet are all matters of evidence and will have to await the trial of the action.

I have already expressed some sympathy with the plaintiff. I do not consider the pleadings as they stand give him sufficient indication of the defences that are to be relied upon.

I order that an amended defence be filed within 28 days particularising the defence or defences to defamation upon which the defendants rely in relation to each passage cited in the statement of claim. The plaintiff shall have a further 28 days to file a reply and I shall then consider the matter again in chambers.

There is also an application for discovery and I order it take place within 14 days of this order.

This hearing has been brought about by a casually drafted statement of defence and I see no reason why the costs of today should not be paid by the defence in any event.

Moore Electronic Company Ltd v National Pacific Insurance Company Ltd

Supreme Court, Nuku'alofa
Ward CJ
C 596/98

26 January 2000; 8 February 2000

Practice and procedure — application for 'unless' order to be brought into effect — set aside
Practice and procedure — inadequate answers to interrogatories — if plaintiff did not answer adequately action would be struck out

There was a fire at the plaintiff's business and the plaintiff made a claim for payment of insurance money. From the early history of the action, the defendants had complained about the failure of the plaintiff to provide details of the stock it claimed was destroyed. The plaintiff's answer was that the company's business papers were also destroyed in the fire. Various applications had been made to have the claim struck out. On 23 November 1999 following yet another application by the defence to have the claim struck out, the Court ordered that the defendant should file a list of documents it required to be discovered within two days and gave the plaintiff four days to lodge any objection. None was filed and the Court ordered that the action would be struck out unless those documents or legible copies were produced within 28 days. That time expired on 28 December 1999. Prior to the hearing on 23 November, the Court had ordered that interrogatories be filed. A series of questions were filed by the defendant and answers given by the plaintiff. The defendant moved for the 'unless' order to be brought into effect and, in addition sought to have the action struck out on the ground that the answers to those interrogatories were inadequate and evasive.

Held:

1. The Court retained the power to vary the 'unless' order although it should only do so in rare cases because such orders were made to be complied with and should not lightly be ignored. If the plaintiff were being truthful then it would be an injustice to bring the order into effect. The Court ordered that the 'unless' order be set aside and that the plaintiff pay the defendant's costs in relation to that order.
2. The Court considered that the plaintiff's answers to some particular interrogatories were inadequate. The Court held that the plaintiff was to

answer the interrogatories listed within six weeks. If it failed to do so the action would be struck out.

Case considered:

Samuels v Linzi Dresses Ltd [1981] QB 115; [1980] 1 All ER (CA)

Counsel for plaintiff : Mr Tu'uatafaiva
Counsel for defendant : Mr Garrett

Judgment

This is a claim for payment of insurance money following a fire at the plaintiff's business.

From the early history of the action, the defendants have been complaining about the failure of the plaintiff to provide details of the stock it claims has been destroyed. The plaintiff's answer has been that the company's business papers were also destroyed in the fire.

Various applications have been made to have the action struck out on the basis that, in consequence of the failure to provide the information, the defendant has been unable properly to prepare its case. None has been successful. My previous rulings have been based to a substantial extent on the fact that, as the burden of proving the case rests with the plaintiff, any failure to produce documentary support for the claim will have to be considered at the trial and is likely to work against the plaintiff.

The plaintiff has not helped itself by repeated failures to comply, or to comply timeously, with the various interlocutory orders of the court.

On 23 November 1999 following yet another application by the defence to have the claim struck out, I ordered that the defendant should file a list of documents it required to be discovered within two days and gave the plaintiff four days to lodge any objection. None was filed and I ordered that the action would be struck out unless those documents or legible copies were produced within 28 days thereafter. That time expired on 28 December 1999.

Prior to the hearing on 23 November, I had ordered that interrogatories be filed. A series of questions have been filed by the defendant and answers given by the plaintiff.

The defendant now moves for the 'unless' order to be brought into effect and, in addition seeks to have action struck out on the ground that the answers to those interrogatories are inadequate and evasive.

I deal with the application to bring in the 'unless' order first. The document, the failure to produce which is the basis of the application, is referred to as an Account Quick Report for June 1997 to September 1997.

Lists of documents were exchanged in late 1998 and early 1998 and it was not mentioned in the plaintiff's list. However, the defendants included it in a list of documents it required to be discovered and the Managing Director of the plaintiff, Lisiate Teulilo, swore an affidavit on 19 April 1999 in which he stated:

> "10. The reference in paragraph 9 of the list to the Account Quick Report for June 1997 to September 1997 is correct and a copy has been located in our office and available for inspection by the defendant."

The defendants promptly sought a copy of that report but it was not forthcoming and so this application to apply the 'unless' order was filed. Following that, Lisiate Teulilo swore a further affidavit. In it he stated;

> "2. I refer to paragraph 10 of my affidavit sworn on 19 April 1999 and say that at present I do not remember the reason for deposing as such. I have looked into my files in the office and no copy of the Quickreport could be located. Furthermore, I am not concealing any report from the defendant.
> …
> 4. At present I have difficulties with my memory and also my concentration, and I have sought medical assistance accordingly."

Counsel for the defendant suggests to the court that this is simply not good enough. The deponent cannot simply, at the eleventh hour, deny his earlier statement. He also points to the answers to the interrogatories as further evidence that Mr Teulilo's attitude is deliberately obstructive rather than, as he would have the court believe, a case of a person doing his best to co-operate but hindered by a failing memory.

The position previously held in England that failure to comply with an 'unless' order effectively prevented the court from taking any other course no longer applies. Since the decision in *Samuels v Linzi Dresses Ltd* [1981] QB 115; [1980] 1 All ER (CA), it has been accepted that the court always retains the power to vary the order although it should only do so in rare cases because such orders are made to be complied with and should not lightly be ignored.

I have no means at this stage of deciding the truth of the conflicting statements by the deponent. If his statement is true that he is not concealing anything from the other side and that the earlier statement was made in error, it would be an impossibility to produce this document. If that is the case, it would plainly be an injustice to bring the 'unless' order into effect and strike out the action on that ground alone. Had that been stated at the previous hearings, the court could not have felt the plaintiff's conduct was so contumelious as to make an 'unless' order appropriate.

In the particular circumstances of this case, I set aside the 'unless' order. The imposition of such an order was the result of the plaintiff's failure accurately to state its position and I order that the plaintiff shall pay the defendant's costs incurred in relation to that order in any event.

The courts in England and elsewhere have become much firmer in dealing with cases where they see the parties wasting time. However, the passing of time militates against the plaintiff in this case far more than the defendant. Already the effect of the defendant's repeated applications in this case has been to vacate one date fixed for trial. Counsel for the defence has applied that, if he should fail in this application, the court should once again vacate the fixture on 1 May.

I pass to the answers to the interrogatories. I agree that many are casually answered and would suggest no real effort by the plaintiff to supply the information requested. That is not satisfactory.

Counsel for the defendant also complains that some are answered literally with the result that, where, for example, there is a mistake in the name of the person referred to in the question, the answer is simply that he did not work there. The responsibility for the interrogatory lies with the asking party. His opponent is entitled

to take a literal approach to the question and answer on that basis and I find no ground for that complaint.

However, the sufficiency of the other answers is a matter the court can consider. A party answering interrogatories must answer them to the best of his knowledge, information and belief and if that requires inquiry from his employees or agents or any other relevant source, he must make the necessary inquiries before answering.

The plaintiff has not challenged the propriety of any of the interrogatories but has simply repeatedly stated that the information requested was on the main server hard disc which has been damaged to the extent that no further information can be retrieved from it. That may be an adequate answer to many of the interrogatories but, where the information could be obtained from alternative sources, it should have been supplied.

I consider the defendant's complaint that the answers to the following interrogatories are inadequate is justified;

> 2.1, 2.2, 2.3 (c) to (g), 4.1, 4.2, 4.3, 6.1, 6.2, 6.5, 6.7, 6.8, 6.9, 6.10, 6.11, 6.12, 7.1, 8.1 (a), (b), 8.2 (b), 8.5(a), (b), (c).

Counsel for the plaintiff has contended that his client has authorised the defendant to contact the various agencies who may have such information directly. Generous though that gesture may be, it is not a sufficient response to the interrogatories.

I order that the plaintiff shall answer the interrogatories listed above within six weeks. Failure to do so will result in the action being struck out. The time will not be extended without good cause. If it is impossible to obtain the information requested for any particular interrogatory, the answer must set out the steps taken in detail and the reason why they were unsuccessful.

Counsel for the defendant has asked that the trial date should be vacated because he has not been able to submit the evidence to an expert in New Zealand. I do not accede to that request. The trial will remain fixed for 1-4 May 2000.

Attorney General v Ulakai

Supreme Court, Nuku'alofa
Ward CJ
Cr 1178/99

9 February 2000; 10 February 2000

Contempt of court — fine should reflect culpability and seriousness
Practice and procedure — costs not regarded as penalty

On 15 December 1999 the defendants were found guilty of contempt for broadcasting the contents of a statement of claim from an action that had been filed in the Supreme Court by the fourth defendant. There was no penalty imposed on the first, second, third and fifth defendants and the sixth defendant, the radio station, was fined $1,000.00. The fourth defendant, the lawyer, was not able to attend on the day of judgment and appeared separately to address the court on penalty. He did not dispute that he gave the documents to the radio station and accepted that he failed to consider the consequences properly or to advise adequately the person to whom he passed the documents.

Held:

1. A costs order should not be regarded as a penalty nor should it be used in place of a penalty. If the contempt is sufficient to merit a pecuniary penalty, the court should determine the appropriate level to reflect the contemnor's blameworthiness and impose a fine accordingly.
2. The Court should decide the seriousness of the contempt on the likelihood and degree of interference with the due administration of justice and the culpability of the offender. The Court considered the culpability of the defendant high because of the clear and deliberate intention to influence the proceedings he had instituted. The Court accepted that his unqualified expression of remorse was genuine.
3. The Court imposed a fine of $3000 and ordered that he pay two-thirds of the costs of the proceedings.

Case considered:

Secretary of State for the Home Office v Harman [1983] 1 AC 280; [1982] 1 All ER 532

Counsel for prosecution : Mr Kefu
Fourth defendant in person

Penalty

On 15 December 1999, I found the defendants guilty of contempt for broadcasting the contents of a statement of claim from an action that had been filed in the Supreme Court by the fourth defendant. I imposed no penalty on the first, second, third and fifth defendants and fined the sixth defendant, the radio station, $1,000.00.

The fourth defendant was not able to attend on the day I gave judgment and has now appeared to address the court on penalty. He has filed written submissions and addressed the court further on penalty and in mitigation and, in deference to his research, I give brief written reasons for my decision.

The defendant is a practising lawyer of some experience both in New Zealand, where he has his principal practice, and in Tonga. He does not dispute that he gave the documents to the radio station and accepts he failed to consider the consequences properly or to advise adequately the person to whom he passed the documents.

I found on the evidence I had before me that his actions went further and showed a reckless disregard of the possible use of the documents he disclosed. I was also satisfied that he had passed those documents to the radio station with the deliberate intention of influencing the trial of the action by putting pressure on the defendants to make them settle or to deter them from defending rather than leave it to trial.

Mr Tupou has cited cases from other common law jurisdictions, particularly England and New Zealand, where the court has ordered the defendant to pay the costs of the proceedings and imposed no separate penalty. There are many cases where this course has been followed including, notably in England, *Secretary of State for the Home Office v Harman* [1983] 1 AC 280; [1982] 1 All ER 532 where a solicitor was the defendant and the contempt related to her professional conduct. That was an unusual case where the documents she disclosed had already been read in open court and the contempt was her failure to observe her own undertaking. There are many, and more recent, cases of 'media contempt' in England where newspapers have been fined very substantial sums and been ordered to pay the costs as well.

With respect to the learned judges in other jurisdictions, I do not consider a costs order should be regarded as a penalty nor should it be used in place of a penalty. If the contempt is sufficient to merit a pecuniary penalty, the court should determine the appropriate level to reflect the contemnor's blameworthiness and impose a fine accordingly.

Whether or not a defendant should pay the costs of the proceedings may be dependent on other factors. If, having considered them, the court decides to order costs, it should not influence the level of fine except, possibly, in relation to the defendant's means and his ability to pay.

This was not, as I have said in my previous judgment, a very serious contempt as far as the broadcast was concerned. The decision to pass no penalty on the officers of the radio station took account of that. I also considered that the fact the document was supplied by a lawyer in the case may well have misled them and that they had no actual intention to prejudice the trial.

The position of Mr Tupou is different. He was the lawyer in the case and he passed those documents with the clear intention of influencing the court proceedings. The manner in which he did it made it impossible for the defendants to have any opportunity to know of the case brought against them before the broadcast.

This is an application for committal but I do not consider that to be the appropriate order here. Such a penalty should be used only in the most serious cases and it has rarely been imposed in 'media contempt' cases. The reason is that the intention of the publication in such cases is rarely to interfere with possible proceedings. However, where such an intention has been proved, the courts in other jurisdictions have not shrunk from making such an order.

The court decides the seriousness of the contempt on the likelihood and degree of interference with the due administration of justice and the culpability of the offender. Those, together with the subsequent actions of the offender are, therefore, the principal considerations in deciding the proper sentence.

I have already stated that I consider the culpability of this defendant high because of the clear and deliberate intention to influence the proceedings he had instituted. In such a case, I cannot accept this would be sufficiently measured by an order solely to pay the costs.

He has told the court that he done nothing like this before and has received a salutary lesson. I accept that is the case and I also recognise that making such a statement publicly in the court in which he practices is not easy. I accept his unqualified expression of remorse is genuine.

In all the circumstances, I consider the proper penalty is to order a fine of $3,000.00.

These proceedings were brought about by his actions. The broadcasters should have exercised more care in the inclusion of such a report in their news item but the whole matter grew from Mr Tupou's action in supplying the documents in the manner in which he did. I see no reason why he should not be liable for the major part of the costs. He will pay two thirds of the costs of these proceedings to be taxed if not agreed.

Re Sela Moimoi Finau (Deceased)

Supreme Court, Nuku'alofa
Finnigan J
C 478/99

3 February 2000; 11 February 2000

Application for committal — no application to charge that crimes were committed — struck out

The late Sela Moimoi had made a will in 1990. In 1999 she was ill and sensed death approaching. She made known her wishes about succession to any rights she might have over some leased property. She sought legal advice about that and Mr Kengike drew up a will. She executed the will on 12 March 1999 in the presence of two witnesses, who signed their names in her presence and in each other's. These witnesses were Tevita Moimoi and Meleana Moimoi. The will appointed Tevita Moimoi as administrator of the will, and its sole beneficiary. He was Sela Moimoi's second son and Meleana was his wife. Sela Moimoi died on 10 April 1999. Subsequently, a new will appeared. This will purported to have been made on 7 April 1999. It appointed no administrator, and named a sole beneficiary, 'Ofa Kelepi Toutai who was Sela Moimoi's eldest daughter. Mr Kengike then filed his application for the committal of 'Ofa Kelepi Toutai on the grounds that she forged a document and then presented it to the Court. Mr Edwards acted on 'Ofa Kelepi Toutai's instructions and filed a motion to strike out the application.

Held:

1. The power to commit for an apparent contempt of Court in civil proceedings has no application to a charge that certain crimes have been committed, even if they are said to be crimes that were intended to mislead the Court. The application itself sought a nullity. It must be struck out.
2. Determination of the validity of the will was left for further consideration.

Statutes considered:

Criminal Offences Act (Cap 18)
Probate Act (Cap 16)

Counsel for applicant : Mr Kengike
Counsel for respondent : Mr Edwards

Judgment

There is an application for committal of certain persons and a motion to strike out the application. After hearing counsel and considering their submissions I intend to dispose of both matters by issuing a final judgment.

The Applications

Mr Kengike filed the application for committal. The grounds for the application are an allegation that a certain person, 'Ofa Kelepi Toutai, forged the testator's signature in a purported will of a person now deceased, Sela Moimoi, then presented that will at the Supreme Court as genuine, thus fraudulently dealing with a forged document. The object of the application is the committal of 'Ofa Kelepi Toutai. Possibly the purported witnesses are also included. The motion to strike out the application is filed by Mr Edwards, who is acting on 'Ofa Kelepi Toutai's instructions. The facts emerge from the affidavits. These are untested, and were filed by Mr Kengike. Briefly, the facts are these.

The Facts

The late Sela Moimoi had made a will in 1990. In 1999 she was ill and sensed death approaching. She made known her wishes about succession to any rights she might have over some leased property. She sought legal advice about that and Mr Kengike drew up a will. She executed the will on 12 March 1999 in the presence of two witnesses, who signed their names in her presence and in each other's. These witnesses were Tevita Moimoi and Meleana Moimoi. The will appointed Tevita Moimoi as administrator of the will, and its sole beneficiary. He is Sela Moimoi's second son. Meleana is his wife.

Sela Moimoi died on 10 April 1999. Subsequently, a new will appeared. This will purported to have been made on 7 April 1999. It appointed no administrator, and named a sole beneficiary, 'Ofa Kelepi Toutai who is Sela Moimoi's eldest daughter.

Mr Kengike thereupon filed his application. It is full and detailed, and is supported by many affidavits and, in his extensive written submissions, by many cited authorities.

Comments

From its general tenor and from his submissions at the hearing, it is clear that the main object of the application is to have the Court declare that the second will is false. What the application alleges is that the 12 March will naming Tevita Moimoi is the true last will of the deceased, and that the 7 April will is a forgery and should be declared a nullity. I shall return to that.

Mr Edwards has moved to strike out the application. He submits that the application for committal is misconceived. In his submission, it confuses and attempts to combine the power of the Court to imprison for contempt in the face of the Court in civil proceedings with certain crimes created in the Criminal Offences Act (Cap 18).

I have no alternative open to me, but must accept that submission. The power to commit for an apparent contempt of Court in civil proceedings has no application to a charge that certain crimes have been committed, even if they are said to be crimes

that were intended to mislead the Court. The application itself seeks a nullity. It must be struck out, and I strike it out.

I turn now to the general situation. The Court is not yet required to make findings on the facts in the untested affidavits. I note that both claimant beneficiaries have given public notice by advertisement that each intends to apply for probate of the last will of the deceased. Each should now proceed with a probate application if they wish, and if both apply the Court will resolve the issue of whether the later will is genuine. To enable this to occur, 'Ofa Kelepi Toutai must file affidavits with her application that set out the facts of the later will, and then there will be a hearing. Notices for cross-examination will be exchanged, and the Court will hear cross-examination of any witnesses.

There are clear and direct allegations against 'Ofa Kelepi Toutai in some of the affidavits, and circumstantial allegations in most of the others. The allegations amount to serious charges, which the Court cannot ignore. However, they will be left for now, until that person has the opportunity to reply to them if she wishes.

I turn now to the earlier of the two wills. Mr Kengike addressed the question of its validity. There is clearly a problem, which Mr Kengike addressed. It arises from the provisions of s 23(1) and (2) of the Probate Act (Cap 16). That section is as follows:

> "(1) Subject to subsection (2), if a person who attests the execution of a will is a person to whom any interest is given by the will (whether by way of gift or by way of exercise of a power of appointment, but other than and except charges and directions for the payment of debts), the gift or appointment is void, so far as it concerns such an attesting witness or any person claiming under the witness; but the attesting witness is competent as a witness to prove the execution, or to prove the validity or invalidity of the will, notwithstanding the gift or appointment mentioned in the will.
>
> (2) Attestation of a will by a person to whom or to whose spouse there is given or made any such disposition as is described in subsection (1) shall be disregarded if the will is duly executed without his attestation and without that of any other such person.
>
> (3) This section applies to the will of any person dying after the passing of the Probate (Amendment) Act 1987, whether executed before or after the passing of that Act."

Pursuant to those provisions, the appointment of, and the gift to, Tevita Moimoi are void. In other words, while the will appears validly executed and attested, and while Tevita Moimoi is available as a witness to prove that it is valid, it cannot operate to confer anything on Tevita. Section 23(2) provides that his attestation, and that of his spouse Meleana, are to be disregarded if the will is duly executed without their attestations. However, without their attestations the will, on its face, is not duly executed. Mr Kengike made submissions of law about proof of the will by other persons who were present at the same time as the testator and at the same time as

each other. I have to put those submissions aside until any such persons have filed affidavits in the application for probate. I shall consider them then.

Conclusion

There the matter rests. The present application is at an end. However, I reserve leave to Mr Kengike to rely upon the affidavits and submissions in this file should any of them be relevant to the application for probate.

Lavaka v Ministry of Police

Supreme Court, Nuku'alofa
Finnigan J
C 1236/99

7, 8 February 2000; 25 February 2000

Tort — unlawful imprisonment — damages
Tort — assault — damages
Damages — wrongful arrest — exemplary damages allowed

The plaintiff, a 14 year old alleged theft suspect, was taken into custody by the police and allegedly beaten. He was not formally arrested, nor charged, and he was not taken before a Magistrate for an order relating to his custody. The police made no contact with his guardian. He was not offered the opportunity of consulting a lawyer, nor the opportunity of having his guardian present. As a minor, suing through his next friend, he sought damages of $5,500 for assault, $3,000 for unlawful imprisonment, $2,000 for loss of reputation, $2,000 for emotional distress and discomfort and $5,000 as exemplary damages.

Held:

1. The actions of the police amounted to an arrest and the police officer had not discharged the onus on him of justifying his action. That being so, the prima facie interference with the plaintiff's right to liberty remained what it appeared to be - an interference with that right that had not been justified and was therefore contrary to law.
2. In respect of the damages claim for unlawful imprisonment the Court concluded that the $3,000 claimed as compensation for the loss of liberty and for the mental anguish, both of which were proved, was justified and it was allowed.
3. Injury to reputation resulting from unlawful arrest and detention can be a factor for an award of compensation in a case of unlawful imprisonment without the need to plead it separately; however, such a claim had not been made out in this case.
4. The assaults constituted by themselves a case of wrongful interference with liberty where proof of the events was sufficient, and specific injury need not be proved in order to sustain a claim for damages. For the assaults themselves and the specific injuries proved, although the injuries were not in themselves grievous, the separate claim of $5,500 was justified, and was awarded.

5. A wrongful arrest by a police officer came within one of the three categories of cases where exemplary damages may be awarded, such arrest being an oppressive, arbitrary or unconstitutional action by a servant of the government. The Court had no doubt that this was one of those rare cases when an award of exemplary damages may be made. The claim for $5,000 was awarded.

Cases considered:

Castorina v Chief Constable of Surrey [1988] NLJR 180 (CA)
Collins v Wilcock [1984] 1 WLR 1172; [1984] 3 All ER 374
Fifita and Edwards v Fakafanua (Court of Appeal, CA6/98, 7 August 1998)
Flint v Lovell [1935] 1 KB 354; [1934] All ER Rep 200
Hussien v Chong Fook Kam [1970] AC 942 (PC)
Kaufusi v Lasa (SC & CA) [1990] Tonga LR 39 & 139
Liversidge v Anderson [1942] AC 206; [1941] 3 All ER 338
Murray v Ministry of Defence [1988] 2 All ER 521 (HL)
'Otuafi v Sipa (Supreme Court, C42/89, Webster J, 3 August 1990)
Rookes v Barnard [1964] AC 1129; [1964] 1 All ER 367
Soakai v Taulua & Ors (Privy Council, No 6/1983, 6 May 1983)
Teisina v R [1999] Tonga LR 145 (CA)

Statutes considered:

Criminal Offences Act (Cap 18)
Magistrates' Courts Act (Cap 11)
Police Act (Cap 35)

Counsel for plaintiff : Mr Fifita
Counsel for defendants : Mr Pouono

Judgment

The plaintiff claims that on 13 October 1998 when he was 14 he was unlawfully arrested by a police officer, unlawfully detained and unlawfully assaulted while in custody. He seeks damages of $5,500 for the assaults, $3,000 for the unlawful imprisonment, $2,000 for loss of reputation, $2,000 for emotional distress and discomfort and $5,000 as exemplary damages. The plaintiff was born on 29 September 1984. He is now 15 and sues through his next friend.

The Facts

Four witnesses gave evidence, all for the plaintiff. I have very little discretion about my findings of fact. The facts of the matter were clearly stated by the witnesses and were not challenged. The defendants called no witnesses and although counsel cross-examined the plaintiff's witnesses, he avoided questioning their narrative of what occurred.

Some time before midnight on Tuesday 13 October 1998 there was a theft from a house at Pea and the police were called. The owner of the house was Fale'ako Vao. The plaintiff and another youth Lesini Tonga were said by some to have been the thieves. They were taken to a house and they stayed there till the police arrived. Two

officers came in a white marked police car, and the plaintiff knew one of them as Vilisoni. The other he did not know, but was in uniform. The one named Vilisoni took charge. He got out of the car and called to the youths to get into the car or he would beat them. The youths did not want to get into the police car, but got into the car. The plaintiff got into the car because the police officer had said he would come and beat them if he did not. At Veitongo the police officers stopped the car and, it seems, went to Fale'ako's house. While out of the car, the officer named Vilisoni beat the youth named Lesini Tonga. After that the car proceeded with its four occupants to the central police station.

The station diary from the central police station was produced in evidence by a chief inspector of the police. From the movements recorded in the diary the chief inspector gave evidence that a call had come in from Pea, reporting that there had been a house burglary, and that the person who seemed to have entered the house was known but had run away. He said the officer who responded to the call from Pea was named Finau, and that this officer returned from Pea with two people who were to be questioned about the Pea complaint. In response to a question about how many had been arrested, the chief inspector replied that there were two but that they had not been arrested. The times in the diary have been altered, but the legible recorded time of the return to the station is 15 minutes past midnight.

The officer known to the plaintiff as Vilisoni and to the chief inspector as Finau then began to hit the plaintiff, in an office downstairs in the police station. The plaintiff said it was in the room where they charge people. Lesini Tonga was there. The beating was with a black police uniform belt and the blows were delivered to the plaintiff's chest and back. The plaintiff said in evidence that he was standing leaning against a wall, and that there were approximately 20 blows. He said he asked why he was being beaten and that Vilisoni replied, what had they done? He said he replied that they had done nothing and that this caused the policeman to beat him some more. He said that by this time he was in distress and hurting very much.

After that the policeman went upstairs with the plaintiff. He told the plaintiff to open the door of a room and go inside. He then told the plaintiff to fetch a piece of iron and give it to him and then to hold on to the table. The plaintiff described the piece of iron to the Court. He said it was about 2 feet long, though his demonstration made it about 1 meter. It was triangular, in that its end-section was triangular. He said he was struck on the back with the piece of iron 5 times.

Up to this point the plaintiff had made no statement to the police officers about the burglary allegation. He was told to go downstairs and that Lesini should come up. He said in evidence that after this he made a statement to other police officers about why he had been arrested. There is no further record in the station diary, but he was kept in the police station until about 11 or 12 the following day. There had been a separate diary kept in the criminal investigation department where these events occurred, but that diary cannot now be located. The chief inspector, who was giving evidence on subpoena to bring the police documents, said he had been advised that these diaries and other files were stored in a locked room in the police station. He surmised that the diary had been destroyed when that room was flooded during the hurricane in December 1998. I daresay it was fortunate that the station diary for the same day was preserved. The chief inspector said there were also from these events an investigation report, but that this was not available either. However, a copy of it

had been sent to the Crown Law Office in respect of a prosecution that had been commenced against Lesini Tonga.

The plaintiff was not formally arrested, he was not charged, and he was not taken before a Magistrate for an order relating to his custody. The police made no contact with his guardian. He was not offered the opportunity of consulting a lawyer, nor the opportunity of having his guardian present. No copy of any written statement he may have made to the police has been produced. The following day at about 11 am-noon, he was taken back to Pea by police officers who attended a traffic accident at Takomololo. After attending the accident they took him and left him at Pea, some distance from his home.

He said in evidence that all this time he had been feeling homesick and very sore, and in great distress. When he arrived home he was observed by his guardian, who is his uncle, to be depressed, and on being asked why the plaintiff said that the police had beaten him. Being asked where, he took off his T-shirt. He himself saw the bruises on his chest and with a mirror, those on his back. His uncle observed bruising on his back and chest, mostly on his chest. The plaintiff told him he felt distressed and his uncle bathed his bruises with warm water. This treatment continued for a week, but no medical intervention was sought. During that time the plaintiff stayed around the house, being still distressed, and was reluctant to go to school because he was taunted about being a burglar. From the time of these events he has not been regarded as a suspect in the burglary.

The facts of this case intertwine with those of another claim, which has been brought by the other youth Lesini Tonga (*Tonga v Ministry of Police* [2000] Tonga LR 111). Neither party sought consolidation, the two cases were tried separately and at different times. Each is decided separately on its own evidence and submissions.

The Damages Claims, and the Submissions

Mr Fifita put a simple case for the plaintiff. He submitted that the plaintiff was aged 14, and though not formally arrested was taken into custody for the purpose of questioning. He submitted that this was beyond any lawful police power. He referred the Court to the judgment of the Court of Appeal in *Fifita v Fakafanua* [1998] Tonga LR 127. There, at 129-134, the Court considered at length the provisions of s 22 of the Police Act (Cap 35), which sets out the procedure for police to follow after an arrest without warrant. The Court concluded, at 134, that a suspect whom the police wish to detain without warrant must be taken before a magistrate before he is questioned. The Court said:

> "Delay caused by a desire to ask questions is not authorised by [s22]; indeed, the bringing of the person arrested before a magistrate as soon as practicable is the safeguard for the citizen the legislature has chosen to provide … A few simple questions may resolve some doubt, and even lead to the immediate release of the suspect. But the safeguard requiring that the arrested person be brought before a magistrate without unnecessary delay is primary, and must be fully observed."

He pointed to the evidence and submitted that the police officers had detained him without warrant from a magistrate, and that while he was detained, one of them

assaulted him. He submitted that the police lacked justification for taking him into custody, lacked justification for assaulting him, lacked justification for detaining him, and at the end still had no reason to charge him with any crime and did not charge him.

He pointed to the evidence and submitted that the arrest, assault and detention and the resultant physical injuries were adequately proved, along with mental and emotional disturbance and distress.

He submitted that, if the Court found the arrest was lawful, then still there had been no warrant for detention by a magistrate as required by s 22 of the Police Act (Cap 35) in cases of arrest without warrant. Further to that, he submitted, there had been abuse of police powers in not contacting the plaintiff's guardian or allowing him to do so. He referred the Court to the judgment of the Court of Appeal in *Teisina v R* [1999] Tonga LR 145 (CA) at 149, on the topic of police dealings with young people. I note that this judgment was handed down after the events in question. There the Court was discussing the obligation to inform an arrested or detained person of the right to consult a lawyer, which is imposed by some codes overseas on the police. It went on to say:

> "There is no such express provision in the Constitution of Tonga, nor in any enactment. We accept that there may be circumstances when fairness may require the interviewing officer to advise or even encourage the person to be interviewed to seek the advice of a lawyer, or to have present during the interview a lawyer, family member, or friend. This could be the case, for example, if the person being interviewed were young or suffering from a disability."

No grounds in any event had been found for charging the plaintiff, and he submitted that, even assuming a lawful arrest, the plaintiff should have been released long before he was.

In respect of the claim for damage to reputation he submitted that both the plaintiff and his family had suffered from the unfounded allegation that he was a burglar. He submitted that the evidence amply justified the award that the plaintiff claimed.

In respect of the claim for exemplary damages he submitted that the unlawful arrest, detention and beating of a 14-year-old had all occurred at the hands of those whom we trust not only to uphold the law, but also to keep us safe from others who would do such things. He accepted that an award of exemplary damages is rare, but submitted that this is a proper case. He submitted that what the police had done was the contrary of their duty, and that it engendered fear, which should be allayed by an exemplary award.

Mr Pouono in reply drew attention to the origin of the night's events, and pointed out that police officer Finau entered the scene as a police officer doing his duty. He was investigating in response to a complaint from a member of the public. The information given to him was that two persons were said to have broken into a house and that the two were known. He submitted that it was part of the police officer's duty to arrest without warrant, under s 21(a) of the Police Act (Cap 35), "any person whom he suspects on reasonable grounds of having committed a crime". He submitted that in the circumstances what the police officer did at Pea was not

unlawful. On the question of reasonable suspicion, he referred me to the judgment of Lord Devlin in *Hussien v Chong Fook Kam* [1970] AC 942 (PC), at page 948 B to D. Indeed, I take note of the whole of that judgment. It is noteworthy for the distinction it draws between reasonable suspicion, which is all an arresting constable needs to justify an arrest, and prima facie proof. It is clear also in stating that first the Court must apply the statutory code governing powers of arrest, but that where the code embodies common law principles, as it does here, then the common law can be helpful in applying the code.

About the claim of assault, Mr Pouono relied on *Collins v Wilcock* [1984] 1 WLR 1172; [1984] 3 All ER 374, and submitted that there must be an element of mens rea in an allegation of assault or battery. In his submission the evidence did not disclose an intention in the police officer while doing his duty and detaining the plaintiff, to assault him in the criminal sense. I have read that judgment with interest. It is relevant to the exercise by the constable of his powers in the present case, but I find ultimately that the decision I have to make is to be made on the evidence.

About the claim that the police had unlawfully held the plaintiff overnight, Mr Pouono submitted that the police had no alternative. To require them to return a suspect after their questioning is finished is, in his submission, to set too high a standard, which imposes burdens on the police in their work of suppressing crime. He submitted that it is fair to overlook the fact that the plaintiff was detained overnight. On that basis he submitted that the claim for damages for unlawful imprisonment should not be allowed.

In respect of the claim for reputation, Mr Pouono submitted that the damage to reputation, if any, did not arise from anything that the police had done. It arose, in his submission, from the complaint itself. He referred me to two authorities on this topic, particularly one on remoteness of damage. I have considered those authorities, but believe the decision of this part of the claim is to be made on the facts.

In respect of the claim for emotional distress, Mr Pouono referred me to *Flint v Lovell* [1935] 1 KB 354; [1934] All ER Rep 200. He submitted that the onus is on the plaintiff to show that there are psychological factors that have had a significant impact on his life. In his submission the plaintiff had failed to do that, and this part of the claim should be dismissed.

About the claim for exemplary damages, Mr Pouono cited *Rookes v Barnard* [1964] AC 1129; [1964] 1 All ER 367, and submitted that the present case comes within the first category of the cases mentioned there. That is the category of case in which there is oppressive, arbitrary or unconstitutional action by the servants of the government. He relied upon a submission that the police officers in the present case were acting in pursuance of their duties as laid down in law, and thus cannot be within that category.

In the alternative, Mr Pouono referred me to a judgment of the Court of Appeal for the principles to be applied in assessing damages. This is *Kaufusi v Lasa*, which both counsel may note is reported at [1990] Tonga LR 139. The judgment at first instance is also reported in that volume.

Both parties sought costs, and were agreed that these should follow the event.

Conclusions

To begin I shall make findings of fact in respect of each head of claim and apply the law to each factual claim according to the findings. I shall consider the claims for damages after that. First, the claim of unlawful arrest. It is clear that the police officers went to Pea to investigate a complaint, with the information that there was a known suspect who had run away. They settled on the plaintiff and Lesini Tonga as two persons whom they elected to question. Neither officer gave evidence and there is no evidence why they did that. In their pleadings the defendants admit that the arresting officers were Vilisoni Finau and another. Vilisoni Finau told the plaintiff and his companion to get into the police car or he would beat them. The plaintiff was then taken to the police station. The chief inspector, after reading the station diary, was of the opinion that the two youths on arrival at the station had not been arrested, but Mr Pouono has submitted that they were arrested pursuant to the powers of arrest without warrant in s 21(a). They were definitely in police custody, under threat of a beating. That in my opinion amounts to arrest under s 21(a). Any arrest is prima facie an unlawful interference with the right to liberty, and has to be justified by the person directing the arrest - see the dictum of Lord Atkin in *Liversidge v Anderson* [1942] AC 206; [1941] 3 All ER 338 cited by the Court of Appeal in *Fifita v Fakafanua* (above) at 128. The onus is on the police officer who arrested the plaintiff to justify his arrest by showing that he suspected on reasonable grounds that the plaintiff had committed a crime. There must be a finding of fact about the officer's state of mind, and an objective assessment of whether there were reasonable grounds for his suspicion if he had one - *Castorina v Chief Constable of Surrey* [1988] NLJR 180 (CA), cited by the Court of Appeal in *Fifita* (above) at 134 and 135.

The officer did not give evidence. Without evidence, the Court can make no finding about the officer's state of mind. There is no evidence why he told the plaintiff to get into the police car. The police officer has not discharged the onus on him to justify his action. That being so, the prima facie interference with the plaintiff's right to liberty remains what it appears to be - an interference with that right that has not been justified and was contrary to law. I so hold.

I turn now to the claim of unlawful imprisonment. False imprisonment is complete deprivation of liberty for any time, however short, without lawful cause, and the constraint may be physical or merely the apprehension of physical force - *'Otuafi v Sipa* (Supreme Court, C42/89, 3 August 1990, Webster J) at p12. I find the facts to be as follows. The officer named Finau detained the plaintiff and has not shown that he had reasonable grounds to suspect that the plaintiff had committed a crime. This amounted to an unlawful arrest of the plaintiff. Without any right to detain the plaintiff, or to remove him from where he had been, the police officers brought him and his companion to the central police station for questioning. The plaintiff was brought against his will under threat of a beating. Once there he was kept in a room and was struck about 20 times with a police belt. After that he was directed to another room which he himself was directed to open and once there was struck again with a bar, which he himself was directed to fetch. He was struck on the back 5 times after being directed to hold on to a table. After that he was kept in the police station and the total time he was in the station was about 12 hours. There is no evidence that force was used to detain him after those assaults, but it would be foolish

to conclude on the balance of probabilities that after what occurred, this 14-year-old felt free or was left free to leave the station. He left the station when some police officers took him, while on other police business. The station diary shows that the following morning was a Wednesday, but no move was made to take the plaintiff to a Magistrate to charge him or to obtain a warrant to detain him, and no charge against him was prepared.

These facts need only be recounted for them to appear, as a matter of fact, to be an interference with the plaintiff's right to liberty. What was the situation at law? The key to the legality of his detention in the police station is s22 of the Police Act (Cap 35). The interpretation of s22 offered to me in the submissions of counsel is the judgment of the Court of Appeal of Tonga in *Fifita* (above) at 131-134 (the section is set out at 129) and the judgments mentioned therein on this topic, together with the judgment of the Privy Council in *Hussien v Chong Fook Kam* (above). I accept that those judgments state the law for the present case. It is not necessary for me to re-state in detail here the fundamental principles of our law governing the liberty of the subject. They have been re-stated recently in Tonga several times. They are well known already from the judgments of the Privy Council and the Court of Appeal and of this Court. One assumes also that in particular police officers have been instructed in the law that is laid down for them by those judgements. I note that the events in question occurred two months after the judgment of the Court of Appeal in *Fifita* (above).

I think it is important to reinforce the legal position by going back to *Soakai v Taulua & Ors* (Privy Council, No 6/1983, 6 May 1983). Although it is not the strongest recent judicial statement on the topic, this landmark judgment has been available to police officers since 1983, and the position has not changed. It is not reported, though the judgment at first instance is, at [1981-1988] Tonga LR 46. In its judgment, the Privy Council stated, at p6 - 7:

> "It is common ground that the appellant was arrested without a warrant. … The gravamen of her claim is an allegation that [after she was arrested] she was not dealt with in accordance with her legal rights. The matter turns solely on the true construction of Sec 22 of the Police Act 1968 which is a provision aimed at safeguarding the rights of a citizen to freedom from arrest and detention without a formal warrant first being obtained for that purpose."

The Court then went on to say:

> … appellant should have had her arrest dealt with by bringing her before a magistrate. She was entitled to have the charge then dealt with according to procedures laid down before a magistrate. The police had no right to hold her longer than was reasonably necessary for the charge to be dealt with by the available magistrate. There was a clear breach of Sec 22 (1) after the expiry of that time and thereafter she was unlawfully detained until her subsequent release. For that detention she is entitled to damages.

In my view, that statement of the law by itself, without the other clear statements of other Courts on this topic, makes it plain that in the facts of the present case the law favours the plaintiff. Had he been lawfully arrested, his detention without a warrant would have been lawful until the soonest time within 24 hours of his arrest that he might reasonably have been brought before a magistrate. In the present case that may have been the following morning at the beginning of the working day. In the present case in my view, the plaintiff was unlawfully detained from the time he was unlawfully arrested. I so hold.

I turn now to the claims of assault. I have set out my factual findings as part of the facts of the unlawful detention. Clearly the plaintiff was assaulted, first downstairs and then upstairs in the police station. He had been assaulted within the definition of that term in the Criminal Offences Act when he was forced by threats to enter the police car - s 112(g), Act No 12/95. I hold accordingly.

The Awards of Damages

I turn first to the claim of $3,000 for unlawful imprisonment. There is no separate claim for the unlawful arrest. I include the facts of that within the consideration of this claim. I have considered the principles as set out in *'Otuafi* (above), particularly at pp 15 - 16, and in *Hussien* (above), particularly at pp 949 - 950, and in *Kaufusi v Lasa* (SC & CA) [1990] Tonga LR 39 & 139. As Webster J pointed out in *'Otuafi*, (p 12), it had already been held (in *Murray v Ministry of Defence* [1988] 2 All ER 521 (HL)) that the law attaches such supreme importance to the liberty of the individual that a wrongful interference with it is actionable even without proof of damage. There is in the present case proof not only of the unlawful interference, but also of damage. In my opinion, this detention of a 14-year-old boy in the central police station without recourse to his guardian and without recourse to legal assistance during part of a night and part of the following day must have had all the mental consequences that the plaintiff described. He said about this part of the events that "I was in great hardship, I was homesick and hurting very much". After observing him give evidence I accept that as an understatement. I have considered all the evidence and the above judgments, and conclude that the $3,000 claimed as compensation for the loss of liberty and for the mental anguish in addition, both of which were proved, is justified and I allow it in full.

In respect of the reputation claim, I know there are some cases where an unlawful arrest and unlawful detention have resulted in proof of injury to reputation. This can be a factor for an award of compensation in a case of unlawful imprisonment without the need to plead it separately. In the present case I am satisfied that there was a slur on the plaintiff's reputation in that some of the people in his village and/or school said of him that he was a burglar, and that that allegation was not shown to be justified. However, I am unable to hold that this was caused by any action of the police officer or officers. There was no evidence about why the police officer Finau called to the plaintiff and his companion to get into the car. There is only conjecture, and it probably was because somebody had accused him. But it was not the police who accused him, on the evidence before me. This part of the claim must be declined.

I come now to the $5,500 claimed for assault, itemised as $3,000 for assaults with the belt and $2,500 for assaults with the iron bar. I treat them as one. The belt was a police officer's uniform belt. The blows with that were to the chest and back.

The 5 blows with the bar were to the back. The bar was about 2 feet long and of triangular section. The plaintiff and his uncle described bruises on his back and chest, mostly on his chest. The plaintiff told him he felt distressed and his uncle bathed his bruises with warm water. This treatment continued for a week, but no, medical intervention was sought. During that time the plaintiff stayed around the house, being still distressed. The level of injury described indicates blows at a medium level of force, as distinct from full force, but in my opinion, the distinction is immaterial in the circumstances of this case. This was an assault by a police officer, supposedly doing his duty, on a 14-year old boy from whom he was trying to exact a confession in the face of denials. The boy was assaulted while being held in custody in the police station unlawfully, late at night and without any communication to his guardian. At one time, the police officer made the plaintiff enter a room and fetch the bar with which he was to be beaten, then told him to hold on to a table while being hit. This was an appalling abuse of power and dereliction of duty. These assaults in these circumstances constitute by themselves a case of wrongful interference with liberty where proof of the events is sufficient, and specific injury need not be proved in order to sustain a claim for damages. For the assaults themselves and the specific injuries proved, although the injuries are not in themselves grievous, the separate claim of $5,500 seems to me to be justified, and I award it in full.

There is a further claim of $2,000 for emotional distress and discomfort, but in assessing damages for unlawful imprisonment and assault I have already taken that injury factor into account, and make no further awards.

I come to the final claim, which is for exemplary damages of $5,000. In *Kaufusi v Lasa* (above) the Court of Appeal increased an award of exemplary damages to $5,000. It noted the established law that a wrongful arrest by a police officer comes within one of the three categories of cases where exemplary damages may be awarded, such arrest being an oppressive, arbitrary or unconstitutional action by a servant of the government. It commented that in the *Kaufusi* case there was not only a wrongful arrest but also a serious assault and wrongful detention. The assaults in the present case were possibly, in their physical character at least, less serious than the kick delivered in that former case, and less serious in their consequence, and I have to bear that in mind. Having read the judgments in *Rookes v Barnard* (above), I have no doubt that the present case is one of those rare cases when an award of exemplary damages may be made. From the judgment in *Kaufusi* I conclude that the claim in the present case for $5,000 is justified and I award it in full.

In summary, then, the awards which I have made are:

Unlawful imprisonment	$3,000
Assault	$5,500
Exemplary	$5,000

Costs on this judgment are awarded to the plaintiff. These are to be agreed, or else taxed.

Pacific Vendors Ltd v United States of America

Supreme Court, Nuku'alofa
Finnigan J
C 57/2000

25 February 2000

Practice and procedure — setting aside interim order — damages would be sufficient remedy — order set aside

A Disclosure Directive was issued in Hawaii against the plaintiff. The plaintiff in the substantive proceedings applied for a declaration that the Directive was ineffective in Tonga, and an injunction that forbade any bank in Tonga from disclosing the first plaintiff's bank records and damages. An interim order had been made nullifying the Disclosure Directive in Tonga until further order. The defendants applied to set aside the interim order.

Held:

1. The Court was satisfied that (1) the substantive proceedings raised a serious issue for trial; (2) the interim order was not necessary in order to preserve the subject matter of the substantive applications for declaration and injunction and for damages; and (3) damages would be a sufficient remedy.
2. The Court ordered the setting aside of the interim order.

Counsel for applicants to set aside/defendants : Mr Niu
Counsel for respondents/plaintiffs : Mr Foliaki

Judgment

There has been today a chambers hearing of an application by the Defendants to set aside an interim order which nullified in Tonga a document issued in Hawaii and called a Disclosure Directive ("DD"). The DD was signed in Hawaii by the second plaintiff, pursuant to an order to do so made in the District Court in Hawaii.

I shall call the first plaintiff "PVL". The plaintiffs in their substantive proceedings have applied for a declaration that the DD is ineffective in Tonga, and an injunction forbidding any bank in Tonga from disclosing bank records of PVL, and damages. The grounds include claims:

- that bank records concerned are documents of PVL and PVL has not authorised disclosure;

- AND that the second plaintiff is not a signatory of any PVL account, therefore cannot lawfully consent even if voluntarily;
- AND that his consent if involuntary - even if otherwise effective - is unlawful.

On 31 January 2000 I made an interim order nullifying the DD in Tonga till further order, reserving for the defendants liberty to apply.

Some relevant terms of the DD are as follows:

> I, NATHAN H. SUZUKI, hereby authorize and direct any bank at which I may have or may have had a bank or loan account of any kind, in my name or any other name, for which account I am, was, or may be a relevant principal, signatory or beneficiary, to disclose all information and deliver copies of all documents of every nature an its possession to …
>
> This direction is intended to be construed as a consent to disclosure under the laws of the Kingdom of Tonga … with respect to any of the bank accounts for which I may be a relevant principal.

The wording is the life of the document, particularly (1) its first four lines and (2) its specific consent to its use to obtain disclosure in Tonga and (3) its specific consent to disclosure in Tonga "with respect to any of the bank accounts for which I may be a relevant principal".

Relevant Facts

The second plaintiff was asked to sign the DD, and refused. He took legal advice and decided he would continue to refuse but if ordered by a court to sign would obey the court order. The matter came before a District Judge who ordered him to sign, pursuant to the jurisdiction of that court. The order went only that far, and attorneys for the second plaintiff made it clear in court that they would litigate in Tonga the issue of the enforceability of the consent, it being given under duress.

Hence the substantive proceedings. The interim order is only until further order, i.e. pending today's argument, but if it is set aside that may also nullify the application for permanent injunction.

There is an investigation in Hawaii, in preparation for a trial of one Boulware. It is said (Seabright affidavit #7) that PVL was set up by the second plaintiff, a US national, and a Tongan national Hawaiian resident, and registered in Tonga. The first directors' meeting was held in Hawaii. The two mentioned and another US national are the officers and the second plaintiff holds 4/5ths of the shares. The voting members are the second plaintiff and the Tongan national.

It is said further (Seabright affidavit #9 & 10) that the second plaintiff and a representative of Boulware subsequently set up a company in Hong Kong (HIKCL), and that 99% of its shares are controlled by PVL. Further to that, it is said that Boulware has sent money, which may be money with which the investigation is concerned, to HIKCL, and that part of that money has been sent by HIKCL to accounts held by M in two (named) banks in Tonga.

Hence the interest of the investigators in the Tongan bank accounts of PVL.

The Issue

The question for me, in today's application to set aside and from Counsels' submissions, is simply whether my interim nullification of the DD should continue in the meantime. One would normally expect to decide this issue on arguments about -

(1) whether there is a serious issue to be tried in the substantive proceedings, (2) whether the interim order is necessary in order to preserve the subject matter of the trial, (3) whether damages will be a sufficient remedy to the party affected if the interim order is set aside or is not set aside, and (4) what is the balance of convenience of the matter. Little of that has been raised, but I have considered all those matters, as I am required by the law of Tonga to do. I have considered the affidavits filed by both parties. In accordance with principle I have taken these as untested statements which are capable of proving the truth of what they say. I have also taken account of Counsel's submissions.

I am satisfied (1) that the substantive proceedings raise a serious issue for trial. The issue is whether a DD signed under protest but in obedience to an order of a court of competent jurisdiction is effective under the law of Tonga. In respect of (2), I tend more strongly towards the conclusion that the interim order is not necessary in order to preserve the subject matter of the substantive applications for declaration and injunction and for damages. I am not persuaded (3) that the reputation of the second plaintiff is likely to suffer seriously from the setting aside of the interim order, if the interim order is set aside, nor that it will be adversely affected if these proceedings become known in Hawaii (which they may or may not). I am satisfied that if the interim order is set aside and if this action subsequently is shown to have damaged either or both plaintiffs, then any injury done to them from that cause may adequately be remedied by damages. This includes any injury from disclosure in accordance with the DD, and injury to reputation.

In my view the applicable principles, including the balance of convenience, when applied to the facts of the matter as presently disclosed, direct that I should now set aside my interim order and allow these proceedings to take their course. I now make that order accordingly. The questions of costs on the interlocutory application and the application to set it aside are reserved, and will become costs in the cause.

Conclusion

Counsel for the defendants should now file and serve a statement of defence in the substantive proceedings and a directions hearing will then set a date for trial.

I have not proceeded to make the injunctive order for which counsel for the defendants applied. It is beyond my jurisdiction in these proceedings, in my view, to require the two named banks to do something on the footing that it is compliance with an obligation under United States law. In any event, the proposed order seeks to require those banks to act in terms wider than those of the DD. To impose those wider obligations is to introduce, without power to do so, new factors into the DD. That application is refused.

Finally, I direct that a copy of these notes be served by counsel for the defendants on the managers of the two banks concerned. I direct the defendants, if approaching any other bank within this jurisdiction in order to serve the DD, to serve

with the DD also a copy of these notes. For the sake of confining the issues to what is presently stated in the statement of claim, and because of what is contained in the affidavits, I caution all concerned in the compliance with the DD to ensure that the words of the DD are fully understood and carefully construed.

Havea v Kingdom of Tonga

Supreme Court, Nuku'alofa
Finnigan J
C 1570/98

14, 15, 18 October, 13, 14 December 1999; 31 March 2000

Tort — trespass to land — unlawful conversion — damages
Damages — damages at large — not limited to specific pecuniary loss

The plaintiff (who lived in New Zealand) had been the holder of a tax allotment in Vava'u since 1983. The land shared a common boundary with an allotment held by Sione Tu'i 'Ofa (Sione Tu'i) who had a contract with the defendant (the Ministry of Works) to supply quarried rock for roading. In the course of quarrying the land of Sione Tu'i, the defendant crossed the boundary into the plaintiff's allotment and took away the topsoil and sub-structure. As well, the defendant had stockpiled some of the quarried rock on an adjoining part of the plaintiff's land. In August 1998, as soon as the plaintiff was informed of the situation, he came to Tonga. He was able to negotiate a resolution of his claim with Sione Tu'i which was recorded in writing. The issue of liability of the defendant to the plaintiff was left unresolved. The plaintiff laid a claim in tort against the defendant for damage to his land.

Held:

1. There was clearly a breach by the defendant of a duty of care to the plaintiff, in the course of which it committed the torts of trespass and conversion.
2. Concepts such as market value that assumes a willing but not anxious vendor and purchaser, and free exposure to the market, did not fit readily into Tongan land tenure. However, the concept of highest and best use, defined by the plaintiff's valuer as the most profitable legal use to which a parcel of land may be put, does apply in the Tongan system of land tenure.
3. What was lost in the loss of surface was different and additional to what was lost in the loss of the underlying substance, and each had a different value. The value of the substance that was lost (the rocks) was settled between Sione Tu'i and the plaintiff in their own separate agreement. Nothing remained to be awarded by the Court under the head of conversion of the underlying rock. The damages for the lost surface was $9,526.

4. The loss of amenity was calculated with regard to the market value, the cultural value, the loss of trees, the loss of contour and the change in character. The award for that loss was included in damages at large.
5. Damages at large were assessed in order to show that the damages were not limited to provable specific pecuniary loss. This arose from the affront caused by the torts of trespass to land and unlawful conversion. Damages at large were calculated to be $17,500.
6. The plaintiff was entitled to costs.

Cases considered:

Darbishire v Warran [1963] 1 WLR 1067; [1963] 3 All ER 310 (CA)

Mokofisi v The Kingdom of Tonga (Supreme Court, C 111/88, 13 June 1989, Webster J)

Counsel for plaintiff : Ms Tonga
Counsel for defendant : Mr Cauchi

Judgment

This is a claim in tort by a landholder against the government for damage to his land. The plaintiff says that during 1997 and 1998 people employed by the defendant quarried away part of his land, without consultation and without permission. The total area of his land had been 8 acres and 1 rood, and he claims that the volume of rocks and topsoil removed was 147 meters long, 40 meters wide and 5 meters deep. He claims also that the quarrying destroyed a number of specified trees, and claims compensation for that. For the destruction of those fruit and coconut trees as well as the claimed unlawful trespass, unlawful conversion of the rocks and soil, damage to the natural state of the land and the loss of future cropping use, he claims damages of $170,000. Ms Tonga, counsel for the plaintiff, commented during the hearing that it was not for the volume of rock taken that the plaintiff claims, but the area of land destroyed. The claim rests on evidence of the value of the allotment at its surface. It is not part of the plaintiff's case to claim for restoring the allotment to its original condition.

The Facts

Briefly, the major relevant facts are these. Other matters were mentioned in evidence but may be omitted here as peripheral. The plaintiff lives in New Zealand. The land is in Vava'u. The plaintiff has been the landholder since 1983, but has not made any specific use of the land other than to allow the trees and vegetables on it to grow and he had rented it out for stock grazing at $100 per year. The land shares a common boundary with land owned by Sione Tu'i 'Ofa ("Sione Tu'i"). Sione Tu'i had a contract with the defendant to supply quarried coral rock for roading. In the course of quarrying the land of Sione Tu'i, the defendant crossed the boundary into the plaintiff's land and took away the topsoil and sub-structure to a depth of 5 meters, over an area of 147 meters by 40 meters, i.e. 5,880 square meters. As well, it had stockpiled some of the quarried rock on an adjoining part of his land.

As soon as the plaintiff was told of this he came to Tonga. That was in August 1998. The defendant (the Ministry of Works) stopped the work and the plaintiff

visited the land with the Minister of Works, who happened to be in Vava'u. There were meetings, at which the plaintiff and/or his lawyer were present, as was Sione Tu'i. The Ministry had paid the latter for all the quarried coral so far delivered. It was suggested by the Minister and generally agreed that Sione Tu'i would pay to the plaintiff half of what he had received. It is accepted that Sione had been paid $16,000. During their discussions, Sione Tu'i told the plaintiff that they were relatives. The plaintiff accepted that, and resolved to do something to help him. So on 4 September 1998, the day the plaintiff left for New Zealand, the two of them entered a written agreement [exhibit A]. They had agreed that Sione had paid $3,000 to the plaintiff, and would give the plaintiff the remaining stockpiled rock, so that he could sell it and keep the proceeds. In the agreement the plaintiff allowed that Sione had full authority to remove (and sell) stock from the stockpile on the plaintiff's land, and the money was to be given to the plaintiff's family. They agreed that this arrangement extinguished any liability that Sione might have to the plaintiff from the conversion of the plaintiff's coral rock and the damage to the land, and they promised each other to live in harmony. Sione paid the plaintiff another $500, and the plaintiff was satisfied, because he wanted to help Sione's family in their money difficulties.

In addition, the Ministry of Works was anxious to complete about 2 kilometres of partially constructed road. The Minister explained to the plaintiff and his lawyer at a meeting about the problem that early completion of those 2 kilometres was necessary in order to avoid paying penalties to the Asian Development Bank, which was financing the road. The plaintiff agreed to supply the Ministry with 663 loads of coral rock from the stockpile on his land so the 2 kilometres could be completed. He was paid $3,779.10 for these 663 loads before he left for New Zealand on 4 September 1998 [exhibit B].

There were two meetings at which the plaintiff and his lawyer discussed with the Minister and his advisers resolutions of all the issues that had arisen. Any issue of liability of the defendant to the plaintiff was left unresolved after the meetings. A claim was subsequently made, this action was filed, and the claim has been redefined to $170,000, based on the evidence of a valuer about the value of the damage done.

At some point not made clear by the evidence, a part of the remaining allotment was stripped of its topsoil. The evidence does not show who removed it. The valuer who assessed the damage 13 months after the events in issue noticed the removal.

There was a letter produced in evidence that appeared to give authority to the plaintiff's mother to deal with the allotment, and thus allow the quarrying. This letter was in the hands of the defendant, and clearly had been given by the mother. The plaintiff denied knowledge of the letter, and in any event the defendant did not rely on it as a defence. At all times, including during the hearing, it has acknowledged that the incursion onto the plaintiff's land was by mistake.

One final fact is important and needs to be mentioned. The plaintiff intends to retain the damaged allotment and to use the part that remains. He has already used some of it as a quarry and sold out the rocks.

The Issues

Counsel approached the matter first on the basis of liability and second on the basis of quantum. The defendant did not seriously contest liability, and on the evidence had not done so from the start. The main submission of counsel for the

defendant about liability is that the agreement with Sione Tu'i was a settlement of all he could claim for the damage caused, and that any claim the plaintiff might have had on the defendant was settled in the meetings. I cannot accept that submission. I find that it was the defendant that did the work that encroached from Sione Tu'i's quarry onto the plaintiff's land, and that the payment by Sione Tu'i was no more than payment from the proceeds of what he had wrongfully received for selling the substance of the plaintiff's land to the defendant. There still remains a liability in the defendant for the encroachment and for the destruction. Nothing in the evidence to show that this liability has been compromised. I find that a case has been made out in liability. There was clearly a breach by the defendant of a duty of care to the plaintiff, in the course of which it committed the torts of trespass and conversion.

I turn to quantum.

The Approach to Valuation

A unique opportunity was offered to the Court by the plaintiff in this case to develop the law governing valuation of land for the purpose of assessing damages. The plaintiff's claim is for loss of and damage to the surface of his land, and to quantify the injury suffered by the land he adduced the evidence of a government land valuer. The valuer's evidence was supported by that of another government valuer called by the defendant. The fundamental step in the valuation evidence of both witnesses was the concept of freehold land as a tradable commodity in an open market. Both valuers assured the Court that this concept is accepted in the Ministry of Land. It is put into operation they said in the following way. While law prohibits sale of land, the right to occupy land can be and is sold. There are even benchmark values, I was told, which are accepted in the Ministry for transfer of the right to occupy land, depending on locality and area. Generally, as I understand it, this buying and selling the right to occupy land may be effected by way of lease, but the acquisition in this way of a registered allotment in a land subdivision was also mentioned.

I have given this matter a lot of thought and taken time to examine it. I have concluded that the invitation to import the concept of freehold land cannot be accepted. However, I do accept as a fact that in Tonga, subject to the Land Act and to cabinet approval, the right to occupy land is given in return for money. It is common experience that the right to occupy land in Tonga is a traded commodity.

However that right once acquired is hedged about by the Land Act. The King, the nobles and the government hold all the land primarily as estates. The nearest approach for the ordinary citizen to land ownership is something granted, i.e. a right to occupy land in the estates of a primary holder. A registered Deed of Grant conveys a title against the world, except that it is itself subject to the rights of an heir. Even surrender of an allotment requires the consent of the heir. Women may buy sell and own leases, and pass them on by will, but the lease has a fixed term and conveys only a right to occupy. Registered title, except for the life tenancy of a widow, is for males only.

Against that background it seems to me inappropriate to import the principles relied on by the plaintiff's valuer, innovative though that may be. Concepts such as market value that assumes a willing but not anxious vendor and purchaser, and free exposure to the market, do not fit readily into Tongan land tenure, and it is beyond the mandate of the Court to introduce them. I do find however that the concept of highest

and best use, defined by the plaintiff's valuer as the most profitable legal use to which a parcel of land may be put, does apply in the Tongan system of land tenure.

I have been told that there is only one previous case in point. It seems to me that the proper course for the Court is to follow that case and let the law develop in that way. The case is an unreported judgment of Webster, J that was delivered on 13 June 1989: *Mokofisi v The Kingdom of Tonga* (Supreme Court, C 111/88, 13 June 1989, Webster J).

In that case, which is very similar on its facts, the Court considered the paucity of authority and on the evidence allowed damages under the following heads:

Trespass to land	— Removal of land (including the commercial value of the rock removed)
	— Loss of amenity
	— Barrier fence (at edge of excavated area)
	— Conversion of topsoil from the remaining land
	— Damages at large

I shall follow the same approach, making the best I can of the evidence.

Discussion, and Awards under Heads of Damage

In *Mokofisi*, the Court held, once it was established that the defendant had encroached on the land of the plaintiff by quarrying and by removing rock and topsoil, that the defendant was liable to the plaintiff in damages for the torts of trespass to land and conversion. On the authority of *Darbishire v Warran* [1963] 1 WLR 1067; [1963] 3 All ER 310 (CA), it held that the measure of damages is the sum necessary to put the plaintiff in the same position as though the damage had not happened. It then held that for trespass to land where there is permanent deprivation of land, as was the case before it where rocks had been quarried away at the boundary, that measure is the value of the land. The question for the Court there, as it is here, was how to assess the value of the land. In *Mokofisi*, the Court had the evidence of a valuer that the value of the land could be said to be $15.25 per square meter. The defendant accepted that value in that case, and for 150 square meters the value was fixed by the Court as $2,287.50.

The Court then held that it would be unfair to allow damages for both the trespass on the land (in that case causing a loss of 150 square meters) and the conversion of the same 150 square meters of its substance. It said (at p6) that this was because both types of damages had the same basis, i.e. the value of what was lost. In the present case I take a contrary view. On the facts before me, what is lost in the loss of surface is different and additional to what is lost in the loss of the underlying substance, and each has a different value. In the present case, the value of the substance that was lost (the rocks) was settled at the meetings. The Minister of Works suggested, and the two adjoining owners accepted, that Sione should pay to the plaintiff half of what the Ministry had paid Sione. Arrangements were made for Sione Tu'i to pass on that payment. He and the plaintiff settled this in their own separate agreement. Nothing remains to be awarded by the Court under the head of conversion of the underlying rock. The head of trespass onto the land however remains. I shall

follow the reasoning of the Court in *Mokofisi* and make an award under that head when I assess damages at large.

Before proceeding, I comment that *Darbishire v Warran* is the English authority that was selected by the Court in 1989. That is a case involving the destruction of a motor vehicle in a collision. As the English Court of Appeal noted in that case, the law applied there was the law of damages arising out of collisions between motor vehicles, which has been developed out of the admiralty rule on collisions at sea. No authorities at all governing damages for destruction of land were put before me, except *Mokofisi*.

I turn to loss of amenity. This is the major head of damage in the plaintiff's claim. The valuer calculated the quantum of the claim by the following method. First he valued the whole allotment by valuing each of 35 proposed residential allotments, the total being $150,000 or $18,000 per acre. Then he valued 5.779 acres, which is what remains, excluding an area from which topsoil has been removed. This area he valued not as residential subdivision but by per acre values of individual acres, said to be based on evidence of exchanges of land for money. These valuations were $10,000, $8,000, $6,000 for three of the acres and $5,000 for the remaining 2.779 acres. By this method for that area he reasoned a value of $38,000. The difference, $112,000, he says is the value of what has been taken. What has been taken, he says, is in two parts. One is the quarried part, the other has not been quarried but has had its top soil taken. The rest of the claim of $170,000 is made up from his fee, legal fees, the plaintiff's valuation of lost trees, and general damages.

I have some reservations about this methodology. However, the evidence of the plaintiff's valuer, written oral and photographic, does put it beyond dispute that the defendant's incursion caused considerable loss of amenity to the plaintiff's land. It lost its natural terrain. The quarried area has removed completely the surface that once was there, to a depth of 5 meters. At the edge of the excavation, roughly 40 meters in from the former boundary, there is now a plunging escarpment. It must be allowed in the defendant's favour that Sione Tu'i was entitled to create a quarry up to the common boundary, so long as he provided on his land natural support of the plaintiff's land up to the plaintiff's boundary. Had he done so, there would still have been some obligation on the plaintiff to fence his land. However, the need for that has now been grossly magnified. In addition, on another substantial area there was a stockpile, and in another place a road had been formed for access by trucks. These latter parts can be put right by removal action, possibly some topsoil enhancement and the passage of time, but they are remediable by damages nonetheless. As the valuer said, the quarried area must now be severed from the plaintiff's land management plan, and the remainder now needs a new management plan.

On that topic, the valuer asserted that the highest and best use of the land, as defined, before the excavation work, was for it to be subdivided into commercial accommodation units or smaller residential lots of at least 30 perches. I confess to a little scepticism about this. There was no evidence that this piece of land 3 kilometres from Neiafu, elevated though it is and with pleasant views, would have attracted in the reasonable future the 35 residential purchasers that he postulated. While mentioning the valuer, I comment in passing that his inclusion of an area of missing topsoil must be disregarded. This is for the reason that his inspection took place over a year after the damage was done, and in that time the plaintiff had conducted further

quarrying. There is no evidence by the plaintiff or by any other witness about when the missing topsoil was removed, or by whom.

I am satisfied by the evidence that this piece of land was formerly 8 acres and 1 rood. The plaintiff's valuer agreed that 8a 1r is 3.3 hectares, which is 33,000 square meters. What was taken by quarrying is 5,880 square meters. The plaintiff's valuer measured the usable surface as now reduced to 5.779 acres or 2.339 hectares, or 23,390 square meters. This excluded the area of missing top soil. By my calculation, the area of missing topsoil must therefore be 3,730 square meters. I must ignore the missing topsoil, but clearly by the removal of 5,880 square meters the plaintiff's allotment has suffered substantial loss of amenity. It has been reduced by about one fifth. It had its contours altered irrevocably, it lost 140 meters of its north-eastern boundary and it was made different in character by the defendant's careless quarrying roading and stockpiling. While the affects of the roading and the stockpiling are not permanent, the loss of 5,880 square meters is. The allotment is no longer what it was. The missing parts of it had intrinsic value because they faced the sun and enjoyed good slope, drainage and views. What remains is irregular in shape and less valuable than it was, even if for no other reason than that it is reduced in size and irregular in shape. There is a part that has no views or even capacity to support housing or crops.

How to assess the value of that loss of amenity? In *Mokofisi* the Court had evidence of a market value for the original allotment, and a range of assessments by a valuer of reductions from that value for disfigurement and in addition for loss of privacy view and outlook. The Court rejected a reduction at the lower end of the scale because of the individual quality of the piece of land, what I have referred to above as the character.

In the present case also there is evidence of market value. Both valuers who gave evidence attested the fact that land in Tonga has a market value and the valuation evidence before Webster, J, also attested that fact in 1989. I accept the evidence of the valuers that there is a market and that in Tonga the occupancy of pieces of land does change hands in return for money. It is established as a fact. This evidence is supported by evidence heard by the Court in other cases. I accept the plaintiff's valuer's view that market value is the value agreed in an open market between a willing buyer and a willing seller.

The land seems to me to be a family asset, little used, and a family asset for which the plaintiff had no plans. His mother lived in Vava'u but did not live on it. Nobody lived on it. Its chief value was its cultural value as the plaintiff's link with the land of his birth, and his refuge as of right should he return. It is the inheritance of his heirs. It was 33,000 square meters, and he has lost 5,880 square meters of it, and the lost land was said to have good topsoil to a depth of 2 and 3 meters. It was good growing land. There were many useful trees destroyed, at least 83 by his estimate. There is also the loss of contour and change in character. There is the irregularity of shape of what remains.

The plaintiff's valuer valued first the whole allotment and then on that basis valued the part which is missing. The valuation of what is now missing is a value before the damage occurred. I think that is the right approach. However I am unable to accept the plaintiff's valuer's concept of residential subdivision as realistic. It seems to me unrealistic. There was no evidence of any demand for the land as residential allotments, only the statement of the valuer in his report (at p 29) that in this area "buildings development is high", and "properties of this size are few in number …

and the demand for these type are reasonably high". On the evidence of the plaintiff's use of the land, the photographs and the evidence of the valuer, subdivision into 35 residential lots is not reasonably the highest and best use for this allotment at present. It seems to be surrounded by land undeveloped for residential purposes. Regrettably, the valuer offered no alternatives.

After a lot of thought, I have concluded that the best I can do with the evidence is to take $38,000 which is the valuer's valuation of the 5.779 acres, i.e. the part of what remains that is still undamaged. He agreed that this is 23,390 square meters. From that I can average out a value per square meter which I shall apply to the whole allotment. The remainder is (33,000 - 5880 =) 27,120 square meters.

By this calculation, the averaged value per square meter is $1.62, and for the 5880 square meters lost the total averaged value is $9,526. The proportion of the whole that is lost is 5,880/33,000, or 17.82%. When I calculate a portion of 17.82% of that averaged valuation to represent a value for what has been lost the result is the same, $9,526. That is the sum I fix upon consideration of the evidence that was presented. However it represents not the loss of amenity but the value of the lost surface. As the Court commented in *Mokofisi*, (at p7) the damages for lost surface and the damages for the lost amenity may be different and cumulative. In making that comment the Court was dealing with damages specifically for lost surface (topsoil) that was removed from the surviving part of the allotment. On the different facts of the present case, where the surviving surface must be treated as intact apart from the stockpile and the roading, I think the principle still applies. The loss of amenity still exists as a remediable head of damage even after damages have been awarded to compensate for the lost portion. So I still have to consider damages for loss of amenity apart from damages for the lost portion.

It seems to me impossible to assess an amount on the evidence. In *Mokofisi* the Court had the benefit of a valuer's assessment, broad-brush though it may have been. It fixed damages under this head at $5,000, about midway in the range suggested by the valuer. Without the benefit of such evidence, I propose to include damages under this head in my assessment of damages at large.

I turn now to the fence. I mention it only because it was a head of damages in *Mokofisi*. This was not raised as part of the present case, or mentioned in argument by either party. It would be inappropriate for me to include any allowance under this head.

Conversion of the additional topsoil from a further area has not been shown to be part of the damage caused by the defendant, so no award is made under that head.

There remains the head of damages at large. As noted above, this includes the head of trespass onto the land, as well as the loss of amenity. As the Court noted in *Mokofisi*, (at p7), there should be an assessment under this head of damages in order to show that the damages are not limited to provable specific pecuniary loss. This arises from the affront caused by the torts of trespass to land and unlawful conversion. In that case the Court awarded $2,000. That included another element not present in the present case, i.e. aggravated damages for the defendant's conduct, but the present case has the added elements of trespass onto the land and the loss of amenity. I also must include an element for the lost trees. The only evidence of that loss is the plaintiff's self-assessment. He claimed for 48 trees and his valuations add up to about $10,000. It seems to have an element of guess in it. I have to assess not replacement cost but a sum representing restitution of the grown trees. My assessment

is necessarily subjective and open to different points of view. I bear in mind that the plaintiff still has the use of the remainder including the ability to subdivide it if he
360 chooses, something that the valuations tended to overlook. My assessment of what is fair compensation under this head, after considering the whole of the evidence over a lengthy period of time, is $17,500.

Conclusion

The damages that I award therefore, in summary, are:

Lost surface - the part removed:
$9,526
Damages at large, including trespass onto the land, tree loss and the loss of amenity:
$17,500

370 In addition to these two awards, the plaintiff is entitled to his costs, which are to be agreed or taxed.

R v Tonga

Supreme Court, Nuku'alofa
Finnigan J
Cr 175/99

11 February 2000; 31 March 2000

Practice and procedure — costs against the Crown for acquittal— declined
Costs — dismissed charges — costs not awarded against Crown

On the day of trial Crown counsel offered no evidence on the two charges of housebreaking and theft against the accused. This was discussed in chambers and the Court was satisfied that the Crown action was a proper one. After that the Court dismissed the charges. The accused applied for costs against the Crown.

Held:

1. To award costs on acquittals as a normal course would be to penalise the Crown for performing its public duty. The application for costs was declined.

Cases considered:

Laino Latu v The Police (Supreme Court, Cr App 673/96, 5 March 1997, Lewis J)
R v Sione Foueti (Cr 933/92, 20 April 1995)

Counsel for accused/applicant : Mr Fifita
Counsel for Crown : Mr Pouono

Judgment

This is an application by an accused person for costs against the Crown. The facts, briefly, are that on the day of trial Crown counsel offered no evidence on the two charges of housebreaking and theft against the accused. The background to this application was discussed in chambers. From the discussion, the Court was satisfied that the Crown application was a proper one. After that the Court dismissed the charges.

It is clear that the reason for the decision to offer no evidence was a judgment made by Crown counsel after his own judgment of the Crown's evidence, which counsel explained in chambers. That was a judgment for counsel to make and the Court to accept.

When the accused, a 14-year-old boy, through counsel sought costs, I adjourned the matter for argument, as it seemed there might be a novel issue about costs requiring a judgment.

I heard the argument in chambers on 11 February 2000 and reserved my decision. Now that I have had the opportunity to consider the written and oral submissions of both counsel, I am satisfied that there is no novel point, and no injustice to the accused if costs are refused. I thank counsel for their submissions.

40 The simplest way to state this is to say that if the trial had proceeded on the evidence that Crown counsel had, and if the accused had been acquitted, the Court would not have awarded him costs. This is because the trial would have been in the normal course of the Crown's duty. That is, to put before the Court a prima facie case of criminality and leave the judgement of proof beyond reasonable doubt to the Court. The Crown has not argued that the Court is without jurisdiction to award costs against the Crown in criminal cases, and one order made by the Court awarding costs against the Crown was put before me. This was an order in an appeal, *Laino Latu v The Police* (Supreme Court, Cr App 673/96, 5 March 1997, Lewis J).

However, it is not normal for the Court to do so. This is because, as Ward CJ
50 noted in *R v Sione Foueti* (Cr 933/92, 20 April 1995, Ward CJ), to award costs on acquittals as a normal course would be to penalise the Crown for performing its public duty.

In the present case, the accused has sought costs on the footing that the laying of the charges wrongful and unfair. That is a matter for proof, and there has been no evidence in the present application. As it happens the accused has commenced a civil action on that basis. That action, at present heard but not yet decided, is a proper forum for the claim that the accused has made herein.

The application of the accused for costs is declined.

Paunga v Paunga

Supreme Court, Nuku'alofa
Ward CJ
F 791/99

24 March 2000; 31 March 2000

Family and domestic relationships — maintenance — no past maintenance
Family and domestic relationships — access arrangements — court ordered reasonable access to father

The parties were married on 28 July 1995 and on 9 May 1996 a daughter, Sinaitakala, was born in New Zealand. In September 1996 the wife/respondent went to San Francisco after being appointed to a post in the Tongan Consulate. The husband/petitioner had, by then, been appointed a Cabinet Minister and needed to stay in Tonga to carry out his duties in that office. By May 1997 they were still living apart and had agreed to separate. In July 1999, the husband filed for divorce on the grounds of separation for more than two years. The wife did not oppose the divorce but filed a Notice of Opposition to the proposals for the maintenance of the child. She accepted the proposal that the respondent should pay the education expenses of the child but suggested that such expenses should include accommodation and travelling costs. She sought an order that he should pay medical insurance of the child and make her one of the beneficiaries of his life insurance. She asked for maintenance for the child of $700.00 per month and, having alleged that the petitioner had neglected sufficiently to support her and the child since they parted, an order also that the petitioner pay past maintenance for herself and the child at the rate of $1,000.00 per month for the period from September 1996 until the filing of the petition. That would amount to a total sum of arrears of $34,000.00. The claim for past maintenance was the only claim with regard to herself; the remainder of the maintenance was claimed for the child only. Faced with this the petitioner applied for the custody of the child rather than pay the sum of maintenance sought by his wife. He filed an affidavit in which he pointed out, in relation to the past maintenance that, since they had agreed to separate, the respondent had never demanded maintenance until it was included in the Notice of Opposition. Since July 1998 the respondent's parents in Tonga had taken care of the child. The custody issue was resolved by the parties who agreed that the respondent should have the custody of Sinai with reasonable access to the petitioner. The Court was asked to make an order for reasonable access and to resolve the question of maintenance.

Held:

1. The Court ordered that the petitioner should have access to the child every Saturday from 10am to 5pm. He should collect her from the respondent's parent's home in Fanga and shall be free to decide the nature and form of his access subject to being accompanied by such person or persons as the respondent's parents consider advisable during all visits in the first six weeks.
2. With respect to past maintenance, that would enrich the mother rather than repay money already spent on the respondent and the child. That claim was refused.
3. In calculating the net income of the petitioner, the Court decided that the amount deducted for church donations and community activities should not be put before the welfare and requirements of his child. Therefore, the Court held that that figure provided a reserve to be drawn on if necessary.
4. The petitioner was ordered to pay $500 per month to the respondent for the maintenance of the child.
5. The petitioner was ordered to pay all the costs of the child's education including any necessary accommodation and airfares provided that he need pay only half the cost of the maintenance at all times the child was attending an educational establishment abroad.
6. The petitioner was to arrange and bear the cost of medical insurance for the child including provision for treatment abroad if not available in Tonga and for emergency evacuation.
7. The petitioner was to pay the premiums to maintain the policy of life insurance taken out with Grand Pacific Life Insurance Ltd to which the child was the primary beneficiary.
8. There was no order as to costs.

Counsel for petitioner : Mr Niu
Counsel for respondent : Mr Tu'utafaiva

Judgment

The parties were married on 28 July 1995 and on 9 May 1996 a daughter, Sinaitakala, was born in New Zealand.

In September 1996 the wife/respondent went to the United States of America after being appointed to a post in the Tongan Consulate in San Francisco. The husband/plaintiff had, by then, been appointed a Cabinet Minister and needed to stay in Tonga to carry out his duties in that office.

By May 1997 they were still living apart and had agreed to separate.

In July 1999, the husband filed for divorce on the grounds of separation for more than two years. The children statement filed with the petition stated that the child was living with the wife's parents in Tonga. The proffered arrangement was that the wife should have the custody of the child with reasonable access to the petitioner. The wife should be responsible for the maintenance of the child but that the petitioner should bear all expenses relating to the child's education.

The wife did not oppose the divorce but filed a Notice of Opposition to the proposals for the maintenance of the child. She accepted the proposal that the respondent should pay the education expenses of the child but suggested that should include accommodation and travelling costs. She sought an order that he should pay medical insurance of the child and make her one of the beneficiaries of his life insurance. She asked for maintenance for the child of $700.00 per month and, having alleged that the petitioner had neglected sufficiently to support her and the child since they parted, an order also that the petitioner pay past maintenance for herself and the child at the rate of $1,000.00 per month for the period from September 1996 until the filing of the petition. This would amount to a total sum of arrears of $34,000.00. This claim for past maintenance is the only claim with regard to herself; the remainder of the maintenance is claimed for the child only.

Faced with this the petitioner applied for the custody of the child rather than pay the sum of maintenance sought by his wife. He filed an affidavit in which he pointed out, in relation to the past maintenance that, since they had agreed to separate, the respondent had never demanded maintenance until it was included in the Notice of Opposition.

Since then the custody issue has been resolved by the parties who have agreed that the respondent should have the custody of Sinai with reasonable access to the petitioner. Sadly, however, the good sense that led to that decision has not extended sufficiently to produce a workable arrangement for access and the court is asked to make an order for such access. Similarly, the question of maintenance is also unresolved.

It is important to remember throughout that there is a little girl at the centre of this case the welfare and interests of whom are the first and paramount concern of the court. I accept that both parties have been aware of this and I hope it will continue to guide them in the implementation of any orders this court makes. It is also right to keep in mind that both the parents have the right to establish as normal a relationship with this child as the consequences of a broken home allow. Inevitably the parent with actual custody has an advantage over the other because the day to day contact must inevitably establish a much closer bond. That is a factor to be borne in mind when allowing access because the other parent must have a reasonable opportunity to establish a normal parent child bond.

I deal first with access. As I have said, the respondent's parents have the care of the child at present and have had since July 1998. Prior to that the child had been in San Francisco with her mother and was looked after by the respondent's grandmother and another relative. When the grandmother died and the relative left, the respondent sent the child to her parents in Tonga against the known wishes of the petitioner. The respondent is due to return to Tonga in September of this year and it is expected that this arrangement will change in that she will be able to resume actual custody.

In the meantime, the petitioner asks the court to make an order for access because he has been unable to see the child. He complains that, whenever he has attempted to arrange to see the child, the parents of the respondent have prevented him from doing so.

The mother of the respondent has filed a detailed affidavit in which she agrees there has been little or no access but denies trying to stop the petitioner seeing Sinai. She suggests the petitioner has only very rarely tried to make contact and there has been good reason on each of those occasions why he has not been able to see the

child. She also objects to him sending a relative to collect the child instead of coming personally.

I have no doubt, she is genuinely concerned for the child. I also believe that the strong bond that has developed between the respondent's parents and the child has added an element of protective anxiety to her assessment of the interests of the child.

However, the child's father is entitled to reasonable access. Every day that passes without contact with his daughter makes it more difficult for him to establish a normal relationship. As it becomes more difficult for him, it becomes correspondingly easier to find apparent justification for keeping him and the child apart but this must not happen.

It is rarely a happy situation for the court to have to enforce rights of access by rigid orders. Such arrangements have the best chance of working if everyone tries equally to make them work. Nonetheless, if one party is being denied his undoubted right to access the court will enforce that right.

I have no doubt of the deep love between the respondent's parents and this little girl. It is they who have effectively brought her up for much of her young life. Inevitably the responsibilities they have borne for that time give added weight to their opinions and I bear them I mind. I hope the agreement between the parties that the custody of Sinai shall remain with the respondent will give them a greater feeling of security than hitherto. The respondent will be working when she returns and it is clear that her mother will be able to continue a very close relationship with this child. With that security of mind, she must now work to ensure the success of the arrangements for the father to have regular access.

I am told by counsel that it has been agreed by the parents that he should have access on Saturday each week. In his affidavit, the petitioner has suggested how it might work.

> "5. In respect of my having access to the child, I did arrange with the respondent before for me to see the child on Saturday of each week from 9.00am to 3.00pm at the residential house of the Respondent's father situated at Fanga. Furthermore, the child may be accompanied by one or two people as may be assigned by the Respondent's parents in order to introduce or familiarise the child to the circumstances of the proposed access. (The times were changed, at the request of counsel, to commence at 10:00 am).
>
> 6. Therefore, I respectfully ask the Honourable Chief Justice to allow me access to the child according to the above proposed arrangements or otherwise as may be agreed for the child's best interest.
>
> 7. I also respectfully ask to allow me to decide how long I keep the child in the beginning (which may start, for example, with only an hour or two depending on the child's mood and circumstances, most suitable for her right at such time). I also ask that I be given liberty to drive with the child during the time of access and together with the people assigned lo be with her and also with my dependent "children" so as to develop our relationship with her."

I consider that is a reasonable and sensible approach. The father has had virtually no access to his daughter for at least a year. There is no benefit in assigning blame for that at this stage but it means that the first steps in building a relationship must now be difficult. The child's reaction to him will inevitably vary from one occasion to the next and it would be unfortunate if the court made a rigid arrangement that would force the situation. But the child has a right to know her father and it is not in her interests if the attempts to make contact are structured in such a way that it becomes a time of upset or dread. If that is to be avoided, the petitioner must be given considerable scope to adjust according to the way the arrangements are working on any particular occasion. Everyone must strive to make it work so that this little girl's life can continue on an even and happy course without the conflicts of emotion that can only too easily arise if, for example, the build up to her father's visit is not one of happy anticipation.

I order therefore that the petitioner shall have access to the child every Saturday from 10.00am. to 5.00pm. He shall collect her from the respondent's parent's home in Fanga and shall be free to decide the nature and form of his access subject to being accompanied by such person or persons as the respondent's parents consider advisable during all visits in the first six weeks. Any unavoidable variation of the time he collects the child must be communicated to the respondent's parents before the time for collection and as long in advance as circumstances allow. Whilst I would suggest he collects her himself, I do not make that part of my order. I do however, order that if he is unable to collect her personally, the respondent's parents must be advised beforehand.

I pass to the claims for past and future maintenance.

I can deal with the claim for past maintenance shortly. The petitioner claims that, when they separated in May 1997, they agreed to live independently without one being liable or obligated to the other. The respondent denies any such agreement. I do not need to resolve that issue.

Whilst the respondent was in San Francisco, she was in receipt of an income that, in broad terms, matched that of her husband and both were subject to social and customary obligations that dug deeply into their finances. The respondent also points out that she had expenses for the fares of her mother and herself and the child to and from Tonga. I do not consider they should be placed in the equation. They were made necessary by the respondent's unilateral decision to send the child to her parents in Tonga. While she had the child with her in the United States, she received a child allowance of approximately $3560.00pa. Of course, when she sent the child to Tonga, that ceased.

That would have been the time to seek some form of financial provision for the child from its father but she did not. Only when the divorce papers were filed did this request appear.

Although the court has received affidavits including evidence of means, there has been no real attempt to quantify this sum of $1000 per month. Whilst in the United States, the respondent has managed to live within her income. There is no suggestion the sum is necessary to pay substantial bills she has had to meet because the petitioner has left her without adequate support. I see no justification in penalising the petitioner, for that is what it would be, in such a large sum for no clear reason. Counsel for the petitioner suggests, with some cause, such a sum will simply enrich the mother rather than repay money already spent on the respondent and the child,

The claim for past maintenance is refused.

The future maintenance is a different matter and, as I have stated, is only sought for the child. The mother should be able to look to the petitioner to help her with the expenses of the child of which she has the custody. Already the petitioner has agreed to pay for the child's medical insurance and has made her the beneficiary of a modest life insurance policy. He has agreed that he will pay all her education expenses and, as it is likely this will involve schooling abroad at least from the secondary level, he will be wise to start making some financial provision.

Although the respondent's income is reasonably close to that of the petitioner at present, when she returns to the Kingdom in September and resumes, it is hoped, her work in the Ministry of Foreign Affairs, her salary will drop to $8769.00. She seeks an order for maintenance for the child of $700.00 per month.

The petitioner's income will remain at the same level. He has a total income of $54,577.00pa. From that are deducted various expenses I do not need to set out in detail but which leave a net income of $20,407.00 pa.

I do not accept all the deductions made to reach that figure should be given priority over provision for his own child. He has deducted an estimated figure of $15,000.00 for church donations and community activities. I appreciate that his position as a Cabinet Minister requires him to be seen to be unstinting in many such things but they are still voluntary in the sense that he is able to determine the level and scale. I do not accept that a reasonable parent should put such things before the welfare and requirements of his child. For that reason, I regard that figure as providing, to some extent, a reserve that can be drawn on if necessary.

He has also deducted the repayments of a loan from the ANZ bank. I do not know the nature of the loan but I do not consider that should be taken out of the income against which I must measure his ability to pay a proper level of maintenance.

I note he has assumed financial liability for relatives and I accept that is a factor that is reasonably taken into account in determining his ability to pay.

In order to decide how much should be spent on the child, it is not realistic simply to add up the cost of the various necessities. A married couple in Tonga with a joint income of the level the parties would have had if they were still together would inevitably provide their child with more than the bare necessities. A child is entitled to continue to be maintained at a similar level where possible.

As with the claim for past maintenance, I have been given no information as to how the figure of $700.00 has been reached but I note that, when he was seeking custody, the petitioner did not dispute the sum and indicated his willingness to pay it if he had custody. I therefore work on the basis of such a sum.

From September, the father will have and will continue to have an income substantially higher than that of the respondent but he should not have to shoulder the whole burden. The respondent must expect to contribute and I bear in mind that it is she who has the privilege and joy of the day to day care of their daughter.

The petitioner has agreed to pay education expenses and, whilst they are likely to be small for the next few years, he will need to make some provision for substantial future payments. If done wisely at this stage, he should not need to commit a great deal each month. Once the child is studying abroad, those expenses should include the cost of air fares and accommodation but the maintenance payments should be reduced accordingly. He is also already paying on his life policy and will

have to start to pay for medical insurance. I have been provided with no figure for the latter and assess it at present at $500.00 pa for a child joining such a scheme at this age.

Taking all those matters into account, I consider a fair sum would be for the petitioner to pay $500.00 per month such order to continue until and unless there is a major change of circumstances of either of the parties or of the child and further application is made to the court. Although the respondent will continue with her higher income until September, I consider this order should commence approximately three months before her return.

Counsel for the respondent also asks for costs. I find it hard to see any reason why one party should pay the costs of the other. The respondent has failed in her claim for past maintenance. Had that claim not been pursued, I consider this may well have been resolved sooner. Equally, the claim by the petitioner for custody in answer to that claim was an unfortunate response and could have helped to harden attitudes and also prolong the proceedings.

I make no order for costs.

Therefore I order as follows:

1. By consent the respondent shall have the custody of the child, Sinaitakala, with reasonable access to the petitioner.
2. The petitioner shall have access on the following terms:
   (i) The petitioner shall have the care of the child every Saturday between 10.0am and 5.0pm. He shall have the sole right to decide the manner in which he entertains the child during that time subject to the right of the respondent's parents to nominate up to two suitable persons to accompany them on any visit within the first six weeks from the date of this order it they consider that will make the arrangement easier for the child.
   (ii) The petitioner shall collect the child from the respondent's parent's home.
   (iii) The petitioner shall give the respondent's parents notice of any change in the time he intends to collect the child as much in advance as circumstances allow but, in any event, not later than 9.30am on the day he is to have access.
   (iv) If the petitioner is unable to collect the child personally he must advise the respondent's parents of the identity of the person who will collect the child before 9.30am on the day he is to have access.
3. The terms for access in the preceding paragraph shall continue in force until the respondent returns to Tonga when they may be varied by written agreement of the parties or by further order of this court on the application of either party.
4. The claim for past maintenance for the respondent and the child is refused.

5. The petitioner shall pay $500.00 per month to the respondent for the maintenance of the child. The first payment shall be on the first working day of June.
6. The petitioner shall pay all the costs of the child's education now and in the future. If the child attends an educational establishment abroad, such costs shall include accommodation and necessary airfares provided that he shall pay only half the cost of the maintenance ordered in the preceding paragraph at all times the child is abroad attending such educational establishment.
7. Within three months of this order, the petitioner shall arrange and bear the cost of medical insurance for the child including provision for treatment abroad if not available in Tonga and for emergency evacuation.
8. The petitioner shall pay the premiums to maintain the policy of life insurance taken out with Grand Pacific Life Insurance Ltd to which the child is the primary beneficiary.
9. There shall be no order for costs.

R v Fakauho

Supreme Court, Nuku'alofa
Finnigan J
Cr 420/99

5 April 2000; 5 April 2000

Criminal law — sentence — whether sentencing provisions are retrospective

The accused saw a man assaulting his (the accused's) brother with a piece of wood. The accused took a knife and killed the man and he was subsequently charged and pleaded guilty to manslaughter. He appeared for sentencing on 5 April 2000. The offence was committed on 12 February 1999 when the maximum sentence was 15 years. On 3 November 1999 the Criminal Offences Act was amended to provide a maximum penalty of 25 years. The Crown submitted that the proper maximum for the offence was that which existed at the time of conviction.

Held:

1. Pursuant to clause 20 of the Constitution the legislature and the King of Tonga cannot pass any law to take away any right to liberty that the accused had, except from the time of that law. The amendment that increased the potential period of imprisonment took away the right of a person sentenced to imprisonment for manslaughter to be a free man after 15 years or less. It empowered the Court to deprive him of liberty for up to 25 years. This provision cannot be retrospective. The maximum penalty of 15 years was the starting point for the Court.
2. The Court concluded that the accused should go to prison for 9 years. After considering the mitigating factors the Court suspended part of that sentence. After serving 6 years the accused would be released, with the balance of the sentence suspended for 3 years.

Statutes considered:
Constitution of Tonga (Cap 2)
Criminal Offences Act (Cap 18)

Counsel for Crown : Mr Cauchi
Counsel for accused : Mr Niu

Judgment

The accused appears for sentence on a charge of manslaughter, to which he has pleaded guilty.

I shall deal first with the issue of the maximum sentence. The offence was committed on 12 February 1999, when the maximum penalty was 15 years' imprisonment. On 3 November 1999 s 93 of the Criminal Offences Act (Cap 18) was amended, to provide a maximum penalty of 25 years. The Crown submits that the proper maximum for the offence is that which exists at the time of conviction.

I have not been referred to, and have not consulted any of the laws of England. In my view the matter is provided for in the laws of Tonga. The accused by law has a right to be a free man, this is clause 1 of the Constitution, cap 2. This right exists until taken away by the police or the Courts according to law, that is clause 14, or until the accused is sentenced by a Court, that is clause 10. Pursuant to clause 20, the legislature and the King of Tonga can not pass any law to take away any right to liberty that the accused has, except from the time of that law. The amendment that increased the potential period of imprisonment took away the right of a person sentenced to imprisonment for manslaughter to be a free man after 15 years or less. It empowered the Court to deprive him of liberty for up to 25 years. This provision cannot be retrospective. I shall sentence the accused for committing a crime with a maximum penalty of 15 years.

The crime is manslaughter. Sione, provocation, and rushing by the accused to the aid of your brother, can be an explanation, but for this crime it cannot be an excuse. Like wise, you were drunk, but you remembered a lot of what happened. Being drunk is an explanation of your bad behaviour, but not an excuse.

If I had directed the jury about provocation in s 88 of the Criminal Offences Act, on what has been told to me this morning, I could not have suggested to them that you were sufficiently provoked as to reduce murder to manslaughter. It would have been their right and privilege and for them alone if they still reduced the charge, but I have heard nothing to suggest that you were sufficiently deprived of the power of self control or had reasonable grounds to believe that it was your legal duty to kill Maikolo in order to protect your brother. Therefore I must treat your offence as being at the more serious end of the scale.

You went to a man who was not threatening you but was using a piece of wood against your brother. You took a knife in your right hand and struck him. This was itself excessive and unlawful. You struck him directly on his neck and the force of your blow sent the knife 8cm into his neck. That is the length of this index finger. You struck him also on his cheek and the knife went 4 cm into the bone of his cheek. That distance is the length of this finger, down to the second knuckle. Then you put the knife in your left hand and struck him again on the arm, the wound was 5 cm deep. With the blows to his neck and cheek you caused grievous bodily harm and were liable to imprisonment for up to 10 years. With the blow to his arm you caused him bodily harm and were liable to 5 years' imprisonment. I must remember that it was not the most violent kind of killing, and it does have some mitigating features. You were not at first seeking to fight. I accept that you came to the dance not carrying the knife and not looking to harm anybody.

However, you did use a dangerous knife and death was the result. For doing this the law says I must consider imprisonment for up to 15 years.

After considering the whole matter, I have concluded you must go to prison for 9 years. Further to that, I have considered the following things. There is no evidence of premeditated use of the knife, you did plead guilty although not until after one year, I accept that you are remorseful and fully regret what you did, and I accept that you have been forgiven by Maikolo's family, and will live in peace and harmony with them. As well, I have no doubt that you are a young man of good character, apart from this crime. For these reasons I shall use the full extent of my power to suspend part of that sentence. After serving 6 years you will be released, with the balance of the sentence suspended for 3 years.

Finally, I have this to tell you. You did not make your plea of guilty until last week, but there is nothing to say that you should make a plea of guilty early in order to be given the benefit of that in sentencing. You have been in custody since 13 February 1999 on this charge, with bail denied. I direct that your sentence will start from that date. Sione, you have had the utmost leniency that the court can allow you.

Toafa v Talisi

Supreme Court, Nuku'alofa
Ward CJ
C 1539/98

31 March, 4 April 2000; 7 April 2000

Tort — trespass by pigs — owner liable for damage to crops
Damages — trespass by pigs — damages reduced where crop owner failed to fence

In July 1998 the plaintiff planted squash pumpkins on an 'api in Fua'amotu belonging to Tu'ifua Pauta. Although the 'api was fenced, a few pigs entered that month but caused only slight damage. Following that the fence was checked each week and, as the plaintiff lived in Tokomololo, Tu'ifua was asked to look after the plantation. By September when the squash were nearly ready to be harvested, the plaintiff went almost every day. Towards the end of the month, he found that pigs had entered and caused considerable damage to his crop. Identification of pigs was difficult. The plaintiff was successful in trapping some of the pigs and they were those of the second defendant and of the first defendant's wife and family. The plaintiff brought a claim for damages for trespass by pigs.

Held:

1. By common law the owner or keeper of domestic animals had a duty to confine them and was liable for any damage caused if they trespassed on another's land. The Court held that the first defendant performed actions that were consistent with him being the keeper of the pigs and therefore he was liable to the plaintiff.
2. The second defendant was also liable for the damage caused by his pigs when they were not properly confined.
3. The Court did not accept the proposition that anyone who planted crops on his land had any duty to fence the land to protect it except where some special law or custom dictated it should be done and no such exception was pleaded here.
4. A farmer who cultivated unfenced land with full knowledge that the land in question had been consistently foraged by pigs previously may be awarded reduced damages. The plaintiff, once the serious damage occurred near to harvest, could have taken more effective steps to prevent the pigs from continuing to enter and the Court, in consequence, reduced the award by 10%.

5. The defendants were liable for the damage caused by four out of a possible six pigs and the Court ordered the defendants to pay four sixths or $1180.00 of the special damages proved. The Court also awarded general damages of $500 based on the problems caused to the plaintiff by the actions of the defendants' pigs beyond the actual damage. Both those sums were reduced by 10% producing a total award of damages of $1512.00. Interest on the damages was to be paid at 5% from the date the writ was served, 26 January 1999, to the date of judgment and it was to continue until payment. The defendants were ordered to pay the plaintiff's costs.

Cases considered:

Lonitenisi v Tu'i'onetoa [1997] Tonga LR 161

Tupou'ahome'e v Talau (Supreme Court, C 762/97, 4 April 1998, Lewis J)

Statute considered:

Pounds and Animals Act (Cap 147)

Counsel for plaintiff : Mr Fakahua

Counsel for defendants : Mr Veikoso

Judgment

This is a claim for damages for trespass by pigs.

In July 1998 the plaintiff planted squash pumpkins on an 'api in Fua'amotu belonging to Tu'ifua Pauta. Although the 'api was fenced, a few pigs entered that month but caused only slight damage. Following that the fence was checked each week and, as the plaintiff lived in Tokomololo, Tu'ifua was asked to look after the plantation.

By September when the squash were nearly ready to be harvested, the plaintiff went almost every day. Towards the end of the month, he found that pigs had entered and caused considerable damage to his crop.

The plaintiff called a number of witnesses who testified to frequent trespass over his plantation by pigs and considerable damage having been caused. I do not recite all that evidence but the owner of the 'api, Tu'ifua, gave clear and, I am satisfied, accurate and truthful evidence that on many occasions he saw pigs on the plantation damaging the plaintiff's crops. When he chased them they ran to the defendants' 'api. That 'api was originally part of Tu'ifua's land and is adjacent to the plantation and he knew the pigs that were kept there. He was satisfied that those were the pigs he chased away. Other witnesses testified to similar effect although they referred to some other pigs also being involved.

Identification of pigs in cases such as these is always difficult. The plaintiff was successful in trapping some of the pigs and I am satisfied they were those of the second defendant and of the first defendant's wife and family.

The second defendant gave evidence and agreed his pig had trespassed on the plantation in early September. He told the court that Tu'ifua had agreed that, if the second defendant watched over the plantation, the plaintiff would not take any action. As a result he watched over the plaintiff's crops on three nights. He took a powerful torch and on each night chased away up to thirty pigs. Tu'ifua denies both the

agreement and the fact of the second defendant having kept watch. I do not believe the second defendant over this. I am satisfied that his pig did trespass and whilst I accept that there were other pigs involved in causing damage to the plaintiff's plantation, I do not accept the suggestion there were so many. Had there been that number attacking the crops for three nights, the damage would have been far greater.

The plaintiff asked an officer from the Ministry of Agriculture to assess the damage. The plaintiff stated he came three times but the officer recalled only two visits. His assessment of the damage was that it would have been caused by a group of pigs. When asked if it could have been done by three pigs he said that they could but only if very hungry. Taking that evidence with that of Tu'ifua and Sione Vailea I am satisfied that the damage was the work of no more than six pigs.

The plaintiff was able to trap some pigs and it is not disputed that they were pigs belonging to the occupants of the first defendant's 'api. I am satisfied that four of the pigs which caused the damage to the plaintiff's plantation have been proved to the necessary standard to have been the pigs kept on the first defendant's land by the occupants.

The first visit of the agricultural officer was on 23 September and he estimated the value of the crops damaged to be $750.00. Following further damage he again visited the plantation on 9 October and the damage then was $1,000.00. He added a $10.00 assessment fee on each visit and the total of $1770.00 is claimed as special damage.

In addition the plaintiff claims $1,000.00 for general damages.

The defendants both gave evidence.

The first defendant is the holder of the 'api and lives there with his wife and the second defendant. He told the court he does not and did not then own pigs. His wife has pigs and so does the husband of his daughter. They are all kept on his land. He agrees that the second defendant also owns one of the pigs kept there.

My note of his evidence on this was:

> "At home I tell them they do what they want to do. If they want pigs and to keep pigs they can do so. It is my 'api but because so many live there I would be a dictator if I tried to control them."

He went on to say, however, that he had instructed them about keeping the pigs and he had built a pig fence for them. He explained that, when he built the pig fence he told his wife and children, including his daughter and her husband when they went to New Zealand, to put the pigs in the fence. There is no dispute that, by the time of the trespass in September and October, he was abroad. When he returned he was shown the assessment of the damage and repeated his assertion that he owned no pigs. His defence is that he does not own any of the pigs that trespassed on the plaintiff's plantation.

In evidence, the second defendant denied that, apart from the incident in early September, his pig had been involved but he admitted that all the pigs were able to leave the pig fence. The first defendant's wife told the court that one of the pigs trapped later and returned was that of the second defendant. The second defendant described how he had assisted the first defendant to build the pig fence and explained that he used to collect the pig food but any of the people living on the 'api would feed them and put them back in the fence if they were outside.

The wife of the first defendant told the court the pigs were nothing to do with her husband. However, her evidence was that the plaintiff told her to take care of the pigs and to keep an eye on them. When there was a warning from the squash growers, he told her to look after them properly.

I am satisfied on the evidence as a whole that four of the pigs from the first defendant's 'api trespassed on the plaintiff's plantation and caused damage to his crops. One of these pigs was the personal property of the second defendant and three belonged to the wife and family of the first defendant. I am also satisfied that the pigs were looked after and generally cared for by all the occupants of the 'api.

The common law has long held that the owner or keeper of domestic animals has a duty to confine them and he is liable for any damage caused if they trespass on another's land. The evidence in this case is that the first defendant allowed those pigs to be kept on his land. Had it stopped there he may not have been liable for the damage caused by their trespass. However, he clearly also performed actions that point to him being the keeper of those animals. He helped build the pig fence and he instructed his family to keep the pigs inside it. I am satisfied his actions went far beyond that of a landowner who has simply given permission to another to use his land to keep stock. I am satisfied he was the keeper of those pigs and gave instructions as to how they were to be kept by the occupants of his land even though the strict ownership of them was in other members of his family and the second defendant. He is liable to the plaintiff for the damage caused and his absence at the actual time of the trespass affords him no defence.

The second defendant's evidence that he helped keep all the pigs also makes him liable for the damage caused when they were not properly confined and he is also jointly liable for the damage caused. I would add that I accepted the evidence of the plaintiff's witness that, when the second defendant was shown the pigs of the first defendant's wife that had been trapped, he referred to them as "our pigs".

I also note that, by section 17 of the Pounds and Animals Act (Cap 147), compensation for cattle trespass may be recovered from the "owner or person having the charge, management or control" of the cattle. I am satisfied on the evidence that both the first and second defendants are such persons.

The defendants have pleaded that the fault also lay with the plaintiff for not fencing his land adequately. They accept the duty of the pig keeper to confine his pigs but suggest an equivalent duty on the landholder to fence his land to protect it from the animals. Mr Veikoso cites the cases of *Lonitenisi v Tu'i'onetoa* [1997] Tonga LR 161, and *Tupou'ahome'e v Talau* (Supreme Court, C 762/97, 4 April 1998, Lewis J).

In the first case, Hampton CJ referred to the pig owner's duty to care for and to fence and properly secure his animals under the Act and went on to say:

> "As to the appellant (the owner of the land upon which the pigs trespassed) the Magistrate found that there was an obligation, a duty to care for and maintain and fence his crops. In the context of the local community, I agree with the magistrate about that. Each side, the magistrate said, failed in their respective duties.
>
> First the respondents let out their pigs from the sty and let them wander loose despite warnings from the others about that in the past, including the appellant.

> Secondly, the appellant, knowing the situation and the claimed trespass by animals in the past and destruction of his crops, failed to fully fence and secure his plantation."

In *'Ahome'e's* case, which was an appeal on the basis of Hampton CJ's ruling in *Lonitenisi*, Lewis CJ referred to the ruling in the earlier case that "a reciprocal duty was owed by land-owners to care for and protect (by fencing) their crops" and continued; "That is surely a correct conclusion - in cases such as these there are rights and duties on both sides. In *Lonitenisi* … The pig owner had not fenced his land securely as the Act requires, but nor had the land owner secured his land as he ought."

I have considered those cases with care and I must, with great respect to the learned judges involved, disagree. As both stated, the Pounds and Animals Act makes it an offence for any person who is the owner or occupier of land who keeps or permits to be kept cattle on that land to neglect to enclose or otherwise secure the cattle (which includes pigs) and, under section 17, compensation may be recovered.

I have already stated that the common law imposed a duty on the owner or keeper of domestic animals to prevent them trespassing and causing damage to other peoples property and that is, I would venture to suggest, the basis of a claim in trespass such as this for damages in excess of actual compensation. That duty is owed to other property holders in general by anyone keeping cattle.

Where I must differ from the cases cited is that I cannot accept nor can I find any authority for the proposition that anyone who plants crops on his land has any duty to fence the land to protect it except where some special law or custom dictates it should be done and no such exception was pleaded here. (Neither do I accept he has the duty suggested in those cases cited to maintain or care for his crops quite apart from fencing them.) If there is duty to protect his crops by a fence I can only ask, to whom is this duty owed? The only way I can read the two judgments referred to is that the duty must be owed to the pig owner and that only needs to be stated to be shown to be untenable.

I do accept that, in determining damages under common law as opposed to compensation under the Act, the fact that a farmer cultivates unfenced land with full knowledge that the land in question has been consistently foraged by pigs previously may be awarded reduced damages.

In this case, the evidence is that there was a fence but it was clearly not maintained sufficiently to stop the pigs. On the other hand it is common knowledge that pigs will find and open any weakness in a fence in a way few other domestic animals will do.

I do feel the plaintiff, once the serious damage occurred near to harvest could have taken more effective steps to prevent the pigs from continuing to enter and I shall, in consequence, reduce the award by 10%.

I have found that the defendants are liable for the damage caused by four out of a possible six pigs and I therefore order the defendants shall pay four sixths or $1180.00 of the special damages proved.

The claim for general damages is based on the problems caused to the plaintiff by the actions of the defendant's pigs beyond the actual damage. The plaintiff gave evidence of having to attend the plantation daily towards harvest. He had to seek the assistance of the landholder to guard his crops, he had to repair damage by the pigs to the fence and he had to take and keep the pigs trapped until after the completion of

the harvest. No specific sum was mentioned but I consider a proper award under this
220 head would be $500.00.

Both those sums are reduced by 10% producing a total award of damages of $1512.00.

The plaintiff also claims interest at 10% from 23 September 1998 - the date the damage occurred. I do not accept that interest should run from that date nor do I accept that it should be at such a high rate. I order interest on the damages at 5% from the date the writ was served, 26 January 1999, to the date of judgment and it shall continue at that rate until payment.

The defendants shall pay the plaintiff's costs to be taxed if not agreed.

Attorney General v Namoa

Supreme Court, Nuku'alofa
Ward CJ
Cr 1154/99

6 March, 5 April 2000; 11 April 2000

Criminal law — contempt of court — real risk of undermining public confidence in the administration of justice

On 18 October 1999, a Check it Out Programme was broadcast on television at 11.00am and 8.00pm by the Oceania Broadcasting Network (the fifth defendant). The programme concerned the repeal of section 16 of the Land Act. It took the form of a discussion between two panelists, 'Esau Namoa (the first defendant), a Member of the Legislative Assembly, and Nailasikau Halatuituia (the second defendant) who was studying land tenure at the University of Sydney. It was hosted by Kilisitina Vaea (the third defendant), an employee of the television station. Christopher Racine, the fourth defendant, was joined as the owner and manager of the fifth defendant. During the programme a number of references were made to a judgment of the Supreme Court in October 1996, and to the judges, Hampton CJ and Lewis J, who presided over it. Following complaints from the public about the tone and intent of some of the comments, the Attorney General moved for the committal of the people responsible and alleged the remarks amounted to contempt of court.

Held:

1. The test for contempt of court was whether there was a real risk of undermining public confidence in the administration of justice. The result will depend on the jurisdiction in which it occurred.
2. With respect to the first theme of the programme, even ignorant criticism of the court may not amount to contempt and the Court was not satisfied to the required standard that the first and second defendant's comments were likely to have lowered the authority of the court in the eyes of any right thinking member of the public and they did not amount to contempt of court.
3. With respect to the second theme of the programme, the overall effect of the comments created a real risk that they would lower the authority of the court. The Court was satisfied to the criminal standard that the first defendant made the remarks with the intention of lowering the judges in the eyes of the public.

4. The second defendant was only involved in the first theme of the programme and as this was held not to amount to contempt he was acquitted of contempt.
5. The Court found that there was a real risk that the comments made by the first defendant would lower the authority of the court. He was convicted of contempt. As it was at the lower end of the scale of contempt, he was ordered to pay a fine of $1,500.
6. The third defendant was the presenter of the programme so could not avoid responsibility for the comments of her guests. She was convicted of contempt but there was no penalty imposed.
7. The Court found that the failure of the fourth and fifth defendants adequately to control the programme they broadcast meant they were also guilty of the contempt in it. The fourth defendant was ordered to pay a fine of $1,000.
8. With respect to costs, it was ordered that there be no order in relation to the second defendant; the first defendant was ordered to pay one quarter of the costs and the fourth and fifth defendants were ordered to pay the remaining three quarters.

Cases considered:

Akau'ola v Attorney General [1997] Tonga LR 36 (CA)

Ambard v Attorney General for Trinidad and Tobago [1936] AC 322; [1936] 1 All ER 704 (PC)

Attorney General v Ulakai [1999] Tonga LR 259

Primary Produce Exports Ltd v Masima [1996] Tonga LR 234

R v Gray [1900] 2 QB 36

R v Kopyto (1987) 47 DLR (4th) 213 (Ontario CA)

Solicitor-General v Radio Avon Ltd [1978] 1 NZLR 225 (CA)

Statute considered:

Land Act (Cap 132)

Counsel for Attorney General : Mr Kefu
Counsel for defendants : Mr Edwards

Judgment

On 18 October 1999, a Check it Out Programme was broadcast on television at 11.0am and 8.0pm by the fifth defendant, the Oceania Broadcasting Network. The programme concerned the repeal of section 16 of the Land Act. It took the form of a discussion between two panelists, 'Esau Namoa, a Member of the Legislative Assembly and Nailasikau Halatuituia, who is studying land tenure at the University of Sydney. It was hosted by Kilisitina Vaea, an employee of the television station.

During the programme a number of references were made to a judgment of the Supreme Court in October 1996 in the case of *Primary Produce Exports Ltd v Masima* [1996] Tonga LR 234, and to the judges, Hampton CJ and Lewis J, who presided over it - particularly the former. Following complaints from the public about the tone and intent of some of the comments, the Attorney General moved for the

committal of the people responsible alleging the remarks amounted to contempt of court. The panelists are the first two defendants, the programme host the third. Christopher Racine, the fourth defendant, is joined as the owner and manager of the fifth defendant.

It appears that the repeal of section 16 stemmed from the decision of the judges in the *Primary Produce Exports Ltd* case that the section conflicted with clause 4 of the Constitution. The topic of the repeal was a matter of intense public debate and concern and this was the second Check It Out programme that had been devoted to the issue. I accept that both commentators held strong and genuine personal views about the issue.

It is not necessary to go into the details of the programme. It was directed largely at the fact that this section was protective of Tongans and should not be lightly discarded. As the programme developed the commentators also pointed out that a number of other provisions of the Land Act could be contrary to the Constitution and posed the question why only this one should, therefore, be repealed. By the end of the programme, this was the main thrust of the commentators' remarks and there can be no challenge to their right to point that out and comment on it even in the rather extreme terms used by Mr Namoa.

As the repeal had resulted from the *Primary Produce Exports Ltd* case, it was inevitable the judgment would itself become the subject of some discussion and comment. It is suggested by Mr Kefu for the Attorney General that those comments amounted to contempt.

The contempt alleged here is that the comments scandalised the Court. As with the phrase contempt of court itself, the word is archaic and would possibly be better replaced but it is an accurate enough description. The classic definition of scandalising the court is that of Lord Russell CJ in *R v Gray* [1900] 2 QB 36, the case that effectively revived the offence in England after a century of disuse:

> "Any act done or writing published calculated to bring the court or a judge of the court into contempt or to lower his authority, is a contempt of court."

In England such prosecutions have become rare but in Australia and New Zealand they have been regularly brought and I consider the scope of the offence is now more plainly reflected in the recent judgments from those jurisdictions.

This court derives its power to punish for contempt from the inherent power developed through the common law. The harm that the law of contempt is to prevent is interference with the due administration of justice. It is to protect that and not the individual, whether a court or a judge, who is administering justice. The reason was explained by Richmond P in the New Zealand case of *Solicitor-General v Radio Avon Ltd* [1978] 1 NZLR 225 (CA) at 230:

> "The justification for this branch of the law of contempt is that it is contrary to the public interest that public confidence in the administration of justice should be undermined."

The test, then, is whether there is a real risk of undermining public confidence in the administration of justice. The types of contempt that will amount to scandalising the court are extreme and would go beyond any form of mere criticism. Scurrilous abuse

of the court or judge may amount to scandalising the court if it is likely to undermine public confidence in the court's function. Similarly untrue allegations of bias or impropriety will amount to a serious contempt because of the tendency to undermine the very basis of the judge's function.

I shall set out the passages complained of but, as is so often the case, the effect lies not just in the individual words or phrases but in the total effect of the words against the general tone and context of the programme as a whole. Time and space prevent me from setting out the whole transcript but, in some instances, I have set out the surrounding passages to clarify the context in which the commentators were using them.

The passages form part of two main themes which I shall deal with separately although to some extent the overall effect is also relevant.

The first theme is the suggestion that the Chief Justice acted outside his jurisdiction because this was really a case that should have been tried in the Land Court.

It first surfaced when Mr Halatuituia was making his second contribution to the discussion. He referred to the finding in the *Primary Produce Exports Ltd* case that the section was contrary to clause 4 of the Constitution and continued:

> "The reasoning and importance attached to the land by the Tongan subject is vastly different hence the publication of this Law (the Land Act) in 1927 which allowed for the establishment of the Land Court and all matters related to the land shall be dealt with by the Land Court. Hence the Constitution and the Law of Tonga allow for an assessor in the Land Court. The nobles and the people of Tonga are aware that the Chief Justice is a European or a foreigner."

He then developed the proposition that the case in 1996 should have been heard in the Land Court so the court would have had the assistance of an assessor to 'clarify matters to the Chief Justice pertaining to how we live as Tongans, our culture and our connection with the land.' He concluded:

> "So the judgment was not in accordance with the Land Act where a land assessor be brought forward as is done by the Land Court. In my opinion, the judgment of the Chief Justice, he had no authority on matters pertaining to the country and the land."

That theme was taken up by Mr Namoa. He suggested that the Crown Law Department should have advised the Chief Justice 'for him to realise he had no authority to deal by himself with the land matters'. Later he stated;

> "… the Minister of Justice and the legal advisers should have known better that the Chief Justice had no authority to deal with and give judgment by himself on land matters in this country."

And finally:

> "The Chief Justice had no authority at all to give judgment in this particular court case."

The second theme arises in the comments by Mr Namoa only. He referred to the section being 72 years old and continued:

> "It has lasted long for there were people wise enough before and people who loved, people who paid allegiance to this country and these people who respected His Majesty. Another thing, Kilisitina, in the history as I understand it from the Palace Office in relation to Tupou I, with respect, he pushed the Chief Justice not to interfere with the matters relating to this country. The land is a record at the Palace Office.
>
> When it came to the Second King, with respect, the Chief Justice was able to make judgments around this country.
>
> When it comes to Queen Salote Tupou III, the Sun who has Fallen, she took the Judge and threw him outside, with respect, he has no involvement at all with the land of this country.
>
> It is now Tupou IV, with respect, the same thing. Tupou IV told the judge stay there according to section 84 of the Constitution. The unfortunate thing is that the judges who delivered the judgments have left and the company PPEL has dissolved. What is the reason for submitting a law where the company has dissolved and the Chief Justice has left? That is what I am talking about. Tupou IV, this King does not accept a Chief Justice or a foreigner to come here and want to make decisions concerning the land of this country."

Mr Kefu suggests that both these groups of comments have a clear tendency and intention to lower the authority of the court and bring it into contempt.

Mr Edwards for the defendants asks the court to see this as reasonable comment and part of freedom of speech. In *Attorney General v Ulakai* [1999] Tonga LR 259, I pointed out:

> "Freedom of the press in Tonga is preserved in article 7 of the Constitution along with and, I would suggest, as part of freedom of speech. The media has the right to publish issues of public importance and also to publish them in such a way as to stimulate discussion. It is important therefore, that the media is not unduly restricted in what it reports and, when it is, the courts must always be careful to see that the rules of contempt are not used to gag the reporting and discussion of matters of public interest or concern for the wrong reasons."

I do not accept Mr Edwards' suggestion that clause 7 can be interpreted by reference to United States cases. In *Ulakai*'s case, I expressed my view that Tonga has already chosen not to follow America. That the common law power to punish for contempt of court exists here alongside clause 7 has been recognised in many cases including the case of *Akau'ola v Attorney General* [1997] Tonga LR 36 (CA).

Where the allegation is scandalising the court, the question of the effect of the words so often, as here, requires analysis of their meaning and the intention of the

person who made them. In this case the court must be careful to distinguish between incorrect statements and illogical comments on the one hand and a real tendency to undermine the authority of the court on the other.

It is only in the clearest case that the court should take action and the court should not be too sensitive of its position. Anyone is entitled to comment on a court decision. Mere criticism is, and for a very long time has been, permitted. In *Gray's* case, Lord Russell went on to point out:

> "That description of that class of contempt (scandalising a court or judge) is to be taken subject to one and an important qualification. Judges and courts alike are open to criticism and if reasonable argument or expostulation is offered against any judicial act as contrary to law or the public good, no court could or would treat that as contempt of court."

Even unfair, inaccurate or biased comment will not give rise to a conviction of contempt unless it goes beyond reasonable comment on the decision and is likely to bring the court itself into disrepute. There is no reason why the courts should not be able to stand the same degree of criticism other institutions and public figures face. If the court has public respect, I find it hard to believe that it will lose it because of even ignorant criticism. It was well expressed by Cory JA in the Canadian case of *R v Kopyto* (1987) 47 DLR (4th) 213 (Ontario CA) at 227:

> "… courts are bound to be the subject of comment and criticisms. Not all will be sweetly reasoned but the courts are not fragile flowers that will wither in the hot heat of controversy."

Even outspoken comments will not amount to contempt unless they are abusive of the courts or the judges or suggest impropriety. In *'Akau'ola v Attorney General* our Court of Appeal stated:

> "The court, by which the rule of law is maintained and implemented is at the heart of a free society; but it is not a fragile institution. It is and must be robust enough to bear the criticisms of the dissatisfied. It was not set up so much to be protected as to protect. Of course the extremes of calumny which might weaken even the strongest institution, need to be repelled. But contempt of court by scandalising the court should be found only in those extreme cases."

The Court adopted the famous words of Lord Atkin in *Ambard v Attorney General for Trinidad and Tobago* [1936] AC 322 at 335; [1936] 1 All ER 704 (PC), in which he pointed out:

> "Justice is not a cloistered virtue: she must be allowed to suffer the scrutiny and respectful, even though outspoken, comments of ordinary men."

The test is not whether a comment is critical or wrong in its interpretation of the case but whether the tendency is such that it undermines the authority of the court itself. The result will depend on the jurisdiction in which it occurred. I would suggest that,

in a small community with few judges and a relatively undeveloped press and media, the test is the same but the level of criticism likely to undermine public confidence in the administration of justice is lower than in a larger community more familiar with and better able to evaluate the remarks of commentators in the media.

The first group of comments are based on the mistaken view expressed by Mr Halatuituia that all matters related to the land shall be dealt with by the Land Court. The jurisdiction of that Court is expressed in and limited by the provisions of section 149 of the Land Act. The *Primary Produce Exports Ltd* case was not a Land Court case but a civil case. It could not have been tried in the Land Court and the suggestion that the Chief Justice was mistaken when he heard it in the Supreme Court is erroneous.

The commentators were correct to state that, had it been a Land Court case, the judge would have sat with an assessor. It is also correct that the duties of the assessor are to assist the judge with explanation and advice in regard to Tongan usages and customs and similar matters. However, the Act specifically provides that the assessor shall have no part in the formulating of the orders and judgments of the Court.

The suggestion that the Chief Justice had no jurisdiction in the case was unfortunate but I read those remarks as relating principally to the absence of an assessor based on the second defendant's mistaken belief that this should have been heard in the Land Court.

Mr Namoa continued to build on the same error but his comments, less tempered that those of his fellow commentator, went further and suggested that the Chief Justice would not have gone wrong if he had been properly advised by the Government's legal advisers. That was an unfortunate addition. I consider he was, at the time, intending to direct his criticism at the legal advisers but the effect was to suggest that the Chief Justice was unfamiliar with his own jurisdiction and needed to be put right and, more seriously, that the court is advised in such matters by the executive arm of Government.

Had I thought for a moment that he intended those comments to be understood in that way, I would have not hesitated to find him guilty of contempt in relation to them. However, having considered the nature and accuracy of his remarks in the programme as a whole I feel these comments also arose from a misunderstanding of the position of the Land Court and apparent ignorance of the doctrine of the separation of powers.

I have already stated that even ignorant criticism of the court may not amount to contempt and I am not satisfied to the required standard that his comments are likely to have lowered the authority of the court in the eyes of any right thinking member of the public and they do not amount to contempt of court.

However, they remain relevant to the consideration of the tone and effect of the later comments by Mr Namoa. Those are the comments I have described as comprising the second theme.

The effect of the passage set out is to suggest that King Tupou I had to prevent the Chief Justice from interfering in the matters of the country. He goes on to suggest that in the time of Tupou II, the Chief Justice was able to make such judgments with the result that Queen Salote had to take the judge and throw him out from any sort of involvement with the land of this country.

I am not commenting on the accuracy or otherwise of the events he may have been referring to. It is no part of the function of this court to dispute what may well be

historical fact. The conduct and attitude of judges over the world have altered with the passage of time and changing public expectations. What concerns Mr Kefu is the way in which these comments are worded. The first defendant, having described the earlier events in derogatory terms, passed on to relate it to the present court with the suggestion that the present King also does not accept the jurisdiction of the Chief Justice to make decisions in land matters.

That passage, of course, followed this defendant's earlier suggestion that the Chief Justice needed to be advised on the jurisdiction of his own court because he had gone wrong when acting without such advice.

Mr Kefu suggests the words used and the whole tenor of the remarks are deliberately intended to demean the judges and court. These remarks were made in Tongan and the effect must be assessed by how a Tongan speaker would take them. Words such as *teke'i* and *lii kitu'a* would be seen as intending disrespect. Following that, the use of the word *fietu'utu'uni* in the reference to the present King would be taken as critical of the judge's conduct now.

I am satisfied the overall effect of these passages creates a real risk that they will lower the authority of the court.

It seems probable that any reasonable person making such remarks must have intended such an imputation but I must consider whether the first defendant intended it or simply made these remarks carelessly with little or no thought of such a meaning. This is a criminal matter and I must be satisfied to the criminal standard of proof beyond reasonable doubt. I am satisfied to that standard that he made these remarks with the intention of lowering the judges in the eyes of the public.

The references to the fact that, because the judges have left the country, their judgment should somehow be of no effect coupled with the suggestion that the present King does not accept a foreigner to make decisions about land are all part of the generally derogatory tone of his comments. I am uncertain of his intention by those remarks but, if it was to suggest the judges were unable to appreciate the true position under the law because they were not Tongan, it was ill-informed. The judges are here to apply the law as it stands and, if that law is such that it is necessary to be Tongan to understand its true meaning, I would venture to suggest it is poorly worded. If the law is clear in its terminology, the nationality of the judge will have no effect upon his interpretation.

The two judges who sat on the *Primary Produce Exports Ltd* case served Tonga well for some years. They applied the law, as they were obliged to do, under the terms of their judicial oath. Their decision becomes a part of the law of Tonga until and if it is changed by the Court of Appeal or by legislation in Parliament. Whether they have left the country or have remained has no effect on the decision and its continuing application, as one would have expected an educated commentator to understand.

I pass now to the individual defendants.

As I have said, I do not consider the remarks I have referred to as the first theme amount by themselves to contempt. They are the only matters Mr Halatuituia faces. He was, of course, present and continued to take part in the general discussion but I see nothing to suggest he was adopting the later comments of Mr Namoa. He has stated in his affidavit that he had no intention of offending the judges and suggests his remarks were bona fide comment on a matter upon which he, and many others, hold strong opinions. I accept that and he is acquitted of contempt of court.

Mr Namoa also filed an affidavit in which he asserts his right to disagree with the judgment and points out that, as a Peoples' Representative, he has a duty to his electors to keep them informed of proceedings in Parliament:

> "I did not appear on television to attack or abuse the judicial system in Tonga. I appeared on television to inform the public of my objection to section 16 being repealed. If it appears that I attacked the Court, then I sincerely apologise to the Judges concerned and to the Courts of Tonga. It was never my intention to be critical of the judicial system."

It was simply, he stated, an expression of his honest belief that the judgment was wrong. I accept he holds an honest belief the judgment was wrong and he is entitled so to do. Whether or not he intended to be critical of the judicial system, I am satisfied he allowed his disagreement with the judgment to lead him into a deliberate attack on the judges who made it.

It is not necessary to prove that the defendant in such a case intended to bring the court into disrepute or lower its authority and whether he did or not is relevant only to penalty. The test is whether the statements made in the way the court has found they were made pose is a real risk that they will lower the authority of the court. I am satisfied that there is a real risk that the comments made by Mr Namoa would lower the authority of the court. He is convicted of contempt.

His intention is relevant in deciding the appropriate penalty. A Peoples' Representative is a position of importance and such people are treated with great respect. I do not argue with his statement that he should keep the public informed of matters in Parliament but he must remember that his position carries with it a great responsibility. When a Member of Parliament makes his views public on an important issue and especially if he seeks to state them on television, his words carry great weight and he must ensure they are accurate and temperate. Unfortunately, his comments in this programme were neither in many instances. Had he limited his remarks to criticism of the judgment the audience would have been better served and he would have avoided the risk that his remarks would place him in contempt.

I have already stated that only serious cases will amount to scandalising the court in the sense of carrying a real risk of lowering its authority. I am satisfied this is such a case but, within the scale of such contempts, this is at the lower end. I consider the appropriate penalty in such a case is to order him to pay a fine of $1,500.00.

The third defendant filed an affidavit and gave oral evidence. By the time of this programme she had been working for the television station for over a year. She had no prior training in this field or in journalism generally but had gained experience over the time she had been presenting Check It Out. She pointed out that she had no intention to attack the courts and she, too, apologised for any disrespect to the courts.

She explained that the individual presenter and producer are responsible for the content and presentation of the show. She was also responsible for any censoring of the material. She indicated that she could stop the programme if she felt it was exceeding the bounds of what was acceptable. What was surprising and is relevant in relation to the fourth and fifth defendants, is that there appears to be little or no editorial assistance or monitoring of the programme whilst it is on air. As a result, the commentator has to make all censorship decisions as the programme progresses.

I appreciate that it would require a very experienced presenter and one who understood the law of contempt of court to appreciate the significance of the way the remarks in this programme were going. However, as the presenter of the programme, she cannot avoid her responsibility for the remarks of her guests. She is convicted of contempt but I do not consider it necessary to order any penalty.

The fourth defendant was, as I have stated, charged as the owner and manager of the fifth defendant. He has filed an affidavit and given evidence that he is neither. He deposes his position is a shareholder and President.

He established the television station, he said, as a 'charitable donation by my wife and myself to Tonga'. He explained to the court that he was the business arm of the organisation and he knows nothing of the actual operation of a television station. He takes no part in the choice of programmes or the manner in which the staff are trained or the station managed. After the original policy decisions about self-censorship, he has not been involved in the programming.

Read with the evidence of Miss Vaea, however a different picture emerges. For some time there has been no General Manager and he clearly maintains a close personal control of the general running of the station despite being away from Nuku'alofa for much of the time. He plainly retains a right to hire and fire staff because he 'holds the payroll' and he equally clearly considers that, as he has paid for the station, he can make any decision he wishes in relation to it. He told the court; "If I know of a programme and I disapprove, I can threaten to pull the plug". The losses of the company he describes as a personal loss and he agreed that, as far as he knew, he was the sole shareholder. I am satisfied beyond reasonable doubt that he is the effective overall manager and owner of the station.

He cannot assume that role without accepting responsibility for the manner in which the station is run. Any prudent manager would see that proper editorial procedures are in place and the lack of any effective control of this programme once it was being broadcast contributed substantially to this contempt. He told the court that he has no experience in the day to day management of such an organisation. If that is so, he should ensure that someone with such experience and knowledge has the responsibility for running it.

He has made no apology to the court and maintains his denial of responsibility.

The fifth defendant, the company itself, carries the ultimate responsibility. Television is a particularly powerful form of communication and the greater power must be met with an equally increased responsibility. In Tonga, the power of this medium is virtually unchecked because there does not exist the type of press or radio that would comment on and encourage critical discussion of a television broadcast. So effective is the medium, that many viewers accept almost anything stated on it as the truth.

That is no criticism of television but is to state, I think, a recognised fact. The result is that anyone who produces a television programme has a duty to be as accurate as possible in the information broadcast because the lack of alternative sources of comment or further information here means it may well be the only source of information about the topic many members of the public will have.

The failure of the fourth and fifth defendants adequately to control the programme they broadcast means they are also guilty of the contempt in it.

Beyond the need to protect the authority of the court, the law of contempt is not and should not be used to restrict public debate. It is only by such debate that the level

of public awareness will be increased, as it should in any society. The Check It Out programme has established itself as a genuine attempt to increase public awareness of matters of current interest and concern and to present them in a way that allows debate and expression of opposing views. In this case it is to the credit of the producers of the programme that an equal opportunity had been given in another programme to present the opposite side and the repeal of section 16 had been referred to in a number of previous programmes.

I bear that in mind in determining the proper penalty. I understand this is the first such case in Tonga involving a live television broadcast. It is important that broadcasters are aware of their responsibility to avoid this type of contempt but I recognise the importance of live debate in current affairs programmes. The actual contempt was by Mr Namoa and he has been fined for it. I do not wish to impose a penalty on the broadcaster that does not recognise the problems of live broadcasts but it should be understood that, if there are other cases, the court will look carefully at the steps taken to reduce the chance of re-occurrence.

I am satisfied the fourth and fifth defendants are guilty of the contempt that occurred in this programme. The fourth defendant is the person who has neglected to ensure proper controls and bearing in mind the remarks I have just made I shall order he pay the relatively nominal fine of $1,000.00. In view of the relationship between the fourth and fifth defendants, I impose no separate penalty on the fifth defendant.

Normally the costs of the second defendant would follow the event. However, his misstatement that the *Primary Produce Exports Ltd* case should have been heard in the Land Court was largely responsible for setting the discussion on the course that lead to the contempt. I make no order for costs in relation to the second defendant.

The first defendant shall pay one quarter of the costs of the Attorney General incurred in the case other than against Mr Halatuituia and the fourth and fifth defendants shall pay the remaining three-quarters.

Appeal

The defendants appealed the conviction of criminal contempt of court.

Namoa v Attorney-General

Court of Appeal, Nuku'alofa
Burchett, Tompkins, Beaumont JJ
CA 9/00

12 July 2000; 21 July 2000

Criminal law — contempt of court — scandalising the court — freedom of speech no relevant application

For the facts and the Supreme Court decision, see *Attorney General v Namoa* [2000] Tonga LR 59.

Held:

1. While certain constitutional rights of free speech exist, the existence of this freedom did not detract from the operation of the common law rules with respect to contempt by scandalising the court. Section 7 of the Constitution (guaranteeing freedom of speech) had no relevant application here.
2. The Court was satisfied beyond reasonable doubt that Mr Namoa's observations scandalised the court.
3. The penalties that were imposed were within a proper exercise of the judicial discretion. The Court was not persuaded that any ground for appellate interference was made out.
4. The appeal was dismissed, with costs.

Cases considered:

'Akau'ola v Attorney General [1997] Tonga LR 36 (CA)
Gallagher v Durack (1983) 152 CLR 238; 45 ALR 53
Mann v O'Neill (1997) 191 CLR 204; 145 ALR 682
Nationwide News Pty Ltd v Wills (1992) 108 ALR 681
R v Kopyto (1987) 47 DLR (4th) 213 (Ontario CA)
Theophanous v Herald & Weekly Times Ltd (1994) 182 CLR 104; 124 ALR 1

Statutes considered:

Constitution of Tonga (Cap 2)
Land Act (Cap 132)

Counsel for appellants : Mr Edwards
Counsel for respondent : Mr Kefu

Judgment

Introduction

This is an appeal from orders of the Supreme Court [Ward CJ] convicting each of the appellants of contempt of court. The contempt found by Ward CJ was the class of contempt known generally as criminal contempt, consisting of words or acts obstructing, or tending to obstruct or interfere with, the administration of justice [see Halsbury's Laws of England 4th Ed Vol 9 at 3]. The particular kind of contempt is that known as scandalising the court. Halsbury [at 21] explains the relevant principles as follows:

> **"27. Scandalising the court.** Any act done or writing published which is calculated to bring a court or a judge into contempt, or to lower his [or her] authority, or to interfere with the due course of justice or the lawful process of the court, is a contempt of court.
>
> Thus scurrilous abuse of a judge or court, or attacks on the personal character of a judge, are punishable contempts. The punishment is inflicted, not for the purpose of protecting either the court as a whole or the individual judges of the court from a repetition of the attack, but of protecting the public, and especially those who either voluntarily or by compulsion are subject to the jurisdiction of the court, from the mischief they will incur if the authority of the tribunal is undermined or impaired. In consequence, the court has regarded with particular seriousness allegations of partiality or bias on the part of a judge or a court.
>
> On the other hand, criticism of a judge's conduct or of the conduct of a court, even if strongly worded, is not a contempt provided that the criticism is fair, temperate and made in good faith and is not directed to the personal character of a judge or to the impartiality of a judge or court."

By notice of motion dated 29 October 1999, the Attorney-General applied to the Supreme Court for orders calling upon 'Esau Namoa, Nailasikau Halatuituia, Kilisitina Vaea, Christopher Racine and Oceania Broadcasting Network to show cause why they should not be committed, or be held liable, for contempt of the Court.

The notice of motion cited comments said to have been made by 'Esau Namoa and Nailasikau Halatuituia as panellists on a television programme "Check it Out", which was said to have been hosted by Kilisitina Vaea and broadcast at 11:00 am and 8:00 pm on 18 October 1999 by Oceania Broadcasting Network, which was said to be owned and managed by Christopher Racine.

The grounds relied upon by the Attorney-General were stated in the notice of motion relevantly as follows:

> "(4) That during the television programme, Esau Namoa and Nailasikau Halatuituia made comments concerning the judgment delivered on 21 October 1996 by the former Chief Justice Nigel Hampton and Justice John Lewis, in

the civil case *PPEL v (1) Samuela Masima, (2) TAMCO; PPEL v (1) Samuela Vakameilalo, (2) 'Aisake Tuiono trading as MALT, (3) TAMCO*;

(5) That the comments were made to the effect that the Judges in the civil matter referred to in (4) were incompetent and ignorant in making their judgment;

(6) …

(7) That Esau Namoa made comments to the effect that the Supreme Court should not have dealt with the civil matter referred to in (4) and that the judgment was wrong as both Judges are non-Tongans and that they have left the country and so we should not be bound by their judgment;

(8) That Esau Namoa made comments to the effect that the Supreme Court in the civil matter referred to in (4) had no right to make decisions regarding Tongan land, and the legal counsel involved should have informed the Court of this, so therefore the judgment is wrong.

(9) That the comments made were calculated to lower the authority of the Judiciary;

(10) The comments were made maliciously and aimed to abuse the authority of the Judiciary;

(11) The comments undermined the public's confidence in the administration of justice."

As has been said, Ward CJ found each of the appellants guilty of contempt. In the cases of Mr Namoa and Mr Racine, fines of $1,500 and $1,000 respectively were ordered to be paid. No penalty was ordered in the case of Ms Vaea or of OBN. Mr Halatuituia was acquitted. The appellants now appeal against their convictions. Those appellants who were fined also appeal against the penalties imposed.

In order to understand the issues that arise in the appeal, it will be necessary to summarise the findings and reasons at first instance.

The findings and reasons at first instance

His Honour's findings and reasons in finding contempt may be relevantly summarised as follows:

- The "Check it Out" programme broadcast by OBN at 11:00 am and 8:00 pm on 18 October 1999 and hosted by its employee Ms Vaea, was concerned with the repeal of s 16 of the Land Act. The repeal of s 16 stemmed from the decision in the *PPEL* case that s 16 conflicted with cl 4 of the Constitution. The programme took the form of a discussion between two panelists, one of whom was Mr Namoa, a Member of the Legislative Assembly.
  (Section 16 provided as follows:
  "16. It shall be unlawful for any Tongan subject to make any mortgage agreement or other document pledging or charging or selling his growing crops of coconuts, yams,

or other produce or any part thereof. Any person acting in contravention of this section shall on conviction be liable to a fine not exceeding $100 or to imprisonment for any period not exceeding 6 months."

Clause 4 of the Constitution provides:

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

- The topic of the repeal was a matter of intense public debate and concern and this was "Check It Out's" second programme devoted to the issue. Mr Namoa held strong and genuine personal views about the issue.
- The programme was directed largely at the fact that s 16 was protective of Tongans and should not be lightly discarded. As the repeal had resulted from the *PPEL* case, it was inevitable that the judgment would itself become the subject of some discussion and comment.
- The test for contempt is whether there is a real risk of undermining public confidence in the administration of justice. Untrue allegations of bias or impropriety will amount to a serious contempt because of the tendency to undermine the very basis of the judge's function.
- One of the themes developed in the programme arose in comments by Mr Namoa. Having mentioned that s 16 was 72 years old, Mr Namoa said (as translated in the transcript of the broadcast in evidence):

"It (s 16) has lasted long for there were people wise enough before and people who loved, people who paid allegiance to, this country and these people who respected His Majesty. Another thing, Kilisitina, in the history as I understand it from the Palace Office in relation to Tupou I, with respect, he pushed the Chief Justice not to interfere with the matters relating to this country. The land is a record at the Palace Office.

When it came to the Second King, with respect, the Chief Justice was able to make judgments around this country.

When it comes to Queen Salote Tupou III, the Sun who has Fallen, she took the Judge and threw him outside, with respect, he has no involvement at all with the land of this country.

It is now Tupou IV, with respect, the same thing. Tupou IV told the V judge stay there according to section 84 of the Constitution. The unfortunate thing is that the judges who delivered the judgments have left and the company PPEL has dissolved. What is the reason for submitting a law where the company has dissolved and the Chief Justice has left? That is what I am talking about. Tupou

IV, this King does not accept a Chief Justice or a foreigner to come here and want to make decisions concerning the land of this country."

- The test for contempt is not whether a comment is critical or wrong in its interpretation of the case, but whether the tendency is such that it undermines the authority of the court itself. The result will depend on the jurisdiction in which it occurred. In a small community with few judges and a relatively undeveloped press and media, the test is the same but the level of criticism likely to undermine public confidence in the administration of justice is lower than in a larger community more familiar with and better able to evaluate the remarks of commentators in the media.
- The effect of the passage set out above is to suggest that King Tupou I had to prevent the Chief Justice from interfering in the matters of the country; and that in the time of Tupou II, the Chief Justice was able to make such judgments with the result that Queen Salote had to take the judge and throw him out from any sort of involvement with the land of this country. What is said to be of concern is the way in which these comments are worded. Having described the earlier events in derogatory terms, Mr Namoa passed on to relate it to the present court with the suggestion that the present King also does not accept the jurisdiction of the Chief Justice to make decisions in land matters. That passage followed an earlier suggestion by Mr Namoa that the previous Chief Justice needed to be advised on the jurisdiction of his own court because he had gone wrong when acting without such advice.
- On behalf of the Attorney-General, it is suggested that the words used and the whole tenor of the remarks are deliberately intended to demean the judges and the court. These remarks were made in Tongan and the effect must be assessed by how a Tongan speaker would take them. Words such as *teke'i* and *lii kitu'a* would be seen as intending disrespect. Following that, the use of the word *fietu'utu'uni* in the reference to the present King would be taken as critical of the judge's conduct now.
- The overall effect of these passages creates a real risk that they will lower the authority of the court.
- it seems probable that any reasonable person making such remarks must have intended such an imputation, but the Court must consider whether Mr Namoa intended it, or simply made these remarks carelessly with little or no thought of such a meaning, This is a criminal matter and the Court must be satisfied to the criminal standard of proof beyond reasonable doubt. However, the Attorney

General had proved to that standard that Mr Namoa made these remarks with the intention of lowering the judges in the eyes of the public.

- The references to the fact that, because the judges have left the country, their judgment should somehow be of no effect, coupled with the suggestion that the present King does not accept a foreigner to make decisions about land, are all part of the generally derogatory tone of his comments.
- Mr Namoa holds an honest belief that the *PPEL* judgment was wrong and he is entitled to hold that belief. But whether or not he intended to be critical of the judicial system, he allowed his disagreement with the judgment to lead him into a deliberate attack on the judges who made it, and there is a real risk that his comments would lower the authority of the court.

On the question of penalty, his Honour said:

- In the case of Mr Namoa, when a Member of Parliament makes his views public, especially on television, on an important issue, his words carry great weight. Therefore he must ensure that his statements are accurate and temperate. Only serious cases will amount to scandalising the court by carrying a real risk of lowering its authority. Mr Namoa's is such a case, but at the lower end of the scale of contempts, and an appropriate penalty was a fine of $ 1,500.
- As the presenter and producer, Ms Vaea was responsible for censorship and there was little editorial assistance or monitoring made available by OBN. As the presenter, Ms Vaea cannot avoid responsibility for her guests' remarks, but no penalty should be ordered.
- Mr Racine, as the effective overall manager and owner of OBN, neglected to ensure that proper editorial procedures and controls were in place and should be ordered to pay the relatively nominal fine of $1,000. In view of the relationship between Mr Racine and OBN, no separate penalty should be imposed on OBN.

Conclusions on the appeal

It will be convenient to deal with the appellants' grounds of appeal in turn.

Were the appellants entitled to the protection of the constitutional guarantee of freedom of speech in s 7 of the Constitution?

Section 7 provides:

> "It shall be lawful for all people to speak, write and print their opinions and no law shall ever be enacted to restrict this liberty. There shall be freedom of speech and of the press for ever but nothing in this clause shall be held to outweigh the law of defamation, official secrets or the laws for the protection of the King and the Royal Family."

On behalf of the appellants reliance is placed upon some observations by Cory JA in the Canadian case of *R v Kopyto* (1987) 47 DLR (4th) 213 (Ontario CA). In ordering the acquittal of a lawyer charged with a statutory offence of contempt by scandalising the court, Cory JA said (at 229):

> "… statements of a sincerely held belief on a matter of public interest, even if intemperately worded, so long as they are not obscene or criminally libellous, should, as a general rule, come within the protection afforded by s 2(b) of the Charter (protecting freedom of speech). It would, I think, be unfortunate if freedom of expression on matters of public interest so vital to a free and democratic society was to be unduly restricted. The constitutional guarantee should be given a broad and liberal interpretation. The comment of the appellant came within the ambit of that protection," [Emphasis added].

However, as the passage cited indicates, *Kopyto* was concerned with the developing Canadian jurisprudence on the protection afforded by the language of that country's Charter. Moreover, as Cory JA went on to note, no absolute approach should be taken in this area. Cory JA said [at 241]:

> *"Can such an offence (of contempt by scandalising the court) meet the requirement of the Charter?*
>
> The decision in this case should not be taken as a conclusion that the offence cannot exist. It is in effect a common law offence that, as presently defined, cannot meet the constitutional requirements of the Charter, and not an offence created by statute. The courts created the offence and thus the courts, as well as the legislature, might modify it to meet the requirements of the Charter. For example if the Crown were to prove:
>
> > that an act was done or words were spoken with the intent to cause disrepute to its administration of justice or with reckless disregard as to whether disrepute would follow in spite of the reasonable foreseeability that such a result would follow from the act done or words used;
> > and that the evil consequences flowing from the act or words were extremely serious;

> and as well demonstrated the extreme imminence of those evil consequences, so that the apprehended danger to the administration of justice was shown to be real, substantial and immediate;
>
> then the act or words could be punishable as a criminal offence in order to ensure the functioning of the judicial process."

The appellants further seek to rely upon the following observations of Deane J in the High Court of Australia in a defamation case, *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 at 179; 124 ALR 1:

> "Whether a particular curtailment of freedom of political communication or discussion can be justified as being in the public interest in that limited sense will depend not only on the nature, extent and claimed justification of the curtailment. It may also depend, to a significant extent, on the nature or category of political communication or discussion which is involved in the particular case. Considerations which may suffice to justify an abridgment of the freedom of some categories of political communication or discussion may be clearly inadequate to justify other categories. Thus, a general curtailment of freedom of speech by laws designed to protect the privacy or the reputation of individuals may be justifiable in its application to the publication, in the course of political communication or discussion, of statements about the character or competence of some junior government employee but unjustifiable in its application to the publication of statements made about parliamentarians, judges or other holders of high office in relation to the performance of their official functions." [Emphasis added.]

Again, no absolute rule is held to exist. Moreover, in *Theophanous* the question was different from that here. There, a member of Parliament commenced defamation proceedings against a newspaper in respect of a letter it had published criticising the member's views on immigration. It was held, by a majority, that there is implied in the Australian Constitution a freedom to publish material (a) discussing government and political matters; (b) of and concerning members of the Parliament which relates to the performance of their duties as member's of the Parliament or parliamentary committees; and (c) in relation to the suitability of persons for office as members of the Parliament. It was further held that, in the light of this implied freedom, the publication will not be actionable under the defamation laws if the defendant establishes that (a) it was unaware of the falsity of the material published; (b) it did not publish the material recklessly, that is, not caring whether the material was true or false; and (c) the publication was reasonable in the circumstances.

None of these questions arises here.

Earlier, in *Gallagher v Durack* (1983) 152 CLR 238; 45 ALR 53, the High Court of Australia had considered, but rejected, an argument similar to that now advanced on behalf of the appellants. Gibbs CJ, Mason, Wilson and Brennan JJ said [at 243]:

> "The law [of contempt by scandalising the court] endeavours to reconcile two principles, each of which is of cardinal importance, but which, in some circumstances, appear to come in conflict. One principle is that speech should be free, so that everyone has the right to comment in good faith on matters of public importance, including the administration of justice, even if the comment is outspoken, mistaken or wrong-headed. The other principle is that 'it is necessary for the purpose of maintaining public confidence in the administration of law that there shall be some certain and immediate method of repressing imputations upon Courts of justice which, if continued, are likely to impair their authority': per Dixon J in *R v Dunbabin; Ex parte Williams* … . The authority of the law rests on public confidence, and it is important to the stability of society that the confidence of the public should not be shaken by baseless attacks on the integrity or impartiality of courts or judges. However, in many cases, the good sense of the community will be a sufficient safeguard against the scandalous disparagement of a court or judge, and the summary remedy of fine or imprisonment 'is applied only where the Court is satisfied that it is necessary in the interests of the ordered and fearless administration of justice and where the attacks are unwarrantable': *R v Fletcher; Ex parte Kisch*, per Evatt J … . There is no reason to reconsider these principles in the light of the American authorities, which are of course decided on constitutional provisions which have no counterpart in Australia, and which in any case lay down rules not dissimilar to those of the common law."

The constitutional validity of a statutory provision making it an offence to scandalise the Australian Industrial Commission (which does not exercise judicial power) was later considered by the High Court of Australia in *Nationwide News Pty Ltd v Wills* (1992) 108 ALR 681. Mason CJ said [at 691]:

> "… scandalising the court is a well-recognised form of criminal contempt, though it was at one time said to be obsolete, and … it consists of any act done or writing published which is calculated to bring a court or a judge of the court into contempt or to lower his or her authority. However, at common law no contempt is made out if all that the defendant does is to exercise his or her ordinary right to criticise, in good faith, the conduct of the court or the judge. Courts and judges are open to criticism … ."

Gallagher v Durack was cited by Mason CJ. It was further referred to, with approval, in the more recent decision of the High Court of Australia in *Mann v O'Neill* (1997) 191 CLR 204 at 253 and 271; 145 ALR 682.

In *Nationwide News*, the reasons of Deane and Toohey JJ recognise the rationale for the continued existence of this branch of the law of contempt. They said (at 727-8):

> "As with a court, it is important that the Commission be constituted by members who are fit and qualified to perform the functions entrusted to them. Again, as with a court, it is important that the members of the Commission have the appearance, as well as the substance, of being fit and qualified and of acting fairly and impartially. If the members of the Commission were publicly perceived to be biased, unqualified, unfit or corrupt or customarily to act unfairly or improperly, the effectiveness of the national system of conciliation and arbitration established by the Act would be undermined and conceivably destroyed. Clearly enough, some legislative control of the kind of unfounded and illegitimate written or oral attack upon the Commission or its members which would be calculated to bring the Commission or its members into unwarranted disrepute can, in accordance with the traditional standards of our society, be justified as being in the public interest for the reason that it is necessary to enable the effective discharge of the important functions of conciliation and arbitration for the prevention and settlement of inter-State industrial disputes. Such disputes can be disruptive of an ordered society and destructive of the legitimate claims of individuals to live peacefully and with dignity in such a society."

It follows, in our view, that in Australia this form of contempt remains part of the common law. Implied constitutional rights of the kind found to exist in *Theophanous* do not detract from the operation of this branch of the common law.

The position is, we think, similar in Tonga. That is to say, whilst certain constitutional rights of free speech exist in both jurisdictions, in neither country does the existence of this freedom detract from the operation of the common law rules with respect to contempt by scandalising the court. We do not understand the decision of this Court in *'Akau'ola v Attorney General* [1997] Tonga LR 36 (CA) to have decided otherwise, and if anything it is to the contrary. It follows, in our view, that s 7 of the Constitution has no relevant application here.

Was there evidence that Mr Namoa made the comments attributed to him by the primary Judge?

At first instance, the Attorney-General initially led secondary evidence in affidavit form of what was broadcast. When the appellants disputed the accuracy of some of this material, the Attorney-General tendered a translated transcript of the programme broadcast on 18 October 1995. This included the passage we have set out above [at p 73] commencing with the words "It … has lasted …" in our summary of his Honour's findings and reasons. On behalf of the appellants, issue is now taken with some of the translation as follows:

- In respect of the passage in the fourth and fifth lines of the first paragraph, it will be recalled that the transcript reads: "… in relation to Tupou I, with respect, he <u>pushed</u> the Chief Justice not to interfere with the matters …"

It is common ground that "pushed" is a translation of "teke'i", a word, as his Honour noted (see our summary at p 74) which was one of the three words particularly relied upon by the Attorney-General as indicating, in this context, disrespect. On behalf of the appellants, it is submitted that a better translation is "went against".

- In respect of the passage in the third paragraph, the transcript reads (in the same terms as his Honour quoted):
  "… she took the Judge and threw him outside …"
  Again, as his Honour noted, the Attorney General relied on the special nuance to be found in the words "lii kitu'a". On behalf of the appellants, it is submitted that a better translation of the emphasised words would be: "and dismissed him".
- In respect of the passage in the final paragraph, the transcript reads (in the same terms as his Honour quoted):
  "Tupou IV, this King does not accept a Chief Justice or a foreigner to come here and want to make decisions concerning the land of this country."
  The words emphasised are a translation of the word "fietu'utu'uni", which is also especially relied upon by the Attorney as indicating somebody who is "bossy" or authoritarian. On behalf of the appellants, it is submitted that, the word is better translated by a statement indicating somebody who was "not tolerant".

We propose to proceed, for present purposes, upon the basis that the meanings of the three words or phrases contended for by the appellant be adopted.

Did Mr Namoa's comments constitute a contempt by scandalising the court?

It will be convenient to set out here the central passage relied upon by the Attorney, substituting the above meanings of the three words or phrases mentioned contended for by the appellants. The passage will then read:

> "It has lasted long for there were people wise enough before and people who loved, people who paid allegiance to, this country and these people who respected His Majesty. Another thing, Kilisitina, in the history as I understand it from the Palace Office in relation to Tupou I, with respect, he (~~pushed~~) *went against* the Chief Justice not to interfere with the matters relating to this country. The land is a record at the Palace Office.
>
> When it came to the Second King, with respect, the Chief Justice was able to make judgments around this country.
>
> When it comes to Queen Salote Tupou III, the Sun who has Fallen, she took the Judge and (~~threw him outside~~) *dismissed him*

> with respect, he has no involvement at all with the land of this country.
>
> It is now Tupou IV, with respect, the same thing. Tupou IV told the judge stay there according to section 84 of the Constitution. The unfortunate thing is that the judges who delivered the judgments have left and the company PPEL has dissolved. What is the reason for submitting a law where the company has dissolved and the Chief Justice has left? That is what I am talking about. Tupou IV, this King does not accept a Chief Justice or a foreigner to come here and (~~want to make~~) *not be tolerant in making* decisions concerning the land of this country."

Did these remarks amount to a contempt by scandalising the court? In addressing this question, we must bear in mind that, as a criminal matter, the Court needs to be satisfied beyond doubt before convicting.

It will be recalled that, as Halsbury has stated, there will be a scandalising of the court if "any act (is) done … which is calculated to bring a court or a judge into contempt, or to lower his [or her] authority … ." (See also, to the same effect, *'Akau'ola* at 38). What is the meaning of "calculated" in this context? In *Nationwide News*, Mason CJ said [at 685-6]:

> "The word 'calculated' in s 299(1)(d) may mean either 'intended', 'apt' or 'likely'. For the purposes of the present case little, if anything, turns on which of these possible meanings is correct. But it is as well that I should record my opinion that 'likely' is the meaning of the word 'calculated' in the context in which it appears in s 299(1)(d). In this respect, I agree with the view taken by Pincus J in *Howard v Gallagher*. It is significant that s 83(1) of the Commonwealth Conciliation and Arbitration Act 1904 (Cth), a legislative ancestor of the present provision, took the form: 'No person shall wilfully … by writing or speech use words calculated … to bring the Court into disrepute.'
>
> In that context, 'calculate' could not mean 'intended'."

In our opinion, the remarks made by Mr Namoa in the passage set out above were likely [i.e. calculated] to bring the Supreme Court and its Judges into contempt, or to lower their authority, in the eyes of the community. We have reached this conclusion by taking into account (1) the whole of the remarks; and (2) the context in which the remarks were made.

It is likely, we think, that a television viewer hearing these remarks in their context [that is, a public discussion of political issues] would understand that Mr Namoa, as a member of Parliament, was indicating that in the history of this country, the Monarch exercised a significant influence over the way in which the Judges, foreign Judges including Chief Justices, adjudicated upon land matters. A statement to the effect that the Monarchy exerted such authority is likely, in our view, to lead members of the community to conclude that the credibility of the Court as an independent institution, the third arm of government, has been seriously compromised. Once there is a public perception that the exercise of an important

jurisdiction of the Court may not be impartial, there will be a loss of public confidence in the Court as an independent institution, with the consequence that the community will have a lower regard for its authority to adjudicate without fear, favour or goodwill.

The matter may be tested by considering the likely reaction to Mr Namoa's remarks by a person who is a potential litigant, whether as plaintiff or defendant, in the Land Court. This should be considered bearing in mind that the rationale for this branch of the law is, as Halsbury states, to protect the public, especially those who either voluntarily or by compulsion are subject to the jurisdiction of the court, from the mischief they will incur if the tribunal's authority is undermined or impaired. In our opinion, it is likely that such a person would, to a significant extent, lose confidence in the Land Court's capacity to adjudicate impartially. To this extent, it is likely that the Court's authority would be impaired. In this sense, we are satisfied, beyond any reasonable doubt, that Mr Namoa's observations scandalised the Court.

The liability of the other appellants

Again, the principles in this area are well established. Halsbury [op cit at 20] states:

> **"24. Liability for contempt.** Where a publication is intended or likely to prejudice the fair trial or conduct of proceedings, a contempt may be committed by any person responsible for the publication of the matter of which complaint is made. Thus the following persons may be held liable for contempt: editors, newspaper proprietors, publishers, printers, distributors and, in certain circumstances, reporters."

The other appellants fall into one or other of these categories. Each, in his, her or its own way, should be held severally responsible for the broadcast. The respective degrees of responsibility ought to be reflected in the particular penalties to be imposed on each of them.

Penalty

As has been seen, in dealing with penalty, his Honour considered the position of each individual appellant. The penalties that were imposed were, we think, within a proper exercise of the judicial discretion. We are not persuaded that any ground for appellate interference has been made out.

Orders

The appeal will be dismissed, with costs.

Saafi v Veikoso

Supreme Court, Nuku'alofa
Ward CJ
C 990/98

20, 24-28, 31 January, 1-4, 7-9, 11, 14, 28, 29 February, 1-3, 13, 14 March 2000; 19 April 2000

Church constitution — trustees acted outside their power — liable
Church constitution — conduct of worshippers — court would never rule on purely spiritual matters

The Church of Tonga was established in 1929 with its own Constitution, Laws and Rules. At the annual Conference of the Church in 1997, the first defendant, Sami Veikoso, was elected President for three years. The outgoing President was Finau Katoanga. At that time, the first plaintiff, Feleti Saafi, was the Head Minister of Tongatapu district and, although there were other parties involved in both sides of this action, most if not all the events central to this action stem directly or indirectly from the actions of these two men following the 1997 Conference. Whilst many of the complaints of the first plaintiff and the defences of the first defendant were founded on Church procedure, the true background that emerged as the evidence unfolded was the clash of two strong characters each of whom was willing to use or to ignore the procedures of the Church as it suited the moment. The first plaintiff complained that the President was high handed in the way he conducted Church business and disregarded the rules when it suited him. The first defendant considered the first plaintiff behaved improperly in important aspects of his duties as Head Minister of Tongatapu and found him a vociferous and increasingly irritating critic. The other parties played relatively minor roles. The third plaintiff was the Church Auditor and the fourth plaintiff the first defendant's driver. Both complain they were wrongly dismissed by the first defendant. The second plaintiff did not appear at the trial and did not seek to pursue those parts of the case that referred solely to him. The second and third defendants, Penisoni Mafi and Malakai Tapealava, were two of the five Chief Trustees of the Church as was the President. The fourth defendant, Tevita Havea, was the Treasurer of the Church. Numerous orders were sought by the plaintiff relating to property, misinales, bank accounts, and employment issues.

Held:

1. The power given by clauses 8 and 9 of the Church Constitution was limited and subject to Conference. The Trustees, in their dealings with the property, decided matters well outside their power.

2. The Court will never rule on purely spiritual matters and the interpretation of the laws relating to the conduct of quest worshippers involved such consideration.
3. The Church may take action against its members in consequence but, if it does, it must still follow its own procedures. Failure to do so becomes another matter into which the court may enquire and, it necessary, interfere.
4. The Court made a number of declarations and orders.
5. Even though the plaintiffs achieved only partial success in the declarations sought, the main thrust of their complaints were made out and they were entitled to their costs. The second plaintiff did not appear and the defendants had to prepare for that defence so costs were reduced by one tenth. The defendants were ordered to pay nine tenths of the costs of the plaintiffs.

Case considered:

Talakai v 'Aipolo and Toe'api (Supreme Court, C 178/97, 22 August 1997, Lewis J)

Counsel for plaintiffs : Mr Niu
Counsel for defendant : Mr Veikoso

Judgment

The Church of Tonga was established in 1929 with its own Constitution, Laws and Rules.

At the annual Conference of the Church in 1997, the first defendant, Sami Veikoso, was elected President for three years. The outgoing President was Finau Katoanga.

At that time, the first plaintiff, Feleti Saafi, was the Head Minister of Tongatapu district and, although there are other parties involved in both sides of this action, most if not all the events central to this action stem directly or indirectly from the actions of these two men following the 1997 Conference.

Whilst many of the complaints of the first plaintiff and the defences of the first defendant are founded on Church procedure, the true background that emerged as the evidence unfolded is the clash of two strong characters each of whom is willing to use or to ignore the procedures of the Church as it suits the moment.

The first plaintiff is now 82 years old and the President is 78 years. In broad terms, the first plaintiff complains that the President is high handed in the way he conducts Church business and disregards the rules when it suits him. The first defendant considers the first plaintiff behaved improperly in important aspects of his duties as Head Minister of Tongatapu and found him a vociferous and increasingly irritating critic.

The other parties play relatively minor roles. The third plaintiff was the Church Auditor and the fourth plaintiff the first defendant's driver. Both complain they were wrongly dismissed by the first defendant. The second plaintiff did not appear at the trial and, whilst he may have some interest in the conclusions the court draws, Mr Niu who represents all the plaintiffs does not seek to pursue those parts of the case that

refer solely to him. On at least one critical aspect of the case (the change of name of an account in the Bank of Tonga), his evidence would have been of considerable interest to both sides. His part in that matter is questionable and his absence may well have saved Mr Niu from possible problems of conflict between the interests of his various clients as the evidence unfolded.

The second and third defendants, Penisoni Mafi and Malakai Tapealava, were two of the five Chief Trustees of the Church as was the President. The fourth defendant, Tevita Havea, was the Treasurer of the Church.

Numerous orders are sought by the plaintiffs but it is convenient briefly to set out the main events that make up the factual background of the case before examining each group of orders in detail. Much is not disputed although the reasons for the actions are generally matters of sharp dispute and, all too often, clearly manifest personal animosity.

The Church owned a building in Fatafehi Road in Nuku'alofa that had been built in 1979 to mark the Church's 50th anniversary. The building had been severely damaged since by a cyclone and, although still used for church functions, it was in a bad state of repair.

Shortly after his election as President, the first defendant ordered the sale of a property in New Zealand which the Church had bought in 1975. It realised $NZ165,000.00 and most of the funds were used to pay for the demolition and rebuilding the Fatafehi Road property. He also ordered the disposal of a truck the Church had owned for some years by offering it as a prize in a raffle to raise further funds for the rebuilding. The Church still required a truck and a replacement was purchased the following year at a cost of $24,200.00. These actions had the concurrence of the second and third defendants as Chief Trustees.

All those matters together with the manner of disposal of the material from the demolition of the old building give rise to the first series of complaints and orders sought against the defendants.

The Church of Tonga had always held the misinales for Kolofo'ou and Kolomotu'a on the same day and, effectively, as one event. The first held after the election of the first defendant was in November 1997. The Kolofo'ou collection was held first and was chaired by the first plaintiff, as Head Minister of the district, assisted by his district secretary and treasurer. However, when the turn came for Kolomotu'a to make their offering, the President took over and effectively ordered the plaintiff and his helpers to leave.

After the misinale was complete, the President ordered that there should be paid out of the two collections an increase in the salary of the building steward.

His authority to carry out either of those actions is disputed. The plaintiffs sought an account of the money donated in the misinale he conducted but that part of the claim is no longer pursued.

Some time later, the President ordered the first, second and third plaintiffs to withdraw the Tongatapu district misinale money from the account where it had previously been held and to pay it into a new account with the ANZ bank. His daughter worked in that bank and it was to her that the money was delivered in order to open the new account. The right of the President and Trustees to do that and the true reason for so doing is another area of conflict that must be resolved.

Previously, the first and second plaintiffs and the district secretary had opened a deposit account with the Bank of Tonga and placed $40,000 in it from previous

misinales. After opening it, the Bank received a letter from them seeking to change the name of the account from the Church of Tonga to the names of the three officials personally. The President received information from the bank that this had occurred and summoned the first and second plaintiffs to his residence. During the course of the conversation he made offensive comments to them, accused them of embezzling the money and repeated that later at the Tongatapu district meeting in April 1998 in front of members of the Church.

The questions arising from the misinale and the bank accounts give rise to the next series of orders sought by the plaintiffs. In order to determine those, it is also necessary to consider the allegations of the defence against the first and second plaintiffs over their handling of the Bank of Tonga accounts which gave rise to the allegations of embezzlement and are one of the reasons put forward by the defendants for the transfer of the misinale funds to the ANZ bank.

By this time, events had come to a head and the hostility between the first plaintiff and the first defendant was only too plain. In March 1998 the first plaintiff filed a series of charges against the President relating to the matters already described. They were raised at the various meetings of the Church up to the Conference in May 1998. They were not determined until the district meeting in April at which the President asked for them to be discussed. He went through each charge and the meeting voted against the charge.

When the first plaintiff tried to put the charges before the Conference, he was prevented from so doing because, it was said, they had been dealt with already.

The whole question of the procedures used in those meetings and the propriety of the manner in which they were conducted is the subject of the next series of orders sought by the plaintiffs.

In his defence, the first defendant has suggested other impropriety by the first plaintiff in the way in which he had used the misinale funds as his contribution to future misinales and the withdrawal of some of the church funds to pay for the legal costs of this court action.

The third and fourth plaintiffs' cases may be dealt with separately.

The third plaintiff was appointed as Church auditor at the 1994 Conference and still held the post when the first defendant was elected President. In the previous year, the first defendant had been Head Minister of the New Zealand district and he had prevented the third plaintiff from looking at the books of account of that district. The third plaintiff had returned and reported the matter to the, then, President, Katoanga. In November 1997, following his election in May, the first defendant dismissed him from his position.

The fourth plaintiff was the driver for the previous President and he also was dismissed by the first defendant.

The manner in which these dismissals were carried out and the power of the President to do so give rise to other orders sought by the plaintiffs.

Whilst the plaintiffs in particular would suggest a link between many of the matters, it is clearer to deal with them as separate topics although cross reference may be necessary in some instances.

The New Zealand and Fatafehi Road Properties

These transactions are the major part of the first plaintiff's complaint against the defendants.

There is no dispute that the Church purchased a house in Papakura, New Zealand, in early 1975 for $NZ30,000.00 and sold it in August 1997 for $NZ165,000.00. The sale was ordered by the first, second and third defendants as Chief Trustees of the Church.

The plaintiffs claim the Trustees had no such right and that only the Conference could make such a decision. They also claim that the money from the sale has not been properly accounted for.

They seek a declaration that the first three defendants acted wrongly in selling the property and an order that they provide detailed audited accounts of the transaction.

The defence is that the Chief Trustees are given power to deal with the Church's property without the express consent of Conference. Alternatively they claim that there was authority given by the Conference and they were acting on that.

The relevant part of clause 8 of the Constitution provides;

> "8. Properties of the Church. All leaseholds owned by the Church whether on Crown Land or Hereditary Estate shall be signed for on behalf of the Church by five Trustees appointed by the Conference … The quorum required for the Meeting of the Trustees shall be at least three members and all resolutions shall be by a majority vote. It is for the Chief Trustees to keep all properties and to control them."

Mr Niu, for the plaintiffs, accepts the word pule is 'to control' but suggests the word tauhi'a was more than simply 'to keep' and included an element of taking care. I note the meaning in Churchward's Tongan Dictionary is "to look after, take care of, attend to the needs of" and I therefore accept the wider meaning suggested by Mr Niu. Clearly clause 8 is charging the Chief Trustees with a duty not just to keep but to look after Church properties.

Church funds are the subject of clause 9 which clearly gives to Conference the power to raise funds and the responsibility to ensure the funds are properly used:

> "9. Church Funds. The Meeting of the Conference shall have the power to decide the manner of collection and raising Church Funds and the employment of such Funds for the Church maintenance and of provisioning of Ministers … and it shall be the duty of the Conference to ensure that Church Funds are not put to waste and to ensure the safe keeping of Funds collected by the Church to be employed only in the interests of the Church of Tonga."

I have no doubt that the intention of those clauses is to leave the power to control funds with the Conference. Although counsel for the defence challenged that meaning and the third defendant told the court he certainly considered the Trustees had the right to make such a decision without the involvement of Conference, the first

defendant has always claimed the authority for the sale and the use of the funds for the rebuilding of the Fatafehi Road property came from resolutions of the Conference. When answering the charge by the first plaintiff at the district meeting in April 1998, he claimed the sale was the result of a resolution of Conference. In court he also claimed the use of the funds to rebuild the hall was in accordance with a further resolution by Conference that it be rebuilt. I take that as acknowledgment by him that Conference has overall control in such matters - a point of view from which he resiled during the course of the hearing and which was not shared by the third defendant initially.

In his evidence he referred to the minutes of the Conference in 1979 which he had attended. The, then, President, Seluipepeli Mafi, asked Conference for suggestions regarding the New Zealand property and the first defendant moved that it be sold. That motion was carried unanimously.

The following year the minutes of the Conference record the President, Mafi, saying that the New Zealand property was currently being advertised for sale.

It was clearly not sold but that is the authority relied upon by the defendants to justify the sale in 1997.

The plaintiffs argue that such a decision was not acted upon and the failure to do any thing more over a period of 17 years clearly showed Conference did not wish to proceed. During that period there has apparently been no further direction by Conference as to the disposal of the property.

I cannot accept that it is right or practicable to regard every resolution of Conference as remaining binding for an indefinite period unless and until it is expressly revoked. It would always be better for such matters to be ruled upon clearly. If the members of Conference checked such matters by raising them as matters arising from the minutes of the previous Conference, such a situation would be less likely to arise. However, it appears this was not the case and I am satisfied the 1979 resolution to sell had lapsed long before the defendants directed the sale in 1997. Circumstances had changed since that time and I have no doubt the first defendant was well aware it could no longer be regarded as valid authority.

The plaintiffs further suggest that the use of the funds for the rebuilding of the Fatafehi Road property was not authorised. They point out that the minutes of the Conference in 1995 show a motion was put before the meeting to rebuild the memorial building. It was felt that the rebuilding would have taken too much of the total money the Church had at that time and it was agreed to defer the matter for two years. However, the next year Conference again discussed the memorial building on a motion brought by Tongatapu district. It was suggested that the building could be rebuilt and rented out in order to bring in funds for the Church. The first plaintiff was present and suggested that the overseas churches be asked to assist. The motion was put to the vote and passed.

It has been emphasised by the plaintiffs that the Conference agreed to build in order that it could be let to bring in funds for the Church. That has not been done. It was agreed that the money for the rebuilding was to be raised by the Church and would include a substantial sum out of the funds of Tongatapu district. The next Conference did not deal with this topic and that was where the matter rested. It was at that meeting the first defendant was elected President. Thus the only decision was that of 1996 which was to try and raise funds to rebuild the Fatafehi Road property so it could be let. There was clearly no authority to use funds from the sale of the New

Zealand house for the work or to rebuild it otherwise than as a property to let. Despite the lack of authority, by the time of the next Conference, the New Zealand property had been sold and the memorial building rebuilt.

No doubt those actions were the result of impatience by a newly appointed President to get things moving. However laudable that may have been, the President is bound by and should be vigilant to uphold, the rules of the Church. It may be, I know not, that the members of the Church applauded the President's initiative and drive in relation to the new building. However they must realise that the rules are made to protect all the members and, once the rules are ignored to permit a popular cause, the power to use them to curb future and possibly unwelcome actions by the elected officials will have been eroded.

The third defendant gave evidence about the New Zealand sale and the memorial building. He was an impressive witness and gave every impression of a man who was careful always to try to speak the truth. However, he was also clearly uncertain of his exact role as a Chief Trustee and the right he had to act in the way he did. His first account of the powers of the Chief Trustees was that they had virtually unfettered power to deal with all matters of money and other property of the Church. The only fetter on their total discretion he described at first was that they should act wisely.

However, as he was asked more about it, it became clear that he was unable to justify that view. I considered it a measure of his honesty that, when the questions placed him in a position that cast doubt on his actions, he was willing to consider the possibility that the Trustees may have been wrong. This was in stark contrast to the first defendant who reacted to the same suggestion by becoming more certain of his right to act as he saw fit.

The third defendant agreed that Conference had the ultimate authority but suggested that, in cases of urgency, the Trustees could take decisions without seeking the approval of Conference first.

Despite his basic standpoint that they had inherent power to act as they did, he, like the first defendant, also sought to suggest they were acting on the specific authority of Conference in both the sale and the rebuilding. He agreed, however, that he had never read the earlier resolutions and also that it was he who had been directed after the 1996 conference to draw up plans for a building to rent. As with the first defendant, this inconsistency in the manner in which it was attempted to justify the actions of the trustees is significant in determining their true attitude to the right to sell the New Zealand property and rebuild the Fatafehi Road property with the proceeds.

I do not go through the evidence on this part of the case in any more detail. The picture that unfolded during his evidence and that of the first and second defendants was of the Trustees meeting to decide matters well outside their power. Their meetings and decisions were, to a large extent, simply a way of confirming the President's views and implementing his wishes. They confirmed the impatience of the President and his unwillingness to wait for the Conference.

Although there are five Chief Trustees, those from Ha'apai and Vava'u were not involved in the vast majority of the meetings. The necessary quorum was three and, as long as that could be achieved, no attempt was made to bring them to meetings or to seek their opinion. That clearly ignored the spirit of Chapter II, rule 3 which starts with the words: "If the Trustees hold a meeting, all 5 members must be present …"

before going on to deal with the requirements of a quorum of three. It is only too apparent on the evidence as a whole that the President regarded the Trustees simply as a means of rubber-stamping his actions and, as long as he could produce a quorum, was unconcerned whether or not the remaining two trustees in Ha'apai and Vava'u might have wished to express any views on the matter.

Despite the suggestion that the Trustees had the power to deal with all matters to do with money and property under the suggested authority of clause 8, I am satisfied the manner in which they alternatively tried to claim authority from the earlier resolutions of Conference showed they did not really believe they had the unfettered right to act as they did. The third defendant acknowledged that the Conference was the highest authority. I am satisfied they went ahead with these transactions in the hope their actions would be popular and would not, therefore, be questioned in Conference.

It is perfectly clear that the power given by clauses 8 and 9 is limited and subject to Conference. A decision as important and having such an effect on the assets of the Church as the sale of the New Zealand property and the use of the proceeds to rebuild the memorial building was well outside their duty to keep all properties and control them. A matter of such importance in relation to the use of the Church's money was plainly for Conference to decide. The part of the decision to rebuild the Fatafehi Road property to a different design and for a totally different purpose from that decided by Conference only a year before went further and showed a lack of concern for the decisions of Conference.

Although there is nothing to say what should happen in a case of urgency, I accept there may be support for the third defendant's opinion that the Trustees should be able to make decisions in really urgent situations without prior authority from Conference. There was, however, never any suggestion that the sale of the house in New Zealand or the rebuilding of the Fatafehi Road property involved any urgency beyond the impatience of the President and the other two Trustees to go ahead and ignore the need to seek the approval of Conference.

Two further complaints of the Plaintiffs relate to this part of the case. The first is that proper accounts of the whole transaction were never given to Conference. The fourth defendant was the Church Treasurer at that time and he told the court that he gave the financial report to the Conference in 1998. He produced his notes of the accounts and stated they were not questioned by the meeting. If they were given in the form in which he presented them to the court, it reflects very badly on the members of Conference and the way they take their responsibilities to the church members who elected or appointed them. However, I do not need to apportion blame in this because I am satisfied on the evidence produced before me that the accounts were not presented to Conference in 1998.

A cursory glance at the accounts reveals a number of serious deficiencies. I set out only a few. The sale of the property in New Zealand was for $165,000.00. Once legal fees, agent's commission and other expenses had been paid, the net figure passed to the Church was NZ$156,247.59. The accounts show that figure as NZ$157,256.91 and I accept that difference is probably an accounting error. However, the next item in the accounts produced by the fourth defendant is stated to be:

"Expenses in NZ (Lawyer and Government charges) NZ$5000.91".

The result is that the sum stated to have been received by the Church here and applied to the building was only NZ$152,256.00. The treasurer could offer no explanation of the double charging (and, subsequently, the loss of about NZ$5,000.00) save to say that those figures were given to him by the President and he accepted them.

Later the money is converted to Tongan currency for the accounts and two successive entries show NZ$50,000.00 and NZ$102,256.00 yielding T$38,946.88 and T$100.665.75 respectively. That difference was explained by the fourth defendant as being due to fluctuations in the exchange rate. No attempt has been made by either side to obtain the exchange rates for the period in question and I do not accept they varied to the extent that one pa'anga bought NZ$1.28 at one stage and NZ$1.01 at the next within a period of months. I am satisfied it is a mistake and yet the final figures are balanced on that incorrect figure and there is no explanation of or accounting for the incorrect figures.

Once the remaining money from the sale in New Zealand is shown to have been brought into Tonga, T$20,000.00 is removed and paid into the office of the Church by the defendants for expenses in that office. That was, of course, the office in which both the first and fourth defendants were working at the time. I was given no details of how or by whom that decision was reached and neither has there been any attempt to justify it. It was the more remarkable because, shortly afterwards, the funds for the new building had been nearly exhausted and it was necessary to borrow $13,000.00 from the President's daughter. It is perhaps also worthy of mention that the entry in the accounts credited the President with this timely and generous gesture towards the completion of the memorial building and it is described not as a loan but as a deposit. However, there is nothing on the evidence before me that shows he knew he was being given the credit for such apparent generosity.

I do not list the other problems with those accounts. It is clear they are totally inadequate to demonstrate what must certainly have been one of the largest single financial transactions of the Church that year and possibly for many years.

The plaintiffs finally allege for this part of the case, that, when the building in Fatafehi Road was being constructed, the President took some of the rubble and fill from the site and had it delivered to his son's home and did not pay for it. A considerable number of truck loads were also removed by a friend of the President, Kali Vailahi, and used for his own benefit and not paid for. I am not satisfied the evidence has revealed the full nature of these events. It is clear a number of people were removing material at the time including the first plaintiff. I am unwilling to attach blame on the evidence I have heard. I leave this part of the case with the comment that it is a lesson in the danger of slovenly accounting and the results of failure properly to follow correct procedures. Even if there was no impropriety, it has given scope for suspicion and malicious comment, which would have been avoided if everything had been done according to the proper controls.

The Kolofo'ou and Kolomotu'a Misinales

The first misinale collection for Kolofo'ou and Kolomotu'a following the election of the first defendant as President was in November 1997. At that time the first Plaintiff was Head Minister of Tongatapu district and his case is that he should

properly have conducted the misinale for the villages in his district including the Nuku'alofa churches. When the collection took place that year, he conducted the Kolofo'ou collection assisted by his district treasurer and secretary. However, when he had finished and before he could start the Kolomotu'a misinale, the President, in a loud and angry voice, told him and his two assistants to get out. When they had moved, the President took over the conduct of the misinale.

The first defendant admits he told the first plaintiff to leave so he could conduct the Kolomotu'a collection but insisted it is traditionally the role of the President to conduct both misinales.

Chapter XL, rule 3 provides that the misinale "shall be conducted by the District Head Minister or by some other Minister that he has ordered to conduct" it. However, even with written rules there may be room for tradition and, if this was a practice followed for some years by previous Presidents as the first defendant and some of his witnesses claim, it may fall into such a category. The first defendant was the Head Minister of Tongatapu immediately before the first plaintiff took over and he insists that was the procedure throughout his tenure. The first plaintiff points out that, as the District Head Minister in 1997, he could have invited the President to do so and that may be the reason previous Presidents have conducted the misinale if that has occurred. I do not consider I have heard enough evidence to be able to rule on the correctness or otherwise of that. However, I am satisfied on the evidence that the first defendant did speak in a rude and unpleasant manner to the three district officials. Even some of the defence witnesses testified to this and it is clear that he acted in a manner that ill-befitted a President of the Church.

Sadly, it is clear that, by this time, the rancour between these two men was becoming apparent to everyone.

The procedure at all misinales is that the money is added up and the church steward is then given 10% of the total figure. The remainder is divided in two. One half goes to the village for its own needs and is the responsibility of the village trustees. The other half is taken by the Head Minister and put into a bank account together with the contributions from the other villages in his district.

Usually, one of the first things that the village trustees have to do is to decide how much should be paid to the building steward in the village. However, in the November 1998 misinale, before he left the chair, the President announced that the building steward should be paid a total from the two villages of $6,000.00. That was a decision, the plaintiffs say, that he was not entitled to make and it should have been left for the trustees of the two villages to decide between them.

The first defendant agrees he gave that money to the building steward. He points out that, whilst the laws deal with the church steward, they are silent about the building steward. He considered that he was right to make the order he did and insisted that it had been done in that way previously. The laws give no guidance on this. It would seem that the decision was a direct interference in matters for which the village trustees should have been responsible and the records of previous misinales do not support the first defendant's contention. It was clearly a matter of some bitterness to the first plaintiff and I am satisfied on balance that first defendant should not have ordered the payment to the building steward.

The half (in fact 45%) of the misinale from each of the villages that is paid into a bank account by the Head Minister is retained until the district meeting. That meeting directs that it be divided after the Conference so that one third goes to the

Head Minister to use for the district and the other two thirds goes to the head office of the Church.

It is in relation to the bank accounts of the district that the most serious allegations and counter allegations have been made in this case and they are central to each of these two men's complaints about the other and their subsequent actions.

The Bank Accounts

There are two accounts involved. The first was a term deposit with the Bank of Tonga.

In 1997 the first plaintiff decided that the money for the district from the previous misinale was substantial and they would not need it all immediately for the district works. The sum was approximately $80,000.00 and so he advised the second plaintiff, Telefoni, who was the district treasurer, to put $40,000.00 into a short-term deposit account. The deposit of this money was no secret and had, according to the district secretary at that time, Siaiku Tapa, been mentioned at the district meeting.

It was clearly a church account but shortly afterwards the bank was asked to change the name of the account from the Church of Tonga to the names of the first and second plaintiffs and Tapa.

This came to the attention of the first defendant and he summoned the three officers involved to explain. I do not need to go through the evidence of the meetings but there is no real dispute that, at one, the President made some extremely strong and angry comments about the first and second defendants in which he accused them of embezzling the money. These remarks were spoken so loudly and in such strong terms that some of the office staff came to see what was going on. The first defendant subsequently repeated them publicly at a district meeting.

During his enquiries into the account, the President went to see the Manager of the Bank of Tonga. Before going to that meeting, he told the first plaintiff that, if he had done wrong, he would be dismissed from his office. The first plaintiff disputed he had done wrong but said that, if he had, it should be taken to the Conference. When the first defendant returned from the bank, he again summoned the first plaintiff and Tapa to his office. The first plaintiff cried and apologised if he had done wrong. The President said that he should go and do his work for the Church. It was the impression of Tapa that this meant the matter was over and had been resolved. The account was transferred to the names of other officers and the funds were still in the account when the first plaintiff resigned at the 1998 Conference.

The first plaintiff later included the matter in the charges he brought against the President by alleging the first defendant had no authority to transfer the funds from that account after the attempt to change the name had been discovered.

In court it was clear both the first plaintiff and the first defendant feel very strongly about this part of the case. The former considers he has been wrongly accused and that he never knew about the alleged dishonesty; the latter that this was a deliberate attempt to take Church funds.

During the evidence of the first defendant the document requesting the bank to change the names on the account was produced. Surprisingly, although the first defendant had seen it at the time he spoke to the bank, it had not been produced previously. Its production changed the direction in which the evidence about this account had appeared to be going up to that point.

It is a letter addressed to the Manager of the bank simply asking to open a term deposit account and is signed by Saafl, Telefoni and Tapa. Below those signatures is written: "P.S. And change the name to the above persons. Thank you". That is signed again by the second plaintiff.

The document produced initially was a typed copy but, when the original was called for, it was a manuscript letter clearly written by Telefoni. The case of the first plaintiff and Tapa has always been that they were asked to sign a document to open the term deposit account and they knew no more. They have consistently denied seeing the postscript when they signed the letter. The letter supports that. The postscript not only appears after their signatures but is written in a slightly 'different colour ink. The signature of Telefoni following it is different from that used by him after the main text.

Having seen it and bearing in mind the manner in which the document appeared at the trial, I am satisfied the first plaintiff had no knowledge of the attempt to change the account to his name.

The first defendant was not willing to take the same view. He told the court he had seen the letter shortly after it was written when he was shown it by a member of the bank staff and it was that which raised his suspicions and started his enquiry. He claimed he did not understand what 'P.S.' meant and was not willing to concede that it had been added after the body of the letter. He would not accept that the signatures above did not apply to the postscript and saw no significance in the fact that Masima had felt it necessary to sign the postscript but the others had not.

Although the first defendant denies many of the actual words used in his office and the district meeting, he does not deny raising his voice and accusing the three men of dishonesty and embezzlement. In court he continued to seek to support his allegation by reference to two other alleged misappropriations by Saafi. These were his use of money from the misinales as his contribution to further misinales and the use of some of the district funds to pay a lawyer for this case. Neither of these appears to be disputed by the first plaintiff but I have insufficient evidence to say whether they were against the practice of the Church. It is clear the President did consider they were wrong and was angered by them but, whatever the rights and wrongs, I am satisfied those two additional matters were not part of his reason for accusing the district officials of embezzlement and abusing them at his house and at the district meeting. I accept he thought they were trying to change the name of the account and was so sure that they were dishonestly involved that lie simply refused to see the matter in any other light and made no proper enquiry before he accused them.

It was this incident more than any other that lead to all the subsequent bitterness and allegations and counter allegations involved in this case.

The second account referred to was in the ANZ bank.

In November 1997, following the events I have described in relation to the Bank of Tonga account, the President ordered the district officials to take the misinale monies from the account in which they were being held until the district meeting and put them in an account with the ANZ. The plaintiffs allege he had no right to do so and that it was done to benefit his daughter in the bank by giving her the credit for bringing a large customer to the bank.

I am satisfied the first defendant ordered this because he, mistakenly as the evidence shows, believed that the three district officials had been dishonest over the term deposit account. However, he told the court that his reason for doing this was

because the interest rates in tile ANZ were, at that time, higher than in the Bank of Tonga. There was evidence that the rates were higher but it was a strange comment in light of an earlier assertion that much of his objection to the district money being deposited in a term account was that it was wrong for the church to lend money for interest. The evidence as a whole showed that the money was left in the Bank of Tonga account to complete the term for the interest. That, together with his claim that he did not consider the Church should receive interest, demonstrated how the first defendant all too often gave the impression to the court that his bitterness towards Saafi lead him to make statements that were based more on a determination to condemn him than a strict regard for the truth.

I do not find there is any evidence that the reason for transferring the money was for the benefit of his daughter. I am satisfied, though, that the President and the Trustees should not have taken charge of those funds before the Conference. I have already found that there was no foundation for the suggestion that the first plaintiff had been dishonest in the conduct of the term deposit account and the defendant has not been able to suggest any improper conduct in relation to the way the district officials were handling the funds in the misinale account to explain his order to transfer it to the ANZ Bank. I do not consider there was any proper reason for their intervention.

Before passing to consider the attempts of the first plaintiff to bring charges against the President, it is convenient to deal with the cases of the third and fourth defendants.

The Dismissal of the Church Auditor

The third plaintiff, Fononga Tu'ipeatati, had been a member of the Church all his life. Since 1977 he had been a quest worshipper and, in 1985 he was appointed as one of the Chief Trustees.

In 1994 he finished his term as a Trustee and was appointed as the Church auditor at the Conference in that year. The President dismissed him from that position in 1998 and he challenges that dismissal. The first defendant claims that he was properly dismissed because he was removed as a quest worshipper and, therefore, lost all positions in the Church.

The court was told of an earlier incident between this plaintiff and the first defendant when the latter was the Head Minister of the New Zealand district. The third plaintiff went to New Zealand to advise the staff of changes in the system of accounting but was denied any access to the office papers. It clearly left the two men with bitter feelings and each side has prayed it in aid of his case to some extent. The first defendant, in particular, claimed this was a reason for his subsequent dismissal of the auditor. Whilst I am satisfied the President harboured bitter memories of this incident in his mind, I do not think it has been demonstrated to have any other relevance to the matters upon which I am now asked to rule.

The events leading to the dismissal started at a Preachers meeting in June 1997. The minister of the third plaintiff's village, Houmakelikao, made two complaints against the third defendant. He said that he was not attending church because of disagreements he was having with the minister and that he had been drunk and passed out on the church premises. The third plaintiff was not present at that meeting. His case was that he was not notified that there was a complaint against him. Saafi

chaired the meeting as Head Minister and, following discussion by the meeting, he asked the minister to seek to reconcile with the plaintiff.

The matter was raised again in the quarterly meeting in September 1997 at which the third plaintiff was also not present. The Head Minister asked if the village minister had raised it with Tuipeatau and was told he had not. Despite that and the fact that the person involved was not present, it was proposed that there should be a vote. The vote was 60:21 to have him removed from the church list of lay preachers. This plaintiff denies the allegation of drunkenness.

Shortly after the quarterly meeting, the third plaintiff was in the United States and he received a letter from the President telling him that he was being dismissed. He has no copy of the letter and the terms cannot be seen because the Church also has not been able to produce a copy. However, he wrote to the President in April asking about the situation and asking to attend the Conference in May 1998.

The reply is produced and is dated 7 May 1998. It is in terse terms. The President advised him that he was dismissed from any positions with the church at the Quarterly meeting, that the President no longer wished him to be a member of the Conference because he had been removed from his position of auditor and advised him that he had no involvement or interest in the Conference.

The third plaintiff did attend that Conference and asked a member to raise the matter but the President refused to allow it to be discussed.

The first defendant disputes that the appointment of the auditor was by the Conference. He claims that the, then, President simply announced the position and there had been no resolution by the Conference to appoint an auditor. His case is that the appointment and the dismissal were not matters for the Conference.

He suggested that, once the quarterly meeting removed his name from the roll of preachers, his name was automatically taken from the roll of quest worshippers. As no one may hold a position in the Church unless he is a quest worshipper, he could not remain as the Church auditor.

Despite those statements, the first defendant also justified the dismissal on other grounds. He said the third defendant had used funds wrongly when he visited Australia following his trip to New Zealand, that he should, as a preacher, have attended the quarterly meeting and also that he was abroad too often when he should have been carrying out his duties as auditor. He stated that the third plaintiff "just pleased himself to do as he wished ... He often went to America when the Church had work for him to do."

I am satisfied on the evidence I have heard that the principal motive of the President was to get rid of an officer he did not like. That, in itself, is an improper basis upon which to exercise his powers but I need to consider the Church rules in relation to his claim that the third plaintiff was properly dismissed from his post as a quest worshipper and, as a direct and inevitable consequence, auditor.

Although the third plaintiff challenges the reason for the decision of the quarterly meeting to strike his name off the roll of lay preachers, there has not been any evidence to persuade me that it was outside the powers of such a meeting. That was as far as the decision of that meeting went.

The first defendant was pressed about the foundation of his assertion that, when anyone is struck off the roll of lay preachers, he is no longer a quest worshipper. His explanation was that there was no regulation but it was simply the procedure that has been used. Once his name is removed he will automatically cease to be a quest

worshipper. It is not written in the law. It is, he said, a working procedure. I found this a remarkable statement in the light of the provisions of the Church law.

The laws of the Church include the "Law relating to Quest Worshippers". It sets out what is required of a person if he is to be a quest worshipper. They are largely rules of conduct and section 13 (i) states:

> "This is the fundamental law of the Church of Tonga, if anyone breaches it, he shall be rebuked for the wrong doing which he has done, and if he shall not repent, he shall be dismissed as a quest worshiper, he shall not have any connection to us by order of the Conference."

However, section 114 sets out a procedure for the dismissal of a quest worshipper:

> "It shall not be allowed to just dismiss any quest worshipper unless he is tried (or examined) in the, people's court, and if any person is tried in accordance with this section and it appears to be true, it is upon them all in the meeting to order any punishment against such person involved in the matter that has been decided."

This is reinforced by Chapter XVI, rule 8 of the Rules:

> "It is strictly forbidden to remove a quest worshipper unless he is tried in the Adjudicating meeting as provided under section 114."

Mr Niu suggested to the first defendant that it was clear that any quest worshipper who was found to have fallen short of the requirements of the law should be rebuked and given a chance to repent. The President agreed that if a lay preacher was taken off the list, the meeting that tried him should also consider his position of quest worshipper. If he apologises, that would be an end of the matter and, if he does not, the meeting may decide to suspend him as a quest worshipper. Mr Niu pointed out that the third defendant had not been rebuked, neither had he been given a chance to repent. More importantly, the quarterly meeting had never purported to make any decision about his status as a quest worshipper. How, in those circumstances would the President have known he had been suspended from that status? As happened a number of times in his evidence, the first defendant became angry and the matter was dropped.

I am satisfied that paragraph (i) makes it clear that a member found guilty of wrongdoing in the terms of section 13 must be rebuked and given an opportunity to repent. He can be dismissed as a quest worshipper if he fails to do so but only after trial in accordance with the Church laws.

The third plaintiff was found guilty by the meeting of conduct that the meeting considered sufficient to require his removal from the roll of lay preachers. Despite the evidence of the village minister to the contrary, the minutes show that the meeting went no further. As the person involved was not present, it was right it did no more.

The third plaintiff was therefore not removed from the status of a quest worshipper. Whether or not his removal from the roll of lay preachers was sufficient for his dismissal as auditor is not relevant because the first defendant's reason for dismissing him was that he no longer held the position of quest worshipper. That was not the case and so I must find that he was wrongly dismissed from that position.

That leaves two other points in relation to the third plaintiff's case. First, he was, he claims, appointed by Conference and therefore only Conference has the power to dismiss him.

Clause 9 of the Constitution deals with the funds of the Church:

> "Church Funds. The meeting of the Conference shall have the power to decide the manner of collection and raising of Church Funds and the employment of such Funds for the Church maintenance and of provisioning of Ministers. It shall be lawful for the Ministers to appoint a Minister to be responsible for the auditing of church funds and it shall be the duty of the Conference to ensure the Church Funds are not put to waste and to ensure the safe keeping of Funds collected by the Church to be employed only in the interests of the Church of Tonga."

I note the distinction between the powers and duties ascribed to Conference and the more specific allocation to the ministers of the power to appoint an auditor. Such an appointment would presumably be made at the ministers meeting before the Conference proper. I have no evidence that the decision to appoint the third plaintiff as auditor was made in that way especially as he was not a minister.

However, if the ministers have the power to appoint him, the power to dismiss him, in the absence of any provision to the contrary, should lie in their hands also. What is clear is that the clause does not give the President the right to dismiss the auditor.

However, the evidence as a whole is insufficient for me to find that he was improperly dismissed on this ground as well.

The second point urged on behalf of the third plaintiff is that the final words of paragraph (i) of section 13 would suggest that only the Conference can make the final decision to sever any connection with the Church.

By a letter dated 5 August 1998, all the plaintiffs were told their names would be struck off so they were no longer members of the Church of Tonga. However, the reason given in that letter is that they had brought this action in the courts. It is not suggested in that letter that their loss of the status of quest worshiper was the reason and I do not consider it is appropriate to rule on the meaning of the last part of paragraph (i).

The Dismissal of the Fourth Plaintiff

The fourth plaintiff, Lavaka Fotukava, was appointed in 1996 as the President's driver by Katoanga when he was still President. After the first defendant was appointed President, the fourth plaintiff continued to drive for him.

In April 1998, he was absent from his work for a family funeral. He told the court that he had been given permission by a member of the office staff although when that member of staff gave evidence he was not asked about this. When he returned to work the first defendant asked him to do an urgent driving job but, on his return, gave him $200.00 and told him he was finished in the work.

The fourth plaintiff's case is that only the Conference had the power to dismiss him. There is no other evidence of the terms or conditions of his appointment. The first defendant disputes that the appointment was by the Conference and suggests it

was by the President personally. The fourth plaintiff was not present at the Conference himself.

The district secretary was present and told the court that Fotukava was appointed at the Conference. He recalls his name being announced in the allocations and that it was then confirmed by the Conference. There is no direct evidence apart from that and I accept it is correct.

The first defendant agrees that he dismissed him in the way described and says it was because the plaintiff had been warned about absences a number of times previously. He admits the plaintiff was asked for no explanation insisting that he had been warned twice before. The fourth plaintiff disputes this suggestion.

Fotukava told the court that his principal duty was to drive for the President but, if there was no need to drive for him, he would take any urgent work for the office. The first defendant insisted that his duties were to drive for him only and he was not to do any other work unless told specifically by the President.

I am satisfied on the balance of probabilities that the appointment of the fourth plaintiff was confirmed by the Conference. It would be reasonable to assume therefore that the Conference would have the power to dismiss him or, at least, to confirm his dismissal but the laws are not clear on the procedures in such a case. It is certainly clear, as Mr Niu points out, that the dismissal was done in a peremptory manner and the plaintiff was given no opportunity to explain. Even if the President had good reason to dismiss him peremptorily, it was still up to the Conference to confirm or cancel it.

I appreciate it is a cumbersome and inconvenient procedure but I consider that the only reasonable reading of the laws would suggest that, in such circumstances, the power of the President would be to suspend the person involved until the next Conference and then seek confirmation of his dismissal.

The Charges Against the President

By March 1998, the first plaintiff had decided to bring charges against the first defendant on all these matters. He filed twelve written charges against the President. They are stated to have been filed on 18th but they were first referred to at the Area Meeting in Nuku'alofa on 11 March.

The first plaintiff's case is that the only forum which has the power to determine these charges is the meeting of the ministers immediately before the Conference. They were to be submitted to the lower meetings but that was only a procedure to lead to the Conference.

At the area meeting for Kolofo'ou and Kolomotu'a, the minutes show that the chairman told the meeting there was a statement of charge against the President. It was decided to hold a ballot to decide whether or not the meeting wished to discuss it but the actual motion is not recorded. The minute then records; "it was the unanimous wish of the meeting not to submit this statement of charge to our district meeting".

At the quarterly meeting, the charges were read by the first plaintiff, who was chairman. The minister who had chaired the previous area meeting then said they did not agree to the discussion of the charge. The church lawyer advised the meeting that they should not discuss the charges but they were simply to go to the Conference. The minute does not say the final result but the minister who recorded the minutes told the court that the meeting decided not to send the charges to the district meeting.

However, the charges were raised at the district meeting. This meeting was chaired by the first defendant. The first plaintiff asked to put the charges forward and pointed out that they had not been accepted by the previous meetings. There was some dissent but the chairman asked the meeting to consider the charges and decide whether to submit them to the Conference. The first plaintiff protested that the submission of the charge was simply a formality and they should be left for the Conference to decide. The Church lawyer supported him but the chairman insisted that the charges be read out to allow him to answer them.

That is what occurred. The first plaintiff was asked to read each charge in turn and the President, from the chair, gave his explanation. That was followed in each case by a vote which was overwhelmingly against the submission of the charges to Conference.

The Minute suggests the meeting was conducted in a forceful, hectoring way by the President and the first plaintiff complains that was the case. At the conclusion the President asked that the conduct of the first and second plaintiffs be referred to the Conference because, he claimed, the Church was being put into disrepute by their actions.

Although it is not strictly relevant to the orders sought, it should be stated that, although these matters were indeed raised at the Conference, there had been no attempt by the President or church officials to follow the proper procedures under the rules for such cases.

At the ministers' meeting at the 1998 Conference, the first plaintiff tried again to raise the charges. The President, again from the chair, told the meeting that the charges had been raised at the district meeting which had rejected them all. He is recorded as continuing:

> "In our district meeting … all the charges were rejected and I believe there were more people attending that meeting than the number of us here in this meeting. And now he unlawfully brings these charges again today. But I ask that we hold a ballot to see if this meeting wish it to be resubmitted then I will be willing to go along with it because if I am guilty of any charge then you should punish me, for I do not want to preserve anything bad in our church."

The first plaintiff protested that he was not bringing a motion that they be resubmitted and insisted the charges had to be heard. Two members of the meeting then proposed a ballot and were supported by the President in the following terms:

> "I ask that we hold the ballot to see if you wish to resubmit the charges by Feleti otherwise we will be wasting our time for they were rejected by our district meeting at Nuku'alofa."

The ballot was held and it recorded that all disagreed to any resubmission of the charges.

Saafi's case is that not only was this the wrong procedure but that it was achieved by the domineering manner of the President. He suggests that at the district meeting and the ministers meeting the President stood and glowered at the members, shouted and generally dominated the proceedings.

I was able to watch the first defendant in the witness box over several days and it must be said that he is clearly a person who does not like to be contradicted. He has the tendency to state his views forcefully and not to consider they may be wrong or even that others should be given an opportunity to suggest they may be wrong.

The evidence of the district and ministers meetings certainly gives cause for concern as to the way in which the meeting was conducted. It is quite wrong to continue to use the authority of the chair when matters directly challenging the chairman's conduct are being raised. It is poor conduct for the chairman to state his view before inviting comment from the meeting and it is never proper for the person chairing a meeting and responsible for the conduct of the members to raise his voice, as I am satisfied the first defendant did. Having said that, I am not satisfied the evidence is sufficient to prove that his conduct altered the course the meeting would otherwise have taken.

The question for the court is whether these charges were dealt with in the proper way according to the Church's laws. Although the Constitution, Laws and Rules of the Church provide a detailed framework within which the Church can function, there is no special procedure for discipline or dismissal of the president.

There is some guidance about the ministers and I consider it is clear that the President is not expected to be treated any differently from the other ministers.

Clause 5 (f) of the Constitution provides that there shall be a meeting of the ministers before the meeting of the Conference "to discuss and decide any matters concerning their ministerial work during the period since the last meeting of the Conference". It is only at the conclusion of that meeting that the Chief Trustees and representatives join them for the Conference proper.

Paragraphs (k) and (l) set out the questions to be asked at each of the ministers' meeting and the Conference itself.

At the ministers meeting, the first question required by paragraph (k) after the call of those attending is; "Are there any issues to be decided in relation to any minister?"

Paragraph (l) has no similar question listed for the Conference.

That the ministers are to be tried by the ministers' meeting is confirmed in sections 39, 42 and 164 of the Laws. Section 164 provides:

> "If there is any matter relating to any minister, he shall be tried in the Conference by the ministers only, and he shall be penalised or acquitted by the Conference as it appears proper for them to do."

Chapter XX rule 8 provides for there to be a meeting, before the Conference, of the ministers only "where they shall be questioned and judged on the performance of their duties since the last Conference …"

Section 164 is the first of four sections under the heading "The Examination of Ministers". The following section, 165, provides:

> "If there is any matter relating to any minister, it is upon the President to order the immediate suspension of such minister from the department he presently holds until the Conference is held in which he will be examined."

Chapter I, rule 9 confirms that such a minister shall be tried at the next sitting of the Conference.

I have absolutely no doubt that the proper tribunal for the hearing of the charges brought by the first plaintiff was the ministers meeting of the 1998 Conference.

The reason for his submission of the charges to the earlier meetings is not clear. The laws do not give the area, quarterly or district meetings any power to deal with such matters neither have I been shown anything that suggests they must be informed of charges for the ministers meeting.

However, in the Rules, Chapter XXII is headed; "The Ministers Meeting at the Quarterly Meeting". Rule 4 of the Chapter sets out the questions to be asked at such a meeting of which the second is; "Is there any matter concerning a minister?" Below that is the following instruction:

> "Call the ministers and if there is any matter concerning a minister then have it tried in order to resolve it and if it is an offence that should be taken to the conference or an offence for suspension then the President must be informed for a decision to be made."

The court was not referred to this rule and neither was there any mention of a ministers meeting at the quarterly meeting. I read that rule as setting up a procedure for the meeting to decide whether any charge against a minister should be sent to the Conference. It appears to state that, if there is any matter concerning a minister, the meeting should try and resolve it but, if it is an offence, it will have to be sent to Conference. I mention it because it may be it is the meeting at which charges against a minister should be first submitted. However, whatever the purpose of that rule, it does not apply in this case because, when the charges were brought up at the quarterly meeting, it clearly was not ministers meeting because people other than ministers were present. Equally, even if it had been a ministers meeting, it did not try it and simply refused to have the matter discussed.

As has been stated, the charges were decided at the district meeting. The purpose of the district meeting is very clearly set out in the laws. It is only for the determination of matters of finance. It is referred to in the laws by the alternative name of fund distribution committee. Nowhere is there any suggestion that it was or could be the proper tribunal to hear the charges against the President and it certainly had no power to determine either whether they were true or whether they should be submitted to the Conference.

The President above all others should be aware of the laws and rules of the Church and it is his duty to ensure they are obeyed. He should have known it was not the proper time to consider the charges at the district meeting. I do not know nor need to know his motive but I am satisfied he insisted on the charges being put and considered at that meeting because he wanted to prevent them being heard at the ministers meeting. I am also satisfied he knew it was not the proper procedure or, at the least, made no effort to try and ascertain the proper procedure.

The reason he gave to the ministers' meeting for not discussing them, namely that they had been rejected at the district meeting, was clearly using the wrong procedures. It is unfortunate that, when the President did not suggest the proper steps, the members of the meeting were themselves so uncertain of the procedures that they were so easily swept along by the President's aim to prevent discussion of the charges

he faced. It must surely be every minister's duty to his church members to know the procedures of the Church sufficiently to ensure they are observed.

The Removal of the Plaintiffs as Members of the Church

Before passing to the various orders sought, it is necessary to deal with this aspect of the case because the defence relied on it as an answer to this claim.

Following the events at the Conference in May 1998, the plaintiffs filed this writ in the Supreme Court on 21 July 1998.

On 5 August, the General Secretary of the Church wrote to the first defendant in the following terms and copied it to the other three.

> "I hereby respectfully inform you that you have been cut off from the Church of Tonga on this day (5/8/1998), because of things you said and how you conducted yourself including bringing proceedings against the Church of Tonga, which is the fifth defendant, in the claim that you and other plaintiffs had brought - civil case No.C998/1998, litigating against the Church in the Courts of Law of the Kingdom.
>
> But those issues were already dealt with in the various courts/forums of the church as follows:
>
> 1. Village or Town Meeting – Kolomotu'a/Kolofo'ou (9/3/98)
> 2. Local District Meeting - Kolomotu'a/Kolofo'ou (11/3/98)
> 3. Quarterly Meeting - Tongatapu (18/3/98)
> 4. District Meeting - Tongatapu (22/4/98)
> 5. The full conference Meeting with the Chief Trustees (11-14/5/98)
>
> And none of these forums upheld the charges because the charges were false.
>
> Your name and those of the other plaintiffs will be struck off - that is
>
> 1. Masima Telefoni
> 2. Fononga Tu'ipeatau
> 3. Lavaka Fotukava
>
> So that you are no longer members of the Church of Tonga.
>
> I therefore inform you and Masima Telefoni of Kolofo'ou and Fononga Wipeatau of Houmakelikao and Lavaka Fotukava of Hofoa you, as of today (5/8/98) had no more interest with Church of Tonga."

Clause 8 (a) and (e) of the Constitution provide:

> "(a) If the President, or any Chief Trustee, or any Minister, or any Preacher, or any Lay preacher, or any member of the Church of Tonga who by any means whatsoever assist or bring any claim in

> any Court of Law in the country against the Church of Tonga, without notifying or without first bringing such claim to Meetings which are authorised to decide such claim, and has failed to first bring such claim before the Conference and the Conference has not approved that such claim be brought in a Court of Law, the name or names of such persons responsible shall immediately be deleted from membership and they shall cease to be members of the Church of Tonga.
>
> (e) The power to decide any claim against any person as mentioned in clause 8(a) above shall be given to any 3 or more Chief Trustees and the Chief Ministers of each Local District and chaired by the President. Before any person, against whom a charge is brought, is tried, that person must be notified of the time and place of the trial. And he must be served a statement of the charges and he has the right to bring his witnesses to the trial, but should that person fail to attend at trial, after being given sufficient notice, the matter shall be tried in his absence."

The wording of paragraph (a) highlights the difficulty the first plaintiff faced. He brought the claim to the meeting that had the power to decide it but it was not decided. Instead the meeting refused to hear it on the basis that it had already been decided by a meeting with no power to do so. It was pointless, in those circumstances, for him to seek approval to take it to the Court of Law from the same meeting that had wrongly refused to hear him.

However, the answer to the letter of 5 August 1998 is in paragraph (e) where the procedure for such cases is clearly set out. It is perfectly plain that the Church authorities made no attempt whatsoever to follow the proper procedure and, indeed, the defence has not suggested they did.

The removal of a person's membership of his Church is extremely serious. The shame and sadness it evokes was seen by the reaction of the fourth plaintiff when he referred to it in the witness box. The drafters of the Constitution had the wisdom to recognise that and to set up a formal procedure to ensure the power is not used casually or capriciously. Sadly their wisdom appears not to have been shared by the Church officials in 1998.

Whatever the rights and wrongs of the charges brought by the first plaintiff, he can claim with justification to be the only person of those involved who, when he brought them, tried to use the correct procedures. Not only was he prevented from bringing them but he was prevented by a total failure of those who opposed him to follow the rules of the Church.

His only recourse was to seek a hearing by another tribunal but, when he did so, he suffered the consequence of being removed from membership of the Church. Sadly, in that, the Church authorities again showed a total ignorance of or disregard for the rules that were laid down to cover such cases.

The Church is entitled to make laws, which proscribe the right to take legal action against it in the courts of the country. However, there is a line of authority, which shows that the court can still enquire into the internal affairs of a church although, as I have pointed out in *Talakai v 'Aipolo and Toe'api* (Supreme Court, C 178/97, 22 August 1997, Lewis J), any such enquiry is limited to a consideration of

whether the church or its members have acted in accordance with its own rules and have observed the rules of natural justice.

The Church may take action against its members in consequence but, if it does, it must still follow its own procedures. Failure to do so becomes another matter into which the court may enquire and, it necessary, interfere.

The Orders

When considering the orders sought, the court must first decide if there has been a failure to follow the rules of the Church. If there has, it can then also make consequential orders. That is the basis upon which I have decided whether to make the various orders requested by the plaintiffs.

The plaintiffs sought a large number of orders. Some have been withdrawn and the remainder (retaining the original lettering) is as follows:

(a) for an order declaring that the First Defendant, Second Defendant and Third Defendant acted wrongfully in selling the property of the Church at 52 Settlement Road, Papakura, New Zealand.

(b) for an order declaring that the First, Second and Third Defendants acted wrongfully in pulling down and demolishing the property of the Church at Fatafehi Road, Kolofo'ou, Nuku'alofa;

(c) for an order declaring that the First, Second and Third Defendants acted wrongfully in selling and disposing of the truck of the Church;

(d) for an order declaring that the First, Second and Third Defendants acted wrongfully in using the proceeds of the sale of the New Zealand property and of the truck of the Church for the purchase of building material and for the construction of the new memorial building of the Church at Fatafehi Road, Kolofo'ou;

(e) for an order declaring that First, Second and Third Defendants acted wrongfully in purchasing the new truck of the Church;

(f) for an order requiring the First, Second and Third Defendants to provide detailed and audited accounts of all monies received by them from the sale of the New Zealand property, Fatafehi Road property and sale of the truck, and of the monies expended by them therefrom, to the Plaintiffs and to the Church within 1 month from the date of the order;

(g) for an order declaring that the First Defendant acted wrongfully in chairing the misinale collection of the village of Kolomotu'a on 15th November 1997;

(i) for an order declaring that the First Defendant acted wrongfully in declaring the increase of the salary of the Church building steward, Mafile'o Tongotea from $2,000

to $6,000, and in instructing the payment of that salary on 15th November 1997;

(j) for an order that the First Defendant is liable to and shall forthwith pay to the fund of the village trustees of Kolofo'ou and Kolomotu'a the sums of $1,000 and $3,000 respectively;

(k) for an order declaring that the First Defendant acted wrongfully in instructing the withdrawal from the Bank of Tonga and depositing in the ANZ Bank the sum of $162,445.17 on 17th November 1997;

(l) for an order requiring the First, Second and Fourth Defendants to withdraw all funds standing in credit together with interests thereof in the said ANZ Bank account and deposit it into the account of the Tongatapu district at the Bank of Tonga within 7 days from the date of the order;

(m) for an order requiring the First, Second and Fourth Defendants to provide detailed and audited accounts of all the monies received, deposited into and withdrawn form the account at the ANZ Bank to the Plaintiffs and the Church within 1 month from the date of the order.

(n) for an order declaring that the First Defendant acted wrongfully in allowing his son Kilifi Veikoso and friend, Kali Vailahi, to have truck loads of soil, coral and rubble for free from the demolition of the Fatafehi Road property;

(o) for an order requiring the First Defendant to pay a sum of $500 to the Church in respect of the said truckloads;

(p) for an order declaring that the First Defendant is guilty of a breach of the laws governing the conduct of a quest worshipper;

(q) for an order that the First Defendant forthwith give a formal apology to the First Plaintiff and to the Second Plaintiff for the unkind and defamatory words which he spoke to them;

(t) for an order declaring that the purported dismissal of the Third Plaintiff from his position of auditor of the Church, preacher and quest worshipper was unlawful and that the Third Plaintiff was and still is the auditor of the Church and is also a preacher and quest worshipper;

(u) for an order that the First Defendant shall pay forthwith to the Third Plaintiff damages for the salary lost by him during the period in which he was deprived of his position of, and salary as, auditor of the Church;

(v) for an order declaring that the Fourth Plaintiff was wrongfully dismissed by the First Defendant, and that he be reinstated forthwith to his position as driver of the Church at Tongatapu, and that the First Defendant be

liable for and for him to pay to the Fourth Plaintiff all salaries lost by him during the period in which he was deprived of his position forthwith;

(w) for an order declaring that the First Defendant has acted wrongfully and improperly during the district meeting of Tongatapu in April 1998, and in the Conference in May 1998;

(y) for an order dismissing the First Defendant from his position of President of the Church;

(aa) for an order declaring that section 29 of the laws of the Church is ultra vires, and that allocation of Ministers be done by the meeting of the Ministers at the Conference;

(bb) For an order that the First, Second, Third and Fourth Defendants be liable to pay any sum or sums which may be found unaccounted for in any account which has been ordered herein;

(cc) For an order that the Defendants be jointly and severally liable for the costs of these proceedings;

(dd) For any other order or relief that may just.

(ee) For an order declaring that the resolution of the Conference referred to in paragraph 48 of the Statement of claim as amended was and is ultra vires.

The basis of declarations (a) to (e) is the same, namely that the defendants had no right to act as they did without specific authority from the Conference.

The defendants rely on the last sentence of clause 8 of the Constitution that it is for the Chief Trustees to keep all properties and to control them. During the trial they also produced an extract from the minutes of the Conference held in Ha'apai in May 1981 which showed a motion was passed that the "Chief Trustees are authorised to use the funds of the Church for the works of the Church".

When it was produced the plaintiffs sought to amend their claim to add a reference to that motion and claim that it is ultra vires clause 9 of the Constitution. Declaration (ee) follows from that.

I have set out the relevant part of clause 9 already.

If the defence is right that the meaning of that motion was to transfer the whole control of Church funds to the Chief Trustees without any further reference to Conference, it is clearly ultra vires that clause.

The Constitution is the principal temporal law of the Church. Clause 9 gives Conference the right to decide the manner in which the church funds are to be employed but it also imposes the duty on conference to ensure the funds are not wasted, are kept safely and are only to be used in the interests of the Church of Tonga. Conference has no right totally to abdicate such power to anyone else and any act purporting to do so must be ultra vires.

However I do not believe the 1981 motion was intended to give the Chief Trustees the unfettered power the defence suggest. The minutes show the Chief Trustees raised it because there were works to be done in Tongatapu. I have no doubt it was passed with the intention only of allowing them to take decisions to spend church funds for that purpose and it was not intended to be a power to act without the

control of conference indefinitely. The Trustees are not involved in costs of the day to day running of the Church but only major transactions that may affect the overall assets and properties of the Church. Clearly such transactions must always be subject to the scrutiny and control of the Conference

I make the declarations sought in (a), (b), (c), (d) and (e) with the addition of the words in each case … "without the express prior approval of conference."

I decline to make the declaration in (ee) but do make the following declaration in its place;

> "The motion passed by the Conference on 14 May 1981 giving the Chief Trustees authority to use the funds of the Church for the works of the Church did not extend the power of the Trustees beyond the year for which it was passed or absolve the Conference from the duty imposed upon it by clause 9 of the Constitution."

As I have stated the monies from the sale of the New Zealand property and of the church truck and the expenditure on the rebuilding of the Fatafehi Road property were not properly accounted for by the first, second and third defendants. Paragraph (f) does not make it clear to whom the accounts should be provided. Clearly the failure to provide them means that Conference was not given proper information about the transaction.

The evidence does not prove that the failure to provide proper accounts was the fault of those defendants named. The person responsible would presumably have been the treasurer who is the fourth defendant. I assume the relevant documents are still in the possession of the Church as it occurred only two years ago but I accept some of the transactions may require the advice of the Chief Trustees.

Instead of (f), I order that the fourth defendant shall supply detailed and audited accounts of all monies received from the sales of the New Zealand property, the materials from the Fatafehi Road site and the truck and all monies expended therefrom and shall provide such accounts within three months to the Head Ministers to hold for submission to the next Conference thereafter.

For the reasons I have stated earlier in this judgment, I do not make the declaration sought in (g).

I do make declaration (i) but I consider any further action must be decided by the village trustees of Kolofo'ou and Kolomotu'a and I decline to make the order sought in (j).

I am satisfied that the instruction to transfer the district misinale funds from the district account into an account in the names of the officials of the church office was wrong. The defendants had no right to control those funds. The only bodies with power to make orders as to the distribution and use of those misinale funds were the district meeting and the conference. Those funds were properly deposited in the account by the first plaintiff and his district treasurer and secretary.

The evidence was that the decision was made by the three Chief Trustees and I therefore make declaration (k) with the addition of the second and third defendants.

I do not consider it is for the court to make the orders in (l) and (m). If any action is needed following declaration (k) it is for the Conference to decide.

As I have stated earlier in this judgment, I do not have sufficient evidence to make declaration (n) or order (o) and decline to do so.

There can be little doubt, on the first defendant's own admissions in the witness box, that he acted more than once in a manner that appears to be inconsistent with the law relating the quest worshippers. The court will never rule on purely spiritual matters and I feel that the interpretation of the laws relating to the conduct of quest worshippers involves such a consideration.

Section 114 of the Laws and Chapter XVI rule 8 provide a procedure for the trial of a quest worshipper and the precise manner in which the laws relating to quest worshippers are interpreted should be a matter for the members of the Church. I do not think it appropriate to make any declaration in relation to that in case there should be a trial under those provisions. I therefore decline to make declaration (p) but I do order that the next Conference shall decide whether the first defendant should be tried under section 114 for breach of the Laws relating to quest worshippers and that Conference shall be chaired during that discussion by the Head Minister of Tongatapu District in accordance with section 35.

I do not think the order sought in (q) is appropriate for the court.

I have already found that the dismissals of the third plaintiff from his position of auditor and quest worshipper were wrong. He denied the allegation of drunkenness and he was undoubtedly tried in his absence. However, I do not consider the minutes of the quarterly meeting on 24 September 1997 are sufficiently accurate to allow me to declare his name was wrongly struck off the lay preachers list.

I make the declaration sought in (t) in the following terms:

> "The purported dismissal of the third plaintiff from his position of auditor and quest worshipper was unlawful under the laws of the Church of Tonga."

I do not consider it appropriate to make the order in (u). Such a claim should be the subject of a separate claim where the issues can be properly aired. This court has certainly not heard sufficient evidence to make such an order.

For the same reason, I make declaration (v) in the limited terms:

> "The fourth plaintiff was wrongfully dismissed by the first defendant."

For the reasons I have already given, I shall make the declaration (w) in the following terms:

> "The first defendant acted wrongfully in failing to follow the proper procedures of the Church at the district meeting for Tongatapu in April 1998 and during the ministers meeting of the Conference in May 1998 and thereby wrongfully prevented the first plaintiff from presenting his charges to the ministers meeting."

Whilst I accept there is precedent in Tonga for the court to order the dismissal of a church president, I do not consider that is a proper order in this case. If the President acted wrongfully, it must be a matter for the Conference to decide the appropriate remedy. I consider it would only be appropriate for the court to usurp the function of the Conference in the most extreme circumstances. I would only add that any

discussion of this by Conference should not be chaired by the first defendant. With that qualification, I decline to make order (y).

The question posed in (aa) refers to the apparent difference between the wording of section 29;

> "It is upon the President to decide and to allocate the Ministers to the department they are each to hold".

and question 23 in clause 5(1) of the Constitution which is to be asked at the Conference; "What are the allocated positions of the ministers?"

I accept these provisions suggest the allocations are, at the least, open to comment and discussion by conference before they are ratified. That interpretation, in itself, would not be sufficient to make the section ultra vires and I have not heard sufficient argument to decide the matter. I decline to make the declaration (aa).

(bb) is a matter for the Conference to decide and I shall not make the order sought.

I have already dealt with (cc).

Finally, although it was not requested by the plaintiffs, I declare that the purported striking off the membership of the Church of the first plaintiff, second plaintiff, third plaintiff and fourth plaintiff on 5 August 1998 for bringing this action in a Court of Law was not decided in accordance with the provisions of clause 8 (e) of the Constitution and is void.

Whilst the plaintiffs have only achieved a partial success in the declarations they have sought, I have found that the main thrust of their complaints have been made out and they are entitled to their costs. The second plaintiff has not appeared to prosecute his claim and the defendants have had to prepare for such a defence. However, I do not consider it added to a great extent to the preparation they had to do to defend the claims of the other three plaintiffs and I shall reduce the costs they must pay by one tenth. I therefore order that the defendants shall pay nine tenths of the costs of the plaintiffs to be taxed if not agreed.

Tonga v Ministry of Police

Supreme Court, Nuku'alofa
Finnigan J
C 1045/99

14, 15, 16 February 2000; 28 April 2000

Tort — unlawful assault and arrest by police officer — vicarious liability — damages
Damages — assault and unlawful arrest — exemplary damages allowed

The plaintiff, a 13 year old alleged theft suspect, was taken into custody by the police and allegedly beaten. A private prosecution was brought and on 17 September 1999 the police officer was convicted of assaulting the plaintiff. The plaintiff claimed that he was unlawfully assaulted and unlawfully imprisoned. As a minor, suing through his next friend, he sought damages of $15,000 for the assaults, $3,000 for unlawful imprisonment, and $1,000 as exemplary damages. The defendants submitted that they were not liable for what the officer did.

Held:

1. Vicarious liability was established and the Ministry of Police was the proper defendant.
2. General damages were intended as restitution for the plaintiff not as punishment for the defendant. The court awarded damages of $12,500 including an element of aggravated damages.
3. The court awarded the full amount sought for exemplary damages, $1,000.

Cases considered:

'Akau'ola v Fungalei [1991] Tonga LR 22
Hsu & Hsu v Latu [1991] Tonga LR 25 (CA)
Keneti 'Otuafi v Sipa (Court of Appeal, CA 19/90, 24 March 1992)
Kingdom of Tonga v Mokofisi [1990] Tonga LR 58 (PC)
Lavaka v Ministry of Police [2000] Tonga LR 17
Lloyd v Grace Smith & Co [1912] AC 716; [1911-13] All ER Rep 51
Rookes v Barnard [1964] AC 1129; [1964] 1 All ER 367
'Uhila v Tatola [1992] Tonga LR 9

Statutes considered:

Criminal Offences Act (Cap 18)
Police Act (Cap 35)

Counsel for plaintiff : Mr Fifita
Counsel for defendant : Mr Pouono

Judgment

This is a claim for damages brought on behalf of a youth who claims to have been beaten by a police officer during a police enquiry. The plaintiff is said to have been 13 years old at the time of the alleged events, though he said in evidence that he was born in September 1984.

The plaintiff himself gave evidence along with another youth who was apprehended with him, as well as the person who had reported the two to the police as suspects, the plaintiff's guardian and a police officer. The police officer gave formal evidence producing the police station diary that covers the period in question. For the defendants, there was one witness, the police officer against whom the claims are made.

The Evidence, and the Facts

The following findings are drawn from the evidence of all six witnesses and from the station diary. The events began with an alleged burglary and money theft in a house at Pea. The witness Fale'aka Vao reported this to a police officer who lived at Pea and he passed it on. The complaint was noted at about midnight in the diary of the central police station. The plaintiff and the other youth were suspected because of what some other children had told Fale'aka Vao, and when a police officer from the central station arrived to investigate she named the two youths.

The officer was Vilisoni Finau. He had worked the previous day from 8.30am till 4.30pm, then had returned to work at 6pm. He was still working when the complaint was recorded and at 12.05am went in a police car to Pea. He says he was the only officer in the station with an available police vehicle. According to the diary, in which the times have been altered, he was back 10 minutes later with two persons said to have been arrested in relation to the complaint.

At Pea, he met the policeman who lived there, and who had received the complaint. The policeman told him some children claimed to have seen the plaintiff and another by Fale'aka Vao's house, and that the other one ("Langoia") had told him the plaintiff had gone into the house. He also interviewed Fale'aka Vao, to ask her what she wanted done. He arrested the plaintiff for housebreaking and theft. The plaintiff denied the allegations and Finau said he asked Langoia to come to the station to make a statement. Langoia thought he had been arrested.

There is a conflict about what occurred on the way to the police station. The plaintiff's evidence was that Vilisoni said they were going to Veitongo and that by the time they got there the plaintiff would have to admit that it was he who committed the theft. On the way, he said he was in the front with Vilisoni, who was hitting him, about 50 times, sometimes with both hands and sometimes with one while the other held the steering wheel. Langoia he said was in the back with another officer. As I understand the plaintiff's evidence, he said Vilisoni put the plaintiff's head on the gear lever of the car and hit him on the back and the back of the head. They stopped at Veitongo and this continued, outside a mini market there. He said that after this they went back to Fale'aka Vao's house, and Vilisoni told her to come to the central police station. He said that when they reached the central station Vilisoni told him to roll up

the car window and that while he was doing that Vilisoni hit him on the back of the head. Then they parked in the station parking area and as he got out of the car he said Vilisoni again hit him on the back of the head, so that he fell down and was unconscious.

Some of this was put to Vilisoni in cross-examination, and denied. Some of it was not referred to in his evidence. To the allegation that he beat the plaintiff while driving, he responded with a question, he said how could he do that, he might cause an accident, his hands were busy driving. Otherwise he told an account of a routine police operation.

The evidence of Langoia was generally the same as the plaintiff's, except that he added an appearance by Fale'aka Vao in the police station parking area. He said that she arrived there a short time after they did. He said it was while she was there that Vilisoni struck the plaintiff on the back of the head and the plaintiff fell down.

Fale'aka Vao was at the police station at about this time, because Vilisoni gave evidence that she was, and she made a statement of her complaint at 12.30am. It was written down and she signed it. A copy of it was produced as Exhibit 1.

Fale'aka Vao gave evidence but was not asked about events in the carpark. From her presence in the station at 12.30am and from the evidence of both youths that Vilisoni had asked her to come, I accept it as proved on the balance of probabilities that she had been asked by Vilisoni to come to the station, and was present in the carpark. It seems reasonable to conclude that, if the plaintiff is telling the truth, he was not aware of her presence there.

This witness gave no evidence about any events up to the present point in the narrative, only about those inside the police station. I have to decide what occurred up to the present point on the evidence of the plaintiff, Langoia and Vilisoni. There is some corroboration of Langoia's account in that Fale'aka Vao was independently shown to be in the vicinity at the time when he said she was in the parking area.

From my observation of the witnesses and consideration of their evidence, I am sure beyond the balance of probabilities that the blow was delivered in the parking area as described by both youths. I am sure also that there was a deviation to Veitongo, after which the police officer returned to tell Fale'aka Vao to go to the central police station. I accept the plaintiff's account of being hit while his head was at or on the gear lever at Veitongo outside the mini market there. I was at first reluctant to accept this, and the plaintiffs account of about 50 hits on the sector between Pea and Veitongo. However, I was not impressed by the police officer's flat denial of the driving incidents and the mini market incident was not denied. I accept the plaintiff's evidence, and it is supported by the account of Langoia, which I accept.

I turn to the events inside the station. The evidence of Fale'aka Vao is crucial to resolution of the conflict about what occurred. Primarily, she was a reluctant witness. She gave her occupation as domestic work. On the day when she was to appear on summons to give evidence she went to plaintiff's counsel with a government sick leave certificate which stated that she was unfit for duty for three days with a cellulite disorder. The hearing was adjourned so that she could be informed that the court would take her evidence the following day at her home, with notice to be given in Form 16 of the Schedule to the Magistrates' Courts Act (Cap 11). The following day she appeared in the courtroom, and gave evidence. She was evasive from the outset, saying that she did not remember much. She said the police at the police station questioned her. She then said that the only thing she knew was that the two youths

had been brought down from upstairs to apologise to her. This was later, and I shall return to that. She then remembered that a police officer told the plaintiff to tell the truth and not change his mind because the police officer might beat him. She then remembered that she saw a police officer with a stick but said she would not call what the police officer did to the plaintiff an assault. She added that the plaintiff was only pushed with that stick by the police officer and was told by the officer to tell the truth. She added further that she didn't see any beating, maybe that had been done upstairs.

At this point in her evidence I declined counsel's application to declare her hostile, but I allowed him to put some of her previous statements to her, all of which she accepted. She agreed that she had been at the court for Langoia's case (*Lavaka v Ministry of Police* [2000] Tonga LR 17). She agreed that she had said to counsel he was wasting her time because she had seen no assault on Langoia, all she had seen was an assault with a bar on the plaintiff. Having agreed with that, she went on to say that she would not call what the police officer did to the plaintiff an assault, demonstrating as she said so a backhand movement with her right arm, and a prodding motion. She said that in that fashion the officer had waved a stick or a bar, she could not remember, and that "these officers" hit the plaintiff with this object, telling him to tell the truth, and that this occurred at 4 o'clock in the morning. She said she has since found out that this can be an assault. She said that this occurred downstairs in the police station, she was not aware of anything upstairs. She agreed that she was angry with the plaintiff and that she had told counsel that Vilisoni had already been punished for the assault. I shall refer to that later.

She said she returned home about 4am. Perhaps she returned, for the station diary records that at 6:15 am she lodged her complaint for housebreaking and theft.

About this complaint to the police, she said in cross-examination that when she was being served with a summons to give evidence in the police case she told the police officer to withdraw the charge. This she said was because she had forgiven the two kids and felt kindness toward them, and as well the case was wasting too much of her time. Her evidence shows that she did not in fact have the grounds to be their accuser in the first place. She herself knew nothing of what had occurred.

On entry to the downstairs station office, both the plaintiff and Langoia stated, Vilisoni lifted the plaintiff off the floor then dropped him, after which he lifted a chair. The plaintiff said he was certain Vilisoni was going to hit him with it until another police officer stopped him. Both youths said the other officer told Vilisoni that he should not break the plaintiff's bones. The plaintiff said he was taken into another room of the main office where he was sat on a chair and struck by Vilisoni across the back with a piece of wood. He demonstrated a length of 18 inches to 2 feet and thickness about half to one inch.

He said he was then told to go with Vilisoni upstairs, and when they entered a room Vilisoni told him to lock the door, then to get an iron bar from inside a box in the room. He said that on hearing this he ran downstairs to the main office where there were other police officers. He said he was scared to death and crying. He said that after a while a phone rang and after an officer answered it another officer took him upstairs again to the room where he had been. He said that Vilisoni again told him to lock the door and get the iron bar and asked him why he had run. He said that he came with the bar and Vilisoni hit him with it and asked him whether he was the one who had committed the theft, and he says he answered no. He demonstrated the length of the bar at about 1 meter, about an inch or more thick, similar in thickness to

a galvanised fence pole. He said the other police officer was sitting in the room, and said that he should admit it so his beating would be stopped. He said there were about 10 hits to his buttocks.

He said that at this point he owned up to the theft and the beating stopped. They went downstairs, and he said there he was accused of stealing a hair clipper from Fale'aka Vao's house. He said he denied this and that Vilisoni asked did he remember that he had just beaten him upstairs, after which Vilisoni told Langoia to fetch an iron bar, which Langoia did. He said Vilisoni then hit him about 10 times on his legs and 5 times on his stomach.

He said that then a police officer named Tauna'uta came with the key to the cells and told him to open cell 4 and get inside. He said Langoia came and locked the cell, taking the key with him. After about 5 minutes Tauna'uta came and opened the cell, saying they were going to Pea to get the hair clipper, and they went to Pea with Vilisoni and another person, a girl, though he knew there was no clipper. This he said was about 4am or 5am.

He said that when they got to his home Vilisoni stayed in the car while he went to the house with Tauna'uta. While that officer remained outside, he went through the house and left by another door.

Much of what he said occurred downstairs was told again by Langoia when he gave evidence. He said he saw the blow with the wood in the downstairs office because there was glass through which he could see, a fact mentioned also by Vilisoni in his evidence. He made no mention of any visit by the plaintiff that ended when a phone call was received, but he told of being sent for an iron bar, to the room, where he had seen the plaintiff being hit with the wood. He recounted blows with the bar, about 15 in all he said, to the plaintiff's legs and stomach, demonstrating an area above the navel and below the breastbone. He gave a similar account of the plaintiff's entry to and exit from the cell, and the parts played in that by Tauna'uta, the plaintiff and himself. He said that the plaintiff and Tauna'uta then went outside and he did not see the plaintiff again that night.

The station diary records that at 3:00am Finau informed the log-keeper that the plaintiff was going to be kept in custody while the document was prepared for taking him to court. He was searched by another officer and put in cell 4. It records that at 3:40am Finau and Tauna'uta left the station in the police vehicle with the plaintiff. Tauna'uta returned at 4:35am, reporting that the plaintiff had run away.

Langoia said that when he saw the plaintiff being hit, Tauna'uta was not present, but that Fale'aka Vao was, along with a person called Vika and another girl. From the evidence of Fale'aka Vao it seems that Vika, whom she described as "still a child" is her daughter. The presence of these people was unexplained.

While trying to be brief, I have felt obliged to set down the accounts of these extraordinary events because counsel for the defendants did not challenge them. In his careful cross-examination of the plaintiff he questioned only on peripheral matters. His cross-examination of Langoia lasted two minutes.

Vilisoni Finau's account of events at the police station matches generally the sequence of the movements around the station recounted by the two youths, but omits references to any events in which physical force may have been used. His evidence matched that of Fale'aka Vao in stating that the plaintiff was brought downstairs to apologise to her. He said that while that was being done, in a room off the main office into which one can see through louvre windows, Tauna'uta arrived, and Tauna'uta

was the officer in charge that night of the CID where Vilisoni was working. He said he asked Tauna'uta to drop him at his home, but Tauna'uta insisted he go with him and the plaintiff to Pea. There he went to sleep in the car, while Tauna'uta went to the plaintiff's house, and he was surprised to learn soon afterwards that the plaintiff had run away.

In cross-examination he said he had taken the plaintiff upstairs, but when asked whether he had done what the plaintiff had said, he replied to each of the allegations simply "no". When asked about an iron bar he replied, "I did not carry round any iron bar in the police station". When asked whether he had hit the plaintiff with an iron bar in the charge office, he replied, "No, it was just a piece of wood, maybe a table leg or something. I was standing by Lesini and told him to apologise to Fale'aka, she was sitting there in the room by the charge office". When asked if he had hit Lesini with a piece of wood at the charge office he said "no".

From the evidence and the demeanor of all the witnesses including Fale'aka Vao I make my finding without any difficulty. It is clear to and beyond the standard of probability, on the evidence that I heard, that what the two youths claimed had occurred downstairs in the police station did occur. I accept and find also that what the plaintiff claimed occurred upstairs did occur. I find that the plaintiff was struck in the police station by the officer Vilisoni as he says he was.

Comment

There was a claim in the statement of claim that a private prosecution that was brought out of these events, and on 17 September 1999 Vilisoni Finau was convicted of assaulting the plaintiff. This pleading was admitted in the statement of defence. Vilisoni Finau gave evidence about it, and a comment is called for. He said he had no lawyer, as if that was the cause of his conviction. He said he gave his evidence and had no other witness. He said he was fined $100 plus $100 compensation to the plaintiff plus $200 lawyer's fee and $8 court costs.

It is for the first defendant to consider the future of this officer in the police force. However, what occurred was wrong not merely because it was assault, it was also a gross dereliction of duty by the police officer. A police officer's only function is to enforce the law, and his duty once he has arrested a suspect on suspicion of committing a crime is clear. This has been emphasised in recent times by this Court and the Court of Appeal. The Court's function is to turn its face firmly against abuse of their authority by police officers, and to express its disapproval. This it does by rejecting evidence shown to have been obtained by force or other persuasion, or obtained while suspects who were entitled to be free on bail are wrongly kept in custody. Even had the actions of this officer resulted in a trial, his actions would have been criticised and the evidence he obtained rejected. On the evidence before me, including some of the evidence of the officer, this was not police work at all, but unprincipled bullying.

Counsel for the plaintiff chose to open his case by quoting Thomas Jefferson, "Give me liberty or give me death", and I mention it because the remark was endorsed on behalf of the defendants by their counsel in his submissions. Both counsel accepted, and I commend them both, that if the police abuse liberties, there is no defence left except principle, as stated in the Constitution, and to flee to the Courts for protection from the police is a desperate remedy.

Decision on Liability

The plaintiff's claim is that he was unlawfully assaulted and unlawfully imprisoned. Counsel for the defendants cross-examined and made submissions on the basis that the defendants are not liable for what the officer did. Plaintiff's counsel submitted that the right defendants had been sued, and that the evidence showed that it was not only this officer who acted badly, but other officers also. He pointed to the evidence that no officer intervened, even though others observed what was happening both upstairs and downstairs at the police station. The only intervention, he said, was by an officer who cautioned Vilisoni Finau against breaking a bone.

From the facts as I have found them it is apparent that what occurred was a series of assaults, as defined in the Criminal Offences Act (Cap 18) at s 112, by a police officer on duty in the presence of other police officers on duty. These were assaults of an aggravated nature, with a piece of wood and a bar as well as with the hand. They were committed in the central police station in the hours after midnight in the presence of other police officers on a suspect who was aged 13 or 14.

As for the claim of unlawful imprisonment, again one needs only state the facts as found for the claim to become self-evident. The plaintiff was arrested at Pea, on the information given to Vilisoni Finau by a policeman there. The plaintiff had denied the allegation on the spot, but Finau had that power under s 21 of the Police Act (Cap 35). However the plaintiff was thereafter kept in various parts of the police station for the purpose of obliging him to abandon his denial and confess to the crimes of which he had been accused. That was an illegal purpose. Even without requiring the plaintiff to unlock and enter the cell, and even without using the services of the youth Langoia for that purpose, even without the entire cell episode, the police officer detained the plaintiff for an unlawful purpose. The officers in the station that night who knew what was happening and did nothing to require Vilisoni Finau to desist were all parties to it, to a greater or lesser degree.

Counsel for the defendants responsibly made no claims outside the ambit of the evidence. He relied on factual submissions that the claims had not been made out, and legal submissions that Vilisoni Finau was not on duty because his hours of duty were 8.30am to 4.30pm. He submitted that vicarious liability had to be established, and had not been. He relied on *Keneti 'Otuafi v Sipa* (Court of Appeal, CA 19/90, 24 March 1992). This judgment seems to be unreported. There are some similarities with the facts of this case, but as the Court noted, it was a decision on its own unusual facts. The Court upheld a decision that the Minister of Police in the facts of the case was not vicariously liable for what a man, who happened to be a police officer, had done.

The factual basis for that finding is absent here. Vilisoni Finau said he was working overtime on urgent police duties, that he was working on them in the police station, that he had been taken from those duties because a CID officer was required to attend every complaint of housebreaking and he had the only available police car. Counsel for the plaintiff relied on a 1912 English authority, *Lloyd v Grace Smith & Co* [1912] AC 716; [1911-13] All ER Rep 51 and the principle that the employer is liable for the malpractice of the employee committed in the course of employment. There are appropriate cases in Tonga, e.g. a judgment of the Court of Appeal, *Hsu & Hsu v Latu* [1991] Tonga LR 25 (CA), a case of an assault by an employee in the course of employment. *'Uhila v Tatola* [1992] Tonga LR 9 was a case that included assault by a police officer and vicarious liability was found established.

Those being the only arguments for the defendants, I am satisfied that they are properly sued, and have no hesitation in finding liability established.

Quantum

The plaintiff seeks damages of $15,000 for the assaults, $3,000 for the unlawful imprisonment and $1,000 as exemplary damages. Neither party cited authorities or precedents in respect of quantum.

There was no challenge to any of the evidence given by the plaintiff or by his guardian about the effects on the plaintiff. The plaintiff said he was born on 29 September 1984 and is now aged 15. He said he had been at school previously, classes 1 to 6 at Pea GPS, but since this incident had had "no ambition whatever regarding education". He said that since he grew up he had wanted to be a policeman, but no longer wants that. He said that during the times he was being hit in the car he was frightened and shivering. When he was hit in the car park he fell and was unconscious. Among the events in the police station he was lifted and dropped, he was told to lock the door and to fetch the iron bar, he was hit with other policemen watching and none intervened. He was ordered to put himself in the cell, and Langoia locked him in. He said he was very scared and very sore. He said he was "frightened to death". He said that after returning from running away he was very sore and "in a difficult state". He said he stayed in bed for three days and it was while he lay in bed that the thought of committing suicide vanished from his mind.

Maliana Laumape, who is the plaintiff's guardian, gave evidence. She said that he had been at home when Langoia and another came to get him to answer questions about some money that had been taken. She said she next saw him the following morning, at about 4 or 5 o'clock, when he came in the back door of their house and went out through the front door and disappeared. A policeman was there and asked where he had gone. She saw him next at about 10am, she saw he was unhappy and he told her the police had beaten him. He showed her his stomach and his buttocks. Demonstrating across the navel area, she said she saw red and black bruises, and some skin coming off. She said it was the same on his buttocks.

She said it made her feel angry and full of hatred for the police officer that had done the beating. She said she did not take him to the hospital because she was afraid the police might get him from there and beat him again. She said he stayed in bed three days, and that she lied to the police when they came looking for him. Her reactions and feelings about the matter are not to be taken into account when assessing damages for the plaintiff, but they are taken into account in assessing the credibility of the plaintiff's claims.

When it comes to assessing the damages which will compensate for the injury proved, I first combine the two primary claims into one of $18,000. In the circumstances of this case, the separation is artificial. What are the standards to apply? The defendants have left the decision to me. In my research I found the 1991 case *Hsu* (above), where a security guard assaulted a nightclub patron and broke his jaw. A jury awarded $8,000, which the Court of Appeal upheld because it was not so high as to justify setting it aside. The Court suggested nonetheless that it would have thought $5,000 would have been more appropriate. This is useful guidance, as it was intended to be.

In 1990 this Court decided *'Akau'ola v Fungalei* [1991] Tonga LR 22. The award in general damages was $2,000 after a finding that the plaintiff had suffered "a vicious attack" at the hands of two police officers. The Court found he had been driving illegally and thereafter had attempted in a long and dangerous drive, to avoid arrest. The Court pronounced his account of being punched and kicked when caught, further injured when thrown into a police van, and punched and slapped in the van all the way from Tatakamotonga to Nuku'alofa, was "greatly exaggerated". The Court concluded with these remarks:

> "We know from a depressing series of cases in this court, both criminal and civil, that this sort of behaviour does occur with some frequency. It must be acknowledged that a police officer has a very difficult job. He has to deal with very difficult people, and there are times when his patience is sorely tried. Nevertheless, when dealing with offenders he may only use such force as is reasonably necessary to restrain them. A number of police officers still appear to believe that they have the right to exercise discipline over the public as a parent would over a child - by physical beating. By now the message from this court should be loud and clear. Such abuse of authority will not be tolerated, and where it is proved to have occurred it will be stamped on, with increasing severity, until the bully boy in uniform no longer roams our streets."

On that reasoning the Court added to the award of general damages a further award of $2,000 exemplary damages. The category for the exemplary award was abuse of public authority, cf *Rookes v Barnard* [1964] AC 1129; [1964] 1 All ER 367. The categories were re-affirmed for this jurisdiction by the Privy Council in *Kingdom of Tonga v Mokofisi* [1990] Tonga LR 58 at 60.

I assess first the general damages. It is clear that had the plaintiff in *'Akau'ola* made good his claims, the award of general damages would have been higher. The claims of the present plaintiff are not dissimilar, and have been made out. They are similar in some respects to the facts of Langoia's case, referred to briefly above. In that case, arising out of the same incident as the present, I awarded $8,500 in general damages. An award in the same general range is indicated, but higher on the scale, because here the beatings began in the car, went on longer, and were more serious with one bout of unconsciousness. Also, they involved further degradation of the plaintiff such as the picking up/dropping incident, and the incident when he was told to put himself in the cell and Langoia was sent to release him. It seems as well that there is in the present case an element of aggravation that was missing in the case of Langoia. This plaintiff specified that his ambition had been to be a policeman. Whether he ultimately returns to that remains to be seen, as he is still young. But for the present his mind is firm and clear. His ambition has been destroyed. He has given up going to school. The blow to his self-esteem is specific in this effect, and is present now. This seems to me to be aggravation in the first and strict sense that is mentioned in *Halsbury*, 4th ed., Vol 12, #1186. I bear in mind that damages are intended as *restitutio ad integrum* for the plaintiff, not as punishment for the defendant.

Weighing all these things, I assess general damages against the defendants, including an element of aggravated damages, at $12,500.

'Uhila (above) was decided in 1992. The levels of damages awarded there are not a guide because the awards were nominal, without specification of what would otherwise have been awarded. I adopt the comments of the Court at p 11 of that judgment, that "… an assault by a police officer on a man in his custody … cannot be justified and the victim is entitled to his remedy", but the case is not authority for allowing that a slap by a police officer on an accused person in custody is a minor assault. Even that is a serious abuse of power, and must be included in what the Court said in *'Akau'ola*:

> "… a police officer … when dealing with offenders … may only use such force as is reasonably necessary to restrain them.
>
> …
>
> Such abuse of authority will not be tolerated, and where it is proved to have occurred it will be stamped on, with increasing severity, until the bully boy in uniform no longer roams our streets."

These words of the Court in 1990 are relevant only to an award in exemplary damages, but in that context I note that had the award in that case been effective, then the present case would not have happened. Clearly as punishment for the defendants an award greater than $2,000 is called for, but the plaintiff has specified $1,000 for exemplary damages. He shall have that.

Conclusion

In summary, I give judgment for the plaintiff. I award against both defendants general damages of $12,500 and exemplary damages of $1,000. Costs will follow the event, to be agreed or taxed.

Taufa v Police Department

Supreme Court, Nuku'alofa
Finnigan J
C 306/99

12 April 2000; 28 April 2000

Practice and procedure — summons need not contain precise date
Practice and procedure — Magistrate's signature on summons is purely administrative — not a conflict
Magistrates — clerks — review appointment of clerks in Magistrates' Court — held to comply with legislation

The applicant claimed that a number of summonses issued against the applicant were void because they were unfair and uncertain. Each summons alleged a separate offence without a specific date. On 4 February 1999 the Court heard and dismissed an appeal against conviction on the charge laid in one of the summonses. There was no appeal. The applicant filed an application for leave to bring a claim against a Magistrate and against the Minister of Police. The applicant also sought a declaration that s 16 of the Magistrates' Courts Act (Cap 11) was unconstitutional and a further declaration that the clerks in the Magistrates' Courts were not validly appointed.

Held:

1. The precise date is not necessarily a precondition for validity of a summons or a charge.
2. The Courts have never required precise compliance with procedures such as the identity of a person who performed one subordinate action in a chain of actions when there was otherwise prima facie a valid chain of actions.
3. There was nothing new in the argument which would justify rehearing the matters that the Court had already decided.
4. A Magistrate, by being required to sign a summons and then to adjudicate upon it, did not become a judge in his own cause. The Magistrate's signature is an administrative act by which the Magistrates' Court issued the summons.
5. There was no ground for holding that the procedures used for appointing clerks in the Magistrates' Court did not comply with s 95.
6. There was no reason to hold that the applicant was arrested without authority.

Cases considered:

Bradbury v Enfield London Borough Council [1967] 1 WLR 1311; [1967] 3 All ER 434

R v Palanite (Supreme Court, Cr 126/93, 28 April 1993, Dalgety J)

Severo Dossi v The King (1918) 13 Cr App R 158

Statutes considered:

Constitution of Tonga (Cap 2)
Interpretation Act (Cap 1)
Magistrates' Courts Act (Cap 11)
Police Act (Cap 35)

Counsel for applicant : Mr Fifita
Counsel for respondent : Mr Kefu

Judgment

The applicant has filed an application for leave to bring a claim against a Magistrate and against the Ministry of Police. Against those defendants he claims four separate prerogative remedies and damages. He claims also a declaration that s 16 of the Magistrates' Courts Act (Cap 11) is unconstitutional and a further declaration that the clerks in the Magistrates' Courts are not validly appointed. It must be said that these extensive claims are not well drafted.

Mr Fifita referred me also to *Bradbury v Enfield London Borough Council* [1967] 1 WLR 1311; [1967] 3 All ER 434, particularly a comment by Lord Denning MR at 1324. The statement of the law there reinforces the role of the Court in enforcing statutory obligations. But those obligations themselves are first subject to interpretation, and the case before me is not so much about enforcing the summons procedure as about interpreting it.

The primary claim is that a number of summonses issued against the applicant are void because they are unfair and uncertain. This is said to be so for the reason that they each allege a separate offence without a specific date. Each claims only that the offence charged was committed in 1997. These summonses were issued in October 1998.

On 4 February 1999 I heard and dismissed an appeal against conviction on the charge laid in one of those summonses (CrApp 1480/98, oral judgment 4 February 1999). It seemed on the face of the appeal to be a test case. Although not so stated in the notice of appeal, the primary ground of the appeal was that the summons was void for uncertainty. I dismissed the appeal, with reasons.

The record of my reasons is not on the file of that appeal so I shall state them briefly here. I held that the requirement in s 14 of (Cap 11) for stating "concisely the offence with which the defendant is charged and the time and place at which it was committed" was a requirement for conciseness, not precision. On the authority of *Severo Dossi v The King* (1918) 13 Cr App R 158, a judgment of the Court of Criminal Appeal upon which the Crown had relied, I stated that the precise date is not necessarily a precondition for validity of a summons or a charge. The offence alleged in the case before the magistrate had been alleged to have been committed some time, any time, in the previous year. That was sufficient in my view for putting the

defendant on his trial, so long as the summons alleged one specific offence. Amendment in respect of the date and adjournment of the hearing had been possible if the evidence had supplied more or different information. But if it had not, then conviction for the offence was not invalidated by the fact that the summons alleged, and the evidence proved, only a broad period of time during which the alleged offence occurred. Had a certain date been specified in the summons and had the evidence shown another date or an uncertain date, then a conviction could still have been entered.

The secondary ground of that appeal was that the summons had been prepared by a police officer and not by a clerk in the court as set out in s 14 of (Cap 11). I rejected that ground for the reason that it is a requirement of administrative practice. I said that the courts have never required precise compliance with procedures such as the identity of a person who performed one subordinate action in a chain of actions when there was otherwise prima facie a valid chain of actions. In the present case, Crown Counsel has referred me to s 9 of the Interpretation Act (Cap 1). That was not a provision to which I turned my mind during the appeal hearing. Above all it is a provision creating powers, but it seems to me to lay the statutory basis in Tonga for my ruling. Counsel for the applicant cited to me *R v Palanite* (Supreme Court, Cr 126/93, 28 April 1993, Dalgety J). He provided a copy, which is appreciated. In this judgment, at point 5 (p4) the Court approved the police preparation of summonses. It said that the police prosecutors are the agents of the Crown Law office in undertaking prosecutions, which included preparation of the summonses. The Court spoke of standardising the wording of the more common offences, for accuracy. This seems reasonable in respect of prosecutions by the police, who decide what charge to lay. It does not override the procedure in ss 13 and 14 of (Cap 11).

From these rulings there was no appeal. Instead, the present application was filed for a variety of administrative remedies. Counsel has placed some fine distinctions before me to justify re-litigating the subject matter of the appeal and for avoiding the effect of that appeal on the other similar summonses.

I have not found anything new in the argument which would justify accepting counsel's invitation to rehear the matters that I have already decided. Those are the decisions of the Court on those two issues. I could only re-state them in the present case as the decisions of the Court and I must refuse leave for the application, insofar as it relates to the two issues I decided in the appeal.

Those are not the only issues raised however. I move to the claim that s 16 of the Magistrates' Courts Act (Cap 11) is contrary to the Constitution of Tonga (Cap 2). Counsel relied on *R v Palanite* (above). The argument is that the Magistrate, by being required to sign a summons and then to adjudicate upon it, becomes judge in his own cause. So the Court said in that case. I take a different view, and am satisfied that the magistrate's signature is an administrative act by which the Magistrates' Court issues the summons.

I turn now to the claim that the Magistrates' Court clerks are not validly appointed. This claim rests on evidence, some in affidavit form and some viva voce. The statutory provision is in s 95 of (Cap 11). The clerks are to be fit persons appointed by the Prime Minister with the consent of Cabinet. I accept it as established that the Prime Minister takes no direct singular role in the assessment of whoever may be fit and the selection of such persons, but the requirement in s 95 is for proper appointment of the persons who have been selected. Suffice it to say that I find no

ground for holding that the procedures presently used for appointing clerks in the Magistrates' Court do not comply with s 95.

I turn to the claim that the applicant was arrested unlawfully. The claim, if I understand the submission correctly, is that the summonses were invalid ab initio and gave no grounds for arrest. I have rejected the submission that the summonses were invalid. The power of arrest in any event rests on the existence of other grounds, such as those in s 21 of the Police Act (Cap 35). The affidavit evidence of the applicant does not state the events clearly. It is clear that he was arrested and was charged with one offence. His claim is that after being arrested and released in respect of the first alleged offence, he was again arrested "for the same offence and put in police custody where I was questioned on other matters which led to my being charged with all the other charges against me…". His evidence is not specific about the grounds for his second arrest and I can find no reason for holding that he was arrested without authority.

There is one other claim. During his submissions, Mr Fifita, counsel for the applicant, produced a copy of the transcript of the lower court proceedings in the first charge, i.e. the one from which an appeal was brought. This transcript, both in Tongan and in translation, was before the Court at the hearing of the appeal in February 1999. He submitted that the transcript contains no record that the witnesses were sworn before they gave their evidence, which is true. He relied on *R v Fakatele Taufa*. In that earlier case where there was no record whether the oath had been administered to the witnesses, this Court remitted the matter for rehearing. He submitted that the same course should be followed here. I reject that submission. First, it is too late to introduce that ground of appeal now. Second, it was Mr Fifita who was representing the applicant in those proceedings, and the record shows that from the outset he vigorously raised objections, including some of the arguments that he has subsequently pursued in this court. Had the witnesses been giving their evidence unsworn, I am certain that matter would have been raised before now.

Leave therefore must be refused for the other aspects of the application as well. Costs will follow the event and are awarded to the defendants, to be agreed or taxed.

Laidlaw Holdings Ltd v Maxam Gold Bank Ltd

Supreme Court, Nuku'alofa
Ward CJ
C 276/2000

11, 13 April 2000; 1 May 2000

Company law — company failed to follow Act — ordered for company to rectify the share register

Maxam Gold Bank was registered and a certificate of incorporation issued by the Registrar of Companies on the 8 July 1999. The application for registration was made by Mrs Fuiva Kavaliku. In the application form she was named as sole shareholder and her shareholding was written as "100%". Laidlaw Holdings Ltd was registered and incorporated on 23 March 2000. On that day, Fuiva Kavaliku signed a share transfer form transferring 100 shares in Maxam Gold Bank to Hemaloto 'Alatini for one dollar and, on 29 March 2000, he signed a share transfer form transferring the shares to Laidlaw Holdings Ltd for ten dollars. On 29 March the forms were delivered to the company office with a covering letter asking that they be entered on the company share register. The company secretary replied on 30 March "refuting your claim to shares" in the company and threatening various actions if the claim was pursued. The company claimed that on 13 July 1999 Fuiva Kavaliku authorised the transfer of her shares to Christopher Pedras. The Companies Act required the company to enter the name of the transferee on the share register "forthwith". Laidlaw Holdings contended that the transfer from 'Alatini to Laidlaw dated 29 March 1999 had not been entered on the share register forthwith and as a result it sought a determination of its entitlement to have the transfer entered on the register.

Held:

1. The Court was satisfied that the statement on Form 1 that the number of shares held by Fuiva Kavaliku as the sole shareholder was 100% meant that there were 100 shares, all held by her. The Court was equally satisfied that she was entitled to transfer those shares to Hemaloto 'Alatini and he was subsequently entitled to transfer the shares to Laidlaw. Therefore, in accordance with section 91, the Court ordered that the Company rectify its share register by entering the transfers of 100 shares from Fuiva Kavaliku to Hemaloto 'Alatini on 23 March 2000 and from Hemaloto 'Alatini to Laidlaw Holdings Ltd on 29 March 2000.
2. The Court was not satisfied that it had the power to make the third order requested by Laidlaw and the application for that order was refused.

3. This application was necessary because of the failure of the company to follow the requirements of the Act and it was ordered to pay the applicant's costs.

Statute considered:
Companies Act 1995

Counsel for applicant	:	Mr Garrett
Counsel for respondent	:	Mr Foliaki

Note: The third order requested by Laidlaw, which does not appear from the judgment, was in the following terms:

> "That Mr Christopher Pedras, his servants, agents and/or employees, are restrained from claiming any entitlement or interest in the Company and, shall refrain from making any public statement or advertisement in respect of the said Company and further, those persons are prohibited from entering into any contractual arrangement and/or dealings on behalf of the Company."

Judgment

Maxam Gold Bank was registered and a certificate of incorporation issued by the Registrar of Companies on the 8 July 1999.

Although, on the limited evidence before the court, it would appear that there has not been proper compliance with the requirements of the Act, section 18 provides that the certificate of incorporation is conclusive proof of the incorporation and that the requirements of the Act as to registration have been complied with.

The application for registration was made by Fuiva Kavaliku as sole applicant. The application on Form 1 names herself and Giovanni Kavaliku as the directors and herself as the sole shareholder. Following that, in the column for the number of shares, the entry is written as "100%". That is not a correct entry but, as the company was registered on the basis of the information on this form, I can only assume that it has been taken by the Registrar as meaning 100 shares.

Laidlaw Holdings Ltd was registered and incorporated on 23 March 2000.

On that day, Fuiva Kavaliku signed a share transfer form transferring 100 shares to Hemaloto 'Alatini for One dollar and, on 29 March 2000, he signed a share transfer form transferring the shares to Laidlaw Holdings Ltd for ten dollars.

On 29 March, in accordance with section 85 (2), the forms were delivered to the company office with a covering letter asking that they be entered on the company share register. The company secretary replied on 30 March "refuting your claim to shares" in the company and threatening various actions if the claim was pursued.

The Act requires the company to enter the name of the transferee on the share register "forthwith" and that has not been done.

As a result Laidlaw Holdings has come to the court seeking a determination of its entitlement to have the transfer entered on the register.

The company has produced evidence claiming that the shares were transferred by Fuiva Kavaliku to Christopher Pedras. It has produced a copy of a resolution

passed on 9 July 1999, that, as of 13 July 1999, she authorised the "transfer of all corporate stock and all other rights of ownership and management to Mr Christopher A. T. Pedras".

Christopher Pedras has filed an affidavit exhibiting a number of resolutions of the directors at a meeting apparently held on 9 July 1999 and the minutes of a meeting of the Board of Directors on 23 July 1999.

It would be reasonable to describe those documents as remarkable. They are frequently incomprehensible and, in a number of critical aspects, appear to be mutually contradictory. They also reveal an ignorance of the Act and even of its correct name and failure to comply with many of its provisions. However, I do not consider I have sufficient evidence upon which to reach any final conclusion about their contents at this stage and neither do I need to do so.

Mr Foliaki for Maxam does not deny that the company has failed to comply with many mandatory requirements of the Act. The method of suggested transfer of the shares disclosed in the resolutions of the company is not, in itself, in accordance with the Act. In particular, he admits there has never been any attempt to register the suggested transfer of the shares from Fuiva Kavaliku to Christopher Pedras.

The requirements of the Act should have been complied with and, in the absence of any such registration following a suggested transfer nine months previously, the court can only conclude that the shares were not transferred in the manner claimed by Christopher Pedras. The evidence on Form 1 is that the shares at the time of registration and incorporation of the company were all held by Fuiva Kavaliku and there is no proper evidence of that having changed.

In accordance with section 91(3), I consider it necessary to decide the meaning of the statement on Form 1 that Fuiva Kavaliku holds 100% of the shares in Maxam and the entitlement of Laidlaw to have its name entered in the register.

I am satisfied that the statement on Form 1 that the number of shares held by Fuiva Kavaliku as the sole shareholder is 100% means that there are 100 shares, all held by her. I am equally satisfied that she was entitled to transfer those shares to Hemaloto 'Alatini and he was subsequently entitled to transfer the shares to Laidlaw.

In those circumstances, in accordance with section 91, I order that the Company rectify its share register by entering the transfers of 100 shares from Fuiva Kavaliku to Hemaloto 'Alatini on 23 March 2000 and from Hemaloto 'Alatini to Laidlaw Holdings Ltd on 29 March 2000.

I am not satisfied that I have the power to make the third order requested by Laidlaw and the application for that order is refused.

This application has been necessary because of the failure of the company to follow the requirements of the Act and it must pay the applicant's costs.

Maxam Gold Bank Ltd v Laidlaw Holdings Ltd

Court of Appeal, Nuku'alofa
Ward President
CA 3/2000

12 May 2000

Discovery — documents sought were claimed to be confidential and not relevant — court directed supervised access

Following the Court rulings of 1st May in the original application and 3rd May in the application for a stay pending appeal, counsel for the parties wrote to the court asking for resolution of a problem that arose in relation to documents apparently held in Maxam's safe deposit box in the MBf bank. The appellant advised the court that the documents were not the property of Maxam but were simply in its possession for safe custody and it objected to the respondent having access to them. Counsel for the respondent argued that they were part of the property of Maxam and they should, in accordance with the change in control of the company, be accessible to him. Until he knew the exact nature of its contents, he was unable to know whether or not the assertions of the other party were correct. Both parties sought a ruling from the court as to the way in which these documents should be treated whilst the appeal was pending.

Held:

1. The Court ordered that the deposit box be opened and the contents checked in the presence of the two company secretaries in a manner that ensured neither could read the documents. This would have to be done by a totally independent person and the Court ordered the inspection be carried out by the Registrar of the Supreme Court.
2. The Registrar was to make a list of all the contents of the deposit box with a description that was sufficient to identify them subsequently. Anything that was not a document should be noted on the list and then handed to the two other people present to examine. All documents shall be returned to the deposit box. After the other persons have examined any article that has been shown to them, they shall return it to the Registrar who shall replace it in the deposit box.
3. Neither box was then to be opened without an Order of the Court and the Registrar was to instruct the Bank officers accordingly.

Counsel for appellant : Mr Niu
Counsel for respondent : Mr Garrett

Judgment

Following my rulings of 1st May in the original application and 3rd May in the application for a stay pending appeal, counsel for the parties have written to the court asking for resolution of a problem that has arisen in relation to documents apparently held in Maxam's safe deposit box in the MBf bank.

Mr Niu advises the court that the documents are deeds belonging to clients of another company, Private Client Services, with which Mr Pedras is involved. That company used the services of Maxam and the deeds were deposited with the latter in the course of that. They are not the property of Maxam but, it is suggested, are simply in its possession for safe custody.

He objects to Laidlaw's nominee as company secretary seeing them because they belong to the owners of the deeds. They are clients of Private Client Services and not of Maxam and allowing him to see them would breach the confidentiality of the clients of Private Client Services.

Mr Garrett argues that they are part of the property of Maxam and they should, in accordance with the change in control of the company, be accessible to him. His client has the right to see the assets and property of Maxam. The safe deposit box is in the name of Maxam and, prima facie, is part of the property of Maxam. Until he knows the exact nature of its contents, he is unable to know whether or not the assertions of the other party are correct.

Both parties have sought a ruling from the court as to the way in which these documents should be treated whilst the appeal is pending. They are content it should be decided on the basis of letters exchanged between counsel dated 8 May 2000 from Garrett to Niu and 9 May 2000 from Niu to Garrett.

In general terms, I accept that, should the appeal succeed, the consequences of a prior revelation of the identity of clients of Private Client Services may be irreparable. On the other hand, as the documents are in Maxam's deposit box, they were presumably available to that company during its operation. I have ordered that both claimants to the position of company secretary of Maxam shall be present when any company documents or records are examined.

I consider the sensible and safe order would be for the deposit box to be opened and the contents checked in the presence of the two suggested company secretaries but in a manner that ensures neither can read the documents. This will have to be done by a totally independent person. I appreciate that in a community such as this, many apparently independent or neutral figures may, in reality, be linked now or in the future with one or other of the parties.

If the representations by Mr Niu about Private Client Services are correct, that company is entitled to have its confidential relationship with its clients preserved. In those circumstances, although I am hesitant to involve a court officer in the events of the case itself, I shall order the inspection be carried out by the Registrar, Supreme Court.

She is to nominate a time when she and the two claimed company secretaries shall attend at the MBf bank.

The deposit box will be opened in the presence of all three persons but in such a manner that the two purported officers of the company cannot read the contents of any document.

The Registrar is to make a list of all the contents of the deposit box with a description that, in her opinion, is sufficient to identify them subsequently. Anything that is not a document shall be noted on the list and then handed to the two other people present to examine. All documents shall be returned to the deposit box. After the other persons have examined any article that has been shown to them, they shall return it to the Registrar who shall replace it in the deposit box.

The Registrar shall then make a further copy of the list and the two claimed company secretaries shall sign the back of each copy of the list. Following that, the registrar shall place one copy of the list in the deposit box and lock it. The second copy shall be placed by her in a separate deposit box in the name of "Supreme Court, Maxam".

Neither box is then to be opened without an Order of this court and the Registrar is to instruct the Bank officers accordingly.

Maxam Gold Bank Ltd v Laidlaw Holdings Ltd (No 2)

Court of Appeal, Nuku'alofa
Burchett, Tompkins, Beaumont JJ
CA 3/00

11, 17 July 2000; 21 July 2000

Company law — no legal ownership until registration — equitable interest
Equity — prior equitable interest existed — no summary relief could be granted

By application dated 6 April 2000, Laidlaw Holdings Limited (Laidlaw Holdings) applied to the Supreme Court for a determination of shareholding in Maxam Gold Bank Limited (the company) pursuant to ss 91 and 183 of the Companies Act 1995. Laidlaw Holdings sought an order that Laidlaw was the holder of all of the shares in the company and sought for the share register to be rectified to reflect this. Mr Pedras (who was joined as an appellant in the appeal) claimed that he was the company's sole director and shareholder. The Supreme Court on 1 May 2000 (reported at *Laidlaw Holdings Ltd v Maxam Gold Bank Ltd* [2000] Tonga LR 125) ordered that the company rectify its share register by entering the transfers of 100 shares from Mrs Fuiva Kavaliku to Hemaloto 'Alatini on 23 March 2000, and from Hemaloto 'Alatini to Laidlaw Holdings on 29 March 2000. The company appealed from that order.

Held:

1. Until registration occurred (and it had not), none of the parties, including Mr Pedras, had any legal ownership of any of the shares. Any interest held by any of them was equitable only. Mr Pedras demonstrated a prima facie equitable claim to at least 90% of the shares.
2. Mr Pedras's prima facie equitable interest was prior in time to any equitable interest created by the transfers executed in March 2000. The rule in equity was that, prima facie, the prior equitable title prevailed. Laidlaw Holdings failed to show an immediate entitlement to be registered under the summary procedure in s 91. Where a prima facie reason for opposing such a summary order is shown, it was inappropriate to give summary relief. Instead, as complex litigation, the matter should proceed as a contentious action in the ordinary way.
3. Laidlaw Holdings' application should have been dismissed as an inappropriate attempt to invoke a summary jurisdiction. The parties, if so advised, must seek final relief in fresh proceedings. To that extent, the appeal was allowed.

4. The notice of appeal sought a number of other orders, including orders that the Board of Directors issue 1,800 shares to Mr Pedras and 5 shares each to Mrs Kavaliku and Mr Viliami 'Alatini; and an order declaring that nominated persons are the directors of the company. The Court declined to make those orders.
5. There was no order for costs at first instance, or on the appeal.

Case considered:
Ireland v Gray [1902] 1 Ch 522

Statute considered:
Companies Act 1995

Counsel for appellants : Mr Niu
Counsel for respondent : Ms Helu

Judgment

Introduction

In order to understand the issues that arise in this appeal, it will be necessary to explain the history of the litigation and the legislative context.

By application dated 6 April 2000, Laidlaw Holdings Limited ["Laidlaw Holdings"] applied to the Supreme Court for a determination of shareholding in Maxam Gold Bank Limited ["the company"] pursuant to ss 91 and 183 of the Companies Act 1995 ["the Act"].

Section 91 empowers the Court, by a summary procedure, to order rectification of the share register of a company. By s 91(1) of the Act it is relevantly provided that if the name of a person is wrongly omitted from the share register, the person aggrieved may apply to the Court for rectification of the register. The Court may order rectification [s 91(2)]; and may decide (a) any question relating to the entitlement of a person, who is a party to the application, to have his name entered in the register; and (b) any question necessary or expedient to be decided for rectification [s 91(3)].

Section 183 empowers the Court, upon the application of a prejudiced shareholder, or of any other entitled person, if the Court considers it just and equitable to do so, to make such order as it thinks fit, including an order for rectification of the company's records.

Laidlaw Holdings' application relevantly sought the following orders:

> "1. That Laidlaw Holdings Limited is the holder of all of the shares in Maxam Gold Bank Limited (the Company).
> 2. That David Corbett, the secretary of the Company, shall forthwith register the said Laidlaw Holdings Limited as the holder of all the shares in the Company.
> 3. That Mr Christopher Pedras, his servants, agents and/or employees, are restrained from claiming any entitlement or interest in the Company and, shall refrain from making

> any public statement or advertisement in respect of the said company and further, those persons are prohibited from entering into any contractual arrangements and/or dealings on behalf of the company …"

In support of its application, Laidlaw Holdings relied upon an affidavit sworn by Mr Laidlaw on 5 April 2000. Mr Laidlaw said:

> "4. I was informed [by my legal advisors] that it appeared from a search at the Companies Office that the company had originally been incorporated with a Mrs Fuiva Kavaliku and Mr Giovanni Kavaliku as directors, and with Mrs Kavaliku as the sole shareholder … ."

Section 15 of the Act relevantly provides that any person may apply for registration of a company. The application for registration of the company was lodged pursuant to s 16 of the Act, which relevantly provides as follows:

> • The application shall [inter alia] be signed by the applicant, and accompanied by a document signed by every person named as a director (s 16(1)(b) and (c)).
> • The application shall also be accompanied by a document signed by every person named as a shareholder, containing his or her consent to being a shareholder and to taking the class and number of shares specified in the document (s 16(1)(e)).
> • The application shall state, inter alia, the full name and address of (a) the applicant (b) every director and (c) every shareholder and the number of shares to be issued to every shareholder.

The form of application in the present case stated that Mrs Kavaliku was the applicant and that Mr and Mrs Kavaliku were the directors of the proposed company. Mrs Kavaliku was shown as the sole shareholder, with the number of her shares shown as "100%" [sic]. The application was signed by Mrs Kavaliku and dated 6 July 1999.

Mr Laidlaw's affidavit went on:

> "5. I was further informed by my legal advisors that there were on the file some irregular forms purporting to show changes in directors of the company, and sales of shares to one Christopher Pedras. I was informed that it appeared that Mr Pedras had never in fact owned any shares in the company, and that accordingly he had no right to transfer Mrs Kavaliku's shares to himself as he had purported to do.
> 6. My legal advisors' opinion was that the company at that point had no directors (Mrs Fuiva Kavaliku and Mr Giovanni Kavaliku having resigned or been removed in July 1999), and that all the shares in the company were still legally the property of Mrs Kavaliku.

7. I was informed that the incorporation document (annexure 'B') was in fact incorrectly completed in that instead of a number of shares in the company, the figure of '100%' was inserted. I was advised that the only sensible interpretation of that was that there were 100 shares in the company, and that they remained Mrs Kavaliku's to dispose of as she wished.
8. At that point I instructed my legal advisors to incorporate Laidlaw Holdings Limited. At the same time, I began discussions with Mr Hemaloto 'Alatini, who was a shareholder and director of a company he believed to be related to Maxam. Mr 'Alatini had also been indirectly involved in the incorporation of Maxam, and in procuring the consents of Mrs Fuiva Kavaliku and Mr Giovanni Kavaliku to act as directors of the company.
9. By that stage I was aware that Mr 'Alatini had become uneasy about Maxam, Mr Christopher Pedras, and the related company Private Client Services Limited (PCS). I became aware that Mr 'Alatini wished to purchase the shares in Maxam from Mrs Kavaliku so as to protect her from any possible liability for uncalled capital. I offered to buy them from him through my company, Laidlaw Holdings.
10. On or about 23 March 2000 I believe that Mrs Fuiva Kavaliku signed a share transfer evidencing the sale of her 100 shares in Maxam to Mr 'Alatini.
11. On about 29 March 2000 I instructed my lawyers to prepare share transfers from Mr 'Alatini to Laidlaw Holdings Limited which had by then been incorporated. On 29 March 2000 Mr 'Alatini signed a transfer of 100 ordinary shares in Maxam from him to Laidlaw Holdings …"

Mr Laidlaw's affidavit next referred to a letter to the company dated 29 March 2000 (written by his solicitors, Garrett and Associates, on behalf of Laidlaw Holdings, Mr 'Alatini and Mrs Kavaliku) forwarding the share transfers previously mentioned for registration; and to a reply to Garretts from the company dated 30 March 2000 refuting Laidlaw Holdings' entitlement to the shares.

Mr Laidlaw went on to say that he had seen a letter to his solicitors from the Company Registration Unit dated 31 March 2000. The letter stated:

> "Re: 'Maxam Gold Bank Limited' and 'Private Client Services Limited'
>
> Your letter of March 27, instant, refers.
>
> We hereby confirmed the completion on requirements relating to the resignations of Mrs Fuiva Kavaliku and Giovanni Kavaliku, from being directors of Maxam Gold Bank Limited, and, the

> resignation of Mrs Fuiva Kavaliku from her directorship at the Private Client Services Limited. The above shortfalls, (together with others), were however voiced out, (verbally), to the company, at the time of the submission of the 'Resolutions', for completion.
>
> You should also take note that Mrs Fuiva Kavaliku, under Resolution 1 of July 13, 1999, had transferred all 'corporate stock' she owned in Maxam Gold Bank Limited, to Christopher A T Pedras. That transfer can be regarded as incomplete should the requirements of Section 85 are not fulfilled.
>
> The shortfalls on other matters such as 'newly appointed directors', (to submit Forms 11 & 12), and, 'change of company secretary', (to submit Forms 13 & 14), pursuant respectively to Sections 151 and 164 are yet to be attended to by the company." [Sic.]

Section 85 of the Act deals with transfer of shares. Relevantly it provides as follows:

- Subject to the constitution of the company, shares in a company may be transferred by entry of the name of the transferee on the share register (s 85(1)).
- For the purpose of transferring shares, a form of transfer signed by the present holder of the shares shall be delivered to the Company (s 85(2)).
- On receipt of a form of transfer in accordance with s 85, the company shall forthwith enter the name of the transferee on the share register, unless the Act or the company's Constitution expressly permits the board to refuse, and certain procedures are followed by the Board (s 85(4)).

Company constitution is dealt with by Part V of the Act. By s 32, in the absence of modification or exclusion [and there was none here], the provisions of the "standard constitution" in Schedule 1 are deemed to be included in the constitution of the company (s 32(3)).

By cl 9 of the standard constitution it is provided (in accordance with s 45 of the Act) that the company shall forthwith after the registration of the company issue to any person named in the application for registration as a shareholder, the number of shares specified in the application.

Transfer of shares is relevantly dealt with by cl 26 in terms similar to the provisions of s 85. There is no relevant power in the board here to refuse registration.

In opposing the application made at first instance, the company relied upon an affidavit sworn by Christopher Antone Thomas Pedras on 12 April 2000. [Mr Pedras was not joined as a party at that stage, but has been joined as an appellant in this appeal.]

In his affidavit, Mr Pedras claimed that he was the company's "Sole Director and Shareholder."

In reply to Mr Laidlaw's affidavit, Mr Pedras said:

> "4. The information on which the statement in paragraph 4 of the affidavit is based which states 'that it appeared that the company had originally been incorporated with a Mrs. Fuiva Kavaliku and Mr. Giovanni Kavaliku as directors' is true however on or about 09 July 1999 per company resolution named the following as directors of the company, Chairman of the board of Directors, Christopher A.T. Pedras, Fuiva Kavaliku, William 'Alatini, Robert McCulley, Thomas D. Willis and Charles D. Clark. See attachment 'A' Resolution of Maxam Gold Bank Ltd dated 09 July 1999. See attachment 'B' pages 1 through 6 inclusive, Consent to act as Directors.
>
> Further, the claim that Mrs. Fuiva Kavaliku was the sole shareholder is true but fails to show the Court that on 13 July 1999 per a company resolution the said Kavaliku transferred 'all corporate stock and all other such rights of ownership and management to Mr. Christopher A.T. Pedras and further removed herself from any position with the company. This resolution was signed by Mrs. Kavaliku, verified by the corporate secretary, Miss Luisa Fukofuka and executed by a Commissioner for Oaths, Miss Lepaola Bloomfield and filed with the Registrar of Companies. See attachment 'C' company resolution dated 13 July 1999. Therefore as of that date 13 July, 1999 Mr. Pedras was the holder of all the shares originally held by Mrs. Kavaliku."

The "resolution" referred to as "attachment A" purported to state, inter the following:

> "**Resolved**, that this resolution has been agreed upon by the Board of Directors of Maxam Gold Bank Ltd, as of this date specified: July 09, 1999.
>
> The Corporation has set into record this resolution and all other agreements, documents that are connected therewith be, and the same hereby are, approved on the terms and conditions as [set] forth therein;
>
> **Resolution Number 1:**
>
> As of the date specific, July 10, 1999, the Board of Directors for Maxam Gold Bank Ltd., have adopted the following persons and parties as their Board of Directors, pursuant to this date specific, July 10, 1999. This Board of Directors shall remain in full force until such time as replaced by vote of the Board Members in a 2/3 percentage of its members … ."

The "resolution" was dated 13 July 1999 at 4:30 p.m. It states that Mr. Pedras was Chairman of the Board of Directors. Mrs Kavaliku signed it as a director with the date 10 July 1999 beside her signature. Mr. William 'Alatini also signed as a director with the date 10 July 1999 beside his signature. The other nominated directors, including Mr. Pedras as Chairman, signed in a similar fashion.

"Attachment B" to Mr Pedras' affidavit consisted, with one exception, of consents by the persons named in para 4 of the affidavit to be directors. The exception is that one of the forms nominated Mr William 'Alatini. This was changed, so as to nominate Hemaloto 'Alatini. It appears that Mr Hemaloto 'Alatini signed the consent form.

The "resolution" referred to in "Attachment C" to the affidavit purported to state, inter alia, the following:

> "**Resolved**, that this resolution has been agreed upon by the Board of Directors of Maxam Gold Bank Ltd as of this date specified: July 09, 1999.
>
> This Corporation has set into record this resolution and all other agreements, documents that are connected therewith be, and the same hereby are, approved on the terms and conditions as [set] forth therein;
>
> **Resolution Number 1:**
>
> As of the date Specific July 13, 1999, I, Fuiva Kavaliku, as Chairman of the Board of Directors and First Director of Maxam Gold Bank Ltd. Hereby and without recourse fully authorize the transfer of all corporate stock and all other such rights of ownership and management to Mr Christopher A.T. Pedras, as such, remove myself from any position with Maxam Gold Bank Ltd, unless so appointed by the board of Directors. [Emphasis added.]
>
> **Resolution Number 2:**
>
> As of date specific July 13, 1999, I, Fuiva Kavaliku, as Chairman of the Board of Directors and First Director of Maxam Gold Bank Ltd. Hereby and without recourse fully and unconditionally remove Mr. Giovanni Kavaliku, as a Director of the Maxam Gold Bank Ltd … ."

The resolution was dated 13 July 1999 at 4:30 p.m. It was signed by Mr Pedras, Mrs Kavaliku and Mr Giovanni Kavaliku.

The affidavit continues:

> "5. As far as the company is aware there were no irregular forms purporting to show changes in the directors of the company as alleged in paragraph 5 of the affidavit. Attachment 'B' were filed with the Registrar of Companies office and there has never been any notice from the Registrar of Companies office that there was anything wrong or irregular with the forms filed. The allegation that there were a sales of shares to Mr. Pedras is clearly false. There were never any sale of the shares. It was decided by all of those forming the company including Mrs. Kavaliku and I that 100% of the shares of the company would be held by Mrs. Kavaliku until such time that the company was fully certified and

registered. She never gave or transferred any consideration for those shares. When the company was registered and at some time when I was in town the shares would be transferred to me because I would be infusing capital with which the company could be operated. In other words I would be giving and transferring valuable consideration for those shares.

The allegation that I transferred Mrs. Kavaliku's shares to myself is preposterous. The shares were transferred to me per a valid company resolution which was agreed to by Mrs. Kavaliku. She signed the resolution which was attested to by a Commissioner for Oaths. It is conceded that a share transfer form has not been filed and the transfer has not been recorded in the share register but those requirements were to be completed before the annual general meeting in June. It was not anticipated at that time there would be a dispute regarding the transfer.

Further, the letter of the Registrar of Companies dated 31 March 2000 that the said resolution dated 13 July 1999 could be regarded as incomplete if the requirements of section 85 are not fulfilled does not invalidate the transfer of the shares from Mrs. Kavaliku to Mr. Pedras but only that the requirements of the Act are incomplete which the principals of the company had every intent of fulfilling before the annual general meeting in June 2000."

The affidavit proceeded:

"6. … Further the claim that all the shares in the company was still legally the property of Mrs. Kavaliku ignores the fact that the company resolved to transfer those shares to Mr. Pedras and ignores the fact that Mrs. Kavaliku transferred those shares willingly and pursuant to a previous agreement.

7. Clearly from the document filed with the Registrar's Office incorporation documents are incomplete but from the minutes of a Board of Directors meeting held on 23 July, 1999 at 5:30 p.m. the topic of shares of stock were discussed and the Mr. Pedras was to hold 90% of the stock and Mr. 'Alatini 5% and Mrs. Fuiva Kavaliku 5%. See attachment 'D'. Whatever the breakdown of the shares were at the time of registration it was certain that 90% of those shares were to go to Mr. Pedras. The claim that the shares were Mrs. Kavaliku's to dispose of as she wished runs counter to the evidence presented above which are supported by the documents filed with the Registrar's Office.

8. I have no information that would lead me to conclude that the first part of paragraph 8 of the affidavit is incorrect except that at this time Mr 'Alatini was not a shareholder of Maxam. Mr 'Alatini was involved in the incorporation of Maxam and in obtaining the consents of Mrs Kavaliku and Giovanni Kavaliku to act as

> directors of the company. This was of course to their advantage because they were to be paid monthly director's fees which they were always willing to accept and which was always paid."

The "discussion" referred to in the meeting of 23 July was recorded in the attached minutes as follows:

> "8. **Shares of stock**
>
> **Motion 8.1** by the Chairman that the shares of stock be as follows:
>
> | | |
> |---|---|
> | Pedras, CA | 90% |
> | 'Alatini, W | 5% |
> | Kavaliku, F | 5% |
>
> At no time will stock be assigned, given or sold unless a resolution is passed by the principals.
>
> **Motion seconded by 'Alatini, W and carried by the Board of Directors.**"

The matter came before the primary Judge on 11 and 13 April 2000. On 1 May 2000, his Honour ordered, for the reasons we will mention, that the company rectify its share register by entering the transfers of 100 shares from Mrs. Fuiva Kavaliku to Hemaloto 'Alatini on 23 March 2000, and from Hemaloto 'Alatini to Laidlaw Holdings Ltd on 29 March 2000.

The company appealed from this order.

When the appeal was called on for hearing on 11 July 2000, we were informed that Laidlaw Holdings had withdrawn its instructions to its solicitors. We then adjourned the hearing to 17 July 2000 and directed the company to inform Mr Pedras and Mrs Kavaliku of these appellate proceedings in case either of them wished to be joined as a party. Mr Pedras did indicate that wish and, as has been said, we ordered that he be joined as an additional appellant. Mrs Kavaliku, through a letter written by her solicitor, indicated that she did not wish to be joined.

The reasons of the primary Judge

His Honour noted that although it would appear that there had not been proper compliance with the Act, s 18 provides that the certificate of incorporation is conclusive in this regard.

Referring to the figure "100%" in the column for the number of shares, his Honour said that it must be assumed that this had been taken by the Registrar to mean 100 shares.

The primary Judge referred to the execution of the transfer to Mr Hemaloto 'Alatini for $1, and to the transfer by him for $10.00 on 23 and 29 March 2000 respectively. His Honour then noted the company's refusal to register these transfers as the basis for the application to the Supreme Court.

Turning to the company's evidence, the Judge said:

> "The company has produced evidence claiming that the shares were transferred by Fuiva Kavaliku to Christopher Pedras. It has

> produced a copy of a resolution passed on 9 July 1999, that, as of 13 July 1999, she authorised the 'transfer of all corporate stock and all other rights of ownership and management to Mr Christopher A.T. Pedras'.
>
> Christopher Pedras has filed an affidavit exhibiting a number of resolutions of the directors at a meeting apparently held on 9 July 1999 and the minutes of a meeting of the Board of Directors on 23 July 1999.
>
> It would be reasonable to describe those documents as remarkable. They are frequently incomprehensible and, in a number of critical aspects, appear to be mutually contradictory. They also reveal an ignorance of the Act and even of its correct name and failure to comply with many of its provisions. However, I do not consider I have sufficient evidence upon which to reach any final conclusion about their contents at this stage and neither do I need to do so.
>
> Mr Foliaki for Maxam does not deny that the company has failed to comply with many mandatory requirements of the Act. The method of suggested transfer of the shares disclosed in the resolutions of the company is not, in itself, in accordance with the Act. In particular, he admits there has never been any attempt to register the suggested transfer of the shares from Fuiva Kavaliku to Christopher Pedras.
>
> The requirements of the Act should have been complied with and, in the absence of any such registration following a suggested transfer nine months previously, the court can only conclude that the shares were not transferred in the manner claimed by Christopher Pedras. The evidence on Form 1 is that the shares at the time of registration and incorporation of the company were all held by Fuiva Kavaliku and there is no proper evidence of that having changed."

Noting the summary jurisdiction conferred by s 91(3) of the Act, his Honour said:

> "I am satisfied that the statement on Form 1 that the number of shares held by Fuiva Kavaliku as the sole shareholder is 100% means that there are 100 shares, all held by her. I am equally satisfied that she was entitled to transfer those shares to Hemaloto 'Alatini and he was subsequently entitled to transfer the shares to Laidlaw."

As has been said, the Judge ordered rectification of the register accordingly, with costs.

Conclusions on the appeal

The law with respect to transfers of shares prior to registration is stated in Palmer's Company Law, 24th Ed [1987], Vol 1 (at 613):

> "A transfer is incomplete until registered. Pending registration, the transferee has only an equitable right to the shares transferred to him. He (or she) does not become the legal owner until his (or her) name is entered on the register in respect of these shares."

It follows that, until registration occurs (and it has not), none of the parties, including Mr Pedras, had any legal ownership of any of the shares. Any interest held by any of them was equitable only.

As has been seen, the equitable interest claimed by Mr Pedras was not clearly articulated before the primary Judge, with the consequence that his Honour was unable to express a concluded view on that question. Although an application under s 91 is a summary procedure, so that the bringing of a counter-claim was not strictly necessary, the affidavit evidence of Mr Pedras was argumentative and the documentation relied upon departed from orthodoxy in some respects, as his Honour noted. Nonetheless, in our view, it did establish, prima facie, an equitable claim to at least 90% of the issued shares. This claim appears to be based upon a real consideration. Whether it should be classified as a claim for specific performance of a promise made on or before 9 July 1999 by Mrs Kavaliku to transfer to him 100% of the shares, (later, on 23 July 2000, reduced to 90%); or as a claim for a declaration that Mrs Kavaliku held the shares (or 90% of them) upon an express, resulting or constructive trust, does not matter for present purposes. On any view, Mr Pedras demonstrated a prima facie equitable claim to at least 90% of the shares.

Significantly, Mr Pedras's prima facie equitable interest was prior in time to any equitable interest created by the transfers executed in March 2000. The rule in equity is that, prima facie, the prior equitable title will prevail. Thus in *Ireland v Gray* [1902] 1 Ch 522, a husband had mortgaged shares of which he was a trustee for his wife; and before the mortgagee had become the registered holder of the shares, the wife took proceedings claiming that her equitable interest prevailed over that of the mortgagee, a claim that the court upheld (see Palmer, ibid). In our opinion, for similar reasons, Mr Pedras' equitable interest if conclusively established, and subject to anything being shown which would postpone his rights, would prevail over those claimed by Laidlaw Holdings. It must follow that Laidlaw Holdings has failed to show an immediate entitlement to be registered under the summary procedure in s 91. In other words, where a prima facie reason for opposing such a summary order is shown, it is inappropriate to give summary relief. Instead, as complex litigation, the matter should now proceed as a contentious action in the ordinary way.

It follows, in our view, that Laidlaw Holdings' application should have been dismissed as an inappropriate attempt to invoke a summary jurisdiction. The parties, if so advised, must seek final relief in fresh proceedings. To this extent, the appeal will be allowed.

The notice of appeal seeks, in addition, that the Court of Appeal make a number of other orders, including orders that the Board of Directors issue 1,800 shares to Mr Pedras and 5 shares each to Mrs Kavaliku and Mr Viliami 'Alatini; and an order

declaring that nominated persons are the directors of the company. We decline to make these orders. We propose to order, as has been said, that Laidlaw Holdings' application be dismissed. If the company or Mr Pedras wish to seek relief in respect of these other matters, this should be pursued in fresh, properly constituted, proceedings.

Costs

In the exceptional circumstances of the case, there should be no order for costs at first instance, or on the appeal.

Orders

We make the following orders:

1. Appeal allowed in part.
2. Set aside the orders made at first instance in lieu thereof, order that the application be dismissed, with no order as to costs.
3. Make no order for the costs of the appeal.

Re Application by Tonga

Land Court, Nuku'alofa
Ward CJ
L 6/2000

9 May 2000; 9 May 2000

Practice and procedure — interim injunction — no writ filed and no undertaking as to damages — court refused
Interim injunction — to prevent burial in particular site — issue should be resolved by Tongan negotiation

The respondent wished to bury the deceased, his uncle, on a particular site because he would then be buried beside his brother. The applicant's objection was that the site was very close to the grave of his parents, there was limited space and the respondent's family was only distantly related. If this burial was to take place there, it would not leave sufficient space for his own family. For that reason, when the respondent asked to use that grave site, the applicant refused and offered him an alternative site. The applicant applied for an interim injunction to prevent the respondent from burying his uncle's body in a grave he had already dug.

Held:

1. Due to urgency there were problems with the application: it was filed before the filing of a writ in the case. It was usual to supply a copy of the proposed writ with the application or at least to indicate the nature of the claim because the order will generally only be made on an undertaking by counsel to file a writ within a period ordered by the court. Also, it was usual for the applicant to give an undertaking as to damages. That was not done and, when the deficiency was pointed out, no step was taken to give one. The Court refused the application.
2. Should the court grant the injunctive relief sought, it would freeze the situation at a very stressful and emotional point. It may not have taken account fully of the customary situation and may lead to future discord and bad feelings. The Court noted that this should be settled by the type of discussion that was part of normal Tongan negotiation so that the funeral could proceed without the complication of a fixed and intrusive order of the Court.

Counsel for applicant : Miss Tupou
Respondent in person

Judgment

This is an application for an interim injunction to prevent the respondent from burying his uncle's body in a grave he has already dug in the Takaunove graveyard. The funeral is tomorrow. The respondent wished to bury the deceased on that site because he would then be buried by his brother.

The applicant's objection is that the site is very close to the grave of his parents, there is limited space and the respondent's family is only distantly related. If this burial is to take place there, it will not leave sufficient space for his own family. For that reason, when the respondent asked to use that grave site, he refused and offered him an alternative site.

Despite that refusal, the respondent went ahead and dug the grave.

I ordered that the application be made inter partes and have heard from both parties and counsel for the applicant. In answer to my question as to where the applicant derives the right to control the graveyard, he informed me that, as the oldest member of the family present at the moment in Tonga, he has that right by custom of the area. The respondent agrees that is a correct statement of the customary position.

There are problems with the application.

In view of the urgency of the application, it has been filed before the filing of a writ in the case. Miss Tupou, for the applicant, suggests that that is a proper course. She is correct that urgent applications may be granted in such circumstances. However it is usual to supply a copy of the proposed writ with the application or at least to indicate the nature of the claim because the order will generally only be made on an undertaking by counsel to file a writ within a period ordered by the court. Counsel for the applicant has provided neither and, indeed, cannot specify any cause of action for which she could enter a claim.

Equally, it is usual for the applicant to give an undertaking as to damages. That has not been done and, when the deficiency was pointed out, no step was taken to give one.

Those matters make it necessary for me to refuse the application but there is more to this case than that.

This involves matters of customary practice. There is no dispute about the applicant's right to control the place where the deceased is buried. It is plainly a case for the parties to seek the guidance and possible intervention of someone experienced in such matters.

Should the court grant the injunctive relief sought, it would freeze the situation at a very stressful and emotional point. It may not have taken account fully of the customary situation and led to future discord and bad feelings.

The applicant has offered an alternative site. It seems to me that this could or should be settled by the type of discussion that is part of normal Tongan negotiation so that this funeral can proceed without the complication of a fixed and intrusive order of the court.

The application is refused with no order for costs.

Polynesian Airlines v Kingdom of Tonga

Supreme Court, Nuku'alofa
Finnigan J
C 126/97

8, 9 May 2000; 19 May 2000

Costs — taxation of costs — scale charges may be exceeded
Costs — taxation of costs — defendant was allowed costs of taxation process

On 27 January 1999 the Court determined liability for costs and directed that costs be paid by the plaintiffs. They were to be taxed if not otherwise agreed. The defendants lodged their bill of costs and the plaintiffs notified that they wished to be heard by filing a notice of objection.

Held:

1. Most cases before the Court in Tonga do not require counsel from overseas, but where that is thought necessary charges outside the scale maxima may be appropriate.
2. The question was, what was the amount that was "reasonably necessary or proper" to pay as a fee for counsel capable of defending the rights of the defendant in the particular case.
3. Fees for travelling time and for days on which no work was done were taxed off because the fees were not "reasonable, necessary or proper for defending the rights of the defendant".
4. In Tonga costs were intended to be a contribution towards the solicitor and client expenses of a successful party, calculated by reference to a scale, whose maximum may be exceeded.
5. As to costs for preparation time the Court applied a standard of 15 days preparation to 1 day of trial. This was due to the complexity and particularly by reason of the documents that were discovered and used.
6. With respect to disbursements, the principle to be applied was what was reasonably necessary for the defence of the defendant's rights.
7. Where an item or service purchased outside Tonga was recognised as being available in Tonga at a cheaper rate then *prima facie* it was the local rate that should be allowed, but this was not inflexible.
8. The defendant sought reimbursement of the costs of the taxation process. As the issues were clear cut, the Court allowed preparation time of 3 days per day of hearing so allowed costs of 6 days preparation and 2 days of hearing.

9. A judgment in costs was a judgment debt, and the Court had a discretion whether to award interest. The Court decided that to do so was just in the present case. Interest was payable on the total taxed costs at 10% per annum, the time to commence to run from the day 1 calendar month after the date of taxation.
10. The total all of those taxed fees and disbursements was Lstg 391,974.15 and 10% per annum commencing on and including 20 June 2000.

Cases considered:

Edwards v Kingdom of Tonga [1994] Tonga LR 62 (CA)
Fonua v MBf Bank Ltd [1999] Tonga LR 4
Kuwait Asia Bank EC v National Mutual Life Nominees Ltd [1991] 3 NZLR 457; (1991) 3 PRNZ 571 (CA)
OG Sanft & Sons v Johnson [1991] Tonga LR 1
Practice Direction 02/92 [1992] Tonga LR 2
Simpsons Motor Sales [London] Limited v Hendon Corporation [1964] 3 All ER 833 (ChD)
Smith v Buller (1875) LR 19 Eq 473; [1874-80] All ER Rep 425
Société Anonyme Pêcheries Ostendaises v Merchants' Marine Insurance Co [1928] 1 KB 750; [1928] All ER Rep 174
Tonga Development Bank v Niu (Supreme Court, C 231/92, 6 November 1992, Ward CJ)
Wraith v Sheffield Forgemasters Ltd [1998] 1 All ER 82

Statutes considered:

Civil Law Act (Cap 25)
Law Practitioners Act No 21/1989

Rules considered:

Supreme Court Rules 1991

Counsel for plaintiffs : Mr Waalkens
Counsel for defendant : Mr Gimblett

Further Judgment of Finnigan J on Taxation of Costs

Introduction

In the judgment issued on 27 January 1999 I determined liability for costs and directed that costs be paid by the plaintiffs. They were to be taxed according to SCR Order 29 rules 2-4 if not otherwise agreed.

Subsequently, within the mandatory 28 day period of O29 Rule 3(2), the defendant lodged a bill of costs showing profit costs of Lstg 346,333.74 and disbursements including fees paid to counsel, other lawyers and expert witnesses, of Lstg 238,524.57. The total amount of the bill was L584,858.31. Within the mandatory 14 day period the plaintiffs notified that they wished to be heard by filing a notice of

objection which stated 5 grounds. Full particulars of objection were subsequently filed pursuant to an order.

Legal Argument and analysis of the bill of costs in respect of this taxation occupied two full hearing days before me. The arguments are strongly opposed. What I now say is in response to the written and oral submissions of counsel which I shall not specifically set out. I take particular note of the plaintiffs' detailed particulars of the objections dated 20 March 2000 which Mr Gimblett characterised as "the agenda for this hearing" and the defendant's detailed responses. Reference to any of those submissions is necessarily brief by reason of time constraints. What occurred in the hearing was not strictly a taxation as such but rather was argument of the principles applicable as if on a review of taxation, which is illustrated by the suggestion of Mr Gimblett about how the matter could proceed if necessary after my judgment by adjustment of the figures.

The Law in Tonga about Taxed Costs

Primarily this law is stated in the Supreme Court Rules 1991, relevantly it is stated as Order 29 R3(1), (2) and R4(1). These Rules came into effect on 1 January 1992.

> Rule 3
> (1) Where the Court is unable to assess costs under rule 2 such costs shall be taxed in accordance with this rule.
> (2) The party entitled to costs shall within 28 days after the date of the order for costs lodge with the Court a bill of costs showing brief details of, and the sums claimed in respect of:
> (a) the amount of time spent in preparation of pleadings and general preparation for trial;
> (b) the amount of time spent in court;
> (c) counsel's fees; and
> (d) any other disbursements.
>
> Rule 4
> (1)(i) This paragraph applies to costs payable by one party to another under an order in civil proceedings.
> (ii) There shall be allowed all such costs, charges and expenses as are reasonably necessary or proper for the attainment of justice or for maintaining or defending the rights of any party.
> (iii) Unless there are exceptional circumstances there shall not be allowed:
> (a) any costs in respect of work done prematurely and not subsequently proving of use;
> (b) any costs incurred or increased as a result of negligence, mistake, or over-caution;
> (c) any unusual expense.

On 6th February 1992 the court issued a Practice Direction which I shall refer to as PD 02/92 [1992] Tonga LR 2.

1. This Practice Note is issued for the guidance of the legal profession in Tonga, after consultation with the Law Society.
2. In respect of any Bill of Costs taxed in the Supreme Court under and in terms of Order 29 of the Supreme Court Rules 1991 the amounts allowable (a) as between party and party or (b) as between agent and client where no charging arrangement has been entered into in writing, shall be in accordance with the terms of paragraph 4 hereof.
3. For the construction of paragraph 4 hereof -
   (i) "Senior Counsel" means a King's or Queen's Counsel or Counsel of equivalent standing seniority and experience;
   (ii) "Counsel" means any person licensed to practice law in the Kingdom of Tonga who is not a "Senior Counsel" or a "Locally qualified Lawyer";
   (iii) "Locally qualified Lawyer" means any person licensed to practice law in the Kingdom of "Tonga who is not a member of a foreign Bar or Law Society, or who does not have a degree in law from an accredited university obtained by examination.
4. (1) Subject to paragraph 4(2) hereof, the MAXIMUM fees which shall be allowable on taxation are -

		Senior Counsel pa'anga	Counsel pa'anga	Locally Qualified Lawyer pa'anga
(a)	All meetings, incidental court appearances, preparation and all work not covered by items (b) hereof - PER HOUR	150	100	75
(b)	Conducting Trials, Appeals, or any other substantial Court hearing set down for at least one day (to include) time spent travelling to and from Court for such appearance) - PER DAY	1000	600	450

(2) In any case a Judge of the Supreme Court on special cause shown may allow an increase in any of the above charges, of such amounts as he thinks fit.
(3) All disbursements must be properly vouched.
(4) There shall be allowed as disbursements all reasonable sums necessarily expended by Senior Counsel, Counsel and Locally Qualified Lawyers in respect of travelling costs, and subsistence when required to reside away from their ordinary place of residence.

- 6th February, 1992 -

There are some judgments of the Court which interpret those provisions that are relevant and these are as follows: First, on 23 January 1991 *OG Sanft & Sons v Johnson* [1991] Tonga LR 1. This is a judgment issued before Order 29 was passed, but I shall refer to it in respect of one principle.

The first judgment issued after Order 29 and *Practice Direction 02/92* ([1992] Tonga LR 2) came into effect was on 6 November 1992. This is *Tonga Development Bank v Niu* (Supreme Court, C 231/92, 6 November 1992, Ward CJ). Counsel for successful plaintiff was from outside Tonga and the judgment stated relevantly on page 1 to 2 as follows:

> "The maximum fees laid down in the Practice Note are reasonable and sensible. There can never, however, be a hard and fast rule and, in cases of exceptional difficulty for example, it is always open to a lawyer to seek rates in excess of these figures. When counsel comes from overseas, the same general principles apply. He appears as a member of our legal profession and subject to the same rules as other members. That includes the rules as to costs. If he does not wish to be paid at those rates, he should not accept the instructions or should ensure he is properly covered by special arrangements with his lay clients. Costs rules are made to ensure fairness to both parties and it is clearly not fair to order higher costs against the losing party simply because his opponent has employed a lawyer who charges at a higher rate.
>
> Most cases before the Courts here do not require counsel from abroad but where such a course is necessary, charges outside the tariff may be appropriate. In such cases, application should be made to the judge in chambers for the case to be certified as meriting remuneration at rates in excess of the scale and/or requiring the attendance of counsel from overseas and/or requiring two lawyers. Such application should be made as soon as the need is apparent and failure to seek such certification may result in costs in excess of the scale being refused.
>
> This case does not, at this stage, appear to involve any special difficulty but the need to instruct counsel from overseas arose from the limited number of counsel (in terms of paragraph 3 of

the Practice Note) resident in Tonga. Of those that are resident, one is the first defendant and another represents him.

Those circumstances justify instructing counsel from abroad. I also consider it merits a charge above the standard rate. I order that Mr Waalkens be paid at a rate 25% above the scale maximum which is a rate of 125 pa'anga per hour for the costs claimed under paragraph 4(1)(a). The costs claimed are reduced by 24 pa'anga and I tax the total costs, therefore, at 675 pa'anga."

The next relevant judgment was issued on 10th October 1994, this was *Edwards v Kingdom of Tonga* [1994] Tonga LR 62 (CA), 68 (Ward CJ):

The basis on which costs are taxed is set out in Order 29 rule 4(1).

"There shall be allowed all such costs, charges and expenses as are reasonably necessary or proper for the attainment of justice or for maintaining or defending the rights of any party."

That is substantially similar to the English RSC Order 62 rule 28(2) prior to 1986. When our Rules were drafted in 1990, the intention was clearly to apply that rule rather than the more recent rule in England. Thus the intention of our O 29 r4(1) is that the basis of taxation should be "party and party" rather than the standard basis now adopted in England. Recent authorities in England, therefore, are of limited value. Even cases prior to 1986 should be treated with care because of significant differences between the wording of O 29 of our Rules and O62 of the English RSC.

The use of the phrase "reasonably necessary or proper" means that a cost may be justified either as being reasonably necessary when it was incurred or that it was reasonably proper to incur it even though it may not in the event have been necessary. The test of reasonableness applies in both cases; *Société Anonyme Pêcheries Ostendaises v Merchants' Marine Insurance Co* [1928] 1 KB 750; [1928] All ER Rep 174.

The principles of party and party taxation have been settled for a long time. In *Smith v Buller* (1875) LR 19 Eq 473 at 475; [1874-80] All ER Rep 425, Malins VC explained:

"It is of great importance to litigants who are unsuccessful that they should not be oppressed by have to pay an excessive amount of costs. The costs chargeable under a taxation between party and party are all that are necessary to enable the adverse party to conduct the litigation and no more. Any charges merely for conducting litigation more conveniently may be called luxuries and must be paid by the party incurring them."

Most cases before the Court here do not require counsel from overseas, but where that is thought necessary charges outside the scale maxima may be appropriate. And the judgment in *Niu's* case (above) allowed counsel who happened to be Mr Waalkens to be paid at the rate of 25% above the scale maximum.

Now the next case I should also mention is *Fonua v MBf Bank Ltd* [1999] Tonga LR 4 where full solicitor and client costs were allowed as a principled exception to the general rule in respect of costs.

The Bill for Taxation

The Bill of Costs before me sets out all the costs actually incurred by the Defendant, subject to the adjustments which are indicated in the bill which reduce some amounts to be less than full indemnity amounts. The object of that is to avoid breaching any rule which limits indemnity costs to indemnity of actual costs. These costs and the bill of costs are claimed by the defendant as "reasonably necessary or proper" within the meaning of Rule 4 (1)(ii) of Order 29.

It is the defendant's case that wherever costs that are greater than the maxima in PD 02/92 [1992] Tonga LR 2 have *in fact* been incurred and were *in fact* "reasonably necessary or proper" as interpreted for purpose of R4(1)(ii) then on taxation they "shall be allowed", i.e. the Court is bound to allow them. Mr Gimblett set out his most telling submissions on this topic at paragraph 10 of his skeleton.

I cannot accept this proposition in entirety. It is based on a judgment of the English Court of Appeal, which appears on paragraph 12 of Mr Gimblett's skeleton of argument, *Wraith v Sheffield Forgemasters Ltd* [1998] 1 All ER 82.

Indeed that judgment is the corner stone of the Defendant's claim for reimbursement of a very high percentage of its actual solicitor and client costs and for practically every disbursement incurred by its solicitors in connection with the case. That judgment turns on application of English RSC O62 r12(1) which is set out on page 85 g of that judgment.

On pages 85 and following, Kennedy LJ set out the history of r12(1) which had started in existence only in 1986. He referred to a prior rule, R32 of O40 of the Consolidated General Orders of the Court of Chancery, at p 86 of the judgment.

It is that pre-1986 situation that exists in Tonga, as Ward CJ held in *Edwards* (above). I cannot be guided by later cases, which lay down principles as they arise from later redrafting of the Rule.

There may be some help for the Court in Tonga from costs procedures in New Zealand. However, as the New Zealand Court of Appeal said in *Kuwait Asia Bank EC v National Mutual Life Nominees Ltd* [1991] 3 NZLR 457 at 460; (1991) 3 PRNZ 571 (CA), to which Mr Waalkens referred me there is no recognisable practice in Court of Appeal or High Court regarding taxation. Costs in New Zealand are fixed as a contribution only and by reference to a scale of costs as the judgments make clear. Costs are generally fixed on that basis by the High Court itself, on memoranda from counsel or otherwise and by Court of Appeal of its motion.

That healthy practice is the practice which can be adopted under O29 R2 of the Supreme Court Rules in Tonga. However the Court of Appeal and Supreme Court has generally left costs for Counsel to agree, or otherwise to submit the taxation.

For conduct of taxation in Tonga, I have found guidance in *Simpsons Motor Sales [London] Limited v Hendon Corporation* [1964] 3 All ER 833 (ChD) and

Halsbury 4th Edition Vol 37. This volume of Halsbury was published in 1982 and states the English Law about taxation of costs as at that time, and thus states the principles for Tonga. The authorities for application of SCR O29 in Tonga are the judgments of this Court which I have set out above. I am satisfied that English decisions about the application of the English RSC O62 R28 are authority in Tonga for applications of the Tongan provisions as well.

I am satisfied that under English RSC O62 R28, costs were normally taxed on the party and party basis (Halsbury paragraph 744). All references to Halsbury, unless otherwise stated, will be to Vol 37, 4th edition.

There is no statutory provision in Tonga for taxing costs on the indemnity basis, i.e. reimbursement by the paying party of all costs incurred by the receiving party except those unreasonably incurred or unreasonable as to amount. These words are in Halsbury paragraph 744 and refute what is nearly enough the claim that the defendant makes. However the Supreme Court in Tonga has a statutory discretion about who may pay the whole costs (S15 SCA Cap 10) and the Court may order costs on that basis. It did so recently in *Fonua v MBf Bank* (above).

Halsbury paragraph 745 notes as follows:

> "On a taxation on the party and party basis there are to be allowed all such costs as were necessary or proper for the attainment of justice or for enforcing or defending the rights of the party whose costs are being taxed. The proper principle upon which costs are taxed on this basis is that the successful party should be indemnified against the necessary expense to which he has been put in prosecuting or defending the action, although costs incurred in conducting the litigation more conveniently are not included. In practice, however it is a fiction that taxed costs are the same as costs reasonably incurred but the law does not recognise the difference between the sum which it awards as costs on the party and party basis and the larger sum which in fact a litigant has to pay."

And that is the difference between the two arguments in the present case. I rely on that paragraph and upon the other statements of principle that appear in footnotes to that paragraph.

However, I must be careful to ensure that any statement of principle relied on arises only from O62 r28(2) before 1986 and not from some other part of the English O62 and not from judicial consideration of other parts. There is not scale of costs in Tonga other than PD02/92 ([1992] Tonga LR 2), and no guidance on its application other than the Tongan cases which I cited above.

Fees paid to counsel were closely regulated in England under O62 before 1986 (see Halsbury paragraph 751), but those English provisions have not been enacted in Tonga. However, decisions of principle on this topic and related topics by the English Courts which are other than applications of those provisions are judicial authority in Tonga pursuant to S4 of the Civil Law Act (Cap 25).

Therefore it is a principle in Tonga that in a taxation on a party and party basis, the costs of more than 2 counsel will not normally be allowed unless certified as proper (see the authorities cited in Halsbury paragraph 751, particularly footnote 6). It

is also good Law in Tonga that the proper measure for counsel's fees is [citing from Halsbury paragraph 751]:

> "The proper measure for counsel's fees is such fee as would be acceptable to a hypothetical counsel capable of conducting the case effectively but unable or unwilling to insist on the particularly high fee sometimes demanded by counsel of pre-eminent reputation."

The authority for that proposition is *Simpson's* case (above) which is cited by Kennety LJ in *Wraith* (above) as part of the history of the development of the taxing rule. Simpson is instructive for our purposes. At p 837 I Pennycuick J noted the absence of judicial authority on amounts, particularly in connection with counsel's fees on a party and party taxation. He referred to "broad statements of principle" such as those of Malins VC in *Smith v Buller* to which Ward CJ referred in *Edwards* (above). Pennycuick J noted at pp 837-838 that the "necessary" costs stipulated by Malins VC must become (under O62 R28) "necessary or proper for the attainment of justice etc."

He went on at (p838 B) "one must then apply the words of r28(2) to the particular circumstances as best one can…" That is about as far as the case goes on that topic.

However in respect of counsel's fees, the topic of his decision, he stated in greater detail the test I have just recited from Halsbury paragraph 751 and this is on page C to E and further G - H.

The learned Judge then sets out the argument advanced before me by Mr Waalkens, that less eminent counsel could have conducted the case for a much lower fee. He decided that by saying in the following words from page 839 B.

> "One can only proceed by estimation based on such knowledge and experience as one possesses. On the best consideration that I can give the matter, I am not myself persuaded that this particular fee is higher than one would expect leading counsel, competent to conduct this particular case, to charge for his services. Equally, I do not think this fee should be regarded as being a particularly high one that was occasioned by this leading counsel's pre-eminent reputation."

I conclude that these words are the guidance which I have to accept, because those dicta were made against the background of the rule that equates to the Tongan Rule. They set out the practice for Tonga. I turn now to consider the various heads of the defendant's claim advanced in submissions.

Before finally doing so however, I deal with a preliminary matter which was my reserved preliminary ruling about the admissibility of the affidavit of Afqar Dean. The affidavit relates to principles applied in England that are not the principles to apply in Tonga, but it is a factual statement of the current English practice. I admit it for the purpose of comparing English taxation practice with that in Tonga and with the situation in New Zealand.

Defendant's choice of the Solicitors and 2 Counsel who conducted its defence.

In brief, I find the Defendant's choice of solicitors reasonable for the reasons advanced by Mr Gimblett. Briefly these are that this litigation is in reality a contest over liability for quantum of about US$3.5 million between two parties trading worldwide and based in London. They are international insurers that insure very substantial risks across national boundaries. The plaintiff instructed a specialist attorney in San Francisco. The defendant's insurer was justified in the terms used by Pennycuick J in *Simpson* (above) in instructing a London City firm, and the firm called Barlow Lyde and Gilbert which is one of 5 or 6 such firms that specialise in aviation insurance claims. The fact that the claim arose in Tonga is incidental to the main commercial and legal issues. After all the object was to make and settle a claim, and the parties were in London. Only for factual reasons related to the Kingdom of Tonga and the security arrangements at its main airport was it appropriate to consider counsel from this part of the world. I shall return to this, because that is what occurred. Both counsel and experts were employed in this part of the world.

Counsel

I bear in mind the dicta I have cited from Simpson, and from Halsbury. First I shall deal with the trial. I reject the contention that the expense of having three persons present for the trial was necessary in terms of R4(1)(ii). Unquestionably all three representatives of the Defendant was supremely competent and thoroughly familiar with the case. So much so that attendance of two only of them is what I think reasonable in this context of party and party costs. Both Mr Webb and Mr Lydiard were admitted to the Tongan bar for the trial, Mr Gimblett was not. Those two alone were certified and expected to operate as the Law Practitioners conducting the trial in my view could have done so. Indeed Mr Webb and Mr Gimblett could have done so. In the context of R4(1)(ii) to go further was to do more than was reasonably necessary for defending the rights of the defendant. All expenses associated with the attendance of the Mr Lydiard at the trial are therefore taxed off the bill. For this exercise I regard Mr Gimblett as the person who was junior to Mr Webb in the trial and I disregard the fact that he was not an admitted practitioner in Tonga for the purposes of this exercise. Other overseas practitioners were involved apart from those two and I shall return to the part played by them in the proceedings. That includes practitioners in New Zealand and practitioners in Tonga.

The Fees Charged by Those Two Practitioners

This Court will not normally accept in a taxation the fees of law practitioners as vouched disbursements. It was argued that the Tonga rule, O29 R2 (above) allows at (c) that counsel's fees may be submitted as disbursement because (d) allows "any other disbursements". In the present case I cannot accept that interpretation and there are three reasons. This is firstly because the principle laid down for me in *Simpson* is that I must rely on whatever knowledge and experience I possess. In respect of the fees of London City barristers I have no knowledge and no experience. It cannot be expected that a taxing officer in Tonga would have. Second it is because the 2 practitioners were, in Tonga, part of the merged profession and were acting as such and subject to the provisions of the Law Practitioners Act No 21/1989. Ward CJ

makes this point also in *Niu* (above). Under the Act, S8 (a) all law practitioners are entitled to appear as counsel in any Court in the Kingdom. Under S24 all Law Practitioners are entitled to recover as fees either their taxed costs or an agreed fee. Even the agreed fee is subject to review by this Court under S25. The title counsel is used in the Court to denote any law practitioner who appears. This is the universal practice. It is confirmed to a degree by the use of that term in PD02/92 ([1992] Tonga LR 2).

I pause to mention the Practice Direction, the force of which was a point of contention in the argument. It does not have the full force of a statute, but it does have authority. It was issued by the Court pursuant to its inherit jurisdiction to regulate and control its own process. (See Halsbury vol 10 paragraph 909 and vol 37 paragraph 12). As paragraph 1 of the Practice Direction makes clear its purpose is the guidance of the legal profession in Tonga. The word "guidance" is not a pointer to voluntary compliance. Paragraph 4 sets fees which are "MAXIMUM fees which shall be allowable on taxation".

This raises the interpretation of R3(2), and my third and final reason for rejecting the argument that R3(2) provides for admitting counsel's fees as a disbursement. On the reading of R3(2) as a whole, I find it provides for a bill that shows brief details of and the sums claimed for (a) time spend before trial (b) time at trial (c) fees of the law practitioners who conducted the proceedings and (d) any other money claimed for sums paid out incidentally. The bill is to be filed by "a party" to court proceedings and "counsel's fees" are the fees that the lawyer is charging the party. It is rare, but acceptable practice, for a law practitioner in Tonga to brief another for the purpose of conducting a trial. "Counsel's fee" is however still a law practitioner's fee, it is not a disbursement. *Niu's* case (above) illustrates that.

Now I come to Mr Webb's fees for the trial. He is pre-eminent in the field of aviation insurance litigation. He demonstrated that. I have held that to retain him was "reasonable necessary or proper for the attainment of justice and for defending the rights of the defendant". Even in that restrictive context he surely is entitled to a fee that reflects the experience and skill that he displayed in conducting the case for the defendant. But the approach to his fee is through paragraph 4(2) of PD02/92. On special cause shown I may allow an increase in the maximum rates of such amount as I think fit. And that is the only way I can fix a fee for Mr Webb. The taxing Judge here has a discretion, unfettered except by principle. The principles governing the discretion are set out in *Edwards* (above) and *Niu* (above) and *Simpson* (above) particularly at page 838 CD and E. The question is: What is the amount that is "reasonably necessary or proper" not for Mr Webb but to pay as a fee for counsel capable to defend the rights of the defendant in this particular case. In *Simpson's* case, the judge concluded that what had been charged by pre-eminent counsel was not higher than would have been charged for that particular case by any leading counsel who had been competent to conduct that case. However in the present case I have an affidavit from Mr Turner which is evidence, if I accept it, that competent counsel were available in New Zealand and the fee charged would have been in the vicinity of NZ$350 to NZ$450 per hour. Clearly there is range, and I am prepared to hold that it may be wider than that.

I hold that Tongan provisions apply, and they require that Mr Webb's fees be taxed. First I tax off all fees for travelling time and for days on which no work was done. These were charged on the not unreasonable understanding with his briefing

solicitors that Mr Webb had removed himself from his fee earning environment by travelling to Tonga and was unable to earn as he otherwise would have on the days when he was absent from London either travelling or actually in Tonga. While reasonable in that context, these fees are not "reasonable necessary or proper for defending the rights of the defended". They have nothing to do with the plaintiff's claim, they arise from Mr Webb's London domicile.

Next, pursuant to paragraph 4 of PD02/92, for the days of the trial which I fix at 11, I allow an increase in the maximum fee for Senior Counsel (which by definition include a Queen's Counsel). The amount of the increase is in the end subjective and open to discussion. The refresher fee actually paid was Lstg 2,500 per day. The maximum before discretionary increase in Tonga is TOP$1,000 per day. The proceedings are Tongan so the Tongan practice provides an objective standard and must be given greater weight than foreign practice, i.e. in this case English. T$2,000, i.e. double the Tongan maximum, is as far as I feel I can go and I allow TOP$2000 per day for 11 days. I note subsequently that it appears from Mr Turner's affidavit to be about what New Zealand Senior Counsel might charge as a solicitor client fee.

I turn to Mr Gimblett's fees for the trial. For this exercise, I disregard the fact that he was not an admitted practitioner. He participated as instructing solicitor. On the same basis as above I would tax off any fees for travelling time. There may be no charge made for his time spent not working but if there is any element of such a fee it should be taxed off. For the 11 days of the trial I treat him also as Senior Counsel. This may seem paradoxical, but it is consistent with Tongan practice. He is easily equivalent to any of the Law practitioners, local and overseas, who in Tonga are rated as "Senior Counsel". I exercise my discretion here and increase the maximum daily fee. The amount which I allow is TOP$1,500 per day which is the maximum plus 50%.

Trial Preparation

The first point to note is that Mr Lydiard was fully involved as counsel in preparation. Under Mr Webb's oversight he did much of the preparation work done by counsel. All three of the lawyers were involved, and indeed other English practitioners and clerks as well. The task for me here is to apply R4(1)(ii) to a large number of detailed charges, made by English standards, for work of various kinds done by solicitors and clerks who are not members of the Tongan bar. It is practically impossible to single out any from the others as being NOT "reasonably necessary or proper for the attainment of justice or for defending the rights of the defended". Neither have I any objective guide by which to assess the quantum of the various fees charged to the defendant for these services. I have only my subjective experience of fees charged in Tonga by which to judge these items, and the objective categories of R3(2)(a)and (b) - the amount of time spent in preparation and the amount of time spent in court.

I have considered the submissions of both counsel about this point. Mr Gimblett for the defendants submits that all the preparation charges should be allowed, on the basis that (i) employment of his firm and the 2 barristers was reasonably necessary for the preparation (which I have accepted) and that (ii) the amounts claimed are reasonable having regard to, among other things, rates for similar firms and counsel. He submits that PD02/92 does not provide guidance.

It is the second point that I cannot accept. There is no mandate in Tonga for finding a foreign practitioner's charges reasonable by comparing them with other similar foreign practitioners. The test is whether the charges were reasonably necessary for the defending the defendant's rights. Those rights were challenged in Supreme Court of Tonga and the question is what expenditure was reasonably necessary. It has to be assumed that a pre-eminent firm of London solicitors and pre-eminent London barristers did a great deal more than was reasonably necessary. It is right that they should charge their client for what they did but it is not a principle of taxation in Tonga that for every service they rendered their client the unsuccessful plaintiff should pay. The plaintiff should pay for only what was reasonably necessary for the defence to the claim.

The defendant's solicitors have put in a detailed bill of costs of 46 pages. The related explanatory schedule is 59 pages. One approach to the taxation task is to peruse these two documents in tandem, assessing from the schedule whether the task and the time set out in the bill of costs were reasonably necessary for the defence of the defendant's rights. After that is the question of the fee charged.

That is a task to be undertaken with counsel present. Some of the charges are clearly reasonably necessary for defence of defendant's rights, and would be acceptable to the paying party without discussion. Others require further explanation, particularly as to time taken. Yet others require explanation as to content. The relationships between entries in the bill of costs and entries in the schedule is not always self-evident. "Letters of average length", "telephone attendances" and "personal attendances" are not readily identifiable as reasonably necessary or not. It could appear to the unaided reader that some items have been charged for twice - eg. the bill of costs Part II, Part A (vii) on page 8. The corresponding page in the schedule is page 3. In the bill of costs there is a charge of Ll,147.50 for a personal attendance of 4 hours 30 minutes on 7 October 1995 by a partner on the Crown Law Department in Tonga. In the schedule the same meeting is included in an overall claim for 39 hours, which is additional. It appears on bill of costs on p.8 in Part A (ix) Documents, included within a claim for 93 hours and 30 minutes.

Also included in that 93 hours 30 minutes is time spend in Tonga at meeting with the Minister for Justice and the Chief Justice, and in visiting the Police Training College and videoing police cadet. A great deal of detailed explanation may be necessary before these and other detailed entries in the bill of costs and schedule are accepted as reasonably necessary for defence of the defendant's rights in the claim made by Polynesian Airlines.

Time spent by partners "collating documents" at L230 per hour and "discussing with colleague" at L265 per hour (Schedule Part V, p6) are not automatically recognisable as being reasonably necessary for defence of the defendant's rights in the claim. Neither is time spent by an assistant solicitor "considering photographs", and "drafting fax to client … reviewing file for outstanding information … and discussing with partner" (Schedule Part VII p.8).

I cannot carry out unaided a detailed assessment of the individual parts of this bill of costs and its schedule, or of the work done by assistant solicitors, trainee solicitors and people called paralegal.

The Approach to Adopt

I have rejected the English approach contended for by Mr Gimblett. I have also found it impossible to apply unaided the rate per hour approach of paragraph 4(1)(a) of PD 02/92. I turn therefore to the approach contended for by Mr Waalkens.

I have considered the submissions of both counsel about English practice, Tongan Practice and New Zealand practice and for this purpose I have read and taken into account parts of the affidavit of Afqar Dean and the affidavit of JW Turner.

I accept and hold that the Tongan practice as set out in Supreme Court Rules, PD02/92, *Edwards* and *Niu*, is closer to New Zealand practice than to English Practice. In Tonga costs are intended to be a contribution towards the solicitor and client expenses of a successful party, calculated by reference to a scale, whose maximum may be exceeded. The Law Practitioners Act 1989 allows agreement about solicitor and client fees (subject to oversight and taxation), yet the Rules restrict recovery against those fees to only what was reasonably necessary expense and PD02/92 sets a scale of maximum costs which will be allowable upon taxation of those fees. So what is accepted by the client as reasonable may not be what is reasonably necessary for party and party taxation. This point is noted in Halsbury paragraph 745.

If I were able to tax the bill for preparation costs I would apply the test of reasonably necessary and allow costs as a percentage increase of the maximum scale costs in PD02/92. Since I cannot do that I turn to the alternative method which Mr Waalkens expounded in his submissions.

Mr Turner in his affidavit in paragraph 15 deposes that in New Zealand at the time of this case, the Courts were allowing costs above scale and the awards were in a range of 40% to 70% of solicitor client costs. For guidance they had the scale, just as Tonga has PD02/92, and commonly allowed increases above the scale. A rule of thumb that was explained by Mr Waalkens was a 3 day to 1 day calculation, i.e. for each day in court, it may be that 3 days preparation is reasonable. In Tonga's case, reasonably necessary.

Mr Waalkens proposed a rule of thumb for the present case of 10 days' preparation to 1 day of hearing, because of the complexity and particularly by reason of the documents that were discovered and used. He then recited a variety of calculations, intended to illustrate that applying the Tongan scale fees to that number of days for the solicitor and both barristers produced results that were compatible with the amounts which Mr Turner deposed might have been awarded as costs for a similar case in New Zealand. This clearly is imprecise but is acceptable and useful as a guideline. However I think it understates the amount of necessary pre-trial work. I shall increase the rule of thumb preparation time not by about 3 as Mr Waalkens suggested but by 5 times and so I shall apply a standard of 15 days preparation to 1 day of trial. If I were to use the scale costs that I have allowed above, TOP$2,000 per day would be allowed for Mr Webb and TOP$1500 per day for Mr Gimblett for preparation and for trial, and I would allow the same rate TOP$1500 also for Mr Lydiard during the time of preparation.

If then I were to apply those rates, the result would be as I now set out:

(i) Strike out application (1 day)

Preparation			
Name	Calculation		Total
Mr Webb	15 x 2000	=	T$30,000
Mr Gimblett	15 x 1500	=	T$22,500

Hearing			
Name	Calculation		Total
Mr Webb	1 x 2000	=	T$2,000
Mr Gimblett	1 x 1500	=	T$1,500
			TOP$56,000

(ii) Trial (11 days)

Preparation 11 x 15 = 165 days

Name	Calculation		Total
Mr Webb	165 x 2000	=	T$330,000
Mr Lydiard	165 x 1500	=	T$247,500
Mr Gimblett	165 x 1500	=	T$247,500
Trial			
Mr Webb	11 x 2000	=	22,000
Mr Gimblett	11 x 1500	=	16,500
			TOP577,500

Total of these amounts is TOP919,500

The amount actually claimed as "profit costs" is Lstg 346,333.74. To this must be added the fees paid to counsel which, from their invoices, are: for Mr Webb, L94,250 and for Mr Lydiard L49,550. This makes the total profit costs claimed for English practitioners L490,134.00, rounded up.

Fees paid to Other Law Practitioners

600 From the schedule of vouchers, these are:

Matthew Muir, New Zealand Counsel	Lstg 820
Bell Gully Buddle Weir	Lstg 4505.05
Bell Gully Buddle Weir	Lstg 2976.82
	Total = L8301.87

In the two accounts rendered by Bell Gully there may be a small overlap, in that there are 2 accounts which charge for attendances by Mr MacGillivray between 2-10 June 1997. One specifies attendances in Tonga and the other specifies only attendances. Mr MacGillivray could not have been in 2 places at once, but it is a minor quibble.

It seems to me that these fees (L8301.87) must be treated as part of the solicitor and client costs for preparation of the defence for trial. There was a legal opinion and

work done in relation to discovery of the extensive range of documents. This and the other work done was incorporated into the case being prepared. It was done more efficiently and cheaply this way because of lower fees and lower travelling costs, to the benefit of the client. The practitioners involved were not practitioners in Tonga but neither were some of the persons in the London office, who also contributed to the work, and whose work has been charged out as profit costs. Therefore I add these charges to the profit costs part of the bill. The amount of profit costs by this analysis now increases to Lstg.498,436.

From this total I now deduct L7912, being the profit costs in Part XIII of the bill of costs, which relate to the claim for costs. I shall deal with them later. The total now reduces to L490,524.

I have not been told what this sum would be if expressed in Tongan pa'anga at 1997 or 1998 rates, but on enquiry on 16 May 2000 I was given the selling rate of .3737. This is the rate at or near which payment will be made. If TOP919,500 the amount I have calculated as the taxed amount above, is expressed as Lstg. using that rate, it becomes L343,617. Expressed as a percentage of the profit costs of L490,524, it is 70%. By the scale and contribution method of assessing party and party costs that is used in Tonga, this is at the top of but still within a range of charges that could reasonably have been made by the defendant's London solicitors and counsel for work reasonably necessary for conducting the Defendant's defence. The amount claimed by the plaintiff was substantial, the law involved was arguable and the facts raised by the claim were extensive and detailed. The brevity of the trial was a direct result of painstaking preparation by counsel for both parties.

I therefore tax down the profit costs to TOP919,500 which is L343,617. That is the amount which I allow in respect of the trial, including preparation.

There were many other interlocutory matters and chambers hearings, which were attended by the local practitioners. I have not allowed specifically for them or for interlocutory steps in general. Instead the allowance for them is included in the daily preparation rate, which I have fixed at the same level as the rate for appearances.

Disbursements

PD02/92 provides at paragraph 3, that all disbursements must be properly vouched. The defendant provided vouchers in two binder files. The first one has 28 divisions. The total claim in the bill of costs for those disbursements is L238,524.57 but that sum includes the legal fees charged by counsel from London and New Zealand which I have included above.

There were further disbursements, which were omitted from the bill of costs. These are the ones in a second binder, which contains 11 divisions. The total of these is L29,419.96. Objection was taken to these, they were submitted very late and Mr Waalkens had little opportunity to check them, and was not able to address each claim individually. I ruled at the hearing that the claims are to be admitted for taxation. I accept that with the enormous attention paid to detail and preparation of the original bill of costs within the statutory 28 days, in February 1998, some disbursements were over looked. I think it just to include all the disbursements and I think it not impossible to apply the principles of R4(1)(ii) to them.

First, some general comments.

1. The principle I apply is the same as above, what was reasonably necessary for the defence of the defendant's rights. Many of the claims I must disallow as not complying with that principle. Among these are e.g. computer programming and training which enabled the defendant's solicitor to do the work more conveniently (Halsbury paragraph 751). Likewise there are unspecified film developing and printing charges and other expenses which may be considered of wider use and/or to be in the nature of overhead expenses.
2. I have already disallowed travelling time as being not reasonably necessary for the defence per se, but being rather an incident of the location of the offices of the defendant's solicitors and counsel. Likewise I disallow travelling expenses. I have held that the defendant's choice of the solicitor and counsel whom it chose was reasonably necessary for the conduct of its defence, but the fact that they were so far from the venue of the trial is not reasonably necessary for the defence of the case and R4(1)(ii) makes these expenses solicitor and client's costs, not costs for the plaintiff to pay in a party and party taxation.
3. Having said that, I do not exclude reasonable subsistence expenses, but I note that the accommodation invoices contain a considerable amount of detail. In an item by item taxation dozens of items would have been taxed off without question. I accept the submission of Mr Gimblett that during the trial counsel had to eat and sleep, but more is claimed than reasonably necessary subsistence. Charges for "nuts", "bottles of wine" unspecified bar expenditure, unspecified restaurant expenditure and charges by restaurants and hotels of unspecified quality are claims to be made on the client perhaps, but they are not likely to be charged to another party in party and party costs taxation.

   In Tonga for taxation of party and party costs the Court, when appropriate can adopt the "per diem" system which is well known here and can allow a basic daily rate. Accommodation plus a per diem of TOP100 is not uncommon for senior visiting personnel.
4. Where an item or service purchased outside Tonga can be recognised as being available here at a cheaper rate then *prima facie* it is the local rate that should be allowed, but this is not inflexible, and clearly to do so will sometimes be unrealistic.

5. Where a voucher for accommodation does not specify length of stay I decline to search for that information and
700 allow one day at TOP 150 plus a perdiem of TOP100.00, a total TOP250.00.

Volume I

Tab	Item	Amount
Tab 1:	One day accommodation and subsistence (TOP250 x .3737)	93.43
	Film & video tape	40.91
	Develop and process	67.72
	film & tape	69.33
Tab 2:	Withdrawn	
Tab 3&4:	Included above	
Tab 5:	1997 preliminary bill of costs work	780.00
Tab 6:	Withdrawn	
Tab 7:	Included above	
Tab 9:	Withdrawn	
Tab 10:	Not allowed	
Tab 11:	Courier charges	334.48
Tab 12:	Telephone charges	110.44
Tab 13:	Not allowed	
Tab 14:	Withdrawn	
Tab 15:	Expert witness' fee including travel time	2079.61
Tab 16:	Not allowed, included above as a profit cost	
Tab 17:	Courier charges	376.40
Tab 18:	Withdrawn	
Tab 19:	Not allowed	
Tab 20:	Telephone charges	102
Tab 21:	Not allowed	
Tab 22:	Expert witness' fee including travel time	1880.00
Tab 23:	Withdrawn	
Tab 24:	Expert witness' fee including travel costs and other necessary disbursements (reduced by TOP$1850 for alternate single airfare TBU-AKL-SYD-BNE = L691 (see below, Vol II, tab 6)	4951.75 -691.00 4260.75
Tab 25:	Included above	

Tab 26&27:	This is regarding the costs hearing, not allowed as a trial disbursement, considered later.	
Tab 28:	Considered separately.	
		L10,195.07

Volume II

Tab 1:	Accommodation and subsistence 6 days, 2 persons at TOP$250 per day per person = TOP$3000	1,121.10
Tab 2:	Accommodation and subsistence 1 person 17 days at TOP$250 1 person 4 days at TOP$250	 1,588.23 373.70
Tab 3-5:	Not allowed	
Tab 6:	Expert witness' airfares (including full return airfare BNE-TBU-BNE) (see above Vol I, tab 24)	1,630.60
Tab 7:	Expert witness' airfares	1,299.00
Tab 8:	Not allowed: overhead expenses and meal is Included under tab 9	
Tab 9:	Excess baggage charges not vouched. Meals and accommodation allowed for days as indicated by other documents (bill of costs and invoices) at TOP250 per day x .3737 Mr Webb: accommodation and subsistence 12-28 April 1998 (17 days) Mr Gimblett: ditto Mr Knight: accommodation and subsistence 21-23 April '98 (3 days) Mr Armstrong: ditto	 1,588.23 1,588.23 280.28 280.28
Tab 10:	photocopying and associated stationery	553.73 52.70

Tab 11:	Not allowed, included above	
		L10,356.08

The total allowed from both Volumes is L20,551.15. This is the amount allowed on taxation under the heading disbursements.

The Proceedings in respect of costs

The proceedings in respect of costs I isolated from the above determinations. Costs were not raised in the substantive proceedings and first arose when, in the judgment, I invited counsel to settle costs. Since that time counsel for both parties exchanged submissions and reached no agreements and the matter came on for hearing on 7 October 1998. There had not been agreement even on the question of liability. I issued a judgment on 27 January 1999 in which I settle the issue of liability in respect of all proceedings up to and including that judgment. Quantum at that time was not an issue.

I tax the costs in respect of the cost liability issue now. Costs normally follow the event and R4(1)(ii) applies to the Defendant's costs claim. The claim starts in Part XIII of the bill of costs, with profit costs L7912 and disbursements L37,872.38 which includes L20,900 for costs draftsmen's fees, and L3,713.42 for Bell Gully for preparation and appearance at the hearing. The 3rd disbursement, L13,258.96 was a payment to Crown Law Office Tonga which was for the whole of the proceedings including the costs hearing and indeed preparation for the appeal hearing which has yet to occur.

I follow the same approach as above. Counsel appearing was Mr MacGillivray of Bell Gully, who was admitted as a Tongan Law Practitioner and demonstrated that he also should be classified as "Senior Counsel" for the purposes of PD02/92. I allow him the same rate for appearances as for Mr Gimblett, TOP 1500 per day for hearings, and use that rate also for preparation as with Mr Gimblett. For the hearing I allow a full day. For preparation I cannot increase by 5 the basic guideline, I cannot increase it at all. There was nothing difficult or complex above the ordinary in the argument about liability. I allow 3 day's preparation for what was in fact a short halfday hearing. It was 1hr 13 minutes, plus my own time in perusing the written submissions. I allow TOP1500 for the hearing and TOP4500 for preparation, a total of TOP6,000. There is nothing I can allow for disbursements at this stage, because neither Bell Gully nor Crown Law have supplied vouchers for any disbursements they may have had and there are no other disbursements claimed.

TOP6000 converted at the same rate .3737 and rounded is L2422. It is within the range of expense one might expect for an important argument of this kind on a party and party basis.

Three further topics were raised and argued and I now turn to deal with these.

The Costs on this Taxation.

The defendant seeks reimbursement of the costs of this procedure itself and claims Lstg 66,622.50. There is also one disbursements claim to be dealt with under this head, notably an account from JW Richings & Associates, Law Costs Draftsmen and Consultants, for L20,900. This was their charge at L95 per hour for preparing the

bill of costs in taxable form after my liability ruling. VAT was added but the defendant does not seek to recover paid VAT.

I accept that this work was necessary, that it took 220 hours, and that L95 per hour was a charge to be expected for the work was done. It is specialised work. The work was done in furtherance of a right that has been determined by my judgment; quantum had to be determined. I allow that disbursement in full.

I turn now to the fees actually charged. There has not until now ever been an order made in Tonga for payment of the costs of preparing for taxation. No precedents were put before me and I have found none. Normally this issue does not arise here. I am satisfied that the claim arises properly in the circumstances of the present case where the defendant has a right and is acting in furtherance of it, but I do not expect this case to establish a precedent for run-of-the-mill cases in Tonga. Apart from that invoice for preparation of the bill, the rest of the claim under this head is a supplement and continuation of the original bill of costs and is for fees i.e. "profit costs". They are solicitor and client costs, which the client will pay or has paid. They are charged at full rates of L270 per hour for a partner, L145 and L155 per hour for an assistant solicitor and L85 per hour for trainee solicitors.

They relate to preparation for the taxation hearing. They include making offers of settlement to the plaintiff's representative, which achieved no settlement. They are further costs incurred in attainment of justice and or maintenance of the rights of the defendant i.e. the payment of whatever costs the plaintiffs were liable to pay. Therefore they come within the ambit of R4(1)(ii) and the principle applied above applies to them.

The question is, what costs charges or expenses of those claimed are reasonably necessary to determine the quantum of the costs order? To answer the question I must bear in mind 6 basic facts:

1. Liability was not an issue, only quantum.
2. The quantum of the defendant's entitlement depended on either agreement as to quantum or, ultimately, taxation by the Court.
3. The matters in issue were stated in first, a notice of objection and thereafter a memorandum of particulars of the objection.
4. It was necessary in a chambers hearing for the Plaintiff to obtain leave to file out of time and for the Defendant to obtain an order for filing those further particulars. I can find a record of only one such hearing in respect of the taxation issue.
5. There was only one main question of law and one of fact to be litigated, that was the question of what taxation principle to apply and what charges in the original bill of costs were reasonably necessary for conduct of the Defendant's defence and its claim for costs in its favour.
6. To determine those issues a 2 day hearing was necessary.

For determination of the question I start as before from the premise that geographic location in London does not import any reasonably necessary expense. Neither will taxation allow for the process of consultation with Crown Law officers in Tonga

about the principles that are applied in Tonga. As Martin CJ held in *OG Sanft & Sons* (above) (at page 2) taxation cannot allow for a charge for time spent learning what the law is, except for abstruse points which are outside the reasonable expertise of the average practitioner.

The supplementary bill of costs charges only for time and not for the letters, faxes, phone calls etc. that were generated. It does not specify the use of the individual hours, spent, instead it sets out headings in respect of each time period. Some of the times spent, such as for preparing bundles of vouchers was clearly time reasonably necessary, but other times are impossible to assess.

By my quick assessment the total time claimed for is about 272 hours of preparation for the taxation hearing. This excludes times spent by Mr Lydiard as counsel. By any estimate that is very thorough. By any estimate it exceeds what is reasonably necessary.

I use the same standards that I applied above and note that Mr Gimblett was engaged in a hearing of 2 full days. I allow TOP3000 for the hearing. The issues were clear cut and I allow 6 full days for preparation at TOP1500 but that in my view is the maximum allowance against the principle of what was reasonably necessary in party and party terms. The amount allowed therefore is TOP12,000. In Lstg rounded out that is L4,484.00.

Interest on the costs awarded

I accept, as Mr Gimblett submitted, that English practice makes interest on the taxed costs mandatory. It is not so in Tonga. However, I accept also that a judgment in costs is a judgment debt, and that the Court has a discretion whether to award interest.

In my view, to do so is just in the present case. The Court frequently exercises this discretion to add interest to a money judgment and in the exercise of that discretion is generally at the present time allowing 10% per annum or thereabouts. The Law is stated in Halsbury at paragraph 753.

I declare that interest will be payable on the total taxed costs awarded above the rate be 10% per annum, the time to commence to run from the day 1 calendar month after the date hereof, i.e. one month from midnight tonight that is on and including 20 June 2000.

The Crown Law Office Bill

There was one final issue. This is the bill of costs rendered to the defendant's solicitors by the Crown Law Office. It was for TOP34,612.50 and it is to be or has been paid. It is claimed in full by the defendant as a disbursement. I note that this bill is not restricted to the matters under taxation but contains elements, some identifiable and others presumed, that relate to the forthcoming appeal.

The Solicitor General and the Crown Law Office are the lawyers of the Kingdom of Tonga. They are the solicitors on, the record for the defendant and from the commencement of the proceedings,' lawyers of the Crown Law office have filed the defendant's documents and appeared as defendant's counsel in chambers hearings. The bill may have been rendered earlier, because it was already included in the bill of costs rendered in February 1998. But the bill before the Court was rendered on 5 May 2000, 3 days before the taxation hearing, as a disbursement to be paid in full by the

defendant's solicitors in London and claimed back from the defendant's insurers. It is for the same amount that was included in the February 1998 bill of costs.

The dynamics of the matter are these. The Kingdom of Tonga was insured for some or most of the risks which were affected by the plaintiff's claim and the liability to take up the defence was accepted by the insurers. The insurers then by contract took over the conduct of the defence. They employed lawyers of their choice. Nonetheless the Crown Law office as in house lawyer of the Defendant, was established as the Defendant's lawyer in Tonga and took responsibility before the Court for the conduct of the proceedings. They were the only lawyers for the Defendant in Tonga. They alone had the right to practice in Tonga except for the practicing certificates issued to other counsels for the hearing. They took full responsibility to the Court for the Defendant's proceedings.

The bills of costs rendered by the other legal practitioners in New Zealand to the defendant's London solicitors I did not allow because they were an integral part of the professional preparation process. These practitioners were not contributors like the expert witnesses and the couriers and the telephone company. Neither was the Crown Law Office. Their work was part of the legal proceedings and is rightly included in the taxed costs of preparing and conducting the defence. If the bill of costs from the Crown Law office were to be allowed then it would have to be taxed pursuant to S24 of the Law Practitioners Act 1989, unless there were an agreement about fees. If the bill were to be presented for taxation, vouchers would be required for the disbursements. However, it is not a bill that I am required to tax in the present circumstances, the disbursement or fee being indeed part of the integral trial process and being included already in the amounts that I have allowed above.

In case of errors and omissions, I am willing to reconsider this taxation on review in order to correct those and the time for that may if counsel wish be abbreviated.

These are the amounts which I shall certify:

A. For the substantive hearing including the interlocutory application to strike out in particular where counsel came from London, and all other interlocutory and chambers matters.

i) Fees Lstg 343,617

ii) Disbursements Lstg 20,551.15

B. For the work of establishing liability for the costs.

i) Fees only Lstg 2,422

C. For the costs on this taxation

i) Fees Lstg 4,484

ii) Disbursements Lstg20,900

D. **Total** all of those taxed fees and disbursements:

Lstg 391,974.15

E. Interest on that amount:

10% per annum commencing on and including 20 June 2000.

Polynesian Airlines (Investments) Ltd v Kingdom of Tonga

Court of Appeal, Nuku'alofa
Burchett, Tompkins and Beaumont JJ
CA 13/98

17, 18 July 2000; 21 July 2000

Negligence — duty of care — reasonable standard —respondent not shown to fall below the standard required

On 14 September 1994, a Boeing 737 aircraft, flying on a Polynesian Airlines service between Tonga Fua'amotu airport, Tonga, and Faleolo airport, Western Samoa, came close to disaster. When the pilot, Captain Gilfillan, attempted to lower the landing gear to land at Faleolo, the right main landing gear failed to extend because its operation was impeded by the body of a man who had stowed away in the right main wheel well, and died there of hypoxia. (At the height the plane flew, death from hypoxia in the rarefied atmosphere, or else from the extreme cold, was the fate to be expected if someone rode in the unpressurized wheel well.) Despite repeated efforts, it proved impossible to get the right landing gear to extend, so an emergency landing had to be made on the left main wheels and the nose wheel. Although this was accomplished by the pilot with extraordinary skill, it involved the plane skidding for many hundreds of meters on the right jet engine, to which damage was sustained. It was agreed that, if the appellants succeed in their claim, their damages were US$1,906,774.57 plus interest. The Appellants sued the Respondent, as operator of Fua'amotu airport, for damages for negligence in relation to the failure of the airport authorities, and particularly the airport security service, to prevent the stowaway (who was being sought by the police for questioning) from reaching the wheel well undetected and concealing himself there. The learned trial judge held the airport authorities had not been shown to be liable in negligence for what occurred. From that decision, the appellants appealed.

Held (Beaumont J dissenting):

1. If the appellants were to succeed it was necessary for them to show on the evidence some respect in which the respondent fell below the standard of care required of it. An obvious respect to be considered was the performance of their duties by the security officers. The trial judge saw and heard a number of them, who gave evidence, and he was not prepared to find that they were inattentive or that they had not kept an adequate and reasonable lookout. These findings, dependent as they are on the oral evidence, are entitled to be accorded the greatest weight.

2. The duty of care was imposed by law in accordance with the test of what "a reasonable man in the position" of the respondent would do. The standard of care to be exercised in accordance with the duty of care was also measured by what was reasonable in the circumstances: it was not a standard of unrealistic perfection, nor was it to be established by the deceptive illumination of hindsight.
3. The Appeal Court accepted that there was a duty of care and found that the trial judge's finding that there was no breach of it could not be reversed. The Court could not say that the judge was wrong when he held the security arrangements fulfilled the Respondent's duty of care.
4. per Beaumont J (dissenting): There was evidence, on the uncontroverted facts, from which the respondent's negligence should, on the whole of the evidence, be inferred. The appellant bore no onus to demonstrate how the stowaway gained access to the aircraft. Since the respondent was the occupier and security controller of the apron, and thus the facts were within its knowledge and control, and not within the power of the appellants, only slight evidence was required to discharge the appellants' burden of proof, in the absence of a satisfactory explanation from the respondent (and none was forthcoming).
5. The appeal was dismissed with costs.

Cases considered:

Allison v Rank City Wall Canada Ltd (1984) 6 DLR (4th) 144; (1984) 29 CCLT 50

Bolton v Stone [1951] AC 850; [1951] 1 All ER 1078

Bondurant v Mastin, 2522 NC 190, 113 SE2d 292 [1960]

Byrne v Boadle (1863) 2 H&C 722; 159 ER 299

Cinnamond v British Airports Authority [1980] 1 WLR 582; [1980] 2 All ER 368 (CA)

Clarke v Edinburgh Tramways Co [1919] SC (HL) 35

Dulhunty v JB Young Ltd (1975) 7 ALR 409; 50 ALJR 150

Fardon v Harcourt-Rivington (1932) 146 LT 391; [1932] All ER Rep 81 (HL)

Fred Olsen Flyselskap A/S v Norwich City Council (High Court, 27 July 1979)

Goldman v Hargrave [1967] 1 AC 645; [1966] 2 All ER 989 (PC)

Hampton Court Limited v Crooks (1957) 97 CLR 367

Haynes v Harwood [1935] 1 KB 146; [1934] All ER Rep 103 (CA)

Home Office v Dorset Yacht Co Ltd [1970] AC 1004; [1970] 2 All ER 294

Hughes v Lord Advocate [1963] AC 837; [1963] 1 All ER 705

Johnson v Lamb 273 NC 701, 710, 161 SE2d 131, 139 (1968)

Jolley v Sutton London Borough Council [2000] 1 WLR 1082; [2000] 3 All ER 409 (CA)

Mummery v Irvings Pty Ltd (1956) 96 CLR 99; [1956] ALR 795

Overseas Tankship (UK) Ltd v Miller Steamship Co Pty [1967] 1 AC 617; [1966] 2 All ER 709 (PC)

Plewes v Lancaster 171 Pa.Super. 312, 90 A. 2d 279 [1952]

Powell v Streatham Manor Nursing Home [1935] AC 243; [1935] All ER Rep 58

Rae v International Insurance Brokers (Nelson Marlborough) Ltd [1998] 3 NZLR 190 (CA)
Salmond & Spraggon (Aust) Pty Ltd v Joint Cargo Services Pty Ltd (the "New York Star") [1977] 1 Lloyd's Rep 445
Schellenberg v Tunnel Holdings Pty Ltd (2000) 200 CLR 201; 74 ALJR 743
Scott v London and St Katherine Docks Company (1865) 3 H & C 596; 159 ER 665; [1861-73] All ER Rep 246
Screaming Eagle Air Limited v Airport Commission of Forsyth County (387 SE 2d 1990)
Smith v Leurs (1945) 70 CLR 256; [1945] ALR 392
Smith v Littlewoods Organisation Ltd [1987] AC 241; [1987] 1 All ER 710
Stansbie v Troman [1948] 2 KB 48; [1948] 1 All ER 599 (CA)
State Rail Authority of New South Wales v Earthline Constructions Pty Ltd (1999) 160 ALR 588; 73 ALJR 306
Watt (or Thomas) v Thomas [1947] AC 484; [1947] 1 All ER 582
White v Dickerson, Inc, 248 NC 723, 105 SE2d 51 [1958]
Williams v Boulerice, 268 NC 62, 149 SE 2d 590 [1966]

Counsel for appellants : Mr Jackson QC and Mr Waalkens
Counsel for respondent : Mr Wood QC and Mr Lydiard

Judgment

On 14 September 1994, a Boeing 737 aircraft, flying on a Polynesian Airlines service between Tonga Fua'amotu airport, Tonga, and Faleolo airport, Western Samoa, came close to disaster. When the pilot, Captain Gilfillan, attempted to lower the landing gear to land at Faleolo, the right main landing gear failed to extend because its operation was impeded by the body of a man who had stowed away in the right main wheel well, and died there of hypoxia. (At the height the plane flew, death from hypoxia in the rarefied atmosphere, or else from the extreme cold, was the fate to be expected if someone rode in the unpressurized wheel well.) Despite repeated efforts, it proved impossible to get the right landing gear to extend, so an emergency landing had to be made on the left main wheels and the nose wheel. Although this was accomplished by the pilot with extraordinary skill, it involved the plane skidding for many hundreds of meters on the right jet engine, to which damage was sustained. It is agreed that, if the Appellants succeed in their claim, their damages are US$1,906,774.57 plus interest.

The Appellants sued the Respondent, as operator of Fua'amotu airport, for damages for negligence in relation to the failure of the airport authorities, and particularly the airport security service, to prevent the stowaway, a Mr Felemi, from reaching the wheel well undetected, and concealing himself there. There is no doubt that Mr Felemi, who was being sought by Tongan police for questioning about a theft, gained access to the aircraft at Fua'amotu. But the learned trial judge held the airport authorities had not been shown to be liable in negligence for what occurred. From that decision, the Appellants appeal.

At the trial, a number of issues were debated, not all of which are still in dispute, or are significant for the determination of the appeal. One important question

was when Mr Felemi got into the wheel well. Was it while the aircraft was on the apron at the terminal? Or was it at the threshold of the runway, after the aircraft had taxied there, and just before power was applied to the engines for take-off? The Respondent argued for the latter occasion, but on this issue the Appellants were successful, and the point was not contested on the appeal. Having regard to evidence and findings not now in dispute, it must be accepted that Mr Felemi got into the wheel well at some time during a period of about 12 minutes when the aircraft was standing on the apron at the terminal, and before it began to taxi down the runway. Immediately prior to that relatively brief period, and shortly after 2 a.m., the aircraft having landed at Fua'amotu, at 1.50 a.m. and being scheduled to depart at 2.20 a.m., Captain Gilfillan carried out a routine check, in accordance with the Boeing 737 operations manual, which included an examination of the interior of the wheel well. No stowaway was there then. Departure was delayed by a search for the luggage of a passenger who had got off at Fua'amotu, and after the period of about 12 minutes to which we have referred, the aircraft taxied off. It was airborne by 2.35 am.

Some understanding is required of the position of the aircraft on the apron, which is a short distance in front of the terminal. The apron, the judge found, is 70 meters wide and 120 meters long. At the edge of it, on the terminal side, was a line of lighting towers 18 meters high, of which the centre two, each carrying quartz halogen lamps totalling 4200 watts, were in use on the night in question. The aircraft was occupying the central parking position, which was at an angle of 45^{o} to the apron edge, the right hand side of the aircraft being on the far side, and the nose being angled towards the terminal. The nearer of the lighting towers was 35 meters from the plane. This arrangement, of course, produced some shadow on the far side, that is the right side, of the aircraft, and one witness referred to a "halo-like effect", doubtless caused by light from the elevated towers shining over the aircraft and reaching the apron at some distance beyond it. The judge, however, did not accept evidence that there was deep shadow, pointing out there was no suggestion of any complaint that the Captain had insufficient light to check the exterior of the aircraft or that refuellers or baggage handlers had any difficulty. He held "there was sufficient light for the ground crews to do their routine work on the unlit side." What the Appellants suggested at the trial, as the trial judge noted, was that the stowaway came from scrub some 20 meters from the edge of the apron at the rear or rear right of the aircraft, crossed the apron, and got into the wheel well without being noticed. During his approach, he would, of course, have had some cover, from the aircraft itself, from observation by persons near the terminal. The judge found that the evidence about the range of the apron lights was not precise, but that they were of the standard suggested by the International Civil Aviation Organization. He formed the impression "that the light reached beyond the aircraft to the far edge of the apron, but beyond the aircraft it was reduced, and there was shadow. The light did not reach to the scrub, which was 20 meters or so from there." The judge concluded:

> "If this situation did occur, it occurred when there were no persons observing the right side of the aircraft. This was after the fueller had withdrawn, perhaps while the forward hold occupied everyone's attention; otherwise after the forward hold had been closed and the baggage handlers had withdrawn, probably while Mr Karalus was engaged in visiting the flight deck."

It is necessary to explain his Honour's reference to the forward hold and to Mr Karalus. Mr Karalus was the Tonga Station Manager of Polynesian Airlines, of whom his Honour made the following remarks: "In general, his role in meeting the Plaintiffs' flights at Fua'amotu was supervisory, and after ensuring that Airport Facilitation Services, which included security, were in place, he tended to concentrate on working with the aircraft while it was on the apron. He supervised loading and unloading, cleared the documentation with the flight crew after loading and gave the all-clear for departure ... As Tonga station manager with the plaintiff he was also its security manager." During the vital 12 minutes period, Mr Karalus and one of the security officers were, for some time, involved in a search of the forward cargo hold of the aircraft. The trial judge found: "At this time the forward cargo hold door, on the right side of the aircraft beneath and slightly behind the first officer's side window, remained open while a search was conducted inside the hold for baggage of an alighting passenger. The first officer, sitting on the right side, put his head out the window twice; first to check the reason for the open cargo door, and second, to enquire whether a luggage trolley noticed earlier by the captain had been removed. Engaged in both those activities on the ground was the plaintiffs' local manager, Mr Karalus." After that, the passengers being all on board and the hold door closed, Mr Karalus went to the flight deck to complete some paper work and then left, after which the steps were wheeled away, the engines started, and the aircraft moved off.

During the turn-around of the aircraft, a substantial number of people had responsibilities in connection with it. Apart from Mr Karalus and the Respondent's security officers, there were baggage handlers, the refueller, and two fire officers in the fire truck parked on the apron near the aircraft. As the judge noted, the refueller gave evidence that "there was a security guard walking around the apron, but did not specify when." Mr Karalus, speaking of the search for a passenger's missing luggage which occurred during the 12 minutes period, said that a security officer went out to the forward cargo hold with himself and the passenger. Mr Fiva, the shift supervisor of the security officers at the time, gave evidence that there were twelve security guards on duty at the terminal. His Honour made it clear that he gave credence to the evidence of Mr Fiva and to that of his superior, Mr Holi. According to Mr Fiva, ten of the security officers had assigned positions, "of which three provided security for the air-side of the terminal. These three positions were (i) immediately outside the gate by which boarding passengers left the terminal, (ii) at or near the open access from the air-side to the cargo area and (iii) the area immediately in front of the entrances for arriving passengers." Mr Fiva himself was required both to supervise the other staff and to patrol. He gave evidence that "once an aircraft stopped on the apron, he would stand at the bottom of the steps until all passengers were off, then patrol the apron during the turn-around. In particular he would move to the starboard side of the aircraft to observe the cargo holds and refuelling." Mr Holi also gave evidence of patrolling "mainly on the air-side," and said that "he went around the aircraft at least twice, and then continued circulating to check the security officers at the other posts." There was other evidence, particularly from a security officer, Mr Moeaki, of surveillance of the apron.

The trial judge referred to an expert witness called by the Respondent, who had been Chief Security Officer for the worldwide operations of Qantas for a number of years, a Mr Armstrong. Mr Armstrong had indicated that five guards on or near the apron would have been sufficient, in his opinion, under the conditions prevailing at

Fua'amotu Airport. His Honour, perhaps, slightly overstated this evidence when he said: "The Defendant's expert witness Mr Armstrong put the number of guards who should have been on or near the apron at five. If the three at the terminal and Mr Moeaki were in position on 14 September 1994, and if both Mr Holi and Mr Fiva were on and off the apron, then at most times if not at all times there were five. In closing submissions counsel for the plaintiffs submitted that the evidence of Messrs Patolo, Holi and Fiva about the regular presence of a guard on the apron had been contradicted "… My conclusion after considering all of the relevant evidence is that the conflict does not establish the plaintiff's contentions." His Honour continued: "After hearing the security guards give evidence and submit to cross-examination, my impression is that those whose assigned duties gave them responsibilities on the apron were on the apron for those duties. Messrs Holi and Fiva were performing their assigned tasks, which took each of them to the apron, and there is no evidence to suggest any inference that they were not attentive. At the terminal were Mr Moeaki and at least two other witnesses, not yet named, Mr Tu'uholoaki (near the arrivals gate) and Mr 'Ulukivaiola (outside the departure gate). In the absence of evidence for any other inference, one must find that these guards were all in position and watchful as they said they were."

The judge also referred to the evidence of the driver of the fire truck, Mr Fakatou. This, his Honour said, was "on the apron behind the aircraft and both firemen were in it. Their primary task was to stand by during refuelling and during start-up. Between times their duties included surveillance of the apron. Mr Fakatou … said he saw Mr Fiva patrolling on the apron … and another security guard."

The evidence accepted by the trial judge, which we have summarised, shows that there was surveillance of the apron by a number of security guards at the relevant time, when also two fire officers and Mr Karalus were present, who also had a duty to keep watch. But the security officers did not include anyone with an undivided and specific duty to watch the area on the right hand side of the aircraft, which was partially obscured by the aircraft itself from positions on the terminal side of it, or the right hand side of the fuselage itself. The judgment makes it clear that the trial judge considered the officers were doing their duty, but nevertheless they did not see a conspicuously dressed stowaway (he was wearing jeans and a blue parka and carrying a machete, though whether in his hands or concealed on his person is not known). A question which, plainly enough, is raised by this state of the evidence is whether a further guard should have been stationed, throughout the turn-around, on the far side of the aircraft. As to this, his Honour thought that the Respondent had done all that could reasonably be required of it. In reaching this conclusion, he placed weight on the evidence of Mr Armstrong, who said: "Trespass is not uncommon at the most secure of airports, as is, to a lesser degree, stowing away in various sections of a commercial aircraft. The instance (*scilicet* incidence) of stowing away has increased over recent years mainly by oppressed people seeking refugee status out of Eastern Europe, certain parts of Africa and Asia. It is not a problem of the South East Pacific."

The judge commented that none of the evidence "had the effect of establishing in my mind that stowing away on aircraft was a reasonable likelihood against which positive measures need to be taken at Fua'amotu." The judge also pointed out that the risk of damage to the aircraft, such as happened here, would be even more remote. On the other hand, there was evidence of an incident, one month earlier, on 13 August

1994, when two unauthorized persons gained access through the cargo handling facility of the terminal to an Air New Zealand aircraft in daylight. They were two intoxicated youths, who were observed by the Air New Zealand station manager, Mr 'Aho, at the end of the line of boarding passengers. When observed, they ran to the wheel well and one climbed up into it. They were restrained. The Appellants stressed that the Respondent's Director of Aviation had graphically referred to the possibility of damage being caused to aircraft equipment and of the death of anyone who stowed away in a wheel well. However, it was plainly open to his Honour to regard this incident as quite different from a planned and resolute attempt to gain access to the wheel well of an aircraft from the runway side of the apron at night.

The Appellants' argument, that, since Mr Felemi was able to penetrate the security screen dressed as he was (though at night), either the system must have been unsatisfactory or the operation of it was careless, verges upon, if it does not amount to, an appeal to *res ipsa loquitur*. But that mode of reasoning is not generally appropriate in cases involving the actions of third parties. For the *res* must be under the control of the defendant before it can speak of itself as to his negligence. It is notorious that the control attempted by security cordons has on many occasions been evaded by those with intelligence and determination, or luck, who have taken up the challenge. At the least, an argument along the lines of *res ipsa loquitur* would require expert evidence that evasion would not succeed if proper care were exercised: *Mummery v Irvings Pty Ltd* (1956) 96 CLR 99; [1956] ALR 795.

In the circumstances, if the Appellants are to succeed, it is necessary for them to show on the evidence some respect in which the Respondent fell below the standard of care required of it. An obvious respect to be considered is the performance of their duties by the security officers. But the trial judge saw and heard a number of them, who gave evidence. He had the opportunity, not only to consider the truthfulness of what they said, but also to form an estimate of them as men, and to reach his conclusions accordingly about the happenings on that night. He was not prepared to find them inattentive. On the contrary, he held "that the lookout kept by the security guards was on the evidence adequate and reasonable", and he concluded: "The factual contentions of the plaintiffs about an insufficient standard of security, as a cause of the boarding by the stowaway, are not substantiated by the evidence that I heard." These findings, dependent as they are on the oral evidence, are entitled to be accorded the greatest weight. In *Watt (or Thomas) v Thomas* [1947] AC 484 at 491-492; [1947] 1 All ER 582, Lord Simonds referred to "the principles laid down … for the guidance of courts of appellate jurisdiction, where the appeal is against a finding of fact by a lower court." His Lordship said:

> "Applying those principles to this case I am satisfied that an appellate court having none of those advantages which the trial judge enjoyed of hearing and observing the witnesses, was not justified in concluding that he was so clearly wrong that their judgment of fact should be substituted for his. Nor do I find in the judgment of Lord Mackay any real appreciation of the weight that should be given to the trial judge's own estimate of the value of testimony."

In the same case, Lord Thankerton said (at 488):

> "It may be well to quote the passage from the opinion of Lord Shaw in *Clarke v Edinburgh Tramways Co* [1919] SC (HL) 35, 37, which was quoted with approval by Viscount Sankey L.C. in *Powell v Streatham Manor Nursing Home* [1935] AC 243, 250. Lord Shaw said: 'In my opinion, the duty of an appellate court in those circumstances is for each judge of it to put to himself, as I now do in this case, the question, Am I - who sit here without those advantages, sometimes broad and sometimes subtle, which are the privilege of the judge who heard and tried the case - in a position, not having those privileges, to come to a clear conclusion that the judge who had them was plainly wrong? If I cannot be satisfied in my own mind that the judge with those privileges was plainly wrong, then it appears to me to be my duty to defer to his judgment.'"

That leaves for consideration the system, which relied on the numbers of officers, and their disposition, that have already been discussed. This system was adopted in a situation where there were two fire officers, as his Honour found, "required to remain on the apron throughout a turn-around and conduct security surveillance," who did so remain, whose "duty to keep a lookout was clearly established in the evidence of Mr Fakatou" (one of them), although "their authority to act as security guards was not made clear … in the evidence". Their position gave them a clear view of much of the area Mr Felemi would have crossed to the right of the aircraft. The trial judge considered their view of people on the apron would have been "good". Further, the adoption of the system must be seen in the context of his Honour's finding "that there were as well on the apron other persons employed by the plaintiffs, who were engaged in the tasks of their employment, but who had a residual responsibility through the plaintiffs' own security programme for the security of the aircraft. Of these persons, the station manager Mr Karalus in particular was aware and vigilant."

The trial judge's appreciation of the situation, as well as his estimate of the witnesses, were important for his conclusion that the system was adequate. Although this conclusion is not a primary finding of fact, it is based on an assessment of a number of facts, and is entitled to respect: cf *Jolley v Sutton London Borough Council* [2000] 1 WLR 1082 at 1089; [2000] 3 All ER 409 (HL) at 416 and 417, per Lord Steyn.

The ultimate judgment on the sufficiency of the Respondent's arrangements must also be made, of course, in the light of the relevant principles of law. The duty of care is imposed by law in accordance with the test of what "a reasonable man in the position" of the Respondent would do: *Bolton v Stone* [1951] AC 850 at 867, per Lord Reid, 868-869, per Lord Radcliffe; *Overseas Tankship (UK) Ltd v Miller Steamship Co Pty* [1967] 1 AC 617 at 642-643; [1966] 2 All ER 709 (PC), authorities cited by the judge. The standard of care to be exercised in accordance with a duty of care is also measured by what is reasonable in the circumstances: it is not a standard of unrealistic perfection, nor is it to be established by the deceptive illumination of hindsight. In *Smith v Littlewoods Organisation Ltd* [1987] AC 241 at 251; [1987] 1 All ER 710, Lord Griffiths said:

> "I agree that mere foreseeability of damage is certainly not a sufficient basis to found liability. But with this warning I doubt

> that more can be done than to leave it to the good sense of the judges to apply realistic standards in conformity with generally accepted patterns of behaviour to determine whether in the particular circumstances of a given case there has been a breach of duty sounding in negligence."

Similarly, in *Home Office v Dorset Yacht Co Ltd* [1970] AC 1004 at 1039; [1970] 2 All ER 294, Lord Morris of Borth-y-Gest said of the duty of care:

> "It was not a duty to prevent the boys from escaping or from doing damage but a duty to take such care as in all the circumstances was reasonable in the hope of preventing the occurrence of events likely to cause damage to the company."

Applying the law as to the duty and standard of care stated in these cases to the facts and circumstances as found by the trial judge, his view of which we do not think we can properly disturb, it is inescapable that, accepting there was indeed a relevant duty of care, the ultimate decision denying any breach of it cannot be reversed. We cannot say that, in the circumstances prevailing in the Pacific and particularly in Tonga, where nothing resembling an incursion from the runway side had ever occurred, the judge was wrong when he held the security arrangements fulfilled the Respondent's duty of care.

We have said "accepting there was indeed a relevant duty of care". We do accept this. The time has long gone when it could be argued that the mere fact the damage was the result of the act of a third party provided a ground for denying a duty of care. In many situations, of which the present case is an example, the duty of care relates to the prevention of the possible acts of third parties: *Home Office v Dorset Yacht Co Ltd*; *Smith v Littlewoods Organisation Ltd* at 259, 261, 272. But the Appellants placed reliance on some statements in the judgment under appeal which, if they stood alone, would wrongly state the test in such cases. In *Home Office v Dorset Yacht Co Ltd* at 1030, Lord Reid said:

> "These cases show that, where human action forms one of the links between the original wrongdoing of the defendant and the loss suffered by the plaintiff, that action must at least have been something very likely to happen if it is not to be regarded as novus actus interveniens breaking the chain of causation. I do not think that a mere foreseeable possibility is or should be sufficient, for then the intervening human action can more properly be regarded as a new cause than as a consequence of the original wrongdoing. But if the intervening action was likely to happen I do not think that it can matter whether that action was innocent or tortious or criminal. Unfortunately, tortious or criminal action by a third party is often the 'very kind of thing' which is likely to happen as a result of the wrongful or careless act of the defendant. And in the present case, on the facts which we must assume at this stage, I think that the taking of a boat by the escaping trainees and their unskilful navigation leading to damage to another vessel

were the very kind of thing that these Borstal officers ought to have seen to be likely."

410 The judge referred to the proposition stated by Lord Reid several times, and on occasion, he treated it as requiring foreseeability of the very thing that happened. But, in the end, his Honour made it clear he had not misunderstood the principle. On the third last page of his judgment, he stated the question it had been held the court must ask as: "[W]as the accident that caused the damage one of a different type and kind from anything that a defendant could have foreseen?" And, still later, he asked: "So, was the presence of the stowaway in the wheel well something of a different type and kind from anything that a reasonable defendant in the position of the present defendant could have foreseen?" Accordingly, the point fails: no error is shown.

For these reasons, the appeal must be dismissed with costs.

420 **Beaumont J (dissenting)**

Index

Introduction 178
(a) The case pleaded by the appellants 178
(b) The defences 179
(c) The conduct of the trial - the location where the Stowaway gained access 180
(d) The findings of the primary Judge on background facts 180
(e) The primary Judge's description of the evidence about the
430 events on the night of the incident 185
(f) The primary Judge's factual conclusion 192
(g) The primary Judge's rejection of the "threshold theory" 194
(h) The primary Judge's re-statement, or summary, of factual conclusions 194
(i) His Honour's conclusions on questions of law 195
CONCLUSIONS ON THE APPEAL
(a) Did the respondent owe the appellants any relevant duty
440 of care? 198
(i) The uncontroversial background facts 198
(ii) The relevant legal principles 205
(b) Did the respondent breach its duty of care? 217
SUMMARY OF CONCLUSIONS ON THE APPEAL 229
ORDERS PROPOSED 230

Introduction

The appellants, two related Western Samoan companies, instituted proceedings in the Supreme Court of Tonga, claiming damages against the respondent as the authority responsible for one of Tonga's airports. The appellants were respectively the lessee and sub-lessee of a Boeing 737 aircraft ("the Aircraft"). The respondent was the occupier, and responsible for the management and operation, of Fua'amotu International Airport ("the Airport"). (Although of no legal significance for our purposes, it may be noted here that the Supreme Court was informed that all parties were insured by overseas insurers.)

The appellants' claim was, relevantly, in negligence at common law. The claim was said to arise from the following circumstances. During the turn-around of the Aircraft at the Airport in the early hours of 14 September 1994, Akuila Felemi, a stowaway ("the Stowaway"), gained access to the Aircraft by climbing into the right main landing gear wheel well ("the Wheel Well"). The Stowaway died from lack of oxygen during the flight and his dead body caused the landing gear of the Aircraft to become jammed in the Wheel Well. As a result, an emergency landing at Faleolo International Airport, Apia, became necessary. During that landing the Aircraft sustained substantial damage to one of its engines. The appellants sued for, *inter alia*, the cost of repairs to the Aircraft engine in the amount of approximately $US2 million. (This amount was agreed, during the hearing of the appeal, at $US1,906,774.57.) The Supreme Court dismissed the action. The appellants now appeal from this order. The appeal has raised for our determination several important legal questions as to the liability in negligence of an airport authority, and as to the functions of an appellate tribunal.

In order to understand the issues arising in the appeal, it will first be necessary to describe the appellants' case as (relevantly) pleaded at first instance.

(a) The case pleaded by the appellants

The appellants claimed that the respondent owed them a duty of care as follows:

> "6. At all material times, the [respondent] owed (and/or assumed) a duty of care to the [appellants] to provide reasonable security and protection to all users of the Airport including the [appellants] so as to ensure: (a) security, sufficient to prevent unauthorised access to the air side and other areas of the Airport; and/or (b) adequate monitoring and/or supervision of movement of persons within the Airport; and/or (c) any unauthorised entry to the Airport is detected and acted upon; and/or (d) that aircraft using the Airport will not be subjected to unauthorised entry by any person(s) to it and/or to intrusion or interference; and (e) that they would not suffer loss and/or damage to their aircraft whilst at the Airport; … ."

The appellants claimed that their loss and damage was caused by the respondent's breach of duty of care or negligence (relevantly) as follows:

(a) Failing to prevent the stowaway gaining access to the 'air side' and other areas comprising the Aerodrome of Fua'amotu Airport.
(b) Failing to detect the stowaway's access to the areas referred to in (a) herein.
(c) Failing to prevent the stowaway gaining entry to the aircraft by its wheel well.
(d) Failing to detect the stowaway's gaining entry to the aircraft as referred to in (c) herein.
…
(f) Failing to provide reasonable perimeter guard patrols and/or intrusion detection devices to protect the areas comprising the Airport.
…
(k) Failing to provide any or any sufficient mobile or other reasonable security force to protect aircraft within the Airport.
(1) Failing to re-evaluate security measures and procedures adopted by it and to take remedial action to prevent attempted stowaway action following previous stowaway attempts including an incident on or about 13 August 1994 at Fua'amotu Airport. …"

The appellants also pleaded the doctrine of *res ipsa loquitur*.

(b) The defences

By its defence, the respondent put all the claims of negligence in issue, but raised no special defences. No defence of contributory negligence was raised, although at times during the proceedings the respondent appeared to suggest (and, as will be seen, his Honour's reasons seem at some points to pick up the suggestion) that the appellants' own responsibility to safeguard their own aircraft reduced the respondent's responsibility to provide security **at the Airport's apron** to all persons and property requiring protection, including the Aircraft. In any event, as will be seen, on the uncontroversial facts, it is plain (a) that the appellants were not guilty of any contributory negligence, and (b) that the respondent in no **relevant** sense relied upon the appellants to provide security at the Airport, in particular at the apron. The contrary was not suggested by the respondent on the appeal. At the same time, it was naturally expected that the appellants would co-operate in the planning and implementation of the respondent's own security arrangements, and in fact, the appellants did co-operate.

It should also be noted that, initially, the respondent sought to deny liability on the ground that the appellants' claim was a special one in negligence for "pure" economic loss. His Honour mentioned the well-known legal difficulties of establishing such a claim. But it was clear, as the respondent now accepts, that the appellants' claim was a conventional one for damages for negligence which caused physical damage to the Aircraft's engine. The claim was never one for "pure" financial loss.

(c) The conduct of the trial - the location where the Stowaway gained access

At the trial, a major factual dispute arose as to the location where the Stowaway actually gained access to the Aircraft. The respondent's case was that it was more likely that he climbed into the Wheel Well at the threshold of the runway (some distance from the terminal); and that there could scarcely be liability on the part of the respondent to guard against such an unlikely event. For their part, the appellants' case was that it was immaterial where the Stowaway gained access, in that the respondent's perimeter fencing, lighting, access control and security patrols were insufficient to deter premeditated intrusion onto the Airport and/or to apprehend an intruder, wherever the Stowaway boarded. Nonetheless, the appellants contended (and as will be seen, the trial Judge subsequently held) that the more likely entry place was the apron outside the terminal. At the trial, neither side suggested that boarding could have occurred at some point other than either the apron or the runway threshold.

(d) The findings of the primary Judge on background facts

It will be necessary to refer here to his Honour's findings on background facts. His Honour's reasons are lengthy, but his material findings in this area may be summarised as follows:

(1) Security of the Aircraft while on the apron was a responsibility undertaken by both the appellants and the respondent independently.

(2) The appellants' responsibilities were vested in Mr P D Karalus, their Tongan station manager. His role in meeting flights was, in general, supervisory. After ensuring that airport facilitation services, including security, were in place, he tended to concentrate on working with the aircraft while it was on the apron. He supervised loading and unloading, cleared the documentation with the flight crew after loading, and gave the all-clear for departure. Under his supervision up to twelve other staff engaged in handling passengers, cargo and documents, up to six of whom would be working around the apron. These were the aircraft marshaller, cabin cleaners and baggage handlers. In addition, there were refuellers and the crew of the fire tender on the apron, but these were not under Mr Karalus' control.

(3) Mr Karalus said in evidence that in the month of September 1994, the respondent's airport security staff were not on the apron, except to stand at the bottom of the steps during disembarkation. He saw none on the apron during the turn-around on 14 September, although this position changed after that night. However, he felt no unease about security on the night, to the extent that he was able to identify the people who were on the apron. After the cabin door was closed and the steps removed, he

visually checked the front and rear hold doors, checked to see whether the aircraft fuel display panels were secured, and checked the position of the fire tender on the apron. He signalled the all-clear and the aircraft taxied away.

(4) Mr Karalus was aware of the manual specifying basic security measures for Samoa's Faleolo International Airport in (relevantly) these terms:

"A vital part of the programme is to maintain an acceptable level of vigilance. Even though there may be no specific security alert, experience shows that by the very nature of its operation an airline is constantly at risk. Accordingly at all times the following basic security measures are to be implemented:

…

(c) Polynesian Airlines staff should be alert to challenge unauthorised persons or unmarked vehicles.

(d) Periodic checks to be conducted of doors/gates which should be kept locked to ensure that they are secure.

…

(g) Pre-flight check - (International aircraft). Flight crews and maintenance staff will ensure that the interiors and exteriors of aircraft are inspected for questionable or unaccounted-for articles prior to boarding or loading. This procedure must apply at all ports. …"

(5) The Samoan manual's description of the duties of the airport security manager included:

"(3)Ensuring that airport access points are guarded, locked or kept under surveillance as appropriate.

…

(7) Arranging for tarmac patrols as appropriate to cover the Airline area of responsibility.

…

(11) Maintenance and monitoring of security practices. The Security Manager will establish and maintain a quality assurance system to confirm that all aspects of the Airline Security Programme are maintained to the established standards for all departures. Records for quality assurance checks and procedures are to be maintained and the results of all checks recorded and made available for inspection by persons authorized by the various Civil Aviation Authorities of countries to which Polynesian Airlines operates. …"

(6) Mr Karalus said, in evidence, that in Samoa most of the responsibilities of the security manager were delegated to

and performed by the airport authority, and that the appellants expected the airport authority to attend to them. His responsibility under the manual, he said, was to ensure that the airport authority did attend to them.

(7) Mr Karalus emphasised in his evidence that the appellants relied upon the civil aviation authority to provide security, that is, the physical ways of ensuring security, such as fences and guards. The appellants' concern at the time had been about people on the "air-side" of the terminal without identification. ("Air-side" is the movement area of an airport, adjacent terrain and buildings or portion thereof, access to which is controlled.)

(8) There had in fact been an incident exactly a month before, on 13 August 1994, when two unauthorised persons gained access to the air-side of the terminal of the Airport during the turn-around of an Air New Zealand aircraft. This incident occurred in daylight. Two youths were lingering at end of the line of boarding passengers; when observed by the Air New Zealand station manager, Mr Lui 'Aho, they ran to the wheel well; one climbed up into the starboard (right) well; the other was about to follow, when the ground staff stopped him. The youths were said by Mr 'Aho to be drunk.

(9) In a report to the Director of Civil Aviation on 15 August 1994, Mr 'Aho pointed out the potential for fatalities occurring from tampering with the fittings etc in the wheel wells. In a memorandum to the Director of Civil Aviation written on 15 August, the Chief Airport Supervisor, Soane Patolo, stated that the incident had occurred as a result of the failure of the aviation security service to comply with the procedure then in place to prevent unlawful access to the air-side through the central part of the terminal building. Mr Patolo noted that the procedure provided for three separate points of defence, which should be manned while an international flight was being processed: (i) the domestic departure access; (ii) the cargo make-up area; and, significantly, (iii) the apron. Mr Patolo himself found no fault with the security procedure, but only with the deployment of the staff on duty at that time.

(10) The Director of Civil Aviation disagreed to a point, and wrote to one of the Principal Civil Aviation Officers (Mr Sitafooti 'Aho) that the failure had been by the officer on duty at the entrance to the departure hall. The Director's immediate action, on 16 August, was to require the airport security staff to adopt rigid checking and patrolling procedures for the following thirty days. This was designed to prevent a recurrence of unauthorised access through the terminal building, particularly at the check-in

area, but he required no new security measures. In an associated memorandum to the Police Commander, the Director described what would have happened had the two men not been detected. In a few words, he graphically forecast the death of the Stowaway in an event which was to occur within the thirty-day period.

(11) Mr Karalus was present when the Air New Zealand incident was discussed at the next meeting of the Airport Facilitation Committee on 9 September, at which the representative of the Air New Zealand ground staff (Mr 'Aho) was commended "for the efficient manner in which they [the airline ground staff] met their security obligations … by preventing two youths, who had penetrated the airport security defence and reached the aircraft while passengers were boarding."

(12) The International Civil Aviation Organisation's ("ICAO") security manual for the surveillance and guarding of commercial aircraft provided (cl 4.7.5) that:

> "[t]he first line of defence against unauthorized access to aircraft is the safeguarding of the land-side/air-side boundary. The prevention of unauthorized access to aircraft within this boundary also depends on security measures taken in the immediate proximity of the aircraft and in the general area";

The security manual further provided that the -

> "[b]asic responsibility for the security of aircraft rests with the [airline] operator, whose plans should take into account the airport security programme so that there may be co-ordination of effort and response.

(13) It followed from the ICAO provisions at least, that there was a clear security onus on Air New Zealand ground staff in the first incident and, in the second, on the appellants. However, only the civil aviation authority (i.e. the respondent) provided security surveillance. The appellants did not do so, and by no security programme were they expected to. This seems self-evident in the terminal building, but is valid also in respect of access via the perimeters of the Airport. It was not part of the appellants' security programme to provide security staff at the land-side/air-side boundary and thus ensure a safe airport. Nonetheless, by virtue of the above provisions of the documents, the appellants did have their own ("basic") responsibility to provide vigilant ground-handling staff and a safe turn-around.

(14) The formal security responsibilities of the respondent (which were rather more extensive than those of the

appellants), were set out in, firstly, the two ICAO documents, the Chicago Convention on International Civil Aviation and the ICAO Security Manual on "Safeguarding civil aviation against acts of unlawful interference", and, secondly, in the respondent's own aviation security programmes, including the Draft Tongan National AVSEC (Aviation Security) Programme, and, subordinate to that, the Aerodrome Security Programme for the Airport, as well as more specific documents, in particular the Airport Aviation Security Service Local Unit Orders.

(15) The Draft Tongan National AVSEC Programme focussed on policy directives, rather than on operational details. The methods by which the national policy statements are implemented are contained in documents such as the respondent's Aerodrome Security Programme and the security programmes of the user airlines. The Local Unit Orders are considered by the Tongan authorities to be reasonable security instructions for the circumstances prevailing in Tonga.

(16) The AVSEC Programme had been presented to the Airport users, including the appellants, at the Airport Facilitation Committee meeting held on 9 September 1994, only a few days before the present incident. The minutes of that meeting record that the respondent's stated objective was to enable it to meet, to the maximum extent, its (ICAO) obligation to safeguard international civil aviation against acts of unlawful interference. This Programme, together with the Aerodrome Security Programme, arose out of acceptance by the respondent of the international safety and security protocols. The respondent undertook, for example in the Aerodrome Security Programme (at cl 3.2), to "[e]stablish and maintain an airport environment in which aircraft operations can take place with safety and security …" and to "[maintain fences] and other such general access control measures … for the purpose of preventing inadvertent unauthorised access and deterring premeditated access to the designated security area of the airport". The respondent also undertook to "[p]rovide adequate security lighting of aircraft parking and adjacent areas" (cl 3.3). The programme noted (cl 3.3) that the "prime objective of the Aviation Security Service … [is] … to prevent acts of unlawful interference against civil aviation by … (a) screening … (b) **[foot and mobile patrols … in the security area of the airport for the detection and apprehension of intruders or any other threat which may be a threat to the security and safety**

of aircraft operation" (emphasis added). In cl 7.1, "**physical security measures**" are defined; and "**constant vigilance**" is emphasised as "*a vital factor in the maintenance of optimum security relative to this programme*". As well, "[s]ecurity fencing, gates and doors" are to be subject to "frequent inspections and surveillance", in order, *inter alia*, "to create a physical and psychological deterrent to persons attempting or contemplating unauthorised entry", and "to delay intrusion enabling operating and security personnel to detect, interrogate and, if necessary, apprehend intruders".

(e) The primary Judge's description of the evidence about the events on the night of the incident

His Honour next proceeded to describe the evidence as to the events on the night, without making findings at that stage, although much of this evidence was to prove to be uncontroversial. (As will be seen, his Honour later made findings and drew inferences concerning these events.) His Honour's description of the evidence can be summarised for our purposes as follows.

(1) Upon arrival, the Aircraft taxied to its blocks on Gate 2 at about 1.54 am. (Gate 2 is the central position of three on the open concrete apron.) The Aircraft was at an angle of about 45^{o} to the terminal building, pointing towards the right side of the terminal (looking from the Aircraft) and presenting to the terminal (and to the apron lights) its left side. There are four tall light towers for the apron, in a line on the terminal edge of the apron. Two of those towers were lit for this turn-around, i.e. the two central ones. Passengers descended the Aircraft's steps on the left side of the Aircraft (the side nearer the terminal and the lights) and walked across the apron into the terminal from about 1.55 am. The Captain (Capt T W Gilfillan) also went into the terminal and then, about ten or fifteen minutes after arrival, began his routine pre-flight exterior inspection of the Aircraft. (None of this evidence was contentious.)

(2) The apron is 70 metres wide and 120 metres long. It has three separate standard parking positions, the central one of which was the one in use at the time, along with two of the four light towers. Mr Karalus said that he noted that the nearest of these was at least 35 metres from the Aircraft and that the far side of the Aircraft, the starboard (right) side where refuelling took place, was shadowed. He called it a deep shadow. Capt Gilfillan also said that the shadow was a deep shadow. Mr Karalus said that visibility in the shadow was good enough to work by, but that out toward the edge it was hard to see. He described the conditions as almost a halo-like effect and said that

one would have to walk to the edge to see. He did not specify where the edge was, but said that the thick, high bush and saafa grass which covered much of the airport at that time grew to 20 metres from the edge of the apron. (None of this evidence was seriously in dispute.)

(3) Capt Gilfillan started his inspection in the left main wheel well by turning on the light which illuminates the interior of the well. He stood with his head inside the well, checking hydraulics and other details specified in the aircraft operations manual. He then examined the exterior of the Aircraft, including, among other items, the wheels, tyres, wings, engines and the fuselage generally. He completed his walk-around by returning to the right side wheel well (the Wheel Well), where he made similar checks and then turned off the switch inside the well. He then went up the steps to the flight deck, joining the first officer who had not left the Aircraft. (None of this evidence was controversial.)

(4) By 2.15 am, the cargo and baggage operations were complete, as was refuelling. The rear cargo hold was closed. Passengers were then walked out to the Aircraft to board. At this time the forward cargo hold door, on the right side of the Aircraft beneath and slightly behind the first officer's side window, remained open while a search was conducted inside the hold for baggage of an alighting passenger. The first officer, sitting on the right side, put his head out of the window twice: first, to cheek the reason for the open cargo door, and secondly, to enquire whether a luggage trolley noticed earlier by Capt Gilfillan had been removed. Mr Karalus was engaged in both activities on the ground. (None of this was contentious.)

(5) Mr Karalus said that the only security officer he saw on the apron came out to the Aircraft with a disembarking passenger to search for and identify some missing luggage. Mr Karalus went to the forward hold with the baggage handlers, the security officer and the passenger; the baggage was found in the forward hold. At about 2.22 am, there were one or two baggage handlers on the apron to close the forward hold, the last of the passengers was aboard, and Mr Karalus went up to the flight deck. The engines were started at about 2.25 am, and he then made his visual cheek of the front and rear cargo hold. The Aircraft left the blocks at about 2.29 am. (None of the above was controversial.) Mr Karalus suggested in his evidence that the only times when a stowaway could have approached the Aircraft would have been (i) in the period of about 3 minutes when the ground staff, including him,

were gathered at the forward hold, searching for baggage (i.e. from about 2.15 am) or (ii) in the following 7 or so minutes (Capt Gilfillan estimated a little longer, about 12 minutes) until about 2.25 am, when Mr Karalus visually checked the hold doors and the fuel display panels.

(6) As has been noted, by 2.22 am, the passengers were all on board and the hold door was closed; Mr Karalus came up to the flight deck, then left, after which the steps were wheeled away. At 2.25 am start-up procedures commenced; and at 2.29 am, the Aircraft moved off. It travelled to its right towards, and then along, a taxiway at a right angle to the runway. Almost immediately upon its entry onto the taxiway, the apron lights were extinguished. While it was on the taxiway, its speed reached 8 to 10 knots. Illumination was provided thereafter by the Aircraft itself. The lights turned on were the nosegear light, which shone ahead, the wing-root lights which shone 15 to 20 degrees to each side, and, at takeoff, the main landing lights. At the end of the taxiway, it turned right and accelerated to about 30 knots, travelling along the runway to its western end. There is a turning area (a widening of the runway surface) near the threshold. Approaching that area the Aircraft slowed to about 5 knots, veered right, circled left and, without moving below 5 knots, rolled down the runway towards its takeoff. It cleared the ground at 2.32 am. (None of this was controversial.)

(7) Throughout all this time, the fire tender had been parked on the apron, with its crew on board. In his evidence, Mr Karalus differed from the version of events given by the fire officer and security guards in their evidence. In his opinion, from where the fire truck was placed, the crew inside could not have had good visibility. However, his Honour said that he was not able to see how it could be that their view of the Aircraft and of the people on the apron was not good.

(8) [As to the lighting, his Honour said at this point (going beyond a description of the evidence) that he was satisfied that there was shadow, but there was sufficient light for the ground crews to do their routine work on the unlit (right) side. Some witnesses agreed with Mr Karalus about a difficulty, when one looked toward the far side of the apron, in the form of a "halo" effect. There was evidence that there had not been any complaint by the appellants, or anybody else, that the ground staff had insufficient lighting for moving about on the right side of an aircraft, refuelling, external cargo and baggage handling, or for checking the closure of the cargo hold

doors before giving the clearance to move. His Honour said that he had difficulty accepting the suggestion that there was a deep shadow that could make it significantly easier to achieve a clandestine approach from the scrub at the rear - said by Mr Karalus to be only 20 metres from the edge of the apron - to the underside of the Aircraft.]

(9) Mr Karalus said that during the entire turn-around, there was no airport security officer on the apron at all, except for the one who came out with the passenger looking for baggage. There had been one at the steps, but only during disembarkation. Mr Karalus disputed the evidence of the fire officer about the position of the fire truck, but there was no dispute that the fire officers were on the apron and on duty.

(10) Mr Karalus was aware that not only the airport authorities, but also the appellants, as the Aircraft operator, had to maintain security surveillance while the Aircraft was on the apron. He was not on the apron constantly, and his functions there were wider than surveillance. Nonetheless his Honour said that Mr Karalus impressed him as being experienced and aware, both of the environment and of his responsibilities during the turn-around. He was off and on the apron constantly during the turn-around. Although at one time he was in and about the terminal, and at another time he was in or looking into the forward cargo hold, and for a time he was climbing to and descending from the flight deck, he was nonetheless a busy presence and a deterrent. He had security in mind, he removed a baggage trolley from under the wing, he checked the Aircraft from the front and side after the Captain did his cheek, he checked the cargo doors and fuel display panels. Certainly, in his Honour's estimate, so long as Mr Karalus was on the apron, a heavily clad man on the apron carrying on his person a machete (the Stowaway was so clad and carried a machete) was bound to be seen.

(11) According to the evidence of the refueller (in re-examination), the period between the end of the pilot's walk-around until departure was 10 to 15 minutes. In cross-examination, he had said that he released his hose from the wing when the passengers were boarding and then packed his gear. He then took the fuel documents to the flight deck for clearance. After that, he disconnected the earth wire. This was the last thing he did before leaving the apron. He then saw Mr Karalus waiting on the grass to signal the all-clear to the Aircraft. In evidence-in-chief, he had stated that there was a security guard walking around the apron, but did not specify when this occurred.

(12) The Chief Airport Supervisor, Mr Patolo, was acting as Airport Manager at this time. He stated in his evidence that the apron was well lit during night turn-arounds. He denied that there was normally "deep" shadow on the apron and/or near the aircraft. He said that he responded to the Air New Zealand incident on 13 August by accepting that there should be increased surveillance of the apron; so did his superior, Mr Vainga Palu, who directed Mr Patolo to carry out this measure and other measures (i.e. identity card enforcement and more rigid enforcement by duty staff). He said that he had verbally directed that an additional security guard was to patrol around the aircraft on the apron during the turn-arounds. The addition of the guard at the apron was a "procedure" which had been in place since the Air New Zealand incident. He said that observance of this procedure by the officer in charge had been required since then. On 13/14 September 1994 the officer in charge was Falanisese Fiva. (It was not seriously disputed that, on some time before and certainly after the Air New Zealand incident, it was proposed that an additional security guard was to be stationed on the apron during the turn-around. However, it is now common ground that this proposal was not implemented until after the events of 14 September 1994.)

(13) On 13/14 September, as Shift Supervisor, Mr Fiva was in charge of the shift. There were twelve security guards on duty at the terminal. Ten of them had assigned security positions, three of which provided security for the air-side of the terminal. These three positions were (i) immediately outside the gate by which boarding passengers left the terminal; (ii) at or near the open access from the air-side to the cargo area; and (iii) the area immediately in front of the entrances for arriving passengers. Indicating position (ii) in cross-examination, Mr Fiva seemed to say that the post itself was within the terminal (i.e. on the land-side). Mr Fiva was himself the eleventh of the twelve, and he had no assigned guard post, because his role was to supervise the other staff. He was rostered for patrol. He had to ensure that the other guards were at their posts and performing their duties. Once an aircraft stopped on the apron, he was to stand at the bottom of the steps until all passengers were off. Then he was to patrol the apron during the turn-around; in particular, he would move to the starboard (right) side of the aircraft to observe the cargo holds and refuelling. He said he did this on 14 September. On that night, the fire truck followed the Aircraft onto the apron and parked behind it. However, his Honour noted that all of this

evidence was disputed by Mr Karalus. He said that he had very rarely ever seen people, including security officers, on the starboard (right) side of the Aircraft.

(14) Assistant Security Officer Moeaki was also on duty on 13/14 September. After finishing the screening of out-going passengers, Mr Moeaki had the duty of patrolling to check that other guards were in position. He said that he did that, and assured himself that the guards were in position outside the entrance to the arrivals hall, and outside the transit lounge. He then positioned himself in front of the cargo area. He had a good view of the apron.

(15) The twelfth security guard on duty that night was Sosefate Holi. His rank (and his role) was Senior Security Officer. He said that he, with another Senior Security Officer, made up the rosters and, when on duty, he maintained the airport duty officer's diary of all movements and events during the shift. He said that his job was mobile, involving the patrol of the Airport terminal, mainly on the air-side. Like Mr Fiva, he supervised the other officers at the ten security positions. He supervised Mr Fiva, who was also on patrol. He said that, on the night in question, he did random checks on the other officers. When the Aircraft arrived, he was standing on the air-side of the terminal, between the departure and arrival lounges. He checked on one of the security officers at the terminal; he then went to the apron. He said that he went around the Aircraft at least twice. He then continued "circulating" to cheek the security officers at the other posts. He remembered seeing one of the flight crew walking around the Aircraft, and seeing Mr Fiva on the apron. He also recalled the presence of other security officers, fire service personnel, the refueller and baggage handlers, and Mr Karalus. He saw no unauthorised person during the time he was on the apron. Although there was a shadow cast by the Aircraft on one side, visibility was still very good.

(16) Some of the respondent's witnesses, in particular Messrs Patolo, Holi and Fiva, agreed that the respondent's Aerodrome Security Programme called for security guard presence on the apron during a turn-around. They all said that this requirement was, in fact, met. The respondent's expert witness, Mr Armstrong, had put the number of guards who should have been on or near the apron at five. [His Honour here observed that "if the three at the terminal and Mr Moeaki were in position on 14 September 1994, and if both Mr Holi and Mr Fiva were on and off the apron, then at most, if not at all, times there were five".]

(17) [At this point also going beyond a mere description of the evidence, his Honour said that his "impression" was that "those whose assigned duties gave them responsibilities on the apron, were on the apron for those duties. Messrs Holi and Fiva were performing their assigned tasks, which took each of them to the apron, and there was no evidence to suggest any inference that they were not attentive." It was only the argument of the appellants, the Judge said, that they allowed an intruder to enter the Wheel Well, that raised an inference that there were not enough of them there, or if there were, that they were not keeping a proper lookout. Against that, his Honour observed, of the twelve security guards overall, at least three had positions outside the terminal on the air-side. There they were enabled to conduct general surveillance of the apron, one of them, however, for only the latter part of the turn-around; in addition, two supervising officers patrolled the apron.]

(18) The driver of the fire truck, Iupou Fakatou, gave evidence as to where the truck stood. This was disputed by Mr Karalus, but the truck was on the apron behind the Aircraft and both firemen were in it. Their primary task was to stand by during refuelling and during start-up. Between times their duties included surveillance of the apron. Mr Fakatou said that the refueller had parked on the starboard (right) side, close to the wing and the Wheel Well. He said that there was one guard patrolling the apron around the Aircraft, and three in front of the terminal. He saw Mr Fiva patrolling on the apron. Also, the baggage handlers were moving back and forth between the terminal and the cargo holds. They were on the same side of the Aircraft as the refuelling operation. He saw Mr Karalus. In cross-examination, he was adamant that he saw both Mr Fiva and another security guard, although he did not know which one. The apron was well lit, and any intruder on the apron attempting to get into either main wheel well would have been seen by himself and his colleague, and by the personnel working in and around the Aircraft. He himself saw no-one.

(19) [Again, departing from a mere description of his evidence, his Honour said that his "impression" was that the light reached beyond the Aircraft to the far edge of the apron. But, beyond the Aircraft, it was reduced, and there was shadow. The light did not reach to the scrub, which was 20 metres or so from there. Therefore, the lit distance for the Stowaway from cover to the Wheel Well, if he boarded at the apron, was not great.]

(f) The primary Judge's factual conclusions

His Honour then proceeded to state his conclusions of fact, to the following effect:

(1) The primary responsibility for physically ensuring that the Aircraft was secure was undertaken by the respondent. It was the respondent that specifically intended to provide a safe environment, and provided a purpose-trained body of security guards. These employees of the respondent were the only people present at the apron, and elsewhere at the Airport, for the purpose of keeping the Aircraft and its people secure, and who devoted their whole attention to the security of the Aircraft on the apron. On the other hand, the appellants' employees at the apron, and elsewhere at the Airport, were present for the purpose of getting on with their jobs, which for none of them (other than the flight crew), included the primary responsibility of devoting themselves to security surveillance. Their security duties, apart from the flight crew's pre-flight check, were defined as being to "be alert", "make periodic checks", etc. Nonetheless, the responsibility for security was shared. The appellants had themselves assumed, in their own security programme, the ICAO basic responsibility for the security of the Aircraft.

(2) The duties of the respondent's security officers in respect of the apron were not clearly defined at 13 September 1994. No security guard was formally rostered and specifically assigned to stand at his post on the apron while the Aircraft was there. Ten of the twelve rostered officers were specifically assigned to posts elsewhere, seven of them doing necessary work within, the terminal. Of the seven, three, possibly four, had sight of the apron, and they were all assigned to remain near the terminal attending to their assigned duties there. Actual presence on the apron was specifically required of the shift supervisor and the senior security officer only; and each had other supervisory duties, which required them to be elsewhere from time to time, The only officers required to remain on the apron throughout a turn-around and conduct security surveillance were the fire officers. Their duty to keep a lookout was clearly established in the evidence of Mr Fakatou, but their authority to act as security guards was not made clear in the evidence.

(3) Nonetheless, during the period of the turn-around, two of the respondent's security officers (Mr Holi and Mr Fiva) were present on the apron, and were conducting security surveillance. As well, there were three other security officers in the vicinity of the terminal, and while the one

whose post was at the cargo area may have been stationed actually at the land-side (i.e. inside the terminal), nonetheless a fourth (Mr Moeaki) stationed himself immediately outside the terminal; he and at least two of the others had general surveillance of the apron.

(4) However, it was not established that either Mr Holi or Mr Fiva was present constantly. There was no arrangement between them whereby one maintained constant surveillance, while the other left the apron to perform supervisory duties elsewhere, and there was no specific evidence that the other three were, in fact, watching for unauthorised activity on the apron.

(5) Present constantly throughout on the apron were the two fire officers, who remained in their truck. At least one of the appellants' ground staff was present for most of the turn-around time.

(6) The crucial time, during which the boarding by the Stowaway must have occurred, assuming it took place on the apron, was the time between the end of the pilot's pre-flight check and the commencement of taxi. This was the last 12 or so minutes of the Aircraft's turn-around. When that time commenced, the pilot's security check of the Aircraft was complete, and the Wheel Well light, recently on, had been turned off. The passengers came out of the terminal building and went up the steps into the Aircraft. The refueller went up to the flight deck and returned to his equipment on the starboard (right) side, and then left the apron. Mr Karalus and others came to the forward cargo hold, and were engaged in a search in that hold for baggage. Those concerned then returned to the terminal.

(7) The number of people present around the Aircraft at any one time during the 12 minute period, except during the boarding, was relatively small. Each was there for an assigned task. Each was wearing a uniform. There is no strong indication that either Mr Holi or Mr Fiva were still on the apron, or that they became aware of any particular one of these events. However, they had been patrolling the apron and had stood on it, and there had been no break in the coming and going of people employed by the appellants, all of whom had a duty to be alert for unauthorised persons on the apron.

The primary Judge then concluded that boarding by the Stowaway during the 12 minute period that the Aircraft was on the apron, was established by the evidence "as a factual possibility, and has not been excluded by the evidence".

(g) The primary Judge's rejection of the respondent's "threshold theory"

It will be recalled that, although not pursued on the appeal, at the trial the respondent had contended, and the opinion evidence of Mr Armstrong (the respondent's expert) was to the effect, that the Stowaway must have gained access at the runway threshold. However, as mentioned, the unchallenged evidence of Capt Gilfillan established that the Aircraft was in continuous motion at this point, with a speed of not less than 5 knots. The experts called by the parties agreed that threshold access by the Stowaway was "challenging, difficult and dangerous". His Honour concluded that it was, in principle, less likely than access while the Aircraft was stationary. The trial Judge went on to conclude that access must have been gained on the apron. As indicated, the respondent now accepts this. Indeed, no other conclusion appeared reasonably open, given Capt Gilfillan's evidence of a "rolling" start and all of the other circumstances; for example, the lights in the Wheel Well were then off; access could only have been gained from behind the Aircraft, where the extreme noise, temperature and velocity from the "jet wash" provided a considerable barrier to entry; and the deceased's body indicated only very minor injuries. Accordingly, the respondent's "threshold theory" was rejected and his Honour confirmed that he had concluded that it was more probably than not that access had been gained on the apron. With this finding, several issues agitated at the trial, for instance, the obligation (if any) on the respondent to provide secure perimeter fencing, became academic.

His Honour then proceeded to analyse authorities on the law of negligence. I will return to this analysis below. Having considered the legal principles, the Judge next made a summary of his earlier factual findings.

(h) The primary Judge's restatement, or summary, of his factual conclusions

His Honour prefaced this "summary" with the observation that "the appellants' factual contentions about an insufficient standard of security as a cause of the boarding by the Stowaway, were not substantiated by the evidence". His Honour then went on to make a "summary" of his "major findings of fact" in, *inter alia*, these terms:

> "…
>
> (5) that the stowaway most probably boarded the aircraft at the airport apron.
>
> (6) that, if so, the time of the boarding was the period of 12 or so minutes immediately before the aircraft began to taxi.
>
> (7) that the parties shared responsibility for security of the aircraft during the turn-around, with the respondent having primary responsibility by providing the physical security surveillance.
>
> (8) that there were up to five security guards who had the aircraft and the apron under general surveillance during the period of the turn-around, two of them being singly on

the apron at different times specifically for apron surveillance.

(9) that the lookout kept by the security guards was on the evidence adequate and reasonable.

(10) that there were as well on the apron other persons employed by the [appellants], who were engaged in the tasks of their employment, but who had a residual responsibility through the [appellants'] own security programme for the security of the aircraft. Of these persons, the station manager Mr Karalus in particular was aware and vigilant."

(i) His Honour's conclusions on questions of law

Earlier, as noted, his Honour had addressed the legal issues of the duty of care, the requisite standard of care and whether negligence had been established. His Honour considered in particular the reasoning in the House of Lords in *Bolton v Stone* [1951] AC 850; [1951] 1 All ER 1078, *Home Office v Dorset Yacht Co Ltd* [1970] AC 1004; [1970] 2 All ER 294, and *Smith v Littlewoods Organisation Ltd* [1987] AC 241; [1987] 1 All ER 710.

The primary Judge said:

> "… it is clear that deleterious acts of third parties are included by legal principle among the things which an occupier must guard against, **but only if they come within the ambit of 'the very thing which is likely to happen'**. This duly in respect of third parties is thus narrower than the general duty of guarding against reasonably foreseeable injury or damage to visitors".
> (Emphasis added)

It appears that the phrase "the very thing which is likely to happen" picked up a submission, earlier cited by his Honour, made by Senior Counsel then appearing for the respondent. That submission, in turn, was intended to, but did not in truth, pick up a reference by Lord Mackay in *Smith v Littlewoods* (at 260C) to the very different notion or concept of "the very **kind** of thing that is likely to happen" (emphasis added). The context of Lord Mackay's observation will be described below. However, later in his reasons, the primary Judge said:

> "… was the presence of the stowaway in the wheel well something of a different type and kind from anything that a reasonable defendant in the position of the [respondent] could have foreseen? I think the answer to that is no [It appears that this is an error, and that the answer should have been expressed in the affirmative, consistently with his Honour's general approach]. First, should the [respondent] reasonably have foreseen that a person who had gained unauthorised access to the airport might get into the wheel-well of the [appellants'] aircraft during turn-around? Second, should the [respondent] reasonably have foreseen the damage such as the losses claimed could result … if

> [the respondent] allowed such a thing to happen? (Emphasis added)
>
> As to the first, … I find it factually was too unlikely an event for the [respondent] as operator of the airport at Fua'amotu, to foresee reasonably as a probable event at Fua'amotu. Apart from that, it cannot he said on the evidence … that the [respondent] had any reason to expect that any unauthorised person would get into the wheel well of the [appellants'] aircraft. The previous incident of entering a wheel well one month previously was a foolish act, without any possibility of completion. The seriousness of that event centres round the lax security in the terminal at the passenger entry point. On the apron there were lights, which always till then had seemed adequate to all concerned. There were security guards, fire officers, a refueller and the [appellants'] ground staff including its station manager. If the boarding had been at the threshold, that was not only rare, but it was difficult, particularly on a rolling start.
>
> As to the second, I am able to find that the [respondent] was bound reasonably to foresee that, if an unauthorised person did stow away in a wheel well, he or she would probably die. After that, however, … there was nothing to show that it was reasonable to expect that, before or after death, his or her body would come to be in a position that blocked the descent of a wheel. It is a more remote probability that, having jammed the wheel, the body would cause the aircraft to sustain engine damage."

[I return to this later, but it will be noted that his Honour here departed from counsel's misstatement of the test ("the **very thing**") and instead referred, in accordance with the settled course of authority, to "something of a different type and kind". However, as has been seen, his Honour proceeded, erroneously in my view, to test the matter by reference to the precise circumstances of the present case (ie "very thing").]

Noting that the respondent's submission focussed on the foreseeability of the particular stowing-away that had actually occurred on the night in question, his Honour referred to the opinion evidence given by the respondent's expert witness, Mr Armstrong, expressed in these terms:

> "Trespass is not uncommon at the most secure of airports, as is, to a lesser degree, stowing away in various sections of a commercial aircraft. The instance of stowing away has increased over recent years mainly by oppressed people seeking refugee status out of Eastern Europe, certain parts of Africa and Asia. It is not a problem of the South East Pacific.

The primary Judge said:

> "None of [the] evidence … had the effect of establishing in my mind that stowing away on aircraft was a reasonable likelihood against which positive measures need to be taken at Fua'amotu."

His Honour went on to say:

> "A dead body that somehow descends and jams the wheel as … happened in this case is something that the evidence shows is rare indeed. If these were the only facts I would hold that there was no duly of care that required the defendant to take preventative action against them."

His Honour cited the expert opinion evidence of Mr Armstrong that the security precautions taken generally at Fua'amotu Airport were adequate and said:

> "… what is reasonable in guarding against any risk must be assessed against the risk itself. The risk assessed must include not just the chances of loss or expense, but also remoteness and the value of what might be lost or spent. An example illustrates the point, even though extreme. For a bank in a major commercial city, a burglar alarm might not be a reasonable minimum precaution. Additional or better precautions may reasonably be required if reasonably assessed risk, including both the chances of loss and the value of what might be lost, indicate that more is required. For a house on a remote Pacific island the reasonably assessed risk might indicate that even the simplest burglar alarm is not needed."

His Honour stated that the ICAO recommendations had always been a matter for compliance by the respondent, as resources permit, but the respondent's overriding duty was always the duty to prevent, by whatever means are best suited, damage to users of the Airport that would be reasonably foreseeable to a reasonable person in the respondent's position. Hence patrols and static security guards were only one means to an end. At common law, these were only preventative measures which the respondent took in compliance with its general duty of care. In certain circumstances an airport operator may be justified at law in taking measures below the ICAO recommended standards. In other circumstances, it may be that mere compliance with those standards will be held to be inadequate.

In expressing his final conclusion, the primary Judge said:

> "I may perhaps conclude with the words of Lord Radcliffe in *Bolton v Stone*. Neither party relied on fairness for its case, and rightly so, for their cases rested properly on the test of culpability. As Lord Radcliffe, said (at p 868), the law of negligence is concerned less with what is fair than with what is culpable and, like Lord Radcliffe in that case, 'I cannot persuade myself that the [respondent] has been guilty of any culpable act or omission in this case.'"

Conclusions on the Appeal

It will be convenient to consider first whether the respondent owed the appellants any relevant duty of care.

(a) Did the respondent owe the appellants any relevant duty of care?

In order to put this issue in context, it will be necessary to recall the **uncontroversial** background facts:

(i) The uncontroversial background facts

- As his Honour noted, and as the ICAO security manual stated (cl 4.7.5): "The prevention of unauthorised access to aircraft … depends on security measures taken **in the immediate proximity of the aircraft** and in the general area …". (Emphasis added).
- Although his Honour did not specifically mention it, the respondent's expert, Mr Armstrong, also emphasised this aspect in his unchallenged evidence on this point. In his report dated 28 March 1998, Mr Armstrong said (para 17):

  > "**Regardless of the number of mobile patrols of the Airport Authority, a person intent on trespass would elude detection short of constant surveillance with the aid of the most sophisticated modern equipment.** In such cases **it is the intent of the Airport Authority to protect the aircraft against acts of unlawful interference. In the case of Tonga** [… where the cost of acquiring modern equipment could be onerous], that [i.e. protection of the aircraft against unlawful interference] **can best be achieved by close security attention to the restricted area where the flight is parked** …". (Emphasis added)

- As his Honour noted, mobile patrols were mentioned in the respondent's Aerodrome Security Programme. It will be recalled that, by this Programme (1) the respondent undertook (cl 3.2) to "[e]stablish and maintain an airport environment in which aircraft operations can take place with safety and security … [and to maintain] … **general access control measures to the designated security area** of the airport"; (2) (cl 3.3) "the prime objective of the Aviation Security Service … [is] … to **prevent acts of unlawful interference** against civil aviation by … (a) screening … (b) [**f]oot and mobile patrols in the security area of the airport for the detection and apprehension of intruders** or any other threat which may

be a threat to the security and safety of aircraft operations"; and (3) (cl 7.1) "**constant vigilance**" was emphasised as "a **vital factor** in the **maintenance of optimum security** … [in order] to create a physical and psychological deterrent to persons attempting or contemplating unauthorised entry", and "to delay intrusion enabling operating and security personnel to detect, interrogate and, if necessary, apprehend intruders". (Emphasis added)

- Although his Honour did not refer to it, an official statement of Tonga's approach to international aviation security in a regional context was in evidence. At a Regional Aviation Security Seminar held in Nadi, Fiji in October 1993, the spokesman for the Tongan Ministry of Civil Aviation introduced his country's presentation as follows:

"**Introduction**

Aviation Security has for the Kingdom of Tonga been extremely fortunate, not having to have dealt with the threat of violence, rioting, sabotage and terrorism, to date. This does not however mean it has been trouble free.

Many of the issues that the Kingdom of Tonga has had to address are in some respects synonymous with the region, more particularly the small Pacific Island states. The main issues being finance, available manpower with suitable backgrounds (ex policeman, militia) and a suitable infrastructure to align Aviation Security with the other important divisions (Airlines and Airport administrations).

The Aviation arena has had a fair amount of press, concerning the security measures that it has and proposes to have in place. Anyone who has had to address the amendments for Annex 17 [to the Chicago Convention] will well appreciate this."

The presentation commenced as follows:

"The enforcement of Aviation Security is to a degree only as good as the Legislation on which it is founded.

The Kingdom [of Tonga], aware of the different types of Aviation Security Legislation (British, Australian, New Zealand) knew, that whilst development of its airports and technical equipment were essential, so [was] the development of its Aviation Security program.

Development of infrastructure would have to be married with a feasible Aviation Security program. The three main aspects are:

1. *Aviation Security Legislation*
2. *Aviation Security Program*
3. *Suitably qualified and trained personnel*

Legislation of Aviation Security, in the Kingdom, is encapsulated under Part V of the Civil Aviation Act, 1990 (Appendix 1). Aspects covered include:

a. *Authority* for *the Minister for Civil Aviation to establish an Aviation Security Service*
b. *Functions of the Aviation Security Service*
c. *Designated security areas*
d. *Search of persons and goods*
e. *Powers of arrest*
f. *Offences and penalties"*

Turning to the subject of security equipment, the presentation continued:

"Security Equipment

The Aviation Security Services within the Kingdom have available to them:

X2 X-Ray detection units (Rapiscan 2 and Linescan E-Scan)

Used for the detection of firearms, knives and in some instances incendiary devices.

Problems associated with the equipment are, the specific training required for defection of incendiary devices by the operator, the initial cost for purchase, leaving appropriation of this type of equipment to Aid Programs.

Which leads on to the fact that the equipment usually of European manufacture has a time consuming and costly spare parts problem.

X1 Walk through metal detector (Astro 200)

Problems associated with this type of equipment are those similar to the X-Ray detection units.

X1 Patrol vehicle (Land Rover 6 seater)

Used for the patrolling of the airport boundary and as a quick response vehicle in an emergency.

X9 Communication facilities (Icom IC-A20)

Used for the routine reporting of patrols

X4 Hand wands (Nikka Densor LTD)

Used for body and personal searches."

The presentation concludes:

"Conclusion

I wish to close this presentation with an adage, which I consider rather apt for my Pacific brethren gathered at this seminar, passed on to me by my colleague I.T. Howard Pelatini (Aviation Security, Fiji).

quote 'The biggest threat to Aviation Security is the belief that there is no threat' *unquote.*

Words I believe that if considered seriously would in their own right provide for a safer Aviation Security environment with the Region."

- Samoa, another country of this region, had also (as his Honour earlier noted) accepted the need for security at an international airport. The Judge mentioned the references in the Samoan programme to "an acceptable level of vigilance" as "vital" and the statement that "[e]ven though there may be no specific security alert, experience shows that by **the very nature of its operation an airline is constantly at risk**". (Emphasis added)
- As his Honour mentioned, the uncontroversial details of the occurrence of the Air New Zealand incident at the Airport on 13 August 1994 (just one month before the subject incident), and what resulted, were officially noticed. But details of the official reaction were, in my view, important and should be mentioned. The response was as follows:

(a) On the day of the incident, the Airport's Senior Security Officer prepared a confidential AVSEC Incident Report Sheet, describing the incident as "Unlawful entry to Aircraft". The report stated that two boys, who were drunk, were trying to run away to New Zealand on Air New Zealand, and "got thru the conveyor belt and joined the pax going to aircraft. They [tried] to get on one of the wheels but 2 A/NZ staff [pulled] them back …". The Senior Security Officer said that he was "surprised when I saw [Mr] Aho and the other A/NZ guy holding these two guys ...". He stated that "this was my first night on the scene. I hurried there, there was no security personnel around". When he "question[ed] the security at the entrance to check-in area, and the security at the base, they didn't recognise anything about this".

Under the heading "Recommendations", the following was stated:

"Short of staff, as some of the personnels were controlling 2 positions. This may cause the unknowing of

this act. One should be patrolling and may be lack of walking around, and of being **ALERT**." [Emphasis in original]

(b) Mr 'Aho, as an Air New Zealand agent, wrote a letter of complaint dated 15 August 1994 to John Best, Tongan Director of Civil Aviation, also sending a copy to Mr Patolo as the Airport Manager (Chief Airport Supervisor). The letter stated:

> *"I am writing to express my concern at an incident which occurred on Saturday 13th instant at the airport before the departure of our flight NZ64 for Auckland.*
> *Check in of flight NZ64 was completed at […] hrs boarding started at the same time.*
> *At about […] hrs two local youths* ***presumably access[ed] the airside through the baggage belt*** *and proceeded to the aircraft with the last passenger to board. As the last passenger boarded, they lingered beside the stairs for a few seconds.*
> *As I was standing nearby with two of our baggage boys, they suddenly rushed and sneaked into the starboard side wheel bay of the aircraft.*
> *The youths were restrain[ed] instantly by ourselves and were both dragged into the terminal area. They were later handed over to your security officers and the Police.*
> *Although, the incident was an amateur attempt by two local youths to stowaway, but may be fatal to both of them and also the passengers and crews should they tamper with the wheel well's fittings etc.*
> *As a result, Air New Zealand is very much in doubt as to the efficiency of the security system now in place at the airport and what measures you have in place to counter such incidents."* (Emphasis added)

Mr Best made a notation on a copy of the letter for his staff that he had "requested a full enquiry and report from Airport Management".

(c) The Chief Airport Supervisor, Mr Patolo, wrote a report to Mr Best dated 16 August 1994 entitled "Security Incident - Unlawful entry with intention to Stowaway" as follows:

> *"Two local youths - Lafaele Fe'ao and Hapakuki longa both of Kolofo'ou gained access into the airline counter through the door immediately beside the conveyor belt door and rode the belt to the airside, while Air New Zealand flight 64 was boarding on Saturday 13 August 1994. On entering the airside they joined the departing*

passengers who were proceeding to the aircraft from the departure lounge. Upon reaching the step, they broke away from the passengers and headed toward the rear undercarriage and entered the compartment. Both were apprehended by the airline staff and brought back into the Terminal Building. The youths were first observed by airline staff when joining the departing passengers from the cargo make-up area.

The timely action taken by the Air New Zealand ground Staff has indicated that the airlines are meeting their security obligation as demanded by ICAO and specified by the National AVSEC programme.

The incident however, occurred as a result of the failure of the aviation security service to comply with the procedure currently in place to prevent unlawful accesses into the airside through the central part of the building. The procedure for three separate points of defence, which should he manned while an international flight is being processed, between the airline check-in counters and the aircraft. The three points are, the domestic departure access, cargo make-up area and the apron. [Underlining in original]

On Saturday the 13th, eleven security staff were rostered for duty. Two were absent and one reported sick. As a result of this shortage, only one officer was detailed to cover the domestic departure access, the cargo make-up area and the domestic arrival exit. No apron foot patrol was provided. Obviously the cargo make-up area was left unsecured at the time of entry and the absence of the apron foot patrol left the first line of defence, i.e. aviation security service, wide open. [Underlining in original]

It can be established from the above that ***the failure was due to the inability of the officer-in-charge of the shift to deploy his available resources in a way so that coverage of critical areas is achieved. It is a human failure rather than procedural.*** [Emphasis added]

Both youths were handed over to the Police for questioning and further investigation.

The late submission of this report was due to the absence of a detailed report on the incident which should have been filed by the security service and handed in to this office on Monday morning.

(The above underlining was made by Mr Best.) Mr Best made two notations on the report. First, beside the statement that two security staff were absent, Mr Best noted:

"Why and what done ..."

Secondly, Mr Best wrote this note at the foot of the report:

"Security Service is very poor - spoke with [Mr] Aho. Must do something. Responsible officers to be disciplined accordingly ..."

(Mr 'Aho gave evidence (transcript p 100) that Mr Best had "apologised" and said that "**Civil Aviation was going to put out an alert to try and improve security at the Airport**" and "**assured [Mr Aho] that security would be tightened**". (Emphasis added)

(d) Mr Best wrote a note dated 16 August 1994 to Mr Sitafooti, Principal Aviation Officer, as follows:

"I have spoken to Vainga [Palu] [Mr Patolo's superior] about this and in the first instance have suggested the following:

Tomorrow when you address the Security Staff about (a) the importance of this incidence and (b) about their failure to prevent access (I really think that the fault lies with the person on duty at the outside 'birdcage' checking-in area door, as had they not entered here, they would never have been able to get to the baggage conveyor belt) ***you should insist on the following procedures for the next 30 days:***

(a) Security Staff physically check each person's airport ID card (close-up) for validity, correct coding and that the picture matches the wearer.

(ii) That (i) above should be carried out on every card holder irrespective of rank, personal familiarity or whatever, and where, discrepancies arise questions are asked, notes taken and appropriate action taken.

(iii) No person other than a bona fide passenger ID card holder (appropriate card) while, on duty a temporary card holder, or any other authorised person should he admitted to the check-in area.

(iii) ***All other access to airside patrolled, or if not, doors locked at all times****."* (Emphasis added)

(e) At the time, Mr Best also wrote to Police Commander Sinilan as follows:

"With reference to the attached report, ***should both men have not been detected prior to the aircraft's departure,*** *the following scenarios could have occurred:*

1. ***A serious malfunction of the aircraft's undercarriage, thereby endangering the lives of all on board.***

2. Both men would have died through hypoxia (lack of oxygen) at cruising altitude, probably about 30 minutes after takeoff.

3. At cruising altitude, both men would have been subject to 30 or 40°C below freezing and died within minutes, as the wheelbay or wheel well is neither pressurised nor heated." (Emphasis added)

- A decision had been made about four years earlier that, in addition to the existing number of security personnel, there would always be a security guard (i.e. an additional guard) stationed (permanently) on the apron. However, that decision was not implemented until after 15 September 1994. (Evidence of Mr Fiva, the respondent's shift supervisor, transcript p 410; evidence of Mr Patolo, Chief Airport Supervisor, transcript p 129.)
- By memorandum to the Secretary for Civil Aviation dated 16 September 1994 on the subject "Additional Security Measures", the Chief Airport Supervisor (Mr Patolo) described the additional security measures which had been implemented on and from 14 September 1994. They included the suspension of the issue of temporary identification passes, "strict enforcement" of procedures for the use of identification cards, and the following:

  "3. ***Security guard is provided to secure aircraft on the apron in addition to foot patrol****.*

  4. Mobile control of western area at night time when international flight is operating.

  5. Positioning of a mobile surveillance unit on the western end of the runway for night time take-off ..." (Emphasis added)

(ii) The relevant legal principles

Uninstructed by authority, one would have thought it beyond reasonable argument that, in the circumstances, consisting of these uncontroversial background facts, the respondent, as the occupier, manager and operator of the Airport had assumed responsibility, that is, owed a duty of care, to the operator of an aircraft to plan and implement a security system which had, as its objective, the prevention of unauthorised access by third parties to the apron. In other words, one would have thought, in the above circumstances, that it was plain beyond argument that the respondent had assumed responsibility for security on the apron, and owed all concerned a general duty of care accordingly. Indeed, it would be no overstatement to say that, in the above circumstances, it would be an astonishing outcome if the common law did not impose upon every international airport authority in the 1990s, and upon this authority in particular in September 1994, a general duty of care to take reasonable steps to provide security in order to prevent unauthorised access to the air-side area. The respondent's own security programmes were explicit to this effect. Although this issue was apparently contested by the respondent at first instance, and although his Honour apparently accepted the arguments advanced by Counsel then appearing for the respondent (see the references above to "the very thing"), Senior Counsel now appearing for the respondent, as I followed his argument, did accept

before us that his client did owe a general duty of care to provide proper measures to secure an aircraft on the apron.

The principles are well settled. They are conveniently stated in Halsbury's Laws of England, 4th Ed (Re-issue) at 429-30:

> ***"610. Liability for omissions****. The courts are unwilling to hold that a person is liable for failure to act. It is not enough that harm is a foreseeable consequence of that omission; a bystander is not liable for carelessly allowing a blind man to walk over a cliff to his death without warning him of the danger. However, a* ***duty to act may be imposed where the defendant has undertaken a responsibility for the plaintiff himself, or for property or for third parties causing damage to the plaintiff. Responsibility for the plaintiff may be based on the general nature of the relationship, or the specific conduct of the defendant either by exposing the plaintiff to danger, or by creating an expectation that he will act to protect the plaintiff.*** (emphasis added)
>
> ...
>
> *611.* ***Responsibility for the conduct of third parties****. There is no general duty to prevent a third party from causing damage to another, but there are* ***four special circumstances in which a duty may arise: (1) where there is a special relationship between the defendant and the plaintiff based on an assumption of responsibility by the defendant; (2) where there is a special relationship between the defendant and the third party based on control by the defendant over certain classes of persons;*** *(3) where the defendant is negligently responsible for a stale of danger and it is reasonably foreseeable that a third party may interfere with it and cause damage by 'sparking off' the danger; "* (emphasis added)

Although the respondent's submissions to his Honour appeared not to accept it, none of the foregoing is controversial. If specific authority be needed to support these well-established statements of legal principle, it may be found in a number of decisions of the House of Lords and the Privy Council, several of which are cited by Halsbury and were mentioned by his Honour.

As has been seen, his Honour was much influenced by *Bolton v Stone*. But, in my view, the facts of that case can provide no useful analogy here. Indeed, it is difficult to imagine circumstances more remote from the present, where the environment and potential for a catastrophe involving many persons or property, demanded the highest level of security, as the respondent's own documents and instruments, for good reason, clearly acknowledged.

In *Bolton v Stone*, the plaintiff was hit by a cricket ball while standing on the highway outside her house in a suburb of Manchester. The ball was hit by a batsman in a match played on a ground adjacent to the highway. The plaintiff sued the committee and members of the local cricket club for damages for negligence. The striker of the ball, a member of a visiting team, was not sued. The ground was enclosed on the highway side by a seven-foot fence, the top of which, owing to a slope, stood seventeen feet above the level of the pitch. The wicket from which the

ball was hit was about seventy-eight yards from this fence and 100 yards from where the plaintiff was injured. There was evidence that while, over a period of years, balls had been struck over the fence on very rare occasions, the hit now in question was altogether exceptional. The House of Lords held that the members of the club were not liable.

Lord Porter noted that there was "a conceivable possibility" that someone would be hit. But so extreme an obligation of care cannot be imposed in all cases. If it were, no one could safely drive a motor car, since the possibility of an accident could not be overlooked, and if it occurred, a stranger might well be injured however careful the driver might be (at 858). The quantum of danger must always be a question of degree. It is not enough that there is a remote possibility that injury may occur, the question is, would a reasonable man anticipate it (at 860)?

Lord Normand said that it is not the law that precautions must be taken against every peril that can be foreseen by the timorous (at 860 - 861).

Lord Reid said that it would be right to take into account not only how remote the chance is that a person might be struck, **but also how serious the consequences are likely to be if a person is struck;** but it would not be right to take into account the difficulty of remedial measures. If cricket cannot be played on a ground without creating a substantial risk, then it should not be played there at all. This was in substance, the test which the trial judge, Oliver J, had applied in dismissing the action. Oliver J considered whether the club's ground was large enough to be safe for all practical purposes, and held that it was. This is a question, not of law, but of fact and degree (at 867).

Lord Radcliffe said that there was only a very remote chance of the accident taking place at any particular time (at 868). A reasonable man, taking account of the chances of an accident happening in this way, would not have felt called upon either to abandon the use of the ground for cricket or to increase the height of his surrounding fences. He would have done what the club did: in other words, he would have done nothing (at 869).

Bolton v Stone was considered recently by the House of Lords in *Jolly v Sutton London Borough Council* [2000] 1 WLR 1082. Lord Hoffmann, in considering (at 1092-1093) whether the accident which actually happened was reasonably foreseeable, said that although this was in the end a question of fact, the courts are not without guidance. "Reasonably foreseeable" is not a fixed point on the scale of probability. Other factors have to be considered in deciding whether a given probability of injury generates a duty to take steps to eliminate the risk. In *Overseas Tankship (UK) Ltd v Miller Steamship Co Pty Ltd* [1967] 1 AC 617, 642 (*"The Wagon Mound (No 2)*"), the Privy Council took into account whether avoiding the risk would have involved the defendant in undue cost or required him to abstain from some otherwise reasonable activity. In *Bolton*, there was a foreseeable risk that someone might one day be hit by a cricket ball, but avoiding this risk would have required the club to incur very large expense or to stop playing cricket. The House of Lords decided that the risk was not such that a reasonable man should have taken either of these steps to eliminate it. On the other hand, in *The Wagon Mound (No 2)* the risk was caused by the fact that the defendant's ship had, without any need or excuse, discharged oil into a harbour. The risk of the oil catching fire would have been regarded as extremely small. But a reasonable man would neglect such a risk

only if there was a valid reason, e.g. that it would involve considerable expense to eliminate it.

In my opinion, *The Wagon Mound (No 2)* provides a better analogy than *Bolton* in the present case. Here, not only were the consequences of neglecting to take proper steps to prevent unauthorised access potentially catastrophic in terms of the loss of many lives and valuable property, but the remedial measures necessary were relatively inexpensive. What was required was the provision of sufficient numbers of security personnel stationed on the apron during the relatively short time of a turn-around. Since there are few international flights per day to and from the Airport, the cost of providing security around an aircraft could hardly be prohibitive. Indeed, as I followed the argument, the respondent did not seek to suggest to the contrary. This accorded with the respondent's own proposal, originating in 1990 but not put into place until after this incident, that an additional permanent guard be stationed on the apron to secure the visiting aircraft. Although the proposal was not earlier implemented, it was never suggested that this was because it was too expensive. Moreover, ensuring that there were sufficient security personnel around an aircraft on the apron, rather than erecting a substantial perimeter fence, an expensive option, was, as noted above, the expert advice of Mr Armstrong in the circumstances (see para 17 of his report).

The closest authority for present purposes is, I think, *Home Office v Dorset Yacht Co Ltd*, above. There, seven Borstal boys, who were working on an island under the control and supervision of three officers, left the island at night and boarded, cast adrift and damaged the plaintiffs' yacht which was moored offshore, The plaintiffs brought an action for damages against the Home Office, alleging negligence in that, knowing of the boys' criminal records and records of previous escapes from Borstal institutions, and knowing that craft such as the plaintiffs' yacht were moored offshore, the officers had failed to exercise any effective control or supervision over the boys. The Home Office denied that they, or their servants or agents, owed the plaintiffs any duty of care with respect to the detention of the boys, or to the manner in which they were treated, employed, disciplined, controlled or supervised. A preliminary issue to be tried was whether, on the facts pleaded in the statement of claim, the Home Office owed any duty of care to the plaintiffs capable of giving rise to a liability in damages with respect to the detention of persons undergoing sentences of Borstal training, or to the manner in which such persons were controlled whilst undergoing such sentences. It was held by the House of Lords that the Borstal officers had owed the plaintiffs a duty to take such care as was reasonable in all circumstances, with a view to preventing the boys under their control from causing damage to the plaintiffs' property, if there was a manifest risk that this would occur if they neglected that duty.

Lord Reid said (at 1027):

> *" …* [It] *is said that the respondents must fail because there is a general principle that no person can be responsible for the acts of another who is not his servant or acting on his behalf. But here the ground of liability is not responsibility for the acts of the escaping trainees; it is* ***liability for damage caused by the carelessness of these officers in the knowledge that their carelessness would probably result in the trainees causing damage of this kind.*** *So the question is really one of remoteness of*

> *damage. And I must consider to what extent the law regards the acts of another person as breaking the chain of causation between the defendant's carelessness and the damage to the plaintiff."* (Emphasis added)

[In the present case, as the respondent's own documentation and the ICAO security manual indicated, the real risk of damage to an aircraft and its passengers and crew if unauthorised access to the area were not prevented, was distinctly acknowledged.]

Lord Reid went on to say (at 1027 -1028):

> *"* … [If] *human action (other than an instinctive reaction) is one of the links in the chain it cannot be said that, looking back, the damage was the inevitable result of the careless conduct. No one in practice accepts the possible philosophic view that everything that happens was predetermined. Yet it has never been the law that the intervention of human action always prevents the ultimate damage from being regarded as having been caused by the original carelessness. The convenient phrase novus actus interveniens denotes those cases where such action is regarded as breaking the chain and preventing the damage from being held to be caused by the careless conduct. But every day there are many cases where, although one of the connecting links is deliberate human action, the law has no difficulty in holding that the defendant's conduct caused the plaintiff loss."*

[Obviously, deliberate human action in the form of gaining unauthorised access to the apron would fall within the scope of Lord Reid's observation.]

His Lordship proceeded (at 1028) to cite *Haynes v Harwood* [1935] 1 KB 146 at 156; [1934] All ER Rep 103 (CA), where Greer LJ had said:

> *"If what is relied upon as novus actus interveniens is the* ***very kind of thing which is likely to happen i****f the want of care which is alleged takes place, the principle embodied in the maxim is no defence."* (Emphasis added)

(Lord Mackay cited this passage in *Smith v Littlewoods,* above, at 260C.)

In *Smith v Littlewoods* the defenders purchased a cinema building in 1976 with the intention of demolishing it and replacing it with a supermarket. After their contractors had done some work in June, the cinema remained empty and unattended. The security of the building was, from time to time, overcome by children and young persons, and vandalism took place in and around it, including an attempt to set fire to some old film in an adjoining close and an attempt to light a fire in the cinema itself. On 5 July 1976 a fire was deliberately started in the cinema by children or teenagers, as a result of which the cinema burned down and an adjacent café, billiard saloon and nearby church belonging to the respective pursuers were seriously damaged. The pursuers brought actions against the defenders for damages claiming that the damage to their properties had been caused by the defenders' negligence. It was held by the House of Lords that whether an occupier of property owed a duty of care to adjoining occupiers, in respect of acts of trespass on his property resulting in damage to the

adjoining properties, depended on all the circumstances of the case and on socially accepted standards of behaviour. Cases in which such a duty would exist were likely to be rare. The defenders had not known of the previous acts of vandalism in their cinema involving fire and the cinema had not otherwise presented an obvious fire risk, therefore the defenders had not been under any duty to the pursuers to anticipate the possibility of the cinema being set on fire by vandals by keeping the premises lockfast or otherwise taking steps to prevent their entry.

Lord Brandon said (at 25l):

> *"* … [So] *far as Littlewoods knew, there was nothing significantly different about these empty premises from the tens of thousands of such premises up and down the country. People, do not mount 24-hour guards on empty properties and the law would impose an intolerable burden if it required them to do so save in the most exceptional circumstances. I find no such exceptional circumstances in this case."*

Lord Mackay (at 264) cited a passage (approved also in *Dorset Yacht)* from Dixon J in *Smith v Leurs* (1945) 70 CLR 256 at 262; [1945] ALR 392, as follows:

> *"... [A]part from vicarious responsibility, one man may be responsible to another for the harm done to the latter by a third person; he may be responsible on the ground that the act of the third person could not have taken place but for his own fault or breach of duty. There is more than one description of duty the breach of which may produce this consequence. For instance,* ***it may be a duty of care in reference to things involving special danger.*** *It may even be a duly of care with reference to the control of actions or conduct of the third person. It is, however, exceptional to find in the law a duty to control another's actions to prevent harm to strangers. The general rule is that one man is under no duly of controlling another man to prevent his doing damage to a third.* ***There are, however, special relations which are the source of a duty of this nature****."* (Emphasis added)

Lord Mackay went on (at 268) to cite the following passage from Lord Reid in *The Wagon Mound (No 2)* at 642-643:

> *"... [It] does not follow that, no matter what the circumstances may be, it is justifiable to neglect a risk of such a small magnitude. A reasonable man would only neglect such a risk if he had some valid reason for doing so, eg, that it would involve considerable expense to eliminate the risk. He would weigh the risk against the difficulty of eliminating it. If the activity which caused the injury to Miss Stone had been an unlawful activity, there can be little doubt but that* Bolton v Stone *would have been decided differently. In their Lordships' judgment* Bolton v Stone ***did not alter the general principle that a person must be regarded as negligent if he does not take steps to eliminate a risk which he knows or ought to know is a real risk and not a mere possibility which would never influence the mind of a reasonable man****."* (Emphasis added)

Lord Mackay (at 269) further relied upon the reasons of Lord Wilberforce in *Goldman v Hargrave* [1967] 1 AC 645 at 662-663; [1966] 2 All ER 989 (PC) as follows:

> *"One may say in general terms that the existence of a duty must be based upon knowledge of the hazard, ability to foresee the consequences of not checking or removing it, and the ability to abate it."*

Lord Mackay concluded (at 270):

> *"... [V]arious factors will be taken into account by the reasonable man in considering cases involving fire on the one hand and theft on the other but since this is the principle the precise weight to be given to these factors in any particular case will depend upon the circumstances and rigid distinctions cannot be made between one type of hazard and another. I consider that much must depend on what the evidence shows is done by ordinary people in like circumstances to those in which the claim of breach of duty arises.*

Lord Goff said (at 272):

> *"That there are special circumstances in which a defendant may he held responsible in law for injuries suffered by the pursuer through a third party's deliberate wrongdoing is not in doubt. For example, a* ***duty of care may arise from a relationship between the parties, which gives rise to an imposition or assumption of responsibility upon or by the defender,*** *as in* Stansbie v Troman *[1948] 2 KB 48, where such responsibility was held to arise from a contract. In that case a decorator, left alone on the premises by the householder's wife, was held liable when he went out leaving the door on the latch, and a thief entered the house and stole property. Such responsibility might well be held to exist in other cases where there is no contract, as for example where a person left alone in a house has entered as a licensee of the occupier. Again, the defender may be vicariously liable for the third party's act; or he may be held liable as an occupier to a visitor on his land. Again,* ***as appears from the dictum of Dixon J in*** **Smith v Leurs,** ***70 CLR 256, 262, a duty may arise from a special relationship between the defender and the third party, by virtue of which the defender is responsible for controlling the third party:*** *see, for example,* Dorset*."* (Emphasis added)

Again, the observations of Lord Goff, far from assisting the respondent, provide powerful support for the appellants' case that, by virtue of the special (security) relationship between these parties, the respondent owed an aircraft user of the Airport a general duty of care to take proper measures to secure an aircraft from unauthorised access in the restricted area on the air-side of the terminal.

Another authority is *Jolly v Sutton London Borough Council,* above (decided after judgment at first instance here). There, a boat was left abandoned for at least two years beside a block of flats on land owned by the defendant council. The council was

aware of the boat's presence and made plans to remove it, but they were not implemented. It appeared to be sound but was in fact rotten. Two boys, the plaintiff and a friend, who were aged 14 and 13, started to repair the boat, using a carjack and some wood to prop it up. While the boys were working on the boat, it fell off the prop, crushing the plaintiff, who suffered serious spinal injuries resulting in paraplegia with major complications. He brought an action against the council for damages in negligence. It was held by the House of Lords (per Lord Browne-Wilkinson, Lord Mackay of Clashfern and Lord Steyn) that the trial Judge's detailed findings of fact and the inferences he drew from them were unimpeachable, so that there were no grounds on which the Court Of Appeal was entitled to disturb his conclusion that the plaintiff's accident and the resulting injuries were reasonably foreseeable; and that (per Lord Mackay of Clashfern, Lord Hoffmann and Lord Hobhouse of Woodborough), since the council had conceded that it should have removed the boat because of the risk that children might suffer minor injuries if the rotten planking gave way beneath them, the wider risk of more serious injury being caused by the condition of the boat, which could have been eliminated without the council incurring additional expense, also fell within the scope of the council's duty of care; and that, accordingly, the council was liable for the plaintiff's injuries.

Lord Steyn (at 1089) cited observations of Lord Reid in *Hughes v Lord Advocate* [1963] AC 837 at 845 and 847; [1963] 1 All ER 705:

> ***"The ground on which this case has been decided against the appellant is that the accident was of an unforeseeable type. Of course, the pursuer has to prove that the defender's fault caused the accident, and there could be a case where the intrusion of a new and unexpected factor could be regarded as the cause of the accident rather than the fault of the defender. But that is not this case. The cause of this accident was a known source of danger, the lamp, but it behaved in an unpredictable way."*** *(Emphasis supplied by Lord Woolf MR* [in *Jolly* in the Court of Appeal]*).*

Lord Steyn went on to say (at 1090):

> *"Lord Woolf MR observed that he had difficulty in reconciling these remarks with the approach in The Wagon Mound No 1 [1961] AC 388. It is true that in The Wagon Mound No 1 Viscount Simons at one stage observed, at p 425:*
>
> > *'If, as admittedly it is, B's liability (culpability) depends on the reasonable foreseeability of the consequent damage, how is that to be determined except by the foreseeability of the damage which in fact happened - the damage in suit?'*
>
> *But this is to take one sentence in the judgment in* The Wagon Mound No 1 *out of context.* ***Viscount Simonds was in no way suggesting that the precise manner of which the injury occurred nor its extent had to be foreseeable.*** *And Lord Reid was saying no more. The speech of Lord Reid*

> *in* Hughes v Lord Advocate *[1963] AC 837 is in harmony with the other judgments. It is not in conflict with* The Wagon Mound No 1. *The scope of the two modifiers - the precise manner in which the injury came about and its extent - is not definitely answered by either* The Wagon Mound No 1 *or* Hughes v Lord Advocate. ***It requires determination in the context of an intense focus on the circumstances of each case****: see* Fleming, Law of Torts, *9th ed (1998), pp 240-243."* (Emphasis added)

Lord Hoffman said (at 1091):

> *"[T]he present law is that unless the injury is of a description which was reasonably foreseeable it is (according to taste) 'outside the scope of the duty' or 'too remote'.*
>
> *It is also agreed that* ***what must have been foreseen is not the precise injury which occurred but injury of a given description. The foreseeability is not as to the particulars but the genus.*** *And the description is formulated by reference to the nature of the risk which ought to have been foreseen. So, in* Hughes v Lord Advocate *[1963] AC 837 the foreseeable risk was that a child would be injured by falling in the hole, or being burned by a lamp or by a combination of both. The House of Lords decided that the injury which actually materialised fell within this description, notwithstanding that it involved an unanticipated explosion of the lamp and consequent injuries of unexpected severity. Like my noble and learned friend, Lord Steyn, I can see no inconsistency between anything said in* The Wagon Mound No 1 *and the speech of Lord Reid in* Hughes v Lord Advocate*."* (Emphasis added)

Lord Hoffman observed (at 1091) that the short point in the appeal was:

> *"... [W]hether the judge ... was right in saying in general terms that the risk was that children would 'meddle, with the boat at the risk of some physical injury' or whether the Court of Appeal were right in saying that the only foreseeable risk was of 'children who were drawn to the boat climbing upon it and being injured by the rotten planking giving way beneath them': ...* ***Was the wider risk, which would include within its description the accident which actually happened, reasonably foreseeable****?"* (Emphasis added)

It is perhaps unfortunate that the House of Lords' judgment in *Jolly* was not delivered until after the decision at first instance here. In fact, counsel for the respondent did provide the primary Judge, after his Honour had reserved his judgment, with a copy of the decision of the Court of Appeal, the respondent presumably relying upon its reasoning. The primary Judge said, as it happened, that the Court of Appeal decision could be distinguished. The decision of the Court of Appeal was, of course, reversed by the House of Lords where, as has been seen, it was made clear, in accordance with the settled course of authority previously mentioned, that "foreseeability is not as to

the particulars but the genus and the description is formulated by reference to the nature of the risk which ought to have been foreseen".

In the present case, the risk that ought to have been foreseen was plain. It was the risk of unauthorised access to the restricted area air-side when an aircraft was in that area.

It follows, in my opinion, that there is nothing in any of these authorities which would detract from the strength of the appellants' case; to the contrary, there is much in their reasoning which, upon analysis, wholly supports the proposition that, given the special (security) relationship between these parties, viewed in the context of the known hazards, vividly illustrated by the recent Air New Zealand incident, the respondent owed the appellants the general duty of care previously mentioned. Indeed, as mentioned, as I followed the argument before us, the respondent did not seriously seek to dispute this.

The existence of a specific duty of care, in the case of an airport authority, is further supported by English authority.

The general liability of an aerodrome proprietor is explained in Shawcross and Beaumont, Air Law, 4th ed (Re-issue) Vol 1 at III (17) as follows:

> *"An aerodrome proprietor, as does any occupier of premises, owes the same common duty of care to all [its] visitors except so far as [its] duly is modified by agreement. The common duty of care is a duty to take such care as in all the circumstances is reasonable to see that the visitor will be safe in using the premises for the purposes for which [the visitor] is invited or permitted by the occupier to be there. The degree of care or want of care which would ordinarily be looked for in a visitor is relevant ... . In determining whether the common law duty has been discharged, regard is to be had to all the circumstances".*

In support of their statement of principle, the authors cite (Fn 3) *Fred Olsen Flyselskap A/S v Norwich City Council* (High Court, 27 July 1979) where an aerodrome proprietor was held liable for the damage caused by the ingestion of gulls into the engines of an aircraft taking off from the airfield, as there was no effective system to discover and disperse the gulls.

Shawcross and Beaumont also (at 111/59A) cite *Screaming Eagle Air Limited v Airport Commission of Forsyth County* (387 SE 2d 1990) where an aerodrome operator was held liable as occupier for damage caused by the presence of a dog on the runway. There Cozort J, writing for the Court of Appeals of North Carolina, said (at 200):

> *"The duty of an airport to an invitee has been clearly stated by this Court:*
>
> > *An aircraft landing field operator owes a duty to persons landing thereon by, invitation to maintain the premises in reasonably safe condition for contemplated use, and he must use reasonable care to keep premises in reasonably safe condition so that a person landing his aircraft there will not be unreasonably exposed to any danger. 65 CJS,*

Negligence, § 63(133), p 913; Plewes v Lancaster *171 Pa.Super. 312, 90 A. 2d 279 [1952]."*

Cozort J went on to say (at 200):

> *"... plaintiff must show that defendant failed to use reasonable care to keep the airport premises in reasonably safe condition so that a person landing his aircraft there would not he unreasonably exposed to any danger. In the first portion of its argument concerning the trial court's denial of the motion for directed verdict, defendant contends that plaintiff's evidence does not show that the dog got on the airport through defendant's negligence. Central to defendant's argument is its contention that plaintiff failed to prove how this specific dog, the one struck by plaintiff's aircraft got on the runway on the night in question. Defendant's contention is a misapprehension of the law of proximate cause and foreseeability. Our Supreme Court has stated:*
>
> > *While this Court has repeatedly said that foreseeability of injury is an element of proximate cause, it is clear that it is not necessary that the defendant should have been able to foresee the precise injury which resulted from this conduct.* Williams v Boulerice*, 268 NC 62, 149 SE 2d 590 [1966];* Bondurant v Mastin*, 2522 NC 190, 113 SE2d 292 [1960]. 'All that the plaintiff is required to prove on the question of foreseeability, in determining proximate cause, is that in the 'exercise of reasonable care, the defendant might have foreseen that some injury would result from his act or omission or that consequences of a generally injurious nature might have been expected'.* Hart v Curry*, supra [238NC 448, 78 SE2d 170 (1953)];* White v Dickerson, Inc*, 248 NC 723, 105 SE2d 51 [1958].*
>
> *Johnson v Lamb 273 NC 701, 710, 161 SE2d 131, 139 (1968)."*

Shawcross and Beaumont go on to say (ibid):

> *"The aerodrome proprietor may of course hand over control of parts of the terminal building to others, to airlines, shops, and catering concessionaires.* [It] *may escape liability if* [it] *is not the occupier of the relevant area."*

It is not, and could not be, suggested that this exception has any relevant application in the present case. Clearly, the respondent was both the occupier and the controller of the restricted air-side areas.

It appears that none of these authorities were drawn to the primary Judge's attention.

On behalf of the respondent, it is submitted that the stowaway incident could not reasonably have been foreseen by it. I cannot accept this submission.

In their explanation of the law with respect to the protection of civil aviation, the learned authors of Shawcross and Beaumont, (op cit Ch 31; at VIII (1)), noting the various forms of criminal acts against civil aviation (hijacking, terrorism, theft, assault, drug smuggling, currency offences etc.) say:

> *"Hijacking ... is, in fact, almost as old as civil aviation itself. The first recorded hijacking occurred in Peru in 1930, and there was a steady trickle of incidents thereafter, of which the series of hijackings to Cuba in the late 1950s and early 1960s received the most publicity. Between 1968 and 1970, however, the trickle became a flood, but, by 1972 the flood was beginning to recede again. In the face of a grave threat to life and property, the international community became active in new law making as seldom before: between 1970 and 1973 two new conventions specifically designed to deal with the situation were ... brought into force, and the application of measures designed to ensure that neither explosives nor weapons should find their way aboard aircraft became widespread ..."*

It will be recalled that his Honour placed much reliance upon *Bolton v Stone*. But in *Dorset Yacht*, as noted above, Lord Reid observed that the result in *Bolton* would have been different if the activity in question had been unlawful. In the present case, the relevant activity, that of the Stowaway, was plainly unlawful - gaining unauthorised access to the air-side area was a trespass to land; and gaining unauthorised access to the Wheel Well was a trespass to goods.

It is true that each member of the public has a right to enter the unrestricted zone of the terminal. But it has been held that, if this right is abused (eg by entering with the intention of gaining unauthorised access) there will be a trespass from the beginning (see *Cinnamond v British Airports Authority* [1980] 1 WLR 582 per Lord Denning MR at 588; [1980] 2 All ER 368 (CA)); to be a trespasser, it is sufficient to go into a part of the aerodrome where the public are not allowed (A W G Kean, "Aerodrome Operators — Some Legal Problems" (1966) Journal of Business Law 232 at 241).

In my respectful opinion, the innocent activity of playing cricket provides no analogy to the hazardous illegal activities in the present case.

Nor, in my view, was the existence of a duty of care to be tested in the method, previously mentioned, adopted by his Honour, that is:

> *"What caused the contact between engine and runway? It was the obstruction of the free movement of the wheel by the stowaway's dead body. This point was taken by counsel for the [respondent] who submitted that this was not a reasonably foreseeable danger against which the [respondent] could be held bound to take steps. He did not rely upon novus actus, but he did submit that the dead body did raise a different question. He relied upon case authority generally for the proposition that an occupier of property, say a building or a tree or a train platform, cannot normally be held responsible for the resultant damage suffered by*

> *a neighbour if a third party chooses to take a suicidal leap from the building or the tree or the platform. I would agree cautiously — normally so. In my opinion, by the principles which I deduce from the authorities above, the results caused by a dead body of a suicide may in the particular circumstances of any particular case be of a type and kind that an occupier could have foreseen. That is a matter of fact in any case. But in the present case I agree. A dead body in a wheel well is, by the evidence and by ordinary experience, something which is not normally taken into account by people assessing the risks to aircraft and passengers in normal commercial operations."*

In my opinion, his Honour was led, into error by these submissions of counsel then appearing for the respondent. To argue that the far-fetched examples given could provide any useful analogy here, given the recognition in the respondent's own security manuals and in its own expert's evidence of the need for constant vigilance to prevent unauthorised access, was not helpful.

(b) Did the respondent breach its duty of care?

In considering this issue, his Honour mentioned a submission by counsel then appearing for the respondent, citing Lord Dunedin in *Fardon v Harcourt-Rivington* (1932) 146 LT 391; [1932] All ER Rep 81 (HL) that:

> *"People must guard against reasonable probabilities, but they are not bound to guard against fantastic possibilities."*

And, as Lord Dunedin there said (at 392), what amounts to negligence depends on the facts of each particular case (see also Halsbury, op cit at 421). In my opinion, the uncontrovertible facts here (the security manuals, the Air New Zealand incident in particular) indicated that unauthorised access was likely to result in illegal inference with the operation of the Aircraft with a potential to cause an accident of catastrophic proportions. These were not merely "fantastical possibilities".

The appellants, of course, bore the onus of proving their claim that the respondent was in breach of its duty of care and thus negligent. Yet the respondent stood in a special position. It was not only the occupier of the subject premises, but also the manager of the security system at the Airport so far as concerned the care and control of the premises and the security precautions taken. All of the facts relating to the operation of that system on the night could hardly be directly within the appellants' knowledge. Rather, they were peculiarly within the knowledge of the respondent. The legal significance of such a combination of circumstances was explained by Dixon J, in an action for negligence brought against the owner of hotel premises by a customer who slipped on the floor, in *Hampton Court Ltd v Crooks* (1957) 97 CLR 367 at 371 -- 372; [1957] ALR 1201:

> *"[V]ery little evidence of negligence might have been enough. For the case is one where the facts can hardly be within the knowledge of the plaintiff and ... so far as concerns the care and control of the premises and the precautions taken, must be peculiarly within the knowledge of the defendant ... But a plaintiff is not relieved of the necessity of offering*

> *some evidence by the fact that the material circumstances are peculiarly within the knowledge of the defendant; all that it means is that slight evidence may be enough unless explained away by the defendant and that the evidence should be weighed according to the power of the party to produce it, in accordance with the often repeated observations of Lord Mansfield in* Blatch v Archer *..."*

In other words, as Halsbury, op cit, states [at p 476]:

> *"Where the evidence relating to negligence is particularly within the control of the defendant, little affirmative evidence may be required from the plaintiff to establish a prima facie case which it will then be for the defendant to rebut".*

It is true that the Stowaway, as the actor, of course knew what happened. But the present point is, as Dixon J noted, the relative power of the appellants and the respondents to control the evidence.

As Jacobs J said in *Dulhunty v JB Young Ltd* (1975) 7 ALR 409; 50 ALJR 150 at 151:

> *"... in circumstances such as those appearing in the present case the plaintiff need only produce slight evidence of negligence before a factual onus may shift to a defendant. The defendant, as was pointed out by Dixon CJ in* Hampton Court Ltd v Crooks *(1957) 97 CLR 367, at p 371, has the means of knowledge of precautions taken and it may be added that he also has the means of knowledge or of finding out the state of the premises before the accident.*
>
> *But there must be some evidence and the evidence must in some way show that an act or omission of the defendant was a cause of the plaintiff's injury."*

In seeking to discharge their onus of proof of negligence, the appellants were bound to accept, as established legal doctrine, as Pollock CB observed in *Byrne v Boadle* (1863) 2 H&C 722 at 727 - 728; 159 ER 299 at 301; that "…there are accidents from which no presumption of negligence can arise …". On the other hand, the respondent was bound to accept, as Channell B there put it (at 729, 301), that whilst it is not every accident which will warrant the inference of negligence, this is not to say that there is no accident which will in itself raise a presumption of negligence.

Byrne v Boodle was considered by Dixon CJ, Webb, Fullagar and Taylor JJ in the High Court of Australia in *Mummery v Irvings Proprietary Limited* (1956) 96 CLR 99 at 113 - 114; [1956] ALR 795. Their Honours went on (at 114) to cite the following passage from the judgment of the Exchequer Chamber in *Scott v London and St Katherine Docks Company* (1865) 3 H & C 596 at 661; 159 ER 665 at 667; [1861-73] All ER Rep 246:

> *"There must be reasonable evidence of negligence. But where the thing is shown to be under the management of the defendant ..., and the accident*

> *is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care."* (That is, the thing speaks for itself - *res ipsa loquitur*.)

Dixon CJ, Webb, Fullagar and Taylor JJ later (at 114) referred to "those special cases in which mere proof of an occurrence causing injury itself constitutes *prima facie* evidence of negligence" (ie *res ipsa loquitur*).

However, I do not find it necessary to consider whether this "principle", in truth one of "application of an inferential reasoning process" [per Gleeson CJ and McHugh J in *Schellenberg v Tunnel Holdings Pty Ltd* (2000) 200 CLR 201; 74 ALJR 743 at 748] known as *res ipsa loquitur* could be applied here. In my view, for the reasons given below, there was evidence here, on the uncontroverted facts, from which the respondent's negligence should, on the whole of the evidence, be inferred. In the absence of any satisfactory explanation from the respondent of how the Stowaway gained unauthorised access to the apron (and none was forthcoming, his Honour having rejected the "threshold theory"), I have concluded that the proper inference to be drawn in the absence of any explanation from the respondent, is that the respondent omitted to exercise reasonable care in the operation of its security system, and that, with all respect, his Honour erred in law in adopting the submissions by Counsel then appearing for the respondent as to the existence of relevant duty of care and on the nature of the foreseeability test and its application to these particular circumstances.

In this connection, it should be borne in mind that the appellants bore no onus to demonstrate **how** the Stowaway gained access. A similar argument was rejected in *Allison v Rank City Wall Canada Ltd* (1984) 6 DLR (4th) 144; (1984) 29 CCLT 50, a case mentioned by the primary Judge here, but presumably distinguished by his Honour. The plaintiff sued the defendant, her landlord, for negligence for failing to provide proper security when she was attacked by a stranger in the parking garage of her apartment building. As the occupier of the garage premises, the defendant was held liable in tort.

Smith J said (at 149):

> *"The negligence of the defendant consisted of failing to reasonably secure the garage premises once having represented their safe condition or alternatively, of allowing the plaintiff to be lulled into a false sense of security. 'You are safe' The fact that security, such as it was, had worked for six years, was due to chance. I do not accept that the evidence fell short of proving that the aggressor's presence was due to lack of security.* ***The plaintiff does not need to show precisely how Howell came to be on the premises.*** *He was bent on criminal activity. He engaged in further and similar criminal activity before he was apprehended at or near the premises some months later. The probabilities are that proper security would have prevented this unfortunate assault as would have a warning to the plaintiff. A knowing and conscious plaintiff could have requested escort services as others had on occasion or exercised greater care or taken up residence elsewhere."* (Emphasis added)

In my opinion, these observations are equally apposite here, as are those of Cozort J in *Screaming Eagle Air*, considered above, where the Court of Appeal of North Carolina said that the plaintiff was not required to show how the specific dog, struck by the plaintiff's aircraft, got onto the runway on the night in question.

Yet, when his Honour's reasons in the present case are read as a whole, it appears that the respondent's argument, that the appellants could only succeed if they could show exactly how the unauthorised access was obtained, was accepted by the trial Judge. In my view, the appellant bore no onus to demonstrate this.

On behalf of the respondent, considerable reliance is placed upon paras (8) and (9) of his Honour's summary of his major findings of fact as follows.

> *(8) that there were up to five security guards who had the aircraft and the apron under general surveillance during the period of the turn-around, two of them being singly on the apron at different times specifically for apron surveillance.*
>
> *(9) that the lookout kept by the security guards was on the evidence adequate and reasonable."*

As has been seen, these conclusions were critical to his Honour's approach. In understanding the structure of his Honour's reasons for judgment, it is important to recall the origin of these restated conclusions as follows:

His Honour first gave a description of the evidence, including that of the respondent's staff, without making findings at that stage. The Judge initially mentioned the testimony of Mr Fiva that, of the twelve security guards in the terminal, seven had been assigned positions on the land-side; three others had been assigned to (i) the terminal's passenger boarding gate, (ii) the terminal's cargo access area, and (iii) the terminal's arriving passengers gate. (However, as appeared in cross-examination, assigned position (ii) was, in fact, on the land-side.) Mr Fiva was one of the twelve, but had no assigned guard post, because his role was to supervise the other staff. He was rostered for patrol. He was to ensure that the other guards were at their posts and performing their duties. He was also to stand at the bottom of the aircraft steps until all passengers had disembarked. He was then to patrol the apron during the turn-around. In particular, he was to move to the starboard (right) side of the aircraft to observe the cargo holds and refuelling. Mr Fiva said he did this on 14 September 1994. However, in his evidence, Mr Karalus had said that he had very rarely seen people, including security officers, on the starboard (right) side.

His Honour then described the evidence of Mr Moeaki, Assistant Security Officer, who had said that, after screening the boarding passengers, he was to check that other guards were in position outside the entrance to the arrivals hall and outside the transit lounge. He said that he did this, and that he then positioned himself in front of the cargo hall. He said that, from there, he had a good view of the apron.

The Judge next summarised the evidence of the twelfth security guard, Mr Holi, the Senior Security Officer. He said that his Job was mobile, that is, he was to patrol the terminal, mainly on the air-side. Like Mr Fiva, he supervised the other security officers, including Mr Fiva. On the night, when the Aircraft arrived, he stood on the air-side between the departure and arrival lounges. He had said that he had checked on one of the security guards at the terminal, and then went to the apron, went around

the Aircraft at least twice, and then checked the security officers at their posts. He had remembered seeing Mr Fiva and other security officers on the apron.

It will be recalled that, in analysing this evidence, some of which had been contradicted by the evidence of Mr Karalus and Capt Gilfillan, and by the provisions of the Local Unit Orders, his Honour said that his impression was that those assigned to the apron, namely Messrs Holi and Fiva, were there; and that there was no evidence to suggest any "inference"' that they were not attentive. The Judge noted that Mr Moeaki was at the terminal, and that at least two other guards were at the terminal gates. His Honour said that, in the absence of evidence to ground another inference, one must find that the guards were all in position and watchful.

The Judge then mentioned the evidence of the driver of the fire truck that he saw Mr Fiva patrolling the apron and another security guard there.

It will be recalled that his Honour next proceeded to make his findings of fact in this context as follows:

- The duties of the security officers in respect of the apron were not clearly defined, and no security guard was specifically assigned to the apron.
- Ten of them were specifically assigned elsewhere (ie to areas other than the apron).
- Three, possibly four, of them had sight of the apron and were assigned to remain near the terminal to perform specific duties there. Only Mr Fiva, the Shift Supervisor, and Mr Holi, the Senior Security Officer, were specifically required to be on the apron, **but each had other supervisory duties requiring them to be elsewhere from time to time.** The fire officers were required to remain on the apron during the turn-around, **but their authority to act as security guards was not made clear.**
- Although Messrs Holi and Fiva were on the apron, **they were not there constantly; there was no arrangement between them whereby one would maintain constant surveillance whilst the other performed supervisory duties elsewhere.**
- There was **no specific evidence that the other three guards were watching for unauthorised activity on the apron.**

Much later in his reasons, after addressing questions of law, his Honour came, as has been seen, to state:

> *"... a **summary** of my major findings of fact. I have decided ...*
>
> [Emphasis added. Then follows ten paragraphs. One para is (8) which, it will be recalled is]:
>
> *(8) that there were up to five security guards who had the aircraft and the apron under general surveillance during*

the period of the turn-around, two of them being singly, on the apron at different times specifically for apron surveillance."

Inevitably, as a summary, this paragraph could not convey a full explanation of his Honour's earlier conclusions in this area. But it is apparent that, if viewed in isolation, it could give a new reader a different impression from that gained from reading his Honour's (earlier) actual conclusions. Clearly, his Honour intended the summary only as an aide-memoire, and not to depart from his actual conclusions. In particular, it must be taken that his Honour's crucial earlier conclusions - (1) that the security duties on the apron were not clearly defined; (2) that only Messrs Fiva and Holi were on the apron, and that they were diverted to other responsibilities from time to time; and (3) that the fire officers had no clear security responsibilities - were to stand.

It will be recalled that para (9) of the summary then read:

"(9) that the lookout kept by the security guards was on the evidence adequate and reasonable."

Again, his Honour could not have meant to depart from his earlier, detailed treatment, in particular, his Honour's reference to the absence of any specific evidence that the three guards air-side near the terminal were watching for unauthorised activity.

Moreover, in considering his Honour's reasons in this area, it is apparent that (8) and (9) were not intended as free-standing specific findings of fact, but merely a summary of conclusions made by his Honour by drawing inferences from the evidence as a whole.

The two fundamental principles upon which a Court of Appeal acts are explained by Halsbury's Laws of England, 4th ed, Vol 37 at 535:

"The first is that on an appeal from the decision of the trial judge sitting alone, the presumption is that the decision appealed against is right. The burden of showing that the trial judge was wrong lies on the appellant, and if the Court of Appeal is not satisfied that the judge, was wrong, the appeal will he dismissed.

The second is that the hearing of an appeal by the Court of Appeal is by way of rehearing. These words do not mean that the Court of Appeal literally 'rehears' the case, and that the parties have to start afresh as they did in the court below or that the witnesses are heard afresh, but rather that the court will rehear the case on the documents, including the transcript of the shorthand note of the evidence or the judge's notes. The Court of Appeal considers the materials which were before the judge below, and the additional materials, if any, before the court itself, and then makes up its own mind, carefully weighing and considering the judgment appealed against, and reversing it if, on full consideration, it comes to the conclusion that the judgment was wrong. Where the only question is as to the inferences to be drawn from evidence admitted to be truthful, the Court of Appeal is in as good a position to decide as the court below. Where, however, the decision depends upon a conflict of

> *oral evidence, the Court of Appeal should generally defer to the opinion of the trial judge."*

On behalf of the respondent, reliance is placed upon well-known observations made in the speeches in the House of Lords in *Watt (or Thomas) v Thomas* [1947] AC 484; [1947] 1 All ER 582. It was there held, as the headnote states (at 484 - 485), that:

> *"When a question of fact has been tried by a judge without a jury and it is not suggested that he has misdirected himself in law, an appellate court in reviewing the record of the evidence should attach the greatest weight to his opinion, because he saw and heard the witnesses, and should not disturb his judgment unless it is plainly unsound.*

As has been seen, I am of the view that his Honour did misdirect himself in law. But, in any event, in *Thomas*, it was further held, as the headnote goes on to state (at 485):

> *"The appellate court is, however, free to reverse his conclusions if the grounds given by him therefor are unsatisfactory by reason of material inconsistencies or inaccuracies or if it appears unmistakably from the evidence that in reaching them he has not taken proper advantage of having seen and heard the witnesses or has failed to appreciate the weight and bearing of circumstances admitted or proved."*

Viscount Simon said (at 486 -- 487):

> *"It not infrequently happens that a preference for A.'s evidence over the contrasted evidence of B., is due to inferences from other conclusions reached in the judge's mind, rather than from an unfavourable view of B.'s veracity as such: in such cases it is legitimate for an appellate tribunal to examine the grounds of these other conclusions and the inferences drawn from them, if the materials admit of this; and if the appellate tribunal is convinced that these inferences are erroneous, and that the rejection of B.'s evidence was due to the error, it will be justified in taking a different view of the value of B.'s evidence. I would only add that the decision of an appellate court whether or not to reverse conclusions of fact reached by the judge at the trial must naturally be affected by the nature and circumstances of the case under consideration."*

To similar effect is the decision of the High Court of Australia in *State Rail Authority of New South Wales v Earthline Constructions Pty Ltd* (1999) 160 ALR 588; 73 ALJR 306. It was there held that the primary Judge had not given sufficient attention to all of the evidence of the case and that there had not been a determination of the appellant's case on a consideration of the real strength of the body of evidence it presented. Moreover, as here, in *Earthline* it was held that it was not the task of the appellant to exclude every reasonable hypothesis, but to establish its case on the balance of probabilities, and that the primary Judge had applied the wrong standard of proof. It was further held that the Court of Appeal was not precluded from concluding that, in the light of other evidence, the primary Judge had too fragile a base upon

which to support his relevant findings and that the appeal in *Earthline* illustrated the danger of attaching too much significance to the words of restraint expressed in cases such as *Thomas*, and allowing those words to deflect the appellate court from its duty.

In *Rae v International Insurance Brokers (Nelson Marlborough) Ltd* [1998] 3 NZLR 190 (CA), Thomas J, noting [at 199], that "exceptional caution" is "imperative" in departing from the trial judge's findings of fact, went on to say [at 199]:

> *"Nothing I have said, of course, means that there will not be cases where it will be appropriate to ask this Court to exercise its jurisdiction on appeal in respect of findings of fact. Obviously, such cases arise where the gap between the advantages ordinarily enjoyed by the Judge at first instance and the appellate Court does not exist or is substantially reduced, or the Judge fails to use the advantage or misuses it in a discernible manner. A case where the facts totally or largely arise from documentary evidence is an example of a case where the Judge at first instance may not have any advantage. In such cases the appellate Court is often in as good a position as the Court at first instance to determine the facts or to draw inferences from the established facts."*

Turning to the case at hand, it appears, upon analysis, that the critical conclusions restated in summary form by his Honour at paras (8) and (9) of his reasons were, in truth, inferences from the circumstantial material in evidence, rather than findings of primary fact made upon an assessment of the credit of individual witnesses. Indeed this approach was inevitable, given the way in which the case for the respondent was conducted at the trial. In essence, as has been said, that case was (1) that none of the security guards could recall anything untoward on the apron and, for this understandable reason, none of them had any distinct recollection of the activities on the apron; and (2) that, logically, it must have followed that access was gained at the threshold.

In other words, this was not a case where, for instance, one of the respondent's security guards gave evidence of a specific sighting of an unauthorised person on the apron. If that evidence had been given, and accepted without qualification by a trial judge, an appellate court would, of course, pay respect to the advantage of a trial judge in assessing the creditworthiness of such specific evidence. But, as has been seen, there was no evidence of this kind here. Rather, his Honour's approach was to draw inferences from all of the surrounding circumstances. Given that background, the appellate Court is at no particular disadvantage in deciding, on the material disclosed in the circumstances surrounding the events on the apron, what are the proper inferences to be drawn. Indeed, the only conflicts that appeared to emerge in the whole of the evidence were, as noted, that Mr Karalus and Captain Gilfillan disagreed with aspects of the evidence of some of the respondents' witnesses, whose version his Honour appeared to prefer. Given the exceptional nature of the power of an appellate tribunal to interfere with such a finding, depending on an assessment of credibility, I accept his Honour's conclusions in this area for present purposes. In other words, I proceed upon the footing that the whole of the respondent's evidence is accepted, as his Honour found.

Having, for my purposes, taken it as beyond reasonable argument that the respondent owed the appellants a relevant duty of care, it is convenient at this point to identify, and then to analyse, the essential steps in his Honour's relevant process of reasoning on the issue whether the respondent was in breach of its duty of care. His Honour proceeded (and I would accordingly comment) as follows:

- The respective security systems of the parties for the protection of visiting aircraft from unauthorised access were independent, but proceeded upon the footing that the parties would co-operate.

[This is uncontroversial. Nor is there, or could there be, any suggestion by the respondent of any lack of co-operation, or default, by the appellants.]

- The respondent accepted that it was bound by the ICAO security manual. The manual, *inter alia*, stated that "[t]he first line of defence against unauthorised access to aircraft is the safeguarding of the land-side/air-side boundary"; and that "[t]he prevention of unauthorised access to aircraft within this boundary also depends on **security measures taken in the immediate proximity of the aircraft** and in the general area". (Emphasis added).

[This is uncontroversial. As noted above, it was consistent with the expert opinion evidence of the respondent's expert Mr Armstrong, and with the respondent's own AVSEC programme, its Aerodrome Security Programme and the Local Unit Orders.]

- Some of the respondent's witnesses, in particular Messrs Patolo, Holi and Fiva, and its expert Mr Armstrong, agreed that the respondent's Aerodrome Security Programme called for a security presence on or near the apron of five guards, and five guards were in fact present.

[The respondent now disputes this interpretation of Mr Armstrong's evidence. It will be recalled that, in his Report, Mr Armstrong expressed the view that at the Airport, protection of an aircraft "can best be achieved by **close security attention to the restricted area where the flight is parked** …" (Emphasis added). However, his Report went on to say this:

> *"That order of protection [was] in place on 14 September 1994, five officers were air-side at various points around the flight. The protection offered was sufficient to secure the operation."*

Clearly, the opinion expressed in the second sentence was given on the assumption that the evidence would demonstrate the facts stated in the first sentence. However, as has been seen, the evidence by no means revealed such a straight-forward state of affairs, given the difficulties of recollection experienced by the respondent's witnesses. In my opinion, an inference that, on the night, five guards were stationed around the Aircraft was not reasonably open on the evidence previously mentioned. In any event, in cross-examination, Mr Armstrong was asked about his assumption of

five security guards stationed around the Aircraft. He said that, in his view, that was "a reasonable number". Although he was not re-examined on the point, on behalf of the respondent it is now submitted that Mr Armstrong's evidence as to numbers of guards should not be interpreted as an opinion that five was a necessary number. In the absence of re-examination in this area, it is difficult, and not appropriate, to speculate about what other views Mr Armstrong might have had.

In any event, as noted, the respondent's Aerodrome Security Programme emphasised the need for "constant vigilance as a vital factor in the maintenance of optimum security relative to this programme". Moreover, the respondent itself had recognised, but had not then satisfied, a need for an additional guard to be permanently stationed on the apron.]

- There was no evidence to suggest an inference that the security guards on the apron were not attentive.

[As mentioned, it appears not to have been suggested that any of the respondent's personnel saw the Stowaway. But, given his Honour's rejection of the respondent's case that the Stowaway could not have gained access on the threshold, if any inference ought to be drawn, it would not be that the guards were attentive. On the contrary, given his Honour's finding that access was gained on the apron, rather than the threshold, the following inferences ought to be drawn, that is, the gaining of unauthorised access by the Stowaway was allowed to occur, that is, the security was somehow breached, and the resulting damage was caused, both by negligence in the system (the absence of sufficient permanent guards in close proximity of the Aircraft) and/or by casual negligence of the security guards (see *Salmond & Spraggon (Aust) Pty Ltd v Joint Cargo Services Pty Ltd (the "New York Star")* [1977] 1 Lloyd's Rep 445 per Glass JA at 447).

It is true that none of the parties was able to establish at the trial exactly how the Stowaway gained access at the apron. But, as Smith J and as Cozort J noted in *Allison v Rank City* and *Screaming Eagle Air* respectively (above), a plaintiff need not show this.]

- Mr Holi and Mr Fiva were on the apron, but not constantly, and there was no arrangement between them in order to maintain constant surveillance.

[For the reasons previously given, an inference can properly be drawn, from this conclusion, both of negligence in the system and casual negligence. There may have been a case in the present circumstances for the application of the inferential principle of *res ipsa loquitur*, even if the respondent had called no evidence. But it is not necessary to consider that possibility here. The expert evidence, in its documentary form (ICAO manual etc), the views of Mr Best and of Mr Armstrong, was itself unanimous that close attention to the restricted area where a flight was parked was required; yet access was gained; and the relevant circumstances in which entry to the Aircraft was gained were within the exclusive knowledge of the respondent as the occupier of the apron and the party responsible for its security. In those circumstances, only slight evidence of negligence is required of a plaintiff, in the absence of a satisfactory explanation from a defendant. Yet here, the only explanation offered by the respondent was that access had been gained at a considerable distance

from the apron, at the threshold to the runway, at an area which was more difficult to secure. The respondent's explanation was rejected by the Judge as impossible, and his finding is now accepted by the respondent.]

- Two fire officers were constantly present on the apron.

[It is not, and could not be, suggested that the fire officers were part of the security surveillance system. They had their own responsibilities to attend to. Of course, if a fire officer had seen the Stowaway, other questions would be raised.]

- An occupier must guard against the deleterious acts of third parties only if they are "the very thing which is likely to happen".

[With respect, for the reasons already given, his Honour did not correctly state the law. But, in any event, even if the law of negligence required that the "very thing" had to be reasonably foreseeable, it was. The official reaction to the Air New Zealand incident in the previous month makes it plain, beyond argument, that the incident that did happen was actually foreseen as a real possibility if security were not improved and it was not improved. If it were needed, there was evidence at the trial of stowaways on aircraft on other occasions in other countries.]

- Stowing away on aircraft is not a problem in the South East Pacific. Accordingly, the evidence did not establish that stowing away "was a reasonable likelihood against which positive measures need to be taken at [the Airport]".

[There are several difficulties in accepting this conclusion. The first is the Air New Zealand incident. Next is the fact that the respondent's relevant duty was to guard against **any form** of unauthorised access. The evidence shows, again, beyond argument, that any access that was not authorised would, by itself, raise a potential risk of damage to an aircraft, and thus to its passengers and crew. Whether that access leads to a stowaway, or some other activity, is immaterial for present purposes.]

- The appellants "gave no evidence [as an aircraft operator] of foreseeing what occurred as the very kind of thing that was likely to happen".

[This has been dealt with above; that is, it is irrelevant. The appellants could, in any event, rely upon Mr Best's expert opinion, expressed in his reaction to the Air New Zealand incident. Moreover, the respondent's presentation at the Fijian regional aviation security conference accepted the need for constant vigilance at South Pacific international airports.]

- What is reasonable in guarding against risk must be assessed against the risk itself, including not just the chances of loss or expense, but also remoteness. His Honour went on to give the example of a burglar alarm in a house on a remote island, acknowledging it to be extreme.

[With respect, there was no need here to look for such extreme analogies. As has been said, the expert material, including the opinion of Mr Best, as the respondent's Director of Civil Aviation, was unanimous in accepting that the respondent foresaw, or must be taken to have foreseen, the real potential for a disaster if unauthorised access were not prevented, and security not improved by stationing an additional guard permanently on the apron. This was not done until after the incident.]

- "A dead body that somehow descends and jams the wheel … is rare indeed. If these were the only facts, I would hold that there is no duty of care that required the defendant to take preventative action against them".

[As has been said, the relevant duty was to take proper steps to prevent unauthorised access and to exercise "constant vigilance" to that end. The particular sequelae, as *Jolly*, above, holds, do not have to be precisely foreseen. In any event, Mr Best did foresee the actual risk.]

- The presence of the Stowaway in the Wheel Well was "something of a different type and kind from anything that a reasonable defendant in the position of the [respondent] could have foreseen".

[With respect, I cannot agree, for the reasons previously mentioned; in particular, the unanimous expert view that, in order to prevent unauthorised access, **close** security attention to the restricted area where the aircraft is parked should be provided. As has been said, in my view, it should be inferred that such security was not provided.]

- In certain circumstances, an airport operator may be justified at law in taking measures below the ICAO recommended standards.

[It appears that his Honour had in mind perimeter fencing, now an irrelevant aspect, given the explosion of the runway threshold access theory. Here we are concerned only with the apron. Mr Armstrong's view was that, in order to compensate for other security inadequacies or demands, and given the cost of perimeter fencing, removal of scrub etc, "compensatory manpower" should be provided on the apron when an aircraft visits (transcript p 438, 468). So far as concerns an aircraft on the apron, the expert evidence pointed one way: close security attention was required in that area. In my view, it should be inferred that this attention was not provided.]

- Like Lord Radcliffe in *Bolton*, I cannot persuade myself that the [respondent] has been guilty of any culpable act or omission".

[As has been said, it is difficult to imagine a case more removed from the facts of this case than *Bolton*. It is plainly distinguishable, for the reasons given by Lord Hoffmann in *Jolly*.]

Summary of Conclusions on the Appeal

In summary, then, my conclusions are as follows:

- On the uncontroversial facts mentioned above, the respondent owed a duty of care to the appellants, as operators of a visiting aircraft, to take proper steps to prevent unauthorised access to the Aircraft when on the apron. In other words, the risk of an attempt to gain unauthorised access was reasonably foreseeable.
- On the unanimous expert evidence, the standard of care required of the respondent is that it be "constant[ly] vigilan[t]" and provide "close security attention" to the Aircraft.
- Since the respondent was the occupier and security controller of the apron, and thus the facts were within its knowledge and control, and not within the power of the appellants, only slight evidence was required to discharge the appellants' burden of proof, in the absence of a satisfactory explanation from the respondent. The only explanation proffered, the "threshold" theory suggested by the respondent, was not accepted.
- The respondent's evidence of the need for an extra permanent guard on the apron, especially after the Air New Zealand incident, is itself evidence from which negligence may be inferred, as is the respondent's evidence of the failure of Mr Holi and Mr Fiva to ensure that one or other of them was **always** on the apron.
- Mr Best's expert views, as Director of Civil Aviation, are entitled to great weight. His opinion, expressed after the Air New Zealand incident, that security procedures had been lax and needed to be improved (but were not) is crucial evidence from which negligence in the system may properly be inferred. Moreover, in Mr Best's opinion, the security scheme envisaged by the respondent's own security manuals etc ("constant vigilance"), reinforced by Mr Armstrong's view of the need for "close security attention" in the vicinity of the parked Aircraft, could hardly be described as a counsel of perfection. Given the real potential for a disaster if unauthorised access occurred, these standards were no more than reasonable, for the reasons given by Lord Reid in *The Wagon Mound (No 2)* at 642.
- It is true that security guards require training. But it is no answer for the respondent now to say that more time was needed to train an extra security guard to be stationed permanently on the apron during the turn-around. This need had been recognised four years earlier, but not

remedied, despite the Air New Zealand incident, until after a catastrophe was narrowly averted by virtue of Capt Gilfillan's skilful efforts,

- Although his Honour sometimes spoke of foreseeability of "the very thing" and at others of "the very **kind** of thing", it is clear, beyond serious argument, that either test is satisfied here on the uncontroversial facts, given the warning of the Director of Civil Aviation, only one month before, that if unauthorised access to the apron were not prevented, one scenario was that the trespasser could stow away in the wheel well, the landing gear could malfunction and the lives of those on board and the aircraft could be endangered.
- With all respect, upon a full consideration, the judgment below was wrong and accordingly ought to be reversed.

Orders Proposed

I would propose that the appeal be allowed, with costs; that the orders at first instance be set aside; and that, in lieu thereof, it be ordered that judgment be entered for the appellants for the cost of repair of the engine in the agreed amount; and that liberty be reserved to the appellants to apply, in writing, to a single Judge of the Supreme Court in respect of pre-judgment interest on the agreed amount, and for the costs of the action.

'Epenisa v Tonga Development Bank

Supreme Court, Nuku'alofa
Ward CJ
C 1225/98

22 May 2000; 23 May 2000

Insurance law — plaintiff relied on assurance from officer that he was covered — claim not paid
Damages — loss of profit claimed — needed proof

Since 1994, the plaintiffs had operated a tyre repairing business in Vava'u. When they first started they took a loan from the defendant bank in order to purchase the necessary equipment including two compressors. The bank told them that it was necessary to take out insurance on the equipment and that was done by the bank with the premium being added to the overall loan. The motor on one of the compressors burned out and was not repaired. The plaintiff then obtained another compressor by means of another loan from the bank. The motor on that one also burned out. The plaintiff attempted unsuccessfully to claim from the insurance. By then, the plaintiff wanted a larger compressor and, in November 1996, he restructured the loan with the bank he was able to purchase such a compressor. Again he was advised that the bank would require it to be insured. In view of his earlier experiences, he demurred but was told it would have to be done. He asked the insurance officer at the bank what would happen if the new motor burned out like the others and was told it would be covered by the insurance. By March 1997, the motor had burned out and the plaintiff sought to claim against the insurance. It was not met and so he sued the bank for the repayment of the premiums, for the loss of the compressor and his loss of earnings resulting from the inability to use the compressor.

Held:

1. The plaintiff satisfied the Court on the balance of probabilities that the insurance officer in the bank did inform him that the policy would cover the burning out of the motor and that the plaintiff relied on that assurance.
2. The claim for the refund of the premiums paid for the cover after the motor burned out was dismissed. The premiums were paid to the insurance company and there was a policy in existence. That did not simply cover the machine being in working order but covered it for loss from fire and earthquake at least. That cover continued whether it was working or not.
3. The claim for the total loss of the compressor was modified to allow for the fact that the compressor was repaired. The claim of $375 was allowed.

4. The claim for loss of profit for the whole time the plaintiff was unable to use his compressor (two years and nine months) depended on whether he proved to the satisfaction of the court that there was an actual loss and the amount. The plaintiff failed to prove his claim.
5. With regard to costs, the plaintiff only proved damages in a very much reduced sum from that claimed. It was held that each side should bear its own costs.

Counsel for plaintiffs : Mr Tu'utafaiva
Counsel for defendant : Mrs Vaihu

Judgment

Since 1994, the plaintiffs have operated a tyre repairing business in Vava'u. When they first started they took a loan from the defendant bank in order to purchase the necessary equipment including two compressors. The bank told them that it was necessary to take out insurance on the equipment and that was done by the bank with the premium being added to the overall loan. Only the first plaintiff gave evidence and it appears all further transactions were carried out by him. I shall simply refer to him as the plaintiff hereafter.

It appears that the motor on one of these burned out and was not repaired. The plaintiff then obtained another compressor by means of another loan from the bank. The motor on that one also burned out. There was evidence that the plaintiff claimed or attempted unsuccessfully to claim from the insurance but that is no part of this case although it must be said that the evidence suggests that, had those claims been properly pursued, they might have been successful.

By then, the plaintiff was beginning to think that he ought to have a larger compressor and, in November 1996, he found someone who had brought such a compressor from the United States. By restructuring the loan with the bank he was able to purchase that compressor.

Again he was advised that the bank would require it to be insured. In view of his earlier experiences, he demurred but was told it would have to be done. He asked the Insurance Officer at the bank what would happen if this motor burned out like the others and was told it would be covered by the insurance.

By March 1997, the motor had burned out and the plaintiff sought to claim against the insurance. It was not met and so he sues the bank for the repayment of the premiums, for the loss of the compressor and his loss of earnings resulting from the inability to use the compressor.

As the evidence has emerged that claim has had to be modified to some extent.

The plaintiff's evidence was that he asked the insurance officer at the bank a number of times for a copy of the policy before the motor burned out but was never given it.

It appears from his evidence that the insurance officer suggested he should arrange for a person called Muller to repair the motor which he did. That repair worked in an unsatisfactory way for three to four weeks before the compressor broke down again. The repair cost $100 and the insurance officer from the bank advised him to pay it and it would then be reimbursed by the insurance company. He paid but has not been reimbursed.

The plaintiff again went to the insurance officer at the bank and, a week or so later, two men came to inspect the machine. The plaintiff was later told that the insurance would not pay.

The plaintiff claims for the loss of the earnings caused by the machine's failure from that time to the present but he told the court that he did in fact have the compressor repaired in January this year.

The defendant called two witnesses and their evidence gave support to the some aspects of the plaintiff's claim.

The manager for the Vava'u branch of the bank explained that the policy of the bank in such cases is always to require insurance cover for fire and hurricane. I accept that is the policy but it is clear that is not the cover paid for in this case. The policy is for fire and earthquake and expressly excludes hurricane.

He explained that the forms proposing insurance must be filled in before the loan is processed and they are then sent to the bank's head office and forwarded to the insurance company.

The documents produced to the court show that there was a policy for fire and earthquake taken out on 28 March 1996 for the building and equipment, including the original compressors. There is nothing on the bank files to show that it was extended to cover the bigger compressor. The manager told the court that in such a case where there was already a policy in existence, they would not take out a new policy. He agreed with counsel for the plaintiff that the insurance company should have been advised of the new bigger compressor but there is nothing on the bank file to confirm that occurred.

The claim supervisor from the insurance company was called and he stated that there was never any such advice given.

It is true that the documents do show that, on 21 November 1996, the bank in Vava'u sent a memorandum to the head office in Nuku'alofa listing a number of new proposals and renewals of policies. It includes, in the new proposals, the plaintiff's name and is plainly a reference to the new compressor. However, there is no evidence it was ever passed to the insurance company and, indeed, in a letter dated 1 August 1997 from the insurance company to the bank referring to the plaintiff's claim there is a request for further information. The questions asked demonstrate clearly that the bank had not sent any advice about the new compressor to the insurance company.

The letter of 1 August is of further interest because it refers to a Business Protection Policy. The claim supervisor told the court that such a policy would cover burning out of an electric motor but limited to motors of 4 HP. The letter points out that the new compressor was 5 HP and was not covered.

The witness from the insurance company told the court that they have never had a reply form the bank with the information sought in the letter and the claim was eventually disallowed.

On the evidence as a whole, the plaintiff has satisfied me on a balance of probability that the insurance officer in the bank did inform him that the policy would cover the burning out of the motor and that the plaintiff relied on that assurance.

Whilst I find it a remarkable state of affairs, I have no reason to doubt the evidence of the insurance witness that the ordinary fire and earthquake policies were all fused into business protection policies so that burning out of the motors was covered. That would mean that the earlier, smaller motors may have been covered but

there is no evidence before the court of their actual size apart from the statement that they were smaller than the later compressor.

I am satisfied that the bank intended to take out a new policy of insurance to cover the new compressor and failed to do so. I am equally satisfied that the bank failed to discover and/or to tell the plaintiff that the new compressor was too large to be covered if the motor burned out and that the plaintiff was misled by the assertion of the insurance officer of the bank to the extent that he did not consider he needed to look for alternative cover.

The plaintiff claims under three heads and I take each in turn.

The first is for the refund of the premiums paid for the cover after the motor burned out. I do not consider he can succeed on this. There is ample evidence that the premiums were paid to the insurance company and that there was a policy in existence. That did not simply cover the machine being in working order but covered it for loss from fire and earthquake at least. That cover continued whether it was working or not. The claim under the first head is dismissed.

The second head is a claim for the total loss of the compressor. As I have stated, that has been modified because the compressor has been repaired and is now in working condition. The plaintiff's evidence was that he had the motor from another compressor transferred to this machine. He gave the repairer one of his smaller compressors worth $500 in full satisfaction of the repair both in terms of labour and materials.

The insurance witness produced the claim form originally put in by this plaintiff. Attached to it was an estimate for the rewinding of the motor at a cost of $375.

It is also notable that, although this claim is for the total loss of the compressor "valued at $2,250 at the time of the damages to the compressor", the plaintiff's own claim form put the replacement value at that time at $1,500.

Such carelessness with regard to the value would have gone against the plaintiff even if I had found in his favour on this. However, I am satisfied that the compressor was repairable and has now been repaired. There is no evidence that the original repair would not have been successful if it had been carried out at the time. I allow the claim under this head in the sum of $375.00.

The final head is for loss of profit for the whole time the plaintiff has been unable to use his compressor - a period of two years and nine months. This is a head under which he should be entitled to damages but only if he proves to the satisfaction of the court that there was an actual loss and the amount.

The evidence of his earnings, however, is scant and confusing. There are no written accounts, no attempt was made to try and give actual figures, the only figures given by the plaintiff were very clearly plucked largely from the air and were inexplicably inconsistent. No attempt was made to supply such essential information as the cost of extra labour when the larger compressor was working, the hours they worked, when and if they were laid off and the actual volume of work still possible with the smaller compressor.

Neither was any explanation given as to why the plaintiff had done nothing in the whole period claimed to mitigate his loss.

The burden is on the plaintiff to prove his claim and he fails under this head.

Finally the question of costs. The plaintiff has succeeded in the claim for liability but he has proved damages in a very much reduced sum from that claimed.

Had he claimed only such a sum, I have little doubt the defendants would not have contested the action. In the circumstances, I consider each side should bear its own costs.

180 Thus the order is:

> Judgment for the plaintiffs in the sum of $375.00 with no order for costs.

Taumoepeau v Taumoepeau

Land Court, Nuku'alofa
Finnigan J
L 320/99

14, 15, 16, 17 March 2000; 24 May 2000

Land law — equitable licence — no evidence of representation or acquiescence by defendant

A registered landholder, the first defendant, leased part of his land to the second defendant for a 60-year term. The land leased was prime land, suitable for commercial use, near the centre of Nuku'alofa. The plaintiffs claimed that they had a prior right to occupy the land. They claimed that their families were granted their respective pieces of the land by their grandfather and they held the land in the customary way. The plaintiffs applied for leases or deeds of grant.

Held:

1. In order to succeed the plaintiffs had to make out a case in equity. The claim was not equitable so it could not succeed.
2. The necessary precondition for the equity of possession is a legal relationship between any/each of the plaintiffs and the first defendant as landholder - and the second defendant as lessor if he had knowledge of that relationship. This relationship could have been held to exist in respect of any/each of the plaintiffs if the evidence had shown that any/each of the plaintiffs had occupied or used the land in reliance on the representation or the acquiescence of the first defendant as landholder. The evidence did not show this so there was no evidence of an equitable licence.
3. Judgment accordingly was entered for the defendants, with costs either agreed or taxed.

Cases considered:

Fie'eiki v Ilavalu (No 2) [1995] Tonga LR 192
Motuliki v Pohahau (Land Court, L 670/97, 12 May 1999, Finnigan J)
OG Sanft & Sons v Tonga Tourist and Development Co Ltd, Hamilton and the Minister of Lands [1981-88] Tonga LR 26
Tafolo v Vete [1998] Tonga LR 164 (CA)
Taufa v Veamatahau [1999] Tonga LR 200
Vai v 'Uliafu & Anor [1989] Tonga LR 56

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

Counsel for plaintiffs	:	Mr Fakahua
Counsel for first defendant	:	Mr Etika
Counsel for second defendant	:	Mr Tu'utafaiva
Counsel for third defendant	:	Mr Tapueluelu

Judgment

A registered landholder, the first defendant, has recently leased part of his land to the second defendant for a 60-year term. The land leased is prime land, suitable for commercial use, near the centre of Nuku'alofa. The plaintiffs claim that they have a prior right to occupy the land. The plaintiffs have houses and trees on the land, and want to continue calling it their home.

The Facts

The relevant facts may be stated briefly. The leased land is 1 acre and 2 roods, part of an allotment of 3 acres 2 roods and 8.4 perches. The allotment is known by its name, "Palataisi". It was granted in November 1926 to Vainikolo Taumoepeau. Upon his death in 1961 it was inherited by his son Pauliasi, and upon his death in 1986 it was inherited by the first defendant.

It is clear that the name Palataisi has some significance. Vainikolo Taumoepeau intended the allotment to remain intact for his family and he allocated parts of it to members of his family. He surrendered no part of the land, and no leases were registered. His allocations were patriarchal, unchallenged during his lifetime and during the lifetime of his son and heir, Pauliasi. They have now been over-ridden by the first defendant. The plaintiffs challenge his action. The first defendant and the plaintiffs are all grandchildren of Vainikolo.

The first plaintiff came onto the land by way of a customary adoption. Pauliasi who was his uncle raised him there, on a part of the allotment that Vainikolo had allocated to Pauliasi. His house was built about 1964 after Pauliasi inherited the allotment, he was shown a part of the allotment where he was to build his house and live with his family. Trees were planted around the house and it was subsequently extended more than once at considerable expense. The house is presently security for a bank loan. One of his sons occupies this house. The first plaintiff says it is in reasonable condition. He has been living and working in Vava'u on government appointment for the last 7 years. The first plaintiff is the registered holder of a town allotment in Ha'apai which he inherited from his father Pauliasi's brother, and claims an interest in Palataisi for his son.

The second and third plaintiffs were born on the land and grew up there. Their mothers were daughters of Vainikolo, who were allocated parts of the allotment on which to build houses. The family home of each remains on the allocated part of the land, with trees. These plaintiffs grew up in those houses. The second plaintiff went to live in America in 1973 and left the one in which he had lived in Pauliasi's hands, for Pauliasi to rent out. Pauliasi did rent it out and kept the rent. Part of it stands on

the land that has been leased. The house has been used since 1989 as security for a bank loan. The first defendant by this time had inherited the allotment, but he was not aware of the mortgage. The second plaintiff, with his family, has continued living and working for the last 27 years in the United States. He says he is a naturalised American citizen. He does not appear to have taken much interest in the house or the land in the time he has been away. His attachment to it is as family land.

The third plaintiff remains a Tongan citizen, but has lived in America for over 30 years. He, like the second plaintiff, does not appear to have been much concerned about the use of the house or the land in that time. At one time this house was extended. His mother told him they were asked to remove it. It has now been removed and/or demolished. Like the second plaintiff, he claims an interest in part of the land because that part was given to his mother. It seems that the mother of the third plaintiff is still alive and residing in the United States, but she makes no claim in these proceedings.

The first defendant is the heir and registered holder of the whole allotment. He was approached by the second defendant with a proposition, and reached an agreement. It seems the second defendant paid him $700,000 and the part of the land which the plaintiffs say is theirs has been leased to the second defendant for 60 years at $5,000 per year. The Cabinet in accordance with the Land Act (Cap 132) has approved this lease as a commercial use.

The way the plaintiffs see it, their families were granted their respective pieces of the land by their grandfather. They say this is land that they hold in a customary way. Had they been given the opportunity, they say, they would have applied for leases or deeds of grant, and they seek to do so now. The key to their case is the principle that allows equity in the land law. In particular, counsel submits on their behalf that the lease to the second defendant should be set aside, because its registration was obtained by fraud and/or misrepresentation which caused mistake or misunderstanding by the Minister of Land, the third defendant. The particular fraud or misrepresentation that they allege in their claim and in their evidence is as follows. They say that the first defendant, and some officials in the Ministry of Land, failed to tell the Minister what each knew about the land, i.e. that it was not available for lease because it was already permanently occupied by them. Their permanent occupation they say arises from their grandfather's surrender of the respective parts to their parents, their long-term occupancy and use and their family ties with the land.

The Submissions

Each of the written submissions filed by counsel is of very high order. They have been central to my decision and very helpful. It is not necessary to refer to every point made, but I have considered them all. Mr Tu'utafaiva counsel for the second defendant supplied copies of authorities relied on, and that is appreciated.

For the plaintiffs, Mr Fakahua relied on the principle of estoppel, but as counsel for the other parties have pointed out, this principle is not available to the plaintiffs. Estoppel as a principle is provided in s 103 of the Evidence Act, which governs the principle. As Mr Etika noted in his response, the use of the principle was commented on in similar circumstances in *Fie'eiki v Ilavalu (No 2)* [1995] Tonga LR 192.

Mr Fakahua next relied upon a judgment of the Privy Council, counsel may care to note the citation, *OG Sanft & Sons v Tonga Tourist and Development Co Ltd,*

Hamilton and the Minister of Lands [1981-88] Tonga LR 26. The case was cited as authority for the proposition that this Court has jurisdiction to apply principles of equity where they do not conflict with the Constitution of Tonga (Cap 2) or the Land Act (Cap 132).

Counsel then cited s 92 of the Land Act, and submitted that the lease in the present case exceeds the allowable 50-year term. However s 92 is restricted to leases of tax allotments. He cited then s 130 and submitted that the actions of the first defendant had not complied with the provisions for surrender of leases. However, what happened in the present case was registration, not surrender.

He then submitted that "there was a fraud and the first defendant breached the promise and the grant of the former landholders Vainikolo and Pauliasi and the first defendant misled the third defendant and also the Ministry of Lands failed to give the proper details of the land in dispute, as the land is not available for lease [because the plaintiffs] were presently occupying the same". That is the crux and conclusion of the plaintiffs' case.

These claims were thoroughly explored by counsel for the first and second defendants. Mr Etika in particular relied on the principles and the authorities that are set out in *Motuliki v Pohahau* (Land Court, L 670/97, 12 May 1999, Finnigan J), and in *Taufa v Veamatahau* [1999] Tonga LR 200. He submitted that the Land Act is a complete code which rigidly controls all claims including claims to leasehold interests, with room for equity only where there has been a breach of the Land Act, or a breach of a promise, or a breach of natural justice. He pointed out that the plaintiffs had not applied for any grant or lease under the Act, nor paid any prescribed fees. He pointed out too that s 48 of the Act prevents the holding of a town allotment by any of the plaintiffs who already hold town allotments. He pointed out also that s 54 of the Act laid down the requirements which Vainikolo and/or Pauliasi were to follow had either of them desired to transfer any part of the allotment permanently to one or more of the plaintiffs or their forebears. He submitted, as did Mr Tu'utafaiva for the second defendant, that from the facts it could be held that permanent transfer was not intended by Vainikolo, who asked that his family live together on the allotment in peace and harmony.

Both also made the point that transfer by Vainikolo to any person, had he intended that, was not a matter for him alone. It was subject to the Act, and in particular subject to the approval of the Minister and Cabinet. Both counsel as well made many other valid points, but it is necessary only to acknowledge them, not to refer to them in detail.

Decision

The plaintiffs acknowledge that, in order to succeed, they have to make out a case in equity. Equitable principles may be applied if not excluded by the Constitution or the Land Act. They claim equity on the footing that they have long association with the land, and that the parts of the land where their houses are were allocated to their parents by their grandfather. They claim it was their grandfather's wish that their parents, and thus they themselves, and their children, should remain in peace and harmony as a family on the allotment.

It would be a strong claim indeed for equity to make, if it were to try to reach out from Vainikolo's grave to enforce his wishes on future generations, and on future

Ministers of Land and future Cabinets, and on other persons who claim title to all or some of this land according to the law. I do not think the claim is equitable, and it cannot succeed.

I doubt that Vainikolo made a verbal promise to future generations, rather he made of them a request that they live together on the whole allotment, in harmony and peace. One of his daughters to whom he allocated a part, and her son the third plaintiff, with his family, left the land to live in America. So did the second plaintiff with his family. Had Vainikolo made a promise, it was not a promise that bound his grandson the first defendant. What was binding was Division VII of Part IV of the Act, which, together with natural events, prescribed the legal consequences to the actions of Vainikolo and Pauliasi. One of the consequences was that the whole allotment passed in 1986 to the first defendant, for him to hold and to dispose of under the strict terms of the Land Act. During that time, any of the plaintiffs was free to urge upon him the claim that they now make, with the hope that a surrender of part of the allotment, or a lease, might have gained the approval of the Minister and Cabinet.

I can find in the evidence no breach of promise by the first defendant, and the evidence makes it plain that the officials of the Ministry of Land and the Minister complied with the Act. I hold that the claims of the plaintiffs and the existence of their houses and trees on the land without any registered title raised no impediments to the work that the officials and the Minister did. I see no breach of natural justice. There may not be even a breach of the wishes of Vainikolo, were those wishes in the present circumstances to be known. The departure of one of his daughters to America may not have seemed to her to be a breach of her father's wishes for she has made no claims.

On that topic, the Nationality Act (Cap 59) provides at s 4 that a Tongan subject who becomes naturalised in any foreign state ceases to be a Tongan subject. The Land Act (Cap 132) at Part IV Division I provides the terms on which Tongan subjects by birth are entitled to land. Beyond that I make no findings for the purposes of the present case. The Land Act at s 48 prohibits two holdings of the same kind, but does not prevent landholders from leasing further land. No further comment on that topic is necessary for present purposes.

As to the claim that the land was not available for lease, I note and adopt the submissions of Mr Tu'utafaiva. The term "available" as used in the plaintiffs' claim and submissions cannot have in the present case the meaning given it in the Act, as e.g. in the term "available for allotment". The term was discussed by the Court in *Vai v 'Uliafu & Anor* [1989] Tonga LR 56, at 64. The factor relied on by the plaintiffs as making the leased portion not available for lease is their occupancy. But they have not relied on any legal occupancy under the Act, and they cannot. They have relied on the allocation of parts of the land to their parents by Vainikolo, and their understanding that he intended those allocated parts to remain always available to the descendants of those to whom he allocated those parts. Even if that was his intention, the law limits its effect. The plaintiffs cannot rely on it as excluding bona fide lessors under the Act. To make a binding and permanent arrangement of the parts of the land concerned, he had to part with control over it by taking steps under the Land Act.

It may be, as Mr Tu'utafaiva suggests, that the plaintiffs are raising an "equity of possession" or "equitable licence", as mentioned by the Court of Appeal in *Tafolo v Vete* [1998] Tonga LR 164 (CA) at 171 of the judgment. He points out that in their

prayer for relief they seek only cancellation of the second defendant's lease and time "until formal application for a deed of grant alternatively a deed of lease and to register the same". He submits that if that is granted the plaintiffs will be still subject to the provisions of the Act that govern such applications, unless the Court overrides the requirements of the Act in Part IV Division VII of the Act. These include a prohibition on holding two town allotments. There are matters provided for there which are outside the jurisdiction of the Court, such as minimum size and the choice that may be made by a plaintiff who has another town allotment to elect not to accept any town allotment that might result from the judgment.

This point is well taken against the plaintiffs, and for another reason. The necessary precondition for the equity of possession is a legal relationship between any/each of the plaintiffs and the first defendant as landholder - and the second defendant as lessor if he had knowledge of that relationship. This relationship could have been held to exist in respect of any/each of the plaintiffs if the evidence had shown that any/each of the plaintiffs had occupied or used the land in reliance on the representation or the acquiescence of the first defendant as landholder. It is a fact that the first defendant has been the landholder since 1986, and that the houses of the plaintiffs, though not the plaintiffs themselves, have been on the land all that time. However, two of the plaintiffs, and the mother of one who is the primary occupier in respect of one part, have been away from the land for all of that period and have taken little interest in it. The other plaintiff has been away for some years, and has his own town allotment in Ha'apai. The pledging of houses as security for bank loans was not explained, nor was there evidence that the first defendant knew that this had occurred. I have found nothing in the evidence that would establish the facts of an equitable licence.

In conclusion, I uphold most of the submissions of counsel for the first and second defendants, and am bound to find that the claim of the plaintiffs cannot succeed. Judgment accordingly is entered for the defendants, with costs to be agreed or taxed.

HRH Prince Tu'ipelehake v Lavulavu

Land Court, Nuku'alofa
Ward CJ
L 1261/99

24, 25 May 2000; 26 May 2000

Land law — vacant possession sought — defendant had no right to be there or to harvest the crops

The defendant started cultivating part of an 'api known as Vaihoi in 1997. It was part of the estate of the Tu'ipelehake and the plaintiff was the present holder of that title having succeeded to it after his father's death in April 1999. The land in question had been leased to a company, the Vanilla Plantation and Curing Company Ltd, since 1976 and, although the lease was due to run until 2029, it was terminated by Cabinet on 10 August 1999. The plaintiff claimed that the defendant had no right to occupy and cultivate the land and sought vacant possession. The plaintiff also claimed that, in order to cultivate the land, the defendant destroyed a number of vanilla plants and a few coconut trees. The plaintiff called evidence of the value of those plants and claimed that sum in damages.

Held:

1. Had the defendant been represented, the Court would not have allowed him to depart from the written defence in the way he did.
2. The Court found that the defendant had no right to remain on the land or to harvest the crops he had planted. He was ordered to quit the 'api immediately.
3. The burden was on the plaintiff to prove the damage and the title to the plants at the time they were damaged. The plaintiff discharged that burden and the defendant was ordered to pay $7,905 to the plaintiff.
4. The defendant was ordered to pay the costs of the plaintiff to be taxed if not agreed.

Counsel for plaintiff : Mr Tu'utafaiva
Defendant in person

Judgment

The defendant in this case started cultivating part of an 'api known as Vaihoi, in 1997. It is part of the estate of the Tu'ipelehake and the plaintiff is the present holder of that title having succeeded to it after his father's death in April 1999.

The land in question had been leased to a company, the Vanilla Plantation and Curing Company Ltd, since 1976 and, although the lease was due to run until 2029, it was terminated by Cabinet on 10 August 1999.

The plaintiff claims that the defendant has no right to occupy and cultivate the land and seeks vacant possession. It is also claimed that, in order to cultivate the land, the defendant destroyed a number of vanilla plants and a few coconut trees. The plaintiff has called evidence of the value of those plants and claims that sum in damages.

The statement of defence was drafted by counsel but, at the trial, the defendant represented himself. As a result the Court has allowed him some latitude in the conduct of his defence but it will be necessary to point out a number of aspects where the defence pleaded and the evidence he has given differ markedly.

It is not disputed that the defendant moved onto the land in late 1997 and start cultivating it. It is also accepted that he approached the late Tu'ipelehake with the aim of acquiring a lease of the 'api. The plaintiff admits that there was an agreement with his father over the land but the nature and extent of that agreement is disputed. I accept that, had the plaintiff's father lived, the defendant may have secured a lease of this 'api. The approach was made in Nuku'alofa in about November 1998 but, shortly after, the former holder of the title had needed to go to New Zealand for medical reasons. He died there in April 1999 without having returned.

The plaintiff called the aide to the late Tu'ipelehake who described the early negotiations with the defendant. He told the court that the arrangement he conveyed to the defendant from the late Tu'ipelehake was that, if the defendant gave a gift of $10,000.00, he would sign an application to give the defendant a lease of the 'api. It was known that the lease with the vanilla company was still in existence and would need to be cancelled before the defendant could have a lease. The defendant came with a cheque for $2,000.00 and told the aide that he was in financial difficulties at the time and, when he had resolved them, he would pay the balance. The cheque was paid to the Tu'ipelehake.

It was then discovered that he had started cultivating the land notwithstanding that the lease had not been agreed and the Tu'ipelehake asked his aide to contact the defendant to say that, as he had paid $2,000.00, he could carry on with the cultivation he had already done but should not do any new work.

That witness told the court that there has never been any further payment and the lease application has therefore never been signed. He stated that the only reason it did not go ahead was because the defendant had failed to pay the balance.

At the time the defendant spoke to the aide, the late Tu'ipelehake's agent was also there. The defendant had spoken to him previously and, when challenged, suggested he had the right to cultivate the land because he had a lease for fifty years. The agent also told of how the defendant continued to extend his cultivation of the 'api through 1998 and into 1999.

The defendant's version of these events differs in critical aspects from that of the plaintiff and his witnesses. It must be said that the version given in evidence also differed from the written defence. Had he been represented, the court would not have allowed him to depart from his defence in that way. However, he told the court that the defence was not a true representation of his instructions.

At the outset, I had asked him if he accepted that the defence filed was accurate and he acknowledged that it was. When challenged over aspects of it later, he told the

court that he had not seen it before the day of the trial and had not had an opportunity to read it properly until that evening. It was only then that he realised it was not an accurate account of his defence. That problem was not mentioned until he was asked directly by the court but I have allowed him to give his evidence even where it differs from the defence pleaded and I shall consider it all. Counsel for the plaintiff asked him how the lawyer could have written such a different case and the defendant said it was because he had given his instructions over the telephone. He then admitted he had been in Nuku'alofa at that time but said he had only spoken to his lawyer about other matters.

He told the court that the agreement with the late Tu'ipelehake was that the defendant would pay $10,000.00 when the lease was signed but the Tu'ipelehake needed to have the lease with the company cancelled before his lease could be made. That was not done until after the late Tu'ipelehake died and so the defendant had never paid his part. His defence as pleaded was that he would receive a lease for 20 years if he paid $15,000.00 and that he was to pay $5,000.00 of that before he could start farming the land. The balance was to be paid when the lease was signed. The $5,000.00 was paid and he then started farming the land. In his evidence he denied that the money was due before the lease was signed. He explained that he had paid $2,000.00 by cheque and a further $3,000.00 in cash but it was to help with the costs of the sick man in New Zealand. He denies the evidence of the aide that he was told not to make any new cultivation.

The suggestion that he had paid an additional $3,000.00 was challenged by the plaintiff. The defendant was asked why he had not put it to the aide when he was in the witness box and replied that the aide had not mentioned it. He was asked if he had received a receipt and said that he had. He was asked where such a vital document was and said he thought it was with his lawyer in Nuku'alofa. He said he had faxed the lawyer on Monday and was told the documents were with the court. He agreed he had not asked the court officers whether they were on the file. When pressed about asking his lawyer for it, he said he believed there was a receipt but that he was uncertain where it was. Later he insisted there was a receipt and was able to tell the court the actual terms in which it was written. Just prior to that, he recalled it was with his lawyer but pointed out that it may have been a previous lawyer or possibly the latest one.

Counsel for the plaintiff then challenged him over the date of the payment. The defendant was unsure if it had been made in late 1997 or late 1998. He told the court he would need to look in his diary which was at home. However, he made no attempt to produce the diary after the adjournment.

I do not go into the evidence further. I have no doubt at all that the plaintiff's witnesses are speaking the truth and have given an accurate account of the events when the defendant went to Nuku'alofa to try and arrange a lease with the late Tu'ipelehake. I equally have no doubt at all that the defendant is not speaking the truth about this.

I am satisfied that he paid $2,000.00 only and that the agreement was for him to pay the balance before the lease would be signed and he failed so to do. It appears probable on the evidence that, had he done so, the late Tu'ipelehake would have carried out his side and signed. Unfortunately for the defendant, his delay in paying the balance lost him the opportunity. I accept the evidence of the aide that the defendant was given approval to continue to cultivate the crops he had already

planted but I also accept he was told not to start any new cultivation and has continued to do so despite that clear warning.

The defendant's evidence was that he was not given such advice. He insisted that he had an agreement with the late Tu'ipelehake to start cultivating the land once he had paid the first $5,000.00 although he had denied that part of the pleadings was accurate. He then suggested that he had authority to cultivate the land from one Hopoate, a shareholder of the company and, the defendant told the court, the managing director. They were the holders of the lease at the time as he correctly pointed out. He was unable to explain why, if he had such authority, he needed to approach the Tu'ipelehake at all or to seek his approval. As with so many aspects of the defendant's evidence, I felt he was willing to say almost anything that seemed to suit the moment with a repeated disregard for the truth.

The plaintiff told the court that, in May 1999, shortly after the death of the Tu'ipelehake, he discovered that the defendant was extending his cultivation of the land and instructed his lawyer to send a written notice to quit the 'api. That was clearly premature but the defendant accepts that, since Cabinet cancelled the company's lease in August this year, the plaintiff has the right to the land. His case appears to be that if the present Tu'ipelehake wants him to vacate the land he will do so but he is concerned about the crops he has planted.

I am satisfied he has no right to remain on the land. I am equally satisfied that he has no right to harvest the crops he has planted. Whilst I accept he was given leave by the late Tu'ipelehake to continue with the crops he had already planted, I am satisfied that was not intended to give a continuing licence to use the land. I am satisfied the basis of that permission was that he had paid $2,000.00 and the Tu'ipelehake was willing therefore to desist from telling him to remove his crops. I do not consider the present titleholder is bound by any such restraint by his father. The evidence is that the defendant planted only for a very short period of one or two months before he went to see the Tu'ipelehake. Since he was advised not to continue he has carried on planting without any right for a further eighteen months until the written notice was served on him in May 1999. He told the court he has continued even since then.

The other part of the claim, namely the damages for destruction of vanilla plants and coconut trees, formed a substantial part of the evidence as a whole. However, I can deal with it shortly.

The defendant's defence as pleaded was worded in ambiguous terms but appears not to be denying the destruction of the vanilla but challenging the valuation on the basis that the plants were unattended and damaged by wind and rain.

His evidence was that there were a number of blocks of vanilla and the only ones that were damaged belonged to the Vanilla Plantation and Curing Company. He called witnesses to explain that many of the plants were those of the company. He also suggested that the chopping down of much of the vanilla and the supporting fig trees was done by another person, Talakai. However, I attach little weight to the last point because he agreed with counsel for the plaintiff and the witness Talakai, whom he called for the defence, that the latter did it only on the purported authority of the defendant - an authority which was never his to give.

I accept on the evidence that there has been a substantial destruction of existing vanilla crops on the 'api. I also accept that this occurred shortly before and during May of 1999. If those plants were the property of the vanilla company, it is the

company who should be claiming the damages and not the plaintiff because the company still had the lease at the time they were destroyed. If, on the other hand, the crop belonged to the Tu'ipelehake he is entitled to proper damages.

The burden is on the plaintiff to prove the damage and the title to the plants at the time they were damaged. He called an officer from the Ministry of Agriculture who had been asked to go to the land in May last year and assess the extent and value of the damage. He gave evidence that the Ministry of Agriculture had planted a number of vanilla vines for the late Tu'ipelehake and had maintained them for him up to a year or two ago. That arrangement was confirmed by a number of witnesses. The arrangement was that the Ministry workers also marketed the vanilla and, after deducting their expenses, paid the balance to Tu'ipelehake. The payment of such money was confirmed by the plaintiff's witnesses and I accept there was such an arrangement.

These plants were apparently separate and distinct from those of the company in which the late Tu'ipelehake also had an interest. Much of the defendant's evidence was directed at demonstrating that these plants were not in the area he or Talakai had been cultivating.

I have considered that evidence with care but, in the final analysis, I am satisfied they were the plants of the titleholder. The agricultural officer who counted them and gave his valuation told the court that all the plants he noted had been removed or damaged were those planted and maintained by his department for the late Tu'ipelehake. I accept that evidence as accurate and credible. The evidence of the defendant and his witnesses fell far short of impugning his testimony.

The defendant finally suggests that the valuation of the vanilla at $7,740 is too high because of the state of the plants. The officer used a table of standard values put out by Cabinet. They were, he said, used by his department in cases where there are claims of damage to crops. The defendant challenges his assessment also on the basis that the witness' only formal qualification was the Higher Leaving Certificate. The evidence of the witness was that he had worked in the Ministry of Agriculture for 14 years and had been doing assessments of this nature for 6 years. I accept he is qualified to carry out such a valuation. The defendant's evidence that they were not worth such a figure is unsupported by any proper evidence upon which the court could base a valuation and I accept the figures given by the plaintiff's witness.

As far as the coconut trees are concerned. The evidence of the officer was that they had been chopped down with a chain saw. He gave no opinion of how long before he saw them that had occurred. Counsel for the plaintiff points out that the defence pleaded does not deny the chopping of these trees. In court the defendant did not seek to challenge that evidence and, on balance, I am satisfied he is liable also for that damage. The agricultural officer valued them at $165.00.

I therefore give judgment to the plaintiff in the following terms:

1. The defendant shall forthwith quit the 'api called Vaihoi and he, his servants and agents shall not enter the land without the express approval of the plaintiff.
2. The defendant shall pay the plaintiff damages in the sum of $7,905.00.
3. The defendant shall pay the costs of the plaintiff to be taxed if not agreed.

'Ameleki v Nai

Land Court, Nuku'alofa
Finnigan J
L 228/99

21, 24, 25, 28 January, 22 February 2000; 29 May 2000

Land law — later registration ordered to be set aside in favour of earlier one — equitable considerations
Land law — failure to consult — did not make registration invalid

The plaintiff claimed that he was entitled to be registered as holder of a town allotment in Ma'ufanga, which he with his mother had occupied since 1971. On 14 September 1994 the plaintiff was registered and a deed of grant was issued to him. Lupeti Vi and the first defendant then lodged their application form, which the estate holder had signed on the same day that the plaintiff's deed of grant was issued. They later enquired about progress of their application for registration of the land in the first defendant's name. Immediately the Minister accepted their application. He cancelled the registration of the plaintiff and on 22 September he issued a new deed of grant to the first defendant. The first defendant had the support of the second and third defendants (the Minister of Lands and the estate holder).

Held:

1. The registration of the first defendant was ordered to be set aside in favour of the registration for the plaintiff on three grounds. The first ground was an inequitable breach by the estate holder of his assurance to the plaintiff; the second ground was that there was an inequitable breach of assurance by the Minister; the third ground was that there was a subsequent error of law made by the Minister when he purported to cancel the plaintiff's registration.
2. The Court was not prepared to hold that a failure to consult (s 8), if that occurred, made registration invalid. Nothing was provided by the Act as a consequence of a failure to consult, particularly, there was no provision, which could easily have been made, that such registration would be void without consultation.
3. The Court directed the Minister of Lands to re issue the deed of grant for Lot 1 on Plan 1509 that was initially issued on 14 September 1994, Volume 334 Folio 65, and to cancel the deed of grant that was issued on 23 September 1994, Volume 334 Folio 68. Costs in the action were

awarded to the plaintiff against each of the defendants, to be agreed or taxed.

Cases considered:

Havea v Tu'i'afitu [1974 – 1980] Tonga LR 55

Motuliki v Pohahau (Land Court, L 670/97, 12 May 1999, Finnigan J)

Taufa v Kupu [1996] Tonga LR 3

Statutes considered:

Evidence Act (Cap 15)

Land Act (Cap 132)

Counsel for plaintiff	:	Mrs Vaihu
Counsel for first and third defendants	:	Ms Tonga
Counsel for second defendant	:	Mr Kefu

Judgment

The plaintiff claims that he is entitled to be registered as holder of a town allotment in Ma'ufanga, which he with his mother have occupied since 1971. He had been the registered holder, but the Minister cancelled his grant. The first defendant is the registered holder, and has the support of the second and third defendants, who are the Minister of Lands and the estate holder.

The Facts

For the plaintiff, evidence was given by the plaintiff himself, the registrar of lands Samisoni Pone, Kisione Tanaki Kula the Ma'ufanga town officer, and Kula 'Etu'afa, a.k.a. Lolesio Havili who is matapule of the Hon Fakafanua. The first defendant gave evidence, as did Paelata Vi Nai his wife, the third defendant Hon Fakafanua, Paea-e-Lone Maile, Lupeti Vi, and the Hon 'Ahome'e who is the land representative of the noble Tungi. In addition, pursuant to the Evidence Act (Cap 15), s 89(1)(iv), the Court admitted by consent the Judge's notes of the evidence of Valamotu Vi, given at a hearing about the present claim in February 1997.

There were some conflicts in the evidence, which have had to be resolved. Where necessary, the following narrative will set out and then resolve the conflicts, and if it is not otherwise stated, the findings that are set out here are what the Court has accepted and finds proved in the evidence. Some of the conflicts are not addressed, as unnecessary for decision of the competing claims to the allotment.

In or about 1971, land was required by the government for the police college at Kolofo'ou. The people who were living on that land were moved onto land in Ma'ufanga. The estate holder of that land was and is Hon Fakafanua. A new village came into being. This was at Houmakelikao. The first people to be given the allotment in issue were Sione and Valamotu Vi. They had two children, Pita being the older son. Like their neighbours, they did not register as the holders, but they were known to Hon Fakafanua the estate holder, who accepted them as the occupiers.

According to Hon Fakafanua, all of the land in Houmakelikao is now occupied, but none of the other occupiers have become registered. He said many of them are in Ha'apai and Vava'u or are overseas, but the allotments are theirs. He agreed that the

only person with a registered grant of an allotment in Houmakelikao is the first defendant Henele Nai.

The plaintiff was another of those who moved to Houmakelikao from Longolongo. For a time he had lived there with his sister and her husband, but when they were required to move Valamotu Vi allowed their allotment for the use of the plaintiff and his mother, saying that her children did not want to live at Houmakelikao. She stated in her evidence that she allowed this because she could not take care of both this and another allotment. She said also that her son Pita had his own lot. That was in 1971, and the plaintiff lived there with his mother till she died in 1990, and lives there still, alone. He has no family.

When Sione and Valamotu Vi first moved onto the land, in 1968, they put on it a hut that had been on their land at Kolofo'ou, and that work was done by their nephew Lupeti Vi with some of his school friends. Sione and Valamotu never lived on the allotment. Sione died in 1972. When Valamotu went to Australia in 1988, she authorised Lupeti to look after it, and he visited it on weekends. Between 1968 and 1973 he personally had looked after it, and visited it to see that the occupiers kept it weeded and tidy. He authorised occupation by a lady 'Ana Kupu (or Kutu) and her son, and was aware that in late 1973 or 1974 an old woman named Moli from Ha'apai (who was the plaintiff's mother) was living there, for the education of her grandchildren. He later found out that the plaintiff was living there.

Valamotu also knew he was living there, she stated in her evidence that he had come because she had allowed his mother to live there. In 1984 Lupeti sent building materials, sand aggregate and blocks to the allotment, intending to build. However, he had to leave Tonga for training and when his cousin asked for the materials he had to let it go and they were removed. The plaintiff was aware of this, as he was living there at the time, though he took no part in it.

When Valamotu Vi went to Australia she told Lupeti, her nephew, that she would like to give the allotment to him, but he told her he had one. He spoke with his father and it was agreed his sister Paelata should have it. Valamotu Vi and her eldest son Pita agreed with this proposal and in 1994 a letter was written surrendering the land to Henele Nai the first defendant, who is Paelata's husband. Pita Vi signed the letter as heir. Lupeti and Henele took the letter to Hon Fakafanua, who signed the consent on their application, and said the land would be registered as Henele's.

In the intervening years, the plaintiff had carried out village obligations, and in particular has been a frequent visitor to the home of Hon Fakafanua. He says he is a relative of Hon Fakafanua's wife, and is known to both of them. His frequent visits have sometimes been for the work of doing the laundry. He visited their home several times as well, he said about 8 times, for the purpose of obtaining registered title to the allotment. He did this because there were people coming to the allotment and he felt the need to ensure that he was entitled to it. He took with him on those occasions an application form for a grant of the allotment, which required the signature of the estate holder. He was not able to see Hon Fakafanua on each occasion, but when he did Hon Fakafanua did not sign the form. Instead, he told the plaintiff each time to go and stay on the land, because it was he who was taking care of it. He said, "Go back to the allotment and stay there." On one occasion, Hon Fakafanua's wife said the same thing to him. On one occasion Hon Fakafanua told him to go to the town officer and tell him to do the work to the allotment, and that whoever was named by the town officer would be the person to whom Hon Fakafanua would give the allotment.

Hon Fakafanua explained this remark in his evidence. He said that he did send applicants to the town officer, for the purpose of confirming the allotment and confirming that the particular applicant did have a house on it. He said that in the present case he did not do so, and that it was not necessary for him to do that because he knew the allotment and he knew Valamotu Vi. However, what the Hon Fakafanua said might have been true of the application made by the first defendant. From observation of these two witnesses and the town officer, it seems clear that what the plaintiff described did occur. Hon Fakafanua stated also that he had no memory of any visits by the plaintiff, and did not know him, but the evidence outweighs his denials.

The town officer stated that he had no authority over the land of the estate holder, and had been given none. Some applications to register occupied land in Ma'ufanga he said were approved by the estate holder, others are postponed. However, when Hon Fakafanua sends people to him he said he signs application forms under the estate holder's signature. He does this at his residence. He said he does this only when people are sent to him by the estate holder, and that some applicants had their forms signed by Hon Fakafanua without their being sent to him. He said he has often signed for people and they took the forms back to Hon Fakafanua for him to sign. He said he did so for the plaintiff when he was sent to him. He said he has no relationship with the estate holder and that he leaves entirely to him what decision is made. It was not for him to assign allotments, he said. Neither has he ever been asked to ascertain who lives on a particular allotment. He said that the reason that Hon Fakafanua sent people with their forms for him to sign was so he could confirm that an applicant was fulfilling his obligations in the village. He said that if he signed, the Hon Fakafanua would trust him and accept his signature and grant the allotment to that person. He said that he did not sign as a witness. On other occasions when Hon Fakafanua asked his opinion he would make a suggestion, but Hon Fakafanua would make up his own mind.

When the plaintiff went to the town officer, he took the form with him and told the town officer that he had taken it many times to Hon Fakafanua, but Hon Fakafanua had not signed it. He said that Hon Fakafanua had told him to bring the form to the town officer and that the allotment would be allocated according to the town officer's recommendation. The town officer signed it and, at the plaintiff's insistence, they went together to see Hon Fakafanua.

They went about three times. On one occasion the plaintiff spoke with Hon Fakafanua, while the town officer waited. The plaintiff came away with the form still unsigned, but told the town officer that Hon Fakafanua had again advised him to return and stay on the allotment. The town officer had not heard the estate holder say that, but he did hear the estate holder's wife say to the plaintiff not to worry, but to go and live on this piece of land because it was his. This made him ask the plaintiff what was his relationship with that woman, and the plaintiff said she was his aunt. The town officer said in evidence that before this he had known that it was the allotment of Sione and Valamotu Vi, and that they had moved overseas. He said that the plaintiff had lived on it since before the town officer arrived there in 1975, but he did not know how the plaintiff came to be the occupier.

After this, the plaintiff then took the form to the Minister. He told the Minister of the above events. The Minister said that he would go and see Hon Fakafanua. After that the plaintiff was told the Minister had approved the application for registration.

On 14 September 1994 the plaintiff was registered and a deed of grant was issued to him.

Lupeti Vi and the first defendant then lodged their application form, which the estate holder had signed on the same day that the plaintiffs deed of grant was issued. They later enquired about progress of their application for registration of the land in Henele's name. Immediately the Minister accepted their application. He cancelled the registration of the plaintiff and on 22 September he issued a new deed of grant to the first defendant.

From the evidence of the relevant witnesses, I accept that what I have set out above is the true version of events so far.

It is important to mention the evidence of Hon 'Ahome'e. The first defendant comes from Fua'amotu, which is on Tungi's estate. He lives there, on an allotment that belongs to his uncle, which will be inherited by the eldest son, his cousin. In 1994 he asked Hon 'Ahome'e in person and in a letter whether there was an allotment on that estate at Fua'amotu for which he could apply. He has not made any application. Hon 'Ahome'e told him that there were no allotments available. Many of the allotments at Fua'amotu are not registered, but the occupants are regarded as the holders, and the land is held for them.

The first defendant's evidence was that there is no land available for him on the estate of Tungi. However, after hearing the evidence of 'Ahome'e, I am not prepared to accept for the purpose of this case that this is so. I am not satisfied that his enquiry has extended to the whole estate of Tungi. Even if it had, I am satisfied he has not attempted to obtain his entitlement by making an application.

Comments

If it were established that he, first, had applied and, second, had found there is no land available for him on the estate of Tungi, then he does still have legal rights. He is not prevented by s 48 of the Land Act from holding a town allotment on Hon Fakafanua's estate, subject to a grant of such allotment to him that complies with all the terms of the Act.

However, his rights are governed by s 50. This provides, at (a) and (b), that first, he must apply, and then any allotment for him shall come from the hereditary estate where he lives or if none is available there then from another of Tungi's estates. Hon 'Ahome'e said the estates of Tungi were at Fua'amotu and elsewhere, and that is confirmed by Schedule I of the Land Act. They extend beyond Fua'amotu but the evidence of 'Ahome'e was of an enquiry about Fua'amotu only.

I find that the first defendant has not exhausted his rights under (a) and (b). Counsel for the plaintiff, Mrs Vaihu, takes this point in her submissions.

But even if he had done so, and if he had then the right to a grant of land on the estate of Hon Fakafanua under s 50(c), he would still be in conflict with the plaintiff.

The plaintiff has the same rights, and his claim under the Land Act to the allotment on Hon Fakafanua's estate is a stronger claim, under s 50(a). He is entitled to have his allotment out of land that is available for allotments on the estate where he is lawfully residing. Just as the first defendant has a first right to available land on Tungi's estate, so the plaintiff has a first right to available land on Hon Fakafanua's estate. The land on which the plaintiff is residing was available when he made his application. This gives him a strong claim to that land under s 50(a). Against that, it is

not proved that there was at the time of the first defendant's application no land available on the estate of Tungi where the first defendant resides, so that he could have had land granted to him outside Fua'amotu under s 50 (b).

So far as Fua'amotu itself is concerned, he was told by Hon 'Ahome'e that there is no land available there because the land there is already either granted to other people, or is said to be held for people who are said to occupy it and could be granted it if they apply for it under s 50(a). That decision is for the Minister to make. To obtain that decision, the defendant must first apply. For myself, I think it is possible that the Minister might give priority under s 50(a) of the Land Act to a claim by one of the latter class of people to a grant of the land he occupies in Fua'amotu. But that would be only if the person who actually resides on that land were also to apply, because only then would the occupant be entitled to any rights under the Act in competition with the first defendant. However, each application will be judged on its own merits. Under s 50(a) and (b) the first defendant has his rights to an allotment, and the first defendant cannot be kept out of his rights by another person merely by reason of that person has long occupied the land while that person slept on his rights. Meanwhile it seems to me that the first defendant cannot establish any right to any land on the Fakafanua estates until is first established to the satisfaction of the Minister there is no land available for allotments on the Tungi estates.

His application for a particular allotment on another noble's estate should not succeed when a person with a s 50(a) right for land already occupies it, and it is not shown that he has exhausted his own rights under s 50 (a) and (b).

On the other hand, the Minister has readily registered him and is prepared to confirm the issue of a grant for him on the estates of Hon Fakafanua, where he does not reside and which the Minister knows is occupied by another. It may well be that were his application to be considered under s 50 (a) or (b) then the Minister might allocate him some land on the estate of Tungi, where he does reside. The Minister has already (but wrongly, I find, in the circumstances of the present case) acted in the present case on the footing that occupation of an allotment by another does not by itself destroy the legal rights of an applicant for an allotment under the Act. In different circumstances it could be right for him to do so.

Had the first defendant applied for land at any time after turning 16 (s 43), then the provisions of s 50 would immediately have come into effect for him and his right to an allotment would have crystallised. From that time on he would have had a right to a search by the Minister for an allotment for him. This also is a point taken by Mrs Vaihu for the plaintiff.

Part of the first defendant's aim in evidence has been to establish that the land has not been occupied by the plaintiff at all, but has been occupied by himself or somebody whose occupation gives him a claim to the allotment, i.e. Valamotu Vi. This is what his evidence has been direct at doing. From the evidence however it is clear that the plaintiff was residing there, and had been for over 20 years before this dispute arose.

It is necessary now to mention the law about the agreement that the Vi family made about who will have the land, for which there was no registered holder. There is no recognition in the law for whatever they may decide among themselves. Sione and Valamotu Vi took no steps to establish themselves as landholders under Part IV of the Act, which includes s 50. Valamotu stated she could not take care of this and another allotment. Perhaps Sione already had one. If so, he was excluded from title to this one

by s 48. Sione died in 1972, and Valamotu left the country in 1988. Pita Vi was not legally the heir to the land. Lupeti Vi made no application for it. He did not reside on it. His sister has no standing under the Act to apply for it. This family has no right at law to decide that it will be granted to the husband of Paelata Nai so that she and her children will have the benefit of it. There was no legal force in the "surrender" letter that was written to Hon Fakafanua. The whole transaction in any event may have been nullified by s6.

I turn now to consider the registration of the plaintiff as landholder. I am aware that the Minister has already twice reconsidered the matter under directions from the Court, and that on both occasions the Minister has confirmed the revocation of the grant to the plaintiff and a grant to the first defendant. Those reconsiderations have evidentiary weight and value, but they cannot dictate the decision which the Court must make, and which only the Court can make for itself.

It was the plaintiff who was first registered as the holder of the allotment. The primary issue is whether the plaintiff was validly granted this allotment, according to the Land Act. If the grant was valid, then it can still be revoked, if the requirements of equity (under which is included a mistake of law) give the first defendant a stronger claim to legal title. If the grant was not valid, then legal title is with the first defendant, so long as his grant was a valid grant. The decision is one of law, to be made according to the provisions of the Land Act. The application of equity can be only limited, and the principles are clearly stated in the cases.

Here one must go back to fundamental principles. These are stated in the Act, and nowhere else, for the Act is the code for land. It provides at s 7 a mandatory entitlement for every male Tongan subject by birth, once application is made to the Minister, and subject only to the provisions of the Act. At s 8 it provides that, subject only to the surrender provisions, the grant to an applicant lawfully residing on an hereditary estate shall be from that hereditary estate, provided that there has first been consultation with the estate holder. Part IV Division 1, particularly but not only at Ss 43 & 50 reinforces that mandatory entitlement to land from a hereditary estate if land is available. Application must be made to the Minister, using the prescribed form, with birth certificate and the prescribed fees. Under Part VII, Division II it is the Minister who grants the allotment, and must register the grant and deliver a copy of the deed to the holder. The Act is clear, the Minister is responsible to the Cabinet for what he does under the Act.

The rights of the tofi'a holder in this matter are limited. They are provided generally at Part III Division I, ss 30 - 3.6. At s 8 the Act provides that land shall not be granted as a tax or town allotment until there has been prior consultation with the hereditary estate holder. Then s 34(2) provides that before granting a tax allotment out of an hereditary estate, the Minister shall consult the holder thereof and hear any objections he may make, but if they fail to agree the Minister "shall nevertheless grant the land as a tax allotment…". That does not apply to the present case, but it is a useful guide. Form 9, the application form under s 43 for an allotment, contains provision for the tofi'a holder to sign a statement agreeing to the grant of the allotment applied for, and declaring that there is no impediment to prejudice the grant. That signature is not mandatory.

The Second Defendant

At the end of the plaintiff's case, Mr Kefu, counsel for the Minister, moved for dismissal from the action on the ground that the evidence against him was insufficient to require an answer. After a question from the Court he accepted that the Minister was a necessary party to the case, and would be the subject of an order if the plaintiff's claim were upheld. The Court also pointed out that no remedies were sought against the Minister. Mr Kefu amended his application and sought leave to remain in the proceedings and abide the outcome. There was no objection to this course from counsel for the plaintiff, who accepted that the Minister should remain a party and abide the outcome.

I made an order that there was no claim or sufficient evidence for an award of any punitive remedy against the second defendant, and gave leave to counsel to remain silent thereafter and abide the outcome. Counsel sought costs for the second defendant, but I ruled that was premature and the issue was reserved for later submissions, if necessary.

The Submissions

The submissions of Mrs Vaihu for the plaintiff are reflected in what I have already said. Ms Tonga, for the first and third defendants, has submitted that the first defendant has a prior right because of the "established title" of the Vi family to the allotment. This title arose in her submission from the facts that the land was "allocated" to Sione and Valamotu Vi in 1967 by the government and the estate holder, and the Vi family erected its house on the allotment and looked after it, visiting it from time to time. As well, they say they carried out the village obligations that went with the allotment.

Title to land cannot be established title until it is established under the Land Act. As for village obligations, the evidence does not establish that either one of the parties carried out village obligations to the exclusion of the other, so little can be built on that fact. I am however satisfied that the plaintiff, who lived there for many years, did carry out his village obligations as he and his witnesses stated that he did. "Allocation" of the land to any person is of little significance at law if it is not done in accordance with the Act. The allotment was not allocated until it was granted, in accordance with the Act, by the Minister of Lands, upon an application by a male Tongan person over 16 years, made in the prescribed way. It was not the land of the Vi family, it was the land of the tofi'a holder, occupied by whoever lived on it. The evidence establishes that some members of the Vi family thought that the allotment was reserved for them, even though none of them had lived on it, and that they had the right to give permission for others to occupy it from time to time. They thought that Pita Vi was the heir to it, and that it was for them to surrender to whomever they selected. This is not the law.

Ms Tonga submitted it had not been proved that the third defendant, the tofi'a holder, had promised the allotment to the plaintiff. She stated, rightly, that only the plaintiff claimed that, and the third defendant denied it. After observing the witnesses giving their evidence, and bearing in mind the evidence of Kisione Tanaki Kula the Ma'ufanga town officer, I say without hesitation that I accept the evidence of the plaintiff and reject the denial of the third defendant. I formed this conclusion on the

evidence as stated by the witnesses. It is appropriate however, to note that there is at least one striking similarity between the evidence of the plaintiff about his visits to the tofi'a holder, the third defendant in the present case, and that given before me by the plaintiff in *Motuliki v Pohahau* (Land Court, L 670/97, 12 May 1999, Finnigan J). In both of these cases, the tofi'a holder reassured the plaintiff and said "go and stay at your allotment", but signed Form 9 for another applicant.

In the present case, those words by the tofi'a holder were a response to the plaintiff's request for his signature on the Form 9 for his application. Instead of signing and instead of refusing, he sent the plaintiff away, saying that he should stay on the allotment. This was an assurance, but the third defendant then consented to the registration of another, later, applicant. In my clear view this action by the estate holder comes within the principle appearing in the judgment of *Havea v Tu'i'afitu* [1974 – 1980] Tonga LR 55. If a person establishes that a grant of an allotment was made in breach of a clear promise by the Minister or the estate holder, then equity may set the registration aside.

My Findings

In my view there are three reasons for setting the registration aside in the present case. First, in applying the equity principle, I will direct that the registration of the first defendant be set aside in favour of the registration for the plaintiff on the ground of an inequitable breach by the estate holder of his assurance to the plaintiff.

Second, I would also set it aside because of an inequitable breach of assurance by the Minister. This occurred after the plaintiff took the form to the Minister and told the Minister of his dealings with the estate holder. The Minister told him that he would go and see Hon Fakafanua. After that the plaintiff was told the Minister had approved the application for registration. The Minister then registered the plaintiff and issued to him a deed of grant. These actions clearly included an assurance to the plaintiff that the Minister had carried out his duties, and had lawfully granted the allotment to him. As it happened, he had.

Third, on the evidence as it stands, there is a stronger ground available, i.e. a subsequent error of law made by the Minister when he purported to cancel the plaintiff's registration. If the evidence is complete, he failed to ascertain, before granting the allotment to the first defendant, whether there was other land available for the first defendant on the estate of Tungi which he was bound by s 50 to do. His failure was an error of law. It is equity that allows me to intervene and correct that error.

I make these findings about the Minister without seeking further submissions from counsel for the Minister. This is first because it was by his own motion that he withdrew from active participation in the hearing and second because there is no detriment to the Minister in any event from my findings about his failures. He is required only to take action, and that outcome arises in any event from my first finding alone. The issue of costs raised by Mr Kefu is governed by the general rule and will follow the event.

Further Comments on the Submissions

I accept the submission of plaintiff's counsel that the plaintiff was lawfully residing on the allotment when he applied for registration. This is not because of any

permission that the Vi family may have purported to give, but rather because of the permission given the tofi'a holder, the third defendant. I hold that he was entitled to registration and a deed of grant under s 50(a) of the Act.

Ms Tonga has submitted that when the Minister purported to register the plaintiff there was no prior consultation with the estate holder, and thus the registration was in breach of s 8. The consultation is mandatory.

In the present case, there has been no signature by the estate holder, so *prima facie* the Minister proceeded without the consent and certificate of the estate holder. There is other evidence, in a letter written by the Minister on 19 September 1994. There the Minister said that "… the estate holder did not offer this allotment", and the third defendant stated that there was no contact made to him by the Minister. I have residual doubts about that denial, and the words in the Minister's letter do not resolve them, but I do not need to resolve that factual issue.

This is because I am not prepared to hold that a failure to consult, if that occurs, makes registration invalid. Nothing is provided by the Act as a consequence of a failure to consult, particularly, there is no provision, which could easily have been made, that such registration would be void without consultation. As well, there is the corresponding provision in s 34(2), about consultation before granting of tax allotments. I said above that this is a useful guide. The Act does go further there, but not to make registration invalid. Rather, it provides for agreement, but on failure to agree then there will be registration in any event, with final review by the Court if a challenge is made within 3 months.

I do uphold the submission of Ms Tonga that the signature of the town officer Kisione Tanaki Kula in the place provided for the tofi'a holder to sign can have no legal effect. However, I hold that the signature of the tofi'a holder on the statement for him to sign in Form 9 is not a necessary pre-condition to a valid grant by the Minister of an allotment on that tofi'a holder's estate. As well, in the present case it is clear on the balance of probabilities from the evidence I heard that the estate holder, in exchange for his signature, was waiting for a gift from the plaintiff. The plaintiff did not offer a gift but the first defendant gave one. The first defendant denied this, but Hon Fakafanua did not deny it. No explanation of the events is necessary, but this it seems to me explains all that occurred.

Ms Tonga has submitted that the Minister made a valid grant to the first defendant on 15 April 1997. This was when he decided that the first defendant should hold the allotment after the Court remitted the matter to him for his consideration. The then Minister, Hon Fakafanua, was also the estate holder. She also submits that the second decision, by the next Minister, was likewise a valid Ministerial decision in the first defendant's favour. These submissions however, about the legal force of the subsequent Ministerial decisions, can be upheld only if the Court first decides that the initial grant to the plaintiff was invalid. If it was valid, the Minister was *functus* and had no further powers to change the legal situation that he had created by making a valid grant. In my view the initial grant was unobjectionable, and was valid under s 50(a), so could not subsequently be cancelled by the Minister.

Conclusion

I have found that the Court applied the same principle in *Taufa v Kupu* [1996] Tonga LR 3 to which Mrs Vaihu referred me (from p 8):

> "In a situation like the present - one where two contenders for title present for registration on the same allotment, the applicants are to be governed by s 50 of the Land Act. They must be judged according to their merits in an even-handed way. …"

For the three reasons I have stated above I decide the application of the plaintiff in the statement of claim dated 5 October 1998, by making an order setting aside the registration of the first defendant as grantee of the allotment in issue. I direct the Minister of Lands to re issue the deed of grant for Lot 1 on Plan 1509 that was initially issued on 14 September 1994, Volume 334 Folio 65, and cancel the deed of grant that was issued on 23 September 1994, Volume 334 Folio 68.

Costs in the action are awarded to the plaintiff against each of the defendants, to be agreed or taxed.

'Ameleki v Nai (No 2)

Land Court, Nuku'alofa
Finnigan J
L 228/99

26 June 2000; 28 June 2000

Costs — factors in assessment of quantum
Costs — determination of proportionate liabilities

On 29 May 2000 costs were awarded to the plaintiff against each of the defendants. Written submissions were received by the Court and there were substantive arguments about the proportionate liabilities of each of the defendants, and about whether the plaintiff was fully or only partially entitled to costs, whatever they may be. The Court determined that the costs issue should proceed under the Supreme Court Rules Order 29, Rule 2: that the Court should proceed "at the conclusion of [the] trial and forthwith assess the amount of costs payable under [the costs] order".

Held:

1. What was awarded was ultimately the Judge's assessment of what a fair amount to allow as "reasonably necessary or proper for the attainment of justice".
2. The rate allowed to counsel was intended to provide a fair return for counsel's expertise and counsel cannot be allowed fees for time spent learning the law.
3. In assessing the quantum, the Court took into account the nature of the claim, the novelty of the legal issues that were raised, the facts that were adduced in evidence and the examination and cross-examination of witnesses that was required. The Court awarded 65% of the allowable costs of $6487.50. Therefore quantum for party-party purposes was $4217, plus all disbursements that were proved by proper receipts.
4. The costs order against the second defendant, the Minister, was an error. Only administrative action was sought against him and counsel for the plaintiff could not find any evidence on which she could seek costs against him.
5. The Court set aside the determination against all three defendants and declared that costs were awarded to the plaintiff against the first and third defendants. The first and third defendants were directed to each pay one third of the party-party amount ($1,405.66 each) and half of all disbursements.

Cases considered:
OG Sanft & Sons v Johnson [1991] Tonga LR 1
Polynesian Airlines v Kingdom of Tonga [2000] Tonga LR 145
Practice Direction 02/92 [1992] Tonga LR 2

Statute considered:
Court of Appeal Act (Cap 9)

Rules considered:
Land Court Rules 1991
Supreme Court Rules 1991

Counsel for plaintiff	:	Mrs Vaihu
Counsel for first and third defendants	:	Ms Tonga
Counsel for second defendant	:	Mr Kefu

Judgment

In my judgment issued on 29 May 2000 I awarded costs to the plaintiff against each of the defendants, to be agreed or taxed. Counsel for all three parties have filed written submissions about the costs, and there was a chambers hearing on 26 June 2000. In the submissions there were substantive arguments about the proportionate liabilities of each of the defendants, and about whether the plaintiff is fully or only partially entitled to costs, whatever they may be. I heard counsel and determined that the costs issue should proceed under SCR Order 29 Rule 2. That is that I should proceed "at the conclusion of [the] trial and forthwith assess the amount of costs payable under [the costs] order". For this purpose, counsel would normally file submissions and the submissions filed by counsel in the present case are an ideal basis of the assessment.

This procedure is one that has been provided for the convenience of counsel and the parties, both in the 1991 Supreme Court Rules and in the 1990 amendment to s 10 of the Court of Appeal Act (Cap 9), (s 5 of Act No 11/1990). It is one that counsel may wish to use more frequently. As the Court noted in *Polynesian Airlines v Kingdom of Tonga* [2000] Tonga LR 145, the fixing of the quantum of costs by the Court without resort to taxation is a course open to litigants in Tonga. Pursuant to O29 R 2 it is the responsibility of the Court to finalise the costs issue as soon as possible after a trial or chambers hearing. The next step available is appeal to the Court of Appeal by leave, (pursuant to s 10, as amended in 1990). If followed, this path excludes taxation of party-party costs which, according O29 R 3, should occur only "where the Court is unable to assess costs under rule 2". The same procedure is available in cases before the Land Court, pursuant to the Land Court Rules 1991, O2 R 2 (applying the Supreme Court Rules) and O6 R 2 (providing for chambers determinations by a Judge sitting alone).

Quantum

Plaintiff's counsel filed a bill of costs in taxable form, itemising the amount of each charge by time and rate. The amount claimed is $7071. Excluding the first two items, which are prior to commencement of the present action, and the claimed

disbursements of $133.50, for which no receipts or vouchers have been supplied, the total is $6487.50. I think the fundamental principle to apply is the principle provided in O29 R 4(ii) for taxation, i.e. to allow "all such costs, charges and expenses as are reasonably necessary or proper for the attainment of justice or for maintaining or defending the rights of [the] party". It is not necessary to examine each charge made to see if it individually is reasonably necessary or proper. Rather in this exercise what is required is an overall assessment of the bill of costs, against the background of the actual issue litigated and the amount of work that was reasonably necessary or proper to achieve the result.

Counsel claims $2,250 for 5 days' trial at $450 per day. The rate is the rate allowed to plaintiff's counsel by the governing practice direction, *Practice Direction 02/92* [1992] Tonga LR 2. The hearing occupied morning and afternoon sessions on each of the five days and that claim is itself reasonable. Counsel in her submissions suggested that on the party-party basis, if other counsel agreed and thus avoided taxation, $5,000 would be an award acceptable to the plaintiff. This is about 77% of the allowable solicitor and client costs (above) and that is too high for a party-party award in practically any normal case. It is certainly too high for the issues and litigation of the present case.

In this assessment under O29 R 2, what is awarded is ultimately the Judge's assessment of what a fair amount to allow as "reasonably necessary or proper for the attainment of justice (etc.)". It is not a matter for fine assessment of hours spent or for argument about minor details. There are various rules of thumb and guiding principles available to the Court. Sometimes it is satisfactory to make a simple assessment of what percentage of the successful party's solicitor and client costs should be paid by the other party or parties as being reasonably necessary or proper for the attainment of the judgment achieved. Sometimes the Court will assess a period of time for trial plus preparation for trial. This will depend on the issues involved and the economy of court time that may have been achieved or unnecessary expenditure of court time. Hence the 1-day-plus-3-days, or even 1-day-plus-15-days assessment that can be found in *Polynesian Airlines* (above).

It is important to have in mind the principle stated by Martin CJ in *OG Sanft & Sons v Johnson* [1991] Tonga LR 1 at 2. The rate allowed to counsel (now in *Practice Direction 02/92*) is intended to provide a fair return for counsel's expertise, and counsel cannot be allowed fees for time spent learning the law. This means that there is a fairly easily assessed average for time spent in preparing a run-of-the-mill case. The issue litigated in the present case was of considerable importance to the plaintiff and the first defendant, and the legal issues needed careful argument and decision. On the other hand, in its pleadings and its facts it was straight-forward. The claim in the bill of costs for 10 hours drafting filing and serving the statement of claim is well beyond what an unsuccessful defendant should pay for. So is a half-hour charge for receiving a notice of a directions hearing and advising the client. Likewise three hours perusing a statement of defence and advising the plaintiff, and 10 hours for "preparation for trial research in law and authorities" with a further 6 hours considering and working on the written submissions, are times outside the average of what would be reasonably necessary or proper.

It would definitely be excessive to allow the days of trial plus 3 days preparation for each of those. For this case a percentage calculation is more appropriate. It seems to me that of the allowable solicitor-client charges made in the bill of costs, the

amount that is reasonable and proper expenditure for the purposes of a party-party award is about 65%. In that assessment I take into account the nature of the claim, the novelty of the legal issues that were raised, the facts that were adduced in evidence and the examination and cross-examination of witnesses that was required. By this assessment, I would award 65% of $6487.50, which by my calculation is $4,217. I fix quantum for party-party purposes at $4217, plus all disbursements that are proved by proper receipts.

However, I must say I am concerned at the amount of the solicitor-client charges in this case, and wonder who it may be that advises the public that on the client's application their lawyers' fees are liable in every case to taxation.

Liability

When I made the order for liability for costs, I expected the three defendants to agree to divide their joint and several liability into equal thirds. Costs are not punitive. They compensate for expense in establishing a right by litigation. Even though there was no finding explicitly against the first defendant, he clearly was making the same claim as the plaintiff, and it was he who was unsuccessful. Counsel for the first and third defendants is correct in her submission that full costs should not be awarded, but they rarely are in a party-party award. Her submission that half the solicitor-client costs should be awarded I have largely upheld. Counsel's further submission, that the first and third defendants were not liable to pay any costs because the judgment found that the fault was that of the second defendant I cannot accept. The first of three reasons for the judgment was that the third defendant had inequitably broken his assurance to the plaintiff. Clearly on that finding the third defendant is liable to pay costs. Counsel made no submission about the proportions to be paid by each of her clients, and I expect she accepts that her clients are liable jointly and severally, with each contributing equally. That is my own view, and I shall direct accordingly.

Counsel for the second defendant has submitted that his client was a wholly successful party in the litigation and, despite my ruling that he was to pay costs, is not liable. He seeks variation of the costs order and relief from the costs liability. The argument is fully set out in the submission, including the citations relied on and this courtesy is appreciated.

A little detail is needed here. At the close of the plaintiff's case, counsel for the second defendant, the Minister, moved for dismissal of the claim against the Minister. He submitted then that although there had been evidence about other actions by the Minister, the claim against the Minister in paragraph 11 of the statement of claim about the present issue had not been proved by any evidence. After agreeing with the Court that the Minister is a necessary party, even if only for the sake of the registration order sought by the plaintiff, he amended his application to a motion for leave to take no further active part in the proceedings and to abide the outcome. Counsel for the plaintiff replied that although there was an allegation pleaded against the Minister, she accepted he should now be granted leave to abide the outcome. She agreed with the Court that the statement of claim sought no remedy against him. She went on to state that she accepted there was no evidence on which she could seek an order for costs against the Minister. I thereupon held that there was not sufficient evidence for the award of any punitive remedy against the Minister, and gave leave to counsel to remain silent thereafter and abide the outcome. Counsel for the Minister

then sought costs to that point for the Minister, and I reserved the issue of costs of the Minister for submissions at the costs stage.

In the event, after the evidence of the other defendants was heard, I held there had been a failure by the Minister, which was an error of law. I stated that I made that finding without hearing further from counsel because first, it was by his own motion that he had withdrawn and second, because there was no detriment to the Minister from my findings about his failures. He was merely directed to take administrative action, and that direction would have been made in any event from my finding against the third defendant alone. Thereafter, without hearing further from counsel I directed that the Minister was liable in costs along with the other two defendants on the principle of liability following the event.

As counsel saw it, and as he expounds in his submissions, the granting of the leave that he sought made his client a successful party. As a successful party the Minister is *prima facie* entitled to costs, liability following the event. Thereafter, since the Court held that the Minister had made an error of law, he accepts that the Minister is disentitled. Thus, his position is that the Minister's position in costs is neutral, and he submits that the proper position is that the Minister should be excluded from the order.

I have considered these submissions very critically. The order against the Minister is not a punitive order. At first glance, it seems inequitable to place the costs burden wholly on the other two defendants and relieve the Minister of liability when he has been at fault. Quantum to be paid by each was left for agreement or taxation and is now to be fixed by this judgment. Finally however, I have concluded that the order against the Minister was an error. This is partly for the reasons advanced in submissions by counsel on his behalf, and I now think I should have heard those submissions before deciding liability. There is also the reason that the Minister was never in jeopardy in the proceedings, because no remedy was sought against him, only administrative action. The third reason is that I had overlooked the concession of counsel for the plaintiff at the time that she consented to the Minister's motion, that she had adduced no evidence on which she could seek costs against him. In advance, counsel for the plaintiff had accepted the points now made by counsel for the Minister. Now that the costs issue has been argued this concession has ruled out any award of costs against the Minister.

The Order in Costs

The issue of liability is reopened on the application of counsel for the second defendant. I set aside my earlier determination against all three defendants, and declare that costs are awarded to the plaintiff against the first and third defendants.

The issue of costs is primarily equitable. I give effect to the equities as I see them and direct that the first and third defendants shall each pay one third of the party-party amount above i.e. $1,405.66 each, and each shall pay half of all disbursements that are proved by proper receipts.

'Akau'ola v Tonga Telecommunications Commission

Supreme Court, Nuku'alofa
Ward CJ
C 447/99

3, 4, 12 April, 2, 8, 9 May 2000; 6 June 2000

Employment law — dismissal — natural justice principles to be observed
Employment law — dismissal — legislative authority

The plaintiffs were employed by the defendant and each had a telephone with arrears accumulated on the bill. In June 1998 the defendant decided to take steps to recover the arrears on the bills of a number of employees and decided that any employee who had a bill in excess of $4,000 should pay it within six months or be subject to instant dismissal. By 29 January 1999, the plaintiffs, having not paid off their arrears, were each sent a dismissal letter. They brought an action claiming that dismissal was in breach of the terms of the Tonga Telecommunications Commission Act (Cap 96) and of natural justice because the plaintiffs were not given an opportunity to be heard.

Held:

1. The Court found that the Commission did have the power under the Telecommunications Act to dismiss the plaintiffs for the failure to pay off their bills in accordance with the Board's direction.
2. The Commission was a public body and therefore was bound to observe the principles of natural justice. The Commission was acting within its powers in dismissing the plaintiffs and it complied with the requirements of natural justice in the manner in which it was done.
3. The plaintiffs' claim failed and was dismissed with costs to be taxed if not agreed.

Case considered:

Tu'itupou v Tonga Water Board [1990] Tonga LR 99

Statute considered:

Tonga Telecommunications Commission Act (Cap 96)

Counsel for plaintiffs : Miss Tonga
Counsel for defendant : Mr Foliaki

Judgment

Both plaintiffs were employed by the Tonga Telecommunications Commission up to January 1999 when they were dismissed. The first plaintiff had worked for the TTC for fifteen years and held the position of assistant accountant at the time he was dismissed. The second plaintiff started working with the TTC in 1984 and held the position of head bookkeeper.

The reason given for the dismissal of both these men was that they each had a very large telephone bill outstanding and failed to settle it when required to do so. In the case of the first plaintiff, his bill exceeded $7,000.00 and, in the case of the second, it exceeded $12,000.00.

In the early part of 1998 the, then, General Manager told the Board that he had just become aware of the scale of outstanding accounts of some of his staff. It was an initial point of dispute that he must have known this well before and the Commission had allowed this to continue for some considerable time. I find it remarkable if he had not known before but he did not give evidence, having since left the Commission.

The minutes of the Board meetings refer to the fact that most of the very high sums were owed by employees working in the finance section. The suggestion is made that they were in some way able to use their position to hide the state of the accounts from him. I have absolutely no evidence to support an allegation of any such improper conduct. The plaintiffs, however, suggest that the allegation was a factor that influenced the Board in its decision to dismiss the plaintiffs and that they were never told of it or given an opportunity to answer it.

On the evidence before me I am satisfied that such a suggestion was made to the Board but I am equally satisfied that it was not considered further and formed no part of the decision to dismiss the two plaintiffs.

The matter of the outstanding accounts was discussed at a meeting of the TTC subcommittee on 23 June 1998. It was reported that six employees had outstanding bills in excess of $4,000.00 and their telephones had been disconnected. After further discussion it was decided to recommend that the Board should give those employees six months to pay off the bills or be subject to instant dismissal.

That recommendation was approved by the Board at a meeting on 26 June 1998 and a memorandum to that effect was circulated to eight senior personnel including the Chief Accountant and the Accountant. How far it went beyond them is a matter of dispute in the case. The first plaintiff told the court he never saw it until March 1999 - well after he had been dismissed. The second plaintiff similarly never saw it but said he heard rumours of its contents.

However, on 31 July 1998, each plaintiff was sent a letter by the Internal Auditor. These were in identical terms apart from the details of the sum outstanding and the amount to be paid off. The second paragraph reads:

> "The Board has directed on Decision Number 149 of 26th June 1998, that you are to settle this account within six months from the date of the Decision or subject to disciplinary action. Therefore it is my duty to ascertain that you comply with this direction."

It then continues to state the manner in which the account is to be paid and concludes with the words:

> "You are now given a period of 14 days from the date shown above to make the necessary arrangement with the Finance section for direct deduction from your salary or otherwise. Should you requite more information, please do not hesitate to contact me."

The second plaintiff wrote a letter to the Chairman of the Management Committee on 26 August 1998:

> "Dear Sir,
> This letter is written with much respect to represent and to submit a request from those employees whose telephone debts have been long overdue. It is requested that a submission be made on our behalf to the Board of the Commission to extend for another 1 ½ years Board Decision No 149 of 26/6/98 giving us a total of 2 years altogether. This would give us adequate time to pay off our debts. We have received from the Commission's Auditor the amount that we should pay fortnightly but the problem is the debts cannot be paid because of loans to the banks and the maintenance of our families.
>
> We do not contest the long overdue debts but we respectfully request that you kindly submit our request to the General Manager and the Board of the Commission to change their decision because we do not enjoy working since we have been informed of their decision.
>
> We do hope this matter is quickly resolved and a new decision by the Board is made that will encourage our working environment at the Commission.
>
> Respectfully,
>
> Visesio Sele (for those whose debts are long overdue TTC)"

On that letter is a hand written note by the General Manager addressed to the Internal Auditor and dated 31 August 1998:

> "Please prepare submission to the Board. Management Committee have agreed to submit this request to the Board."

A submission was prepared, considered by the Board and rejected on 28 September 1998.

On 20 November 1998, the Internal Auditor again wrote to each plaintiff advising him of the rejection of their request. The wording is awkward but I am satisfied the meaning was clear to the plaintiffs. I set out the letter to the first plaintiff. That to the second plaintiff is identical apart from the sums of money.

> "I regret to inform you that the Board had decided (number 221) on 28th September 1998 to withdraw a request on your behalf for leniency with respect of time given to settle your outstanding telephone account. This has therefore reinforce the effect of the Board's decision, number 149 of 26 June 1998.
>
> In accordance with our billing records as at the end of October 1998, you owed the Tonga Telecommunications Commission an amount of T$7,641.21. This is a percentage change of 0% from the balance owed as at the end of June 1998. This outstanding amount is to be settled in six (6) month's time from the date of the above Board decision (26/6/98) or subject to instant dismissal.
>
> Considering the severity of the disciplinary action, it is my duty to ascertain that you comply with this direction. This direction is confirmed to be carried out as has been reminded on Board decision number 238 of 29 October 1998.
>
> I also wish to refer you to my earlier letter, which I had stated the amount you should had been paying per fortnight I order to settle your telephone account. But as shown above, you have made no progress. Should you still want to avoid the consequences of the disciplinary action for failure to settle your telephone account, you are to make three equal payments of T$2,547.07 over the next three pay days.
>
> Should you require further information, please contact the under signed immediately."

Despite the reference to the Board decision of 26 June and to the risk of instant dismissal, it is noteworthy that neither plaintiff asked to see the decision. However, on 15 December 1998, the first plaintiff made a single payment of $1,500.00. The second plaintiff paid nothing.

On 29 January 1999, a letter was delivered to each of them dismissing them from that date.

That is the decision challenged in this action.

It should be added that the plaintiffs wrote a joint letter to the Board after their dismissal asking to be allowed to return to work with the Commission, apologising for their disobedience and undertaking and promising "regarding our telephone accounts, whatever arrangements you make regarding the amount of payment and for how long to be paid in full, we shall comply with it."

The staff subcommittee considered this and recommended that the Management Committee should meet them and hear their appeal. Both plaintiffs were seen on 4 March 1999.

The first plaintiff told them he planned to settle his account within one week. The second plaintiff stated he planned to pay his debt off in two years and forfeit his outstanding vacation leave as part of it. He was advised that his case would be stronger if he tried to pay sooner but he did not accept that advice. On the evidence before the court I am satisfied that, had either paid at least a substantial amount

towards his debt at that time, he would in fact have been reinstated. Neither has paid anything more.

The plaintiffs' statement of claim challenges the dismissal in the following terms:

> "13. That the Defendant's board has no authority under the Act to dismiss the Plaintiffs for the reason of unsettling their telephone bills.
> 14. That section 45 of the Telecommunications Regulations provides the method to adopt in case of default subscribers such as the case of the Plaintiffs in default of settling their telephone bills.
> 15. That the dismissal of the Plaintiffs by the Defendant through its Board is contradictory to the provisions of the Act and therefore unlawful.
> 16. That the dismissal of the Plaintiffs by the defendant was in breach of natural justice for they were not personally heard or given an opportunity to be heard by the Board before making its decisions.
> 17. That the dismissal of the Plaintiffs by the Defendant was in breach of natural justice for accumulation of their telephone bills were not by fraud or cheating but with the knowledge and permission of the Defendant through its general Manger and chief Accountant who have control of permitting subscribers telephone lines to operate or to disconnect in view of the outstanding balance in respect of their telephone bills.
> 18. That the reason for the dismissal of the Plaintiffs by the Defendant is unfair and in breach of natural justice for many default subscribers whose telephone bills are above those of the plaintiffs yet they are not penalised by the Defendant."

I deal with the provisions of the Act first. Miss Tonga for the plaintiffs submits that the power of the Commission under the Act to dismiss its officers and staff is separate from the power it is given to deal with defaulting subscribers. The latter is covered by Regulation 45 and gives the power to discontinue the service. As the reason for the dismissal was the failure to pay and regulation 45 is the only provision for default, she says the Commission was exceeding its powers when it dismissed the plaintiffs.

Mr Foliaki for the defendant says the power to dismiss under section 10(d) gives a wide discretion to the Commission:

> "10. … the Commission has power to -
> (d) engage, employ, pay and dismiss such officers and staff as it deems necessary for the conduct of its business, in accordance with the provisions of this Act"

Further, section 9 charges the Commission with a duty "to operate, maintain and develop the domestic telecommunications system in an efficient and profitable manner to the best advantage and interest of the Kingdom."

It cannot, he contends be in accordance with those provisions to allow such large bills to remain outstanding especially by its own employees.

I do not accept that regulation 45 has any relevance to the dismissal. The power to disconnect a defaulting subscriber is separate from any disciplinary action the Commission deems necessary for the efficient and profitable conduct of its business.

I am satisfied the Commission did have the power to dismiss these plaintiffs for the failure to pay off these bills in accordance with the Board's direction.

Passing to the question of whether the manner in which the decision was made was in breach of the principles of natural justice, there is no dispute that the Commission is a public body and that public law applies. As a result, it is bound to observe the principles of natural justice.

The plaintiffs' case is that the suggestion that these bills had accumulated to such a large extent because the plaintiffs used their position in the finance section to hide the fact from normal scrutiny by the Commission influenced the decision to dismiss. That allegation was never communicated to the plaintiffs and they never had an opportunity to answer it. Miss Tonga points to the severity of the disciplinary action taken and suggests it must have been for more than simply the failure to pay the bills and so the Board must have considered the suggestion of concealing the accounts.

I have already found that, although I accept that the suggestion was mentioned at a Board meeting, it formed no part of the decision to dismiss. There was, therefore, no need to seek the plaintiffs' answers and no failure of natural justice in taking that course in relation to the allegation.

There is no doubt that the penalty was extremely severe but the decision of the Board on 26 June 1998 was not just confined to the six employees whose bills exceeded $4,000.00. The decision covered a large number of outstanding accounts and the penalty for failure to pay was graded according to the sum outstanding. If the total decision is considered, it is clear that the penalty threatened by that decision was a logical grading in accordance with the amount owed. It should also be remembered that the penalty was not for having such a large bill but for failing to comply with the Board's instruction to pay it off within six months.

The second limb of the plaintiffs' case on natural justice is that the two plaintiffs were not given a fair hearing in the sense that they were not given clear information about the decision the Board and were unable, therefore, to present any explanation.

Both plaintiffs say they were not shown the decision of 26 June 1998. I am not satisfied that they were. The second plaintiff says he heard rumours of its contents. The first plaintiff says he never saw it or knew of its contents at the time. I am satisfied they knew of the contents and also knew that they could see the decision but never asked to do so.

Both plaintiffs say that the phrase, in the letter of 31 July 1998, that they would be "subject to disciplinary action" misled them. Had they realised that included dismissal they would have acted differently. I accept it was an unfortunately imprecise form of words but I do not accept on the evidence that the plaintiffs could or would have acted any differently if it had specifically stated they were liable to dismissal. In any event, I am satisfied that the plaintiffs did know of the terms of the

decision of 26 June and, if they had considered the letter of 31 July was altering that, would have take the writer up on his offer to explain it further.

The letter of 20 November 1998 referred to instant dismissal clearly enough and it was less than a month later that the first plaintiff paid $1,500.00. However, his case is that he was never given a copy of that letter and so, on his own case, it could not have been that factor which spurred him into action.

I am satisfied beyond doubt on the evidence that both the plaintiffs were served with a copy of the letter of 20 November. I am satisfied they had heard the threat of dismissal before that and they certainly did then. They still failed to pay off the bills except for the part payment by the first plaintiff.

The requirements of a fair hearing do not, as Martin CJ pointed out in *Tu'itupou v Tonga Water Board* [1990] Tonga LR 99 at 104, give a right to an oral hearing.

> "The term "fair hearing" is misleading because there is no right to an oral hearing in these circumstances. The employer must:
>
> (i) inform the employee of the allegations against him in sufficient detail to ensure that he fully understands them;
> (ii) give the employee a reasonable opportunity to present any explanation; and
> (iii) genuinely consider any explanation given.
>
> If the employer does these things he complies with his obligation to provide a fair hearing."

It would have been better in this case if the Board had ensured that the plaintiffs were given a copy of the decision of 26 June. However, I am satisfied that the order to pay within six months and the consequence of failure were clearly put in the letter of 31 July. Again it would have been sensible to use the actual phrase that was in the Board decision but I am satisfied that the reference to disciplinary action clearly includes any form of disciplinary action including dismissal.

I have no doubt that each plaintiff knew that the decision was to dismiss them if they failed to pay. It defies common sense that such a point would not have been known by all the defaulting staff. Neither plaintiff sought to clarify the point at any stage and I am satisfied that was because they knew the penalty that had been decided should they fail to comply.

Whether or not the penalty was harsh is not a matter for this court to determine. The question for the court in such cases is whether the process by which the decision was reached was fair in terms of natural justice.

The plaintiffs have failed to satisfy me that it was unfair. On the contrary, the evidence satisfies me that the requirement to pay was fairly clearly put to the plaintiffs and they knew exactly what would be the consequence of failure to comply with the Board's decision that the bills should be paid within six months.

I am equally satisfied that both had ample time to make any submission as the second plaintiff did. I am satisfied that submission was considered properly and fully by the Board before it reached its decision.

For six months the plaintiffs knew that they must pay off their bills in six months. For most of that time they knew the penalty would be dismissal and they failed to take any step to comply apart from the $1,500.00 paid in the case of the first

plaintiff. The Commission was acting within its powers in those circumstances to dismiss them and it complied with the requirements of natural justice in the manner in which it was done.

I do not need to deal with the claim for damages.

300 The plaintiffs' claim fails and is dismissed with costs to be taxed if not agreed.

Vaioleti v Tonga Development Bank

Supreme Court, Nuku'alofa
Finnigan J
C 476/99

13, 14 April 2000; 15 June 2000

Employment law — wrongful dismissal — reasonable cause

Lio Manumu'a borrowed from the defendant bank and used a fishing net as security. His payments were in arrears. The plaintiff was his loans officer and she suggested that the net be shared with another fisherman in order to catch more fish and from the money make Lio's repayments. Lio agreed. The plaintiff confirmed this by a letter. If there were any excess after making Lio's payments that would be her share. Over a year later other officials of the bank were investigating Lio's non-payment and discovered the arrangement. The plaintiff was on leave and was brought in from her leave. She recovered the net from the other fisherman and returned it to Lio. Neither the plaintiff nor Lio had made any payments towards his loan. At the time of its return the net was tangled and had large holes so was worthless for fishing. The defendant called the plaintiff in from her leave to discuss what had occurred, and she was told to pay in $400 to Lio's account, which she did. When she returned to work, on 7 December 1998, she was told in a letter that the defendant was investigating the matter and on 9 December, she was advised that the defendant's auditor was assessing her actions to see if there had been anything fraudulent. She was suspended on 14 December 1998. She was called to see the manager, and there she made at his request her statement about what she had done. She wanted Lio brought so he could support her account, but that was refused. Later she was called in again, and the defendant's auditor put to her some questions, which she answered in writing. Lio had written a letter of complaint to the defendant, at the request of the officers who had followed up his loans arrears and heard his story. No complaint or statement made by Lio was shown to her. On Christmas Eve she received a sealed letter which formally dismissed her for breach of clauses 19 (governing 'General Dishonesty') and 20 (governing 'Fees, Rewards, Gratuities, Borrowing') of the staff manual. She appealed to the Board of Directors, but they upheld her dismissal. She claimed that the defendant did not have proper grounds to dismiss her and that her dismissal was wrongful. She claimed damages for unfair and/or wrongful dismissal.

Held:

1. A dismissal procedure provided as a contractual term was not an obligation of strict compliance but of reasonable compliance. If the

employer did not strictly follow a set procedure, the test to apply was not whether the procedure should have been followed, but whether the employer acted reasonably, i.e. fair in all the circumstances.

2. The defendant had given the plaintiff a full opportunity to explain her actions and make a case for continuation of her employment. It gave full consideration to her explanation and to the case for continuing her employment. That was what the law required the defendant to do in using the procedure.

3. No bank officer should ever make arrangements about the bank's security from which he or she may personally make money for himself. The plaintiff's duty as a loans officer was to ensure that the defendant's security was preserved. When she became personally involved in the use of the security asset, she ran a grave risk of becoming responsible to her employer for any loss or reduction in value that might occur.

4. The actions of the defendant were a reasonable exercise of its contractual right to dismiss the plaintiff. By the same principles, the cause for dismissal was reasonable. The plaintiff's claim could not succeed, and it was dismissed with costs. Costs were to be agreed or taxed.

Counsel for plaintiff : Mr Fifita
Counsel for defendant : Mrs Vaihu

Judgment

The plaintiff has claimed damages for unfair and/or wrongful dismissal. She was employed from May 1996 until December 1998 by the defendant and at the time of her dismissal she was a senior loans officer. She states in her claim that the termination of her employment was unfair in that the defendant did not give her the opportunity of full explanation, and had not fully advised her of her responsibilities. She relies on the law of employment and the implied term in her contract of employment that the employer would exercise its contractual right to dismiss in a reasonable manner. She claims that the defendant did not have proper grounds to dismiss her in any event, and that her dismissal for that reason was also wrongful.

The Facts

What occurred is clear from the evidence, which was given for the plaintiff by the plaintiff herself, and by Siola'a Tu'itupou the manager of the defendant's loan department. For the defendant evidence was given by Lio Manumu'a and by Hasiloni Fungavai who was acting managing director of the defendant at the time of the plaintiff s dismissal.

Lio Manumu'a was a borrower from the defendant, and had given as security a fishing net. His payments were in arrears. The plaintiff was checking the defendant's loan securities, and in the course of that duty she went to see him. He did not have the net, and the plaintiff was active in recovering it, and she arranged for him to make a monthly payment of $40. This was a creditable discharge of her duties. However, about 4 months after that, his payments were again a problem. She put a proposal to him, which she stated was intended to help him. She suggested that the net be shared with another fisherman, who also had a loan with the bank and was paying, by salary

deductions. The idea was that he could catch more fish and from the money make Lio's repayments. Lio agreed. She confirmed this by a letter and gave him time to think about it. She stated in her evidence that if there were any excess after making Lio's payments that would be her share. She stated that this arrangement was within her powers as a bank officer and not beyond them.

She went with her husband and collected the net. She delivered it to the other fisherman.

It was over a year later, that other officials of the bank were investigating Lio's non-payment and learned of what had occurred. The plaintiff was on leave, attending to her squash planting. She was brought in from her leave. She recovered the net from the other fisherman and returned it to Lio Manumu'a. During that time she had made no payments towards his loan, and, it appears, neither had Lio. He told the bank officials that the plaintiff had taken some of his nets and that she was to repay some of his loan. At the time of its return the net was worthless for fishing, with large holes and tangled. Lio removed the lead sinkers and some ropes as the only items left of any value.

While the plaintiff was still on leave the defendant called her in to discuss what had occurred, and she was told to pay in $400 to Lio's account, which she did. When she returned to work, on 7 December 1998, she said she was told in a letter that the defendant was investigating the matter and on 9 December, she was advised that the defendant's auditor was assessing her actions to see if there had been anything fraudulent. She was suspended on 14 December 1998. In the suspension letter dated that day, she was told that the suspension would be while the defendant investigated an irregular transaction on the loan account of Lio Manumu'a. The letter told her she would be required to provide a full statement of her involvement with the loan account. She was called to see the manager, and there she made at his request her statement about what she had done. She wanted Lio brought so he could support her account, but that was refused. Some time later she was called in again, and the defendant's auditor put to her some questions, which she answered in writing. Lio had written a letter of complaint to the defendant, at the request of the officers who had followed up his loans arrears and heard his story. No complaint or statement made by Lio was shown to her. On Christmas Eve her younger sister delivered a letter to her. It was unsealed and it formally dismissed her for breach of clauses 19 and 20 of the staff manual. She was very distressed by the message, the timing and the mode of delivery.

Clause 19 of the staff manual governs 'General Dishonesty', and clause 20 'Fees, Rewards, Gratuities, Borrowing'.

She appealed to the Board of Directors, but they upheld her dismissal, upsetting her further because she said they mentioned other matters that had not been stated earlier as the reasons for her dismissal.

To this day she feels her actions over the fishing net were justified. She stated the reasons for this. First she stated that the defendant had deceived Lio and that this was a way of helping Lio meet his obligations. Second what she did was within her powers as a loan officer, and third, she stated that if she could have got the money from her squash or elsewhere she would have paid off the rest of Lio's loan. She stated that everything she had done she did in good faith, and that she gained nothing from it.

During these events, on 16 October 1998, the Board of Directors, because of what had happened in this case had amended clause 20 of the staff manual. The plaintiff feels that what she did was not against anything in the staff manual either at the time of her actions or after the amendment.

The Submissions

I shall not set out the submissions of counsel in detail, but they, applied to the evidence, are the basis of my findings. The main thrust of the plaintiff's case is that the defendant did not employ its dismissal procedure, and if it did so, did not use it in a fair and reasonable manner. The secondary point is that, while the defendant had the right to dismiss for good cause, it had no cause that justified dismissing the plaintiff.

I have a choice about how to go about this matter. In the statement of claim and in his submissions, counsel for the plaintiff has covered a wide range of detailed allegations. I have considered each of these in turn, but feel no good will come from a detailed analysis of each point. As he stated correctly in opening his submissions, the essence of the complaint is that the procedure was not properly followed, and the manner of the dismissal was not reasonable. As well there is a secondary claim that, while the defendant was entitled to dismiss if there were good cause, such cause did not exist in the present case. The plaintiff's essential claims can be dealt with briefly, so I shall be brief.

The claims above are claims that the plaintiff undertook to establish. The first point to make is that a dismissal procedure was, on the evidence, included in the terms of the plaintiff's employment contract, because there was one in the staff manual and both parties accepted from the outset that it contained terms of the contract. However, it is the law, as counsel correctly pleaded and submitted, that the employer is bound to exercise its rights in a reasonable manner. The obligation in an employment situation is not an obligation of strict compliance, but of reasonable compliance. It follows therefore in law that a dismissal procedure provided as a contractual term is always subject to the overriding principle that it must require and enable the employer to act reasonably. By the same principle, if the employer does not strictly follow a set procedure, the test to apply is not whether the procedure should have been followed, but whether the employer acted reasonably. Whether or not a dismissal procedure is itself reasonable, the employer is not required by the law to adhere strictly to it if to depart from it is reasonable, i.e. fair in its circumstances.

Having said all that, I am not persuaded in the present case that the procedure set out in the manual (Clauses 16 and 17) is intended to be the only procedure for dismissal. It is not well drafted. It provides, at Clause 16(e), for an appeal to the Board of Directors if a dismissed employee feels his case has not been considered fairly. It is clear that Clauses 16 and 17 do not set out all the ways the defendant can be fair, and do not set out all the things for which an employee may be dismissed. Further to that, the essence of the procedure, as governed by the law, is that the defendant was bound to treat the plaintiff fairly in exercising its right to dismiss for cause. As the evidence in the present case unfolded it became abundantly clear that the defendant had given the plaintiff a full opportunity to explain her actions and make a case for continuation of her employment. It gave full consideration to her explanation and to the case for continuing her employment. That was what the law required the defendant to do in using the procedure. I uphold the submission of

counsel for the plaintiff on that point of law, but have to rule against the plaintiff on the facts.

I turn now to the claim that the employer did not have cause to dismiss. This claim is not justified. The plaintiff, I am sure, justifies her actions to herself to this day and thus by that alone demonstrates her liability to be dismissed. What she did was, to an objective observer, contrary to her employer's interests and contrary to her duty as a bank employee. She had no rights whatever in respect of the fishing net. If she had been offered some share of it, then it was her duty while an employee of the plaintiff to decline to get involved because of a conflict of interest. Much less should she actively make arrangements that may affect the value of the bank's security. Again, no bank officer should ever make arrangements about the bank's security from which he or she may personally make money for himself. The plaintiff's duty as a loans officer was to ensure that the defendant's security was preserved. That indeed was what she said she was doing at the outset. When she became personally involved in the use of the security asset, she ran a grave risk of becoming responsible to her employer for any loss or reduction in value that might occur. That is what did happen, and the defendant rightly required her to make a payment towards the loss that had accrued from Lio's non-payment. What she did was the opposite of her duty. She was clearly liable to be dismissed if the employer, after following an enquiry procedure that was fair and reasonable, chose to do that. Viewed objectively, her payment in reduction of the debtor's loan was an admission that she had become liable by her actions to do something to put matters right.

Conclusion

For the reasons I have stated, I hold that the actions of the defendant were a reasonable exercise of its contractual right to dismiss the plaintiff. By the same principles, I hold that the cause for dismissal was reasonable. The plaintiff's claim cannot succeed, and it is dismissed with costs. Costs are to be agreed or taxed.

Re Application by Jones

Supreme Court, Nuku'alofa
Ward CJ as Registrar General
RG 248/00

15 June 2000; 22 June 2000

Births, Deaths and Marriages — application for registration of birth in Tongan Register — not Tongan parentage — not allowed

The applicant was born in Tonga on 1 August 1936 and his birth was registered with the Western Pacific High Commission under the terms of the English Pacific Order in Council, 1893. His father had been born in England in about 1901 and his mother had been born in Tonga in 1902. They were married in Tonga in June 1929. The applicant applied to register his birth in the Tongan birth register.

Held:

1. The Tongan Nationality Act 1935 provided that to be a Tongan subject the person must be born in Tonga of Tongan parentage. The Court interpreted Tongan parentage as requiring both parents to be Tongan.
2. The application to register his birth in the Tongan Register was refused.

Cases considered:

Edwards v Kingdom of Tonga [1994] Tonga LR 62 (CA)
Joyce v Director of Public Prosecutions [1946] AC 347; [1946] 1 All ER 186

Statutes considered:

Naturalization Act 1915
Tongan Nationality Act 1935

Counsel for applicant : Mr Foliaki
Counsel for Solicitor General : Mr Tapueluelu

Judgment

This is an application to register the birth of the applicant in the Tongan birth register. The application was served on the Solicitor General and he indicated that he wished to be heard.

The applicant was born in Tonga on 1 August 1936 and his birth was registered with the Western Pacific High Commission under the terms of the English Pacific Order in Council, 1893. His father, Frederick Percy Jones, and had been born in

England in or about 1901 and his mother, Mary Dorothy Jones, had been born in Tonga in 1902. They were married in Tonga in June 1929.

His application is based on the principle that his nationality was determined at the time of his birth and, in accordance with the judgment of the Court of Appeal in the case of *Edwards v Kingdom of Tonga* [1994] Tonga LR 62 (CA), the nationality he acquired then was Tongan.

The basis of the decision in that case was that, when the appellant, Edwards, was born, there was no Nationality Act and the only provision that bore on the subject was the Constitution, which referred to "native born subjects of Tonga". The Court of Appeal ruled therefore that the matter must be determined under the common law rule that, with a few exceptions that do not apply in this or *Edwards*' case, a person's nationality is determined by his place of birth. It can be stated in the words of Jowitt LC in *Joyce v Director of Public Prosecutions* [1946] AC 347; [1946] 1 All ER 186, which were adopted by our Court of Appeal.

> "The natural-born subject owes allegiance from his birth … The natural-born subject cannot at common law at any time cast it off."

As Edwards was born before any provision of Tongan law covered the situation, the common law rule applied and he was a Tongan subject by the very fact of being born here. The same situation applies to Mr Jones' mother who clearly was a Tongan by right of birth.

The position changed on 3 July 1935, the year after Edwards' birth, when the Tongan Nationality Act came into effect. Section 2 of that act provided:

> "2. The following persons shall be deemed to be Tongan subjects:
>
> (a) any person born in Tonga of Tongan parentage …;
> (b) any person naturalized in Tonga under the Naturalization Act 1915;
> (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."

Thus, by the following year when the present applicant was born, the rule under the common law had been superseded by the new Act and so his nationality was determined by those provisions. Unless he fell into one of the categories in section 2, he did not acquire Tongan nationality.

The applicant was born in Tonga. His mother was Tongan but his father was not. Is that sufficient to establish his qualification under section 2(a) as a person born in Tonga of Tongan parentage? Unfortunately for Mr. Jones it is not.

In *Edwards*' case the Court considered this provision and the equivalent phrase in the Tongan version of the Laws " 'ogo matu'a Toga". That, they felt, made it clear that Tongan parentage required both parents to be Tongan. Although obiter, I agree with the Court's reasoning and accept that is the correct interpretation of the phrase "Tongan parentage". It is perhaps a wry comment that, had his parents not been married at the time the applicant was born, he would have qualified under 2(d).

The two years difference in the ages of Edwards and the applicant is critical and defeats his claim. The application to register his birth in the Tongan Register must be refused.

Allied Foods Co Ltd v Moa

Supreme Court, Nuku'alofa
Ward CJ
C 1295/98

19, 20 June 2000; 27 June 2000

Contract — proof of agreement — balance of probabilities
Creditors' remedies — payment for clear debt — interest ordered

The plaintiff company was the owner of flourmills in New Zealand and the defendant was managing a bakery business in Neiafu, Vava'u. In 1994, 1995 and 1996, the plaintiff shipped four consignments of flour to the defendant in Vava'u which he received. The defendant did not pay for them. The plaintiff brought an action to recover those costs. The defendant accepted liability for the two later orders but submitted that the first two orders were the result of an arrangement he had with a Tongan trader, Peter Hala'api'api, in New Zealand whereby the defendant would ship a container of produce such as cassava to him and he would arrange a shipment of flour to the defendant as payment. His case was that the first two orders were made by Hala'api'api and, as far as the defendant was concerned, had been or were to be paid for by him.

Held:

1. The burden was first on the plaintiff to prove on the balance of probabilities that the defendant made the agreement with the plaintiff for the first two consignments before it shifted to the defendant to prove his arrangement with Mr Hala'api'api. The plaintiff did not prove that the agreement to supply the flour was made by the defendant rather than by Mr Hala'api'api. The plaintiff's claim in relation to the first two consignments was dismissed.
2. With regard to the later two consignments, the defendant admitted those and so there was judgment for the plaintiff in the sum still outstanding and admitted by the defendant of $NZ14,129.76 only.
3. The plaintiff sought interest at 10% per annum from the date of purchase. The plaintiff was kept out of its money for a long time despite the clear liability of the defendant to pay so the interest order was made.
4. There was no order as to costs.

Counsel for plaintiff : Mr Garrett
Counsel for defendant : Miss Tonga

Judgment

The plaintiff company is the owner of flourmills in New Zealand and the defendant was managing a bakery business in Neiafu, Vava'u at the time in question. There is no dispute that, in 1994, 1995 and 1996, the plaintiff shipped four consignments of flour to the defendant in Vava'u which he received.

The first was under an order number 20202 dated 2 November 1994 and invoiced at $11,760.00. This was followed by the other consignments as follows:

Order number 20397 dated 27 January 1995, value $12,096.00
Order number 21294 dated 15 March 1996, value $12,610.80
Order number 21534 dated 8 August 1996, value $12,584.00.

The defendant does not dispute that all these consignments were received by him and that he has not paid for them. The plaintiff brings this action recover those costs.

The defendant accepts liability for the two later orders but pleads that the first two orders were the result of an arrangement he had with a Tongan trader, Peter Hala'api'api, in New Zealand whereby the defendant would ship a container of produce such as cassava to him and he would arrange a shipment of flour to the defendant as payment. His case is that the first two orders were made by Hala'api'api and, as far as the defendant was concerned, had been or were to be paid for by him.

It was pleaded by the plaintiff that the defendant had never challenged or questioned the amount owed on any of these four consignments. That is one of the issues in the case.

The plaintiff called a company accountant, Mr Heywood, who produced the invoices and other company documents. They show that the four shipments were made on the dates stated above and were not paid for. He had not been working for the company at the time of these transactions and could only give evidence of the present practice of the company and draw on his experience in accounting in similar businesses for 18 years. He was a helpful and clearly credible witness.

He explained that orders could and most frequently are made by telephone and are taken down and put onto the computer. That order is then produced as a packing list that is sent to the warehouse and the shipment arranged. He told the court that it is company policy that, if an order is delivered and not paid, no further orders would be taken until the payment issue is resolved. When and whether such action is taken depends, of course, on the terms of trade of that particular customer but, once he is outside the period allowed, that policy is implemented. Failure by a member of the plaintiff's staff to observe this rule is a "sackable" offence.

At the time of the relevant transactions, the branch manager of the plaintiff responsible for the Pacific was a Peter Murray. He has since left the company following a disagreement about the manner in which he ran the business especially the fact that he had allowed his customers in the islands to accumulate over a quarter of a million dollars in bad debts. Mr Heywood's searches through the company files had produced a few extra papers, including some correspondence, but it is clear that Mr Murray's filing and general office organisation was haphazard and disorganized. The defence produced some copies of other correspondence between Mr Murray and the defendant which Mr Heywood had not seen and which were clearly no longer in Mr Murray's files.

Mr Heywood said that, when an order is received from a customer, a customer number is allocated to that person made up of the first three letters of the customer's name followed by a number. There were two such numbers issued to the defendant's account. The two disputed orders have the number MOA 130. All the others have the number EMO 130 based, it would appear, on the initial of the defendant's first name which is sometimes wrongly spelt in the correspondence as Elwyn instead of Alwyn.

The defendant gave evidence and told the court of the arrangement with Mr Hala'api'api. The plaintiff challenges such an arrangement could have been made and it was, to say the least, a very casual and ill-considered arrangement. The exact details seem never to have been clarified and it was never put into writing. However, be that as it may, the defendant insists that when he received the containers of flour, he believed they had been ordered and arranged by Mr Hala'api'api under this arrangement. They were accompanied by an invoice and he was able to have them cleared by Customs in Neiafu on the strength of that invoice.

The first he knew to the contrary was when he received a statement from the company in late April 1995 referring to the two consignments that are the subject of dispute in this case. As soon as he received it, he contacted the company by facsimile and was put in touch with Mr Murray. That was the first time he had had any contact with him or the company. He told the court that he challenged the figure and said he was coming to New Zealand and would come and see Mr Murray then. In about June of that year, he saw him in Auckland. They discussed the debt and Mr Murray told him the consignment of flour had been ordered by Mr Hala'api'api. The defendant denied liability and explained the arrangement with Mr Hala'api'api. A further meeting was then arranged at Mr Murray's office to allow Mr Hala'api'api to attend. There were three people there at that time, the defendant, Mr Murray and Mr Hala'api'api.

The defendant's case is that they discussed the whole arrangement and he pointed out that he was not liable. Mr Hala'api'api spoke to him in Tongan at one stage and apologised for letting him down. Mr Murray was, understandably, concerned about the payment and asked the defendant to help Mr Hala'api'api with payment. The defendant said he would send no more cassava because he had sent four containers and only received two containers of flour back. However, he agreed to help to the extent that, if Mr Hala'api'api came to Vava'u, he would allow him to take his (the defendant's) breadfruit for no charge.

The defendant was keen to continue receiving flour from the plaintiff company and so he had a further meeting with Mr Murray who told him the procedure to set up such an agreement. A number of consignments including the third and fourth shipments were the result of that agreement.

The plaintiff was unable to call Mr Murray. He was clearly unwilling to assist the company more than the absolute minimum but he did speak over the telephone to Heywood and on the strength of that an affidavit was drafted and sent to him for signature. That was produced as part of the plaintiff's case.

He stated that, in late 1995 and into 1996, both the defendant and Mr Hala'api'api owed money to the company. He understood both operated bakery businesses and also dealt with each other in Tongan vegetable products. It should be mentioned that the defendant disputes the fact that Mr Hala'api'api runs a bakery.

Mr Murray mentioned the debt Mr Hala'api'api owed as being $42,112. It is, as has been stated, not disputed that the defendant owes the plaintiff money on the later

shipments shipped in March and August 1996. Had Mr Murray also stated the sum to which he recalled the defendant was indebted, it would have been possible to say whether it included the earlier shipments or was only the later ones, as the defendant admits. Unfortunately he did not.

He continued:

> "I recall that Moa told me that he had reached some private deal with Hala'api'api under which the former would supply the latter with some Tongan vegetables, and in return Hala'api'api would pay off some of Moa's debt with us. Because I was under some pressure to obtain payment wherever I could, I agreed to Moa's proposal. I would have accepted money from anyone who had offered it in reduction of either debt.
>
> At no stage was there any agreement, either verbally or in writing, that Hala'api'api would be responsible for Moa's debt. I always regarded the debts as separate and neither debtor indicated otherwise."

He referred to a number of faxed and telephone communications between himself and the two Tongans and produced two faxes dated 13 November 1995 and 16 February 1996.

The plaintiff's contention is that this is a clear case. The defendant received the flour. At the time, he received an invoice upon which he was named both as the recipient and the person who was to be invoiced. There is never any mention in any document of Mr Hala'api'api in relation to either shipment. Counsel for the plaintiff put it to the defendant that he had simply seen the discrepancies in the manner of billing these two consignments and taken the opportunity to avoid his clear liability to pay for both.

The defendant insists on the agreement with Mr Hala'api'api who, he says, ordered the flour. Thus, whilst he was the admitted recipient of the flour, he was not liable to pay the plaintiff.

In view of the defence pleaded, it is perhaps surprising that the defence did not seek to join Mr Hala'api'api as a third party and that apparently neither side took any steps to call him. However, I must judge the matter on the evidence before me.

The evidence of both sides is unsatisfactory to some extent. The burden is on the plaintiff to prove on the balance of probability that there was an agreement between the plaintiff and the defendant for the supply of flour to the defendant for which the defendant would pay. Faced with such evidence, the burden of proving the alternative arrangement then shifts to the defence as the party asserting it.

As I have stated, the evidence of both sides is not wholly satisfactory but the burden lies first on the plaintiff to prove the agreement.

The plaintiff's evidence is clear and undisputed that the flour was ordered and delivered. Mr Heywood says that it would have been ordered by the defendant. The document he produced clearly names the defendant both as the assignee and as the person to be invoiced. He has told that orders are generally taken over the telephone and that would be how these were taken. That would explain why there is no other evidence of the placing of the order. He suggests, because it must be speculation by him, that the two customer numbers are simply either a clerical error or a way of

allowing the defendant to sort previous payment problems by starting, in effect, a new account. The mention of an agreement between the defendant and Mr Hala'api'api in correspondence between himself and the defendant is simply an attempt by Mr Murray to get the defendant's debt cleared in some way.

On the total evidence produced, I cannot accept that the plaintiff has proved the agreement to supply the flour was made by the defendant rather than by Mr Hala'api'api. The agreement under which the defendant says this was done was, as I have already stated, vague and apparently uncertain. Had the burden been on the defendant to prove it, I may have needed more evidence in order to determine its existence or its exact scope but I must first decide whether the plaintiff has discharged its burden to establish the agreement.

The correspondence between Mr Murray and the defendant is incomplete and often imprecise but there is certainly evidence of some sort of agreement for the supply of rootcrops to New Zealand. On 13 November 1995, Mr Murray is wondering "how you and Peter Hala'api'api are getting on loading the breadfruit container which hopefully when it arrives will enable Peter to pay your old outstanding account".

The plaintiff points to the use of the phrase "your old outstanding account". There is no mention there of the liability being on anyone else and the documents show that, from the outset, the defendant was named as the invoicing addressee. On the evidence before me, an equal explanation is that, if Mr Hala'api'api had ordered this over the 'phone and if, as Mr Murray points out, he was already indebted to the company for a substantial sum, he would probably have needed to use the defendant's name to have a telephoned order accepted. The defendant, it must be remembered, was at that time not indebted to the plaintiff at all. In those circumstances I do not consider the use of the phrase referred to advances the plaintiff's case.

It goes further. Mr Heywood gave his suggested explanation for the two customer numbers. The court has noted the apparent coincidence that it is the two disputed orders which have a different number from all the rest. An alternative suggestion to that of Mr Heywood is that they could have been used because the first two orders were in some different way from the rest. In that context, I note that the address of the consignee on each of the first two invoices is the same but differs from the remainder. The MOA130 orders are addressed to the defendant at "Neiafu Vavau" whilst the two admitted consignments are addressed to "Neiafu Vava'u and Beach". Such a difference could support the defendant's suggestion that the first two orders were made by a different person.

I have referred to Mr Heywood's suggestion that the two account numbers may have been a billing device to allow the defendant time to pay off a previous debt. I accept his evidence that such arrangements may be made but, in such case, I would expect some written confirmation at least in the company papers. Nothing has been produced by the plaintiff to support such a suggestion apart from Mr Heywood's speculative view. If such an arrangement has not been proved to have taken place, it is a point in the defendant's favour that by the time Mr Murray sent the two admitted containers in March and August 1996, the two dispatched more than a year before had still not been paid. That would have been a remarkable step by any company let alone one with the policy of clearing old debts before allowing further orders as described by Mr Heywood.

The court was shown a letter from Mr Murray dated 8 August 1996 in which it is clear that the defendant was paying off his more recent orders with the plaintiff by monthly installments. Even at that stage, having referred to those payments by the defendant, Mr Murray writes:

> I am still having problems with Peter Hala'api'api regarding your old account. I am disturbed that I am the one suffering regarding the settling of this account. Peter is now saying that the breadfruit etc is not available from Vavau to be shipped to Auckland. Would you please confirm that it is still your intention to give/supply to Peter Hala'api'api the product to ship to enable him to settle this large outstanding account of $17,572.00."

There is previous correspondence between them about payments for the later shipments but, apart from the reference to "your old account", there is never any apparent suggestion that the company policy required it to stop any fresh supplies until the old account was paid off. On the other hand, there is reference more than once to Mr Hala'api'api being the person who will pay it.

As I have said, the burden is first on the plaintiff to prove on the balance of probabilities that the defendant made the agreement with the plaintiff for the first two consignments before it shifts to the defendant to prove his arrangement with Mr Hala'api'api. The plaintiff's evidence depends on the invoices and statements. The defendant's suggestion that they were the result of an arrangement between Mr Hala'api'api and the company and not with him is supported in part by the correspondence between Murray and himself, by his evidence of his challenge to the bill on his visit to New Zealand, which I accept did occur, by the differences between those invoices and the succeeding ones and by the willingness of the company to continue to supply him with flour when the disputed accounts had been outstanding for such a long time.

The plaintiff's claim in relation to the first two consignments is dismissed. The defendant has admitted the later two consignments and so there shall be judgment for the plaintiff in the sum still outstanding and admitted by the defendant of $NZ14,129.76 only. The plaintiff also seeks interest at 10% per annum from the date of purchase. The plaintiff has been kept out of its money for a very long time despite the clear liability of the defendant to pay so I shall make that order.

Costs would normally follow the event but I shall make no order. The defendant has succeeded in his challenge to the consignments he did not admit ordering but he relies on his suggested agreement with Hala'api'api. Had he joined him and had court accepted he was the person liable, the defendant would have had his costs paid by him and the plaintiff would have succeeded in getting judgment. Alternatively, the matter may have been resolved without needing to go to trial.

Therefore the order is judgment to the plaintiff in the sum of $NZ14,129.76 only with interest at 10% per annum from the date of consignment. No order for costs.

Litili v Fifita

Supreme Court, Nuku'alofa
Ward CJ
F 11/2000

28 June 2000; 29 June 2000

Dissolution of marriage — petition for divorce — claim of unreasonable conduct — not proved

The parties were married on the 5 November 1996 in Vava'u and there were two children of the marriage; a daughter Lorendanna Sharon born on 26 July 1997 and a son Sione Mapa Ha'angana born on 22 July 1999. The husband petitioned for divorce on the ground that his wife had behaved in such a way that he could not be expected to live with her. He filed an affidavit of the incidents that he sought to put forward to support his claim of unreasonable conduct and the wife filed one in reply.

Held:

1. Divorce laws were not to be used simply as a way of avoiding something that has become difficult or inconvenient. The petitioner failed to discharge the burden of proving the conduct was unreasonable to the extent required.
2. The petition was dismissed with costs to the respondent.

Counsel for petitioner : Mr 'Etika
Counsel for respondent : Mr Tu'utafaiva

Judgment

The parties were married on the 5 November 1996 in Vava'u and there are two children of the marriage; a daughter Lorendanna Sharon born on 26 July 1997 and a son Sione Mapa Ha'angana born on 22 July 1999.

The husband petitions for divorce on the ground that his wife has behaved in such a way that he cannot be expected to live with her. He has filed an affidavit of the incidents that he seeks to put forward to support his claim of unreasonable conduct and the wife has filed one in reply. Counsel have agreed that they should be produced and the parties then cross-examined on them.

At the time of the marriage, the petitioner was 49 years of age and the respondent 29. The petitioner had been married and divorced previously. His first wife had died in 1996 leaving him with two daughters aged, at the time of the present

marriage, 22 and 17 years. The respondent had not been married but had an illegitimate child by another man.

There was clearly some discussion before the marriage about the position of the relatives of the parties but there is dispute over what was, in fact, agreed as regards the respondent's brothers and mother. The respondent says that they agreed before the marriage that the petitioner would love her family by which she says she meant they should be able to live with them. Both parties agree it was known that the petitioner had two daughters who were still dependent on him and that the respondent's illegitimate child should be accepted by the petitioner.

Whatever the state of their knowledge and agreement, it is clear that the parties lived with the petitioner's two daughters in their home at Popua. However, there was discord as a result and this strained the relationship between the petitioner and the respondent leading, in late 1997, to the respondent leaving the petitioner and returning to Vava'u. Three months later she returned and sought to apologise and reconcile with her husband.

The petitioner told the court that it was apparent that his daughters would need to leave the home and, although he was unhappy at the prospect, he agreed and they moved to another house. By that time, his eldest daughter had married and the husband had also been living with them.

Once that had occurred the wife's mother moved into the home at Popua. According to the petitioner, the brothers did also but the wife suggests they were living at Fasi and only came occasionally.

During this time, the petitioner told the court that the marriage deteriorated to an intolerable level. His affidavit deals with this in the following way:

> "11. In 1998 after my first children moved out, Vika started to invite her relatives and immediate family to come and stay with us at home which I had also to swallow this hard move to keep up our warm relationship.
>
> 12. I had to strive to support these other people but at the same time I took it as an opportunity to show my wife the warm love and affection I hold for her and her family which I had hoped she will return the same good deeds to me.
>
> 13. But during this time I noticed that Vika is not reviving out relationship but started not appreciating anything from myself, any assistance, words and even our sexual life had become rarely occurred between us.
>
> 14. She started to shape up herself with make-ups and other decorative manners which was not her normal lifestyle when we first met at marriage.
>
> 15. Our relationship gets worse with time as her manners become so rude and dominating over me, at home and a time together for us is no peace but insulting for her to see me at home and no better words to greet me with but swearing and scolding when I return after work.

16. It became her habit to swear at me and our children of the marriage when she is not happy with anything at home or myself.
17. I had some time thought that there is no other better word in her dictionary but indecent language mainly.
18. She would even tell me off in the home if I do not like to live with her but all these things I had to absorb for the betterment of our home and relationship, although life is as bitter as anything to me everyday."

He then goes on to describe how, when his wife was heavily pregnant with their second child, he heard her talking in her sleep and saying: "As if I like to walk together with him. Soon after I have born this out for the dog to eat, I will go and have sex with another man".

In his evidence he was able to give the date of this incident as 24 June 1999 and he said that he questioned her about it that night. He insisted that she was asleep when she said it although she did not often speak in her sleep. The respondent says that she was awake and said it intending him to hear because she was unhappy with his attitude and behaviour towards her pregnancy.

On Sunday 11 July 1999, he had been to work and had also prepared and cooked the meal in the umu. When he asked her to come and eat she refused and he found her making up and doing her hair. He was so angry that he decided to leave home quietly rather than lose his temper and touch her.

He left and has not returned.

In cross-examination, the picture was not so clear. When questioned about the reduction in sexual intercourse, he agreed that his wife had had a miscarriage during that time. It was put to him that the doctor had suggested a reduction in the frequency of sexual intercourse but he said that he did not know because he had not heard the doctor say it. However, it appeared that his wife had told him that was the doctor's advice and he simply ignored it and made no attempt to verify it with the doctor. He also said he could see no reason why sexual intercourse should not continue throughout pregnancy at the same frequency. There was no suggestion in his evidence on this that he might have considered his wife's views.

It was a significant point in his evidence. I considered he was generally a truthful witness but on more that one occasion he revealed himself as self centred and arrogant. He was quick to place blame on others including, notably, his wife.

Despite the passages quoted above from his affidavit, he agreed in evidence that the first time his wife swore at him was after he had left her in July 1999. The problem of the make up had no greater significance than that he did not like her making up her eyebrows and it was a reversion to that to which he objected. When it was put to him that he was often home late from work, he agreed this was frequently the case but seemed not to think it reasonable that he should telephone his wife and tell her. He objected to his wife's mother being in their home up to the time he left but agreed it was because of his wife's pregnancy.

What is clear is that, after he left his wife in July 1999, she became abusive and difficult. However, in cross-examination he conceded that on at least two occasions she had tried to resolve the matter but he agreed with counsel's suggestion that he had decided by then that he would not go back.

The wife opposes the petition because she says he is the father of her children and the marriage agreement was until death.

Whilst many people enter marriage with such views, the court does not accept the marriage bond is so absolute. The law allows a marriage to be dissolved in a number of circumstances but it should be remembered that the court's duty is principally to uphold the bond. The divorce laws are not to be used simply as a way of avoiding something that has become difficult or inconvenient.

In the present case, it is clear that the marriage was not running smoothly for some time before the petitioner left his wife. There is no doubt that the wife was to blame for much of the difficulty. I have no doubt that she demonstrates her own share of vindictiveness. It may be that the petitioner felt she was being unreasonable in many ways but I am far from satisfied on the evidence that her conduct was such that he could not reasonably be expected to live with her.

The worst conduct occurred after he had made the unilateral decision that he no longer wanted to continue with the relationship. At that time, on the evidence I have heard, the marriage was far from being finished. His wife's conduct following his departure in July 1999 does not affect the issue. He had simply left her. He had decided he was no longer willing to make the effort to make his marriage work and he rebuffed her advances. Her abuse was unpleasant and offensive but, in the circumstances of his departure, anger and abuse are understandable. As he had already left the matrimonial home, they were not a factor in his decision to leave and it was that move that put him in the wrong.

The petitioner has failed to discharge the burden of proving the conduct was unreasonable to the extent required by section 3(1)(g).

The petition is dismissed with costs to the respondent.

Fifita v R

Court of Appeal, Nuku'alofa
Burchett, Tompkins, Beaumont JJ
CA 7/00

10 July 2000; 21 July 2000

Criminal law — appeal against sentence — armed robbery — leave to appeal not granted
Sentencing — suspended sentence triggered

The applicant pleaded guilty to an indictment containing three counts, two of armed robbery and one of robbery both contrary to the Criminal Offences Act (Cap 18). The Supreme Court imposed sentences of imprisonment for 4 years for counts 1 and 2 (armed robbery), and on count 3 (robbery) the sentence was of imprisonment for 3 years, all to be served concurrently. The convictions also triggered the operation of s 24(3)(c) of the Criminal Offences Act, in respect of a previously imposed suspended sentence of one year for housebreaking, and the Court ordered that this be brought into effect in full, to be served consecutively, so that the total sentence was imprisonment for 5 years. The applicant applied for leave to appeal against the sentences.

Held:

1. Armed robbery was an offence which inevitably involved a severe danger that a robber armed with an offensive weapon may cause death or serious injury to an innocent person. The legislature regarded this offence very seriously.
2. The applicant had already been shown mercy, and given an opportunity to rehabilitate himself, after conviction of a serious offence. A suspended sentence was intended to assist and encourage an offender towards reform. Its impact may be blunted if the notion becomes current that rejection of the opportunity it offers will not be regarded by the courts as a very grave matter.
3. The purposes of a sentence imposed on an offender were to punish so far as was just and fitting in the circumstances; the deterrence of criminal behaviour by the offender and others; the rehabilitation of the offender to fulfil a useful role in society; the vindication of society's standards; and the protection of law abiding members of the community. The sentences chosen by the Chief Justice fulfilled these purposes.

4. There was no ground to interfere with the orders that have been made. The application for leave to appeal was dismissed.

Cases considered:

Everett v The Queen (1994) 181 CLR 295

Lowe v The Queen (1984) 154 CLR 606; 54 ALR 193

Statutes considered:

Criminal Offences Act (Cap 18)
Criminal Offences (Amendment) Act 1999
Prisons Act (Cap 36)

Counsel for applicant : Mr Tu'utafaiva
Counsel for respondent : Mr Kefu

Judgment

This is an application for leave to appeal against sentences which the Chief Justice imposed on the applicant, upon his plea of guilty to an indictment containing three counts, two of armed robbery contrary to s 154(3) of the Criminal Offences Act (Cap 18) and one of robbery contrary to s 154(2) of the same Act. On each of counts 1 and 2 (armed robbery), the sentences were of imprisonment for 4 years, and on count 3 (robbery) the sentence was of imprisonment for 3 years, all to be served concurrently. The convictions also triggered the operation of s 24(3)(c) of the Criminal Offences Act, in respect of a previously imposed suspended sentence of one year for housebreaking, and the Chief Justice ordered that this be brought into effect in full, to be served consecutively, so that the total sentence was imprisonment for 5 years.

It is necessary to summarize the circumstances of the offences.

(1) During the night of 12 November 1999, the applicant, a young man of twenty (he was born on 29th June 1979) who had been drinking with another young man called Lei, came upon a shop. They went in, and Lei hit a person in the shop, one Li Yong, with a piece of rock, knocking him to the floor, where Lei threatened him with a knife. The applicant then took $180 cash which was there, and tried to hit Li Yong with a bottle, He missed, and the bottle was smashed. They ran away with the money, to spend it on alcohol.

(2) On 13 November 1999, the applicant was heavily intoxicated when he took a small machete, used to cut meat, from a storekeeper, and went to another store, where he threatened the person minding it with the machete, and took $200.

(3) On 4 December 1999, the applicant was again drunk. He entered a shop minded by a woman, where he took $10 cash, pushing her to the floor, and injuring her arm.

The earlier matter, in respect of which the applicant had been sentenced on 16 April 1999 to imprisonment for 12 months, suspended for 2 years, also involved alcohol. The applicant and another broke into the Yacht Club at night and took items, including liquor, tobacco and a CD player, totalling almost $3,500 in value.

The applicant had been before a court on five previous occasions, starting in June 1995, when he was aged 16 years, being dealt with by a community service order, fines, and a one month suspended sentence.

It is clear that the applicant has a serious alcohol problem. In the past, he has been on medication for a depressive disorder, for which his mother sought psychiatric help in August 1999. Following the three offences, he received further psychiatric treatment at Vaiola Hospital, and was later referred to the Salvation Army Alcohol and Drug Centre for rehabilitation. Although a counsellor there was very impressed with him and with his progress, the psychiatric diagnosis was: (1) Dissocial Personality Disorder; (2) mental and behavioural disorder due to use of alcohol. He had a history of alcohol and marihuana abuse.

There are several considerations which point to the necessity of imprisonment for a substantial period in this case.

The first of these is the fact that the legislature of Tonga has only recently found it appropriate to amend the Criminal Offences Act to introduce a new offence with a severe maximum penalty to deal with conduct of the type involved in counts 1 and 2. By the Criminal Offences (Amendment) Act 1999, which was assented to on 3 November 1999, a new subs (3) was added to s 154:

> "(3) Every person who commits a robbery under sub-section (1) whilst being armed with an offensive weapon commits armed robbery and shall upon conviction be liable to imprisonment for any period not exceeding 20 years."

Plainly, the legislature regarded this offence very seriously. And it is to be remembered it is an offence which inevitably involves a severe danger that a robber armed with an offensive weapon may cause death or serious injury to an innocent person. Such an offence cannot be treated lightly.

The second consideration is that the applicant has already been shown mercy, and given an opportunity to rehabilitate himself, after conviction of a serious offence. A suspended sentence is intended to assist and encourage an offender towards reform. Its impact may be blunted if the notion becomes current that rejection of the opportunity it offers will not be regarded by the courts as a very grave matter.

Thirdly, "inconsistency in sentencing standards" is to be shunned strongly by the counts as an "error in point of principle", a matter that was emphasized in *Everett v The Queen* (1994) 181 CLR 295 at 299. The consistency which is demanded is not to be equated to consistency of result, but requires consistency of approach: *Lowe v The Queen* (1984) 154 CLR 606 at 609; 54 ALR 193. For the same principle may yield different sentences where the facts relating to two offenders are different. In the present case, a co-offender in respect of one only of the armed robberies, Lei, was a first offender. For that offence, he received a sentence of 3 years of imprisonment, which seems to compare by no means unfavourably to the applicant with the applicant's own sentence of 4 years, as a repeat offender who committed 3 offences.

The purposes of a sentence imposed on an offender are to punish so far as is just and fitting in the circumstances; the deterrence of criminal behaviour by the offender and others; the rehabilitation of the offender to fulfil a useful role in society; the vindication of society's standards; and the protection of law abiding members of the community. The sentences chosen by the Chief Justice fulfil these purposes. However, it should be added that rehabilitation is of particular importance in the case

of a young man such as this. Under The Prisons Act (Cap 36), he can earn some remission of his sentence. There is also provision for mercy to be extended to him by a decision of His Majesty in Council. That would be exceptional, but it is provided for in the legislation, and could be sought, if his conduct in prison merits it, after he has served a substantial period.

On the material that was before the Supreme Court and has been reviewed by
130 us, there is no ground to interfere with the orders that have been made. The application for leave to appeal is dismissed.

Pulu v R

Court of Appeal, Nuku'alofa
Burchett, Tompkins, Beaumont JJ
CA 27/99

10 July 2000; 21 July 2000

Criminal law — defamation of the King — conviction upheld
Practice and procedure — amendment of particulars during trial — allowed

The appellant wrote a letter which was published in the newspaper on 5 November 1997. He was charged with defamation of the King. On 27 July 1999 he was convicted of the offence and was fined $1,500. He appealed against conviction and sentence. The two grounds advanced in support of the appeal against conviction were that the Court erred in allowing the prosecution to amend the particulars of the charge after the Crown had opened its case; and that the Crown erred in deciding that the particular words relied on, in the context of the letter as a whole, exposed the King to ridicule and damaged his reputation without evidence from one or more witnesses to that effect. The appeal against sentence was that the sentence was out of proportion to the seriousness of the offending and was therefore excessive.

Held:

1. The Court could not find any grounds for holding that there was any element of unfairness in allowing the application for amendment at that stage of the trial, particularly where the appellant was given the right to question further the witnesses who had already given evidence. The first ground of appeal did not succeed.
2. The Chief Justice was entitled to conclude that the words relied on, taken in conjunction with other passages in the letter, were defamatory of the King. He was entitled to draw those conclusions from the words themselves. The second ground also did not succeed.
3. In Tonga the King is the embodiment of the state. By ridiculing and damaging the reputation of the King, the appellant was ridiculing and damaging the reputation of Tonga itself. The seriousness of the offence of defaming the King or the Queen is reflected in Parliament making such an action a separate and distinct offence. Had the offending been more serious, even to a moderate degree, the appellant could well have been charged with the far more serious crime of sedition. In all of these circumstances, The Court could not conclude that a fine of $1,500 was clearly excessive.

4. The appeals against conviction and sentence were both dismissed.

Statute considered:
Defamation Act (Cap 33)

Counsel for appellant : Mr Tu'utafaiva
Counsel for respondent : Mr Cauchi

Judgment

The appellant was charged with defamation of the King, contrary to ss 2 and 3 of the Defamation Act (Cap 33).

The following were the particulars of the offence:

> "'ISILELI PULU on or about 5th November 1997 you did write a letter (which was subsequently published in the "*Taimi 'o Tonga*" newspaper, volume 8, No 45 of 5th November 1997) in which you published the words;
>
> "*He neongo e nofo pe 'a e Pule puaka 'i he ve'e 'a puaka, ka 'oku tu'o 2 pe 'ene 'ahia 'a e fanga puaka he ta'u.*"
>
> which translated is:
>
> "*Even though the Chief pig lives next to the pig sty, he only visits the pigs twice a year.*"
>
> Taken in the context of the letter it is alleged that those words carry the imputation that:-
>
> (i) The King is a pig or is a carer of pigs
> (ii) The King is indifferent to the proceedings of the Legislative Assembly."

Following a trial before Ward CJ, he was, on 27th July, 1999, convicted of the offence charged. He has appealed against conviction and sentence.

The statement relied on

The Crown relied on the contents of a letter the respondent wrote on 5th November, 1997 to the Taimi 'o Tonga newspaper. As the significance of the relevant parts of the letter should be judged in the context of the whole of the letter, we reproduce it in full as it was presented to the court:

"Source: *Taimi 'o Tonga* Vol 8 No 45 November, 5 1997
"*The Way of Life Within a Pigsty*"
[**Translation Only**]

> Sir,
>
> We are all well acquainted with the way of life of pigs that are kept in a pigsty. Even though the sty and its fence are beautiful they will still behave like pigs.

> At a pigsty in the centre of Nuku'alofa, its nature is different and exceptional from any other pigsty in Tonga, the Pacific, and even the world. And though the Chief pig lives next to the pig sty, he only visits the pigs twice a year. That is those who dig up and muddy themselves there are 12 attractive boars, 9 large pigs (who just grunt and lie down), and 9 piglets.
>
> It is only natural for the larger pigs to feel a common bond for each other, as they have been selected and cross-bred from a customary dynasty of pigs. And they are very close in body and blood-ties, different from the piglets, as they have only been recently adopted.
>
> The most exciting time is their feeding time. The share, the smallest portion always is the piglets because they are small physically and in number. Whereas the bigger portion is for the larger pigs as they are physically stronger, selfish, cranky and are numerous. And if their portion that was shared out finishes they will still chew noisily. Some will yelp and run about and they won't be calm until some more scraps have been thrown in.
>
> The most surprising thing, is that it is another large pig who cares for the pigs and no wonder because he is very gifted. This job is a small matter to him as he does not care about the mess and filth within the sty. And the larger pigs dominate, flatulate, and casually make a mess. What's exciting is the pig carer's best trick is burying his fellow pigs' mess. Even though the piglets keep on digging it up.
>
> Nevertheless that is the way of life within a pigsty. The strong will always rule over the weak. We cannot criticise the larger pigs as they have no brain, conscience, soul, law or God.
>
> Fortunate are we, mankind, as we are the pinnacles of God's creation. Even though it has been proven, it is quite possible for Godly grace and the pig's way of life to blend within man.
>
> Respectfully Yours,
> 'Iseleli Pulu
> Houmakelikao"

At the trial an issue arose concerning the meaning of the expression "Pule puaka". The Crown initially translated the expression as "the Chief pig". In the course of the trial, on the application of the prosecution, the Chief Justice amended the particulars of offence by adding the words "or is a carer of pigs". The allowing of this amendment is one of the grounds of appeal to which we later return.

In his judgment the Chief Justice set out portions of the interviews of the appellant by the police. We do not reproduce them. The appellant did not admit that he intended to refer to the King and the Legislative Assembly, but nor did he deny it. He elected not to answer directly the questions put to him.

The Chief Justice expressed his findings on the evidence called by the prosecution in these terms:

> "The prosecution called the deputy editor of the newspaper. He expressed the view that, when he first read the letter, he considered it referred only to pigs. He told the court that the accused had frequently written to the paper criticising people and institutions and airing his views about government and political matters. He could not recall him having ever written previously about pigs.
>
> Three other witnesses were called about the effect of the letter. One clearly stated he had never read the article and I discount his evidence. The other two were clear that the letter referred to the Legislative Assembly and the King. It was significant in the context of this case to see that one of the witnesses was extremely reluctant to give his opinion because he found it difficult to repeat something as disrespectful as this in court."

The appellant did not give or call evidence.

The offence charged

The offence with which the appellant was charged is contained in ss 2 and 3 of the Defamation Act (Cap 33):

> "2.(1) defamation of character consists in speaking or writing, printing or otherwise putting into visible form any matter damaging the reputation of another or exposing another to hatred contempt or ridicule or causing him to be shunned.
>
> (2)...
>
> 3. Every person who shall defame the character of his Majesty the King or her Majesty the Queen shall on conviction thereof be liable to a fine not exceeding $2,000 and in default of payment to imprisonment for any term not exceeding two years."

Counsel for the appellant accepted that the Chief Justice correctly set out the burden of proof and the elements of the offence. The burden lay on the prosecution to prove the words set out in the indictment, and that they were published in writing, printing or otherwise in visible form, that they refer to the King, and that the innuendo it claims to make that inference is proved. In a trial by judge alone, the judge must decide if the words are capable of bearing the meaning alleged and, if so, whether they do bear that meaning. The judge must then consider whether it is proved that the meaning they bear damages the reputation of the King or exposes him to hatred contempt or ridicule or causes him to be shunned. As this is a criminal charge each of these matters must be proved beyond reasonable doubt.

The appeal against conviction

Counsel for the appellant advanced two grounds in support of the appeal against conviction.

First, he submitted that the Chief Justice erred in allowing the prosecution to amend the particulars of the charge in the manner to which we have referred. This amendment was applied for and granted after the Crown had opened its case and after the evidence of three of the five witnesses had been heard. However, as the Chief Justice recorded in his judgment, he allowed the amendment subject to the right of the accused further to cross-examine the witnesses already heard - a right he chose not to exercise. Mr Tu'utafaiva, however, submitted that it was generally unfair to allow the amendment of the particulars at that stage of the trial. He did not submit that the appellant had been prejudiced in any particular respect, but rather that allowing the amendment resulted in unfairness of a general nature.

We do not accept that submission. The amendment was to the particulars of the charge, not to the charge itself. Further the amendment was only to the translation of the words in Tongan that the appellant had used in his letter. It was simply a matter of describing more accurately in English what the appellant had written in Tongan. The appellant himself, of course, knew exactly what he had written and what those words meant. We can find no grounds for holding that there was any element of unfairness in allowing the application for amendment at that stage of the trial, particularly where the appellant was given the right to question further the witnesses who had already given evidence. This ground cannot succeed.

The second ground advanced was that the Chief Justice erred in deciding that the particular words relied on, in the context of the letter as a whole, exposed the King to ridicule and damaged his reputation without evidence from one or more witnesses to that effect. Mr Tu'utafaiva submitted that before the Chief Justice was entitled to make that finding, he had to have before him evidence from one or more witnesses to that effect. He was not entitled to draw his own conclusions from the words used in the letter, unsupported by direct evidence from witnesses saying that they thought that the words used defamed the King in the manner alleged.

We are not able to accept that submission either. The letter was itself evidence. The Chief Justice was entitled to have regard to the whole of the letter in deciding whether it defamed the King as alleged. In doing so he could take into account, for example, phrases such as "what's exciting is the pig carer's best trick is burying his fellow pigs' mess." and "We cannot criticise the larger pigs as they have no brain, conscience, soul, or God." There are other passages in a similar vein.

The Chief Justice was entitled to conclude that the words relied on, taken in conjunction with other passages in the letter such as those to which we have referred, are defamatory of the King. As he put it, the description of the King as a keeper of pigs is, in itself, a matter that exposes him to ridicule. Further, the description of the King as the boss of the pigs that are alleged to behave in the manner described in the letter adds significantly to the defamatory meaning of the references to the King in the letter. For the King to be said to be indifferent to members of the Legislative Assembly behaving in the way described, damages his reputation and further exposes him to ridicule. The Chief Justice did not need evidence to that effect. He was entitled

to draw those conclusions from the words themselves. The second ground also cannot succeed.

The appeal against sentence

Mr Tu'utafaiva submitted that a fine of $1,500, when the maximum fine was $2,000, is out of proportion to the seriousness of the offending, and therefore excessive.

This was a satirical article. As such, it did not directly insult the King. But satire can be a particularly effective form of ridicule. So it was in this case. By publishing his satire in the form of a letter to a newspaper with wide circulation in Tonga, the appellant ensured that the ridicule and the damage to reputation intended to be conveyed by the article, reached as wide an audience as possible.

In Tonga the King is the embodiment of the state. By ridiculing and damaging the reputation of the King, the appellant was ridiculing and damaging the reputation of Tonga itself. The seriousness of the offence of defaming the King or the Queen is reflected in Parliament making such an action a separate and distinct offence. Had the offending been more serious, even to a moderate degree, the appellant could well have been charged with the far more serious crime of sedition. In all of these circumstances, we are not able to conclude that a fine of $1,500 is clearly excessive.

The result

The appeals against conviction and sentence are both dismissed.

Helu v Koloa

Court of Appeal, Nuku'alofa
Burchett, Tompkins, Beaumont JJ
CA 30/99

10 July 2000; 21 July 2000

Employment law — wrongful dismissal — probationary employment contract — reasonable conduct still required
Employment law — suspension — no express power — decision reasonable

Gordon Koloa instituted proceedings in the Supreme Court against his employer, Tonga Water Board (the Board), and Saimone Helu (the Board's Manager), and claimed damages for breach of his contract of employment with the Board in two respects: (1) wrongful suspension; and (2) wrongful dismissal. Mr Koloa claimed compensation for loss of three years' salary ($23,310), together with the sum of $10,000 for loss of reputation. The primary Judge dismissed the claim for wrongful suspension, but held the Board liable on the claim for wrongful dismissal. On that claim, the primary Judge awarded damages of $6,500 made up of: (1) the sum of $1,750 for loss of income; and (2) the sum of $4,750 for humiliation, distress and loss of reputation. The Board appealed from the finding against it of liability for wrongful dismissal, and further appealed against the award of damages. Mr Koloa cross-appealed from the dismissal of his claim for wrongful suspension, and from the award of damages for wrongful dismissal.

Held:

1. There was no express power to suspend. If an employer acted in breach of the employment contract in such a way as to repudiate it, the employee may accept the repudiation and sue for damages for breach. However, in the circumstances the decision to suspend was reasonable. There was no repudiation by the Board.
2. Even if the probationary aspect of the appointment was given its full weight, it did not follow that any rights given to the employer in that behalf may be exercised in a way that was not reasonable in the circumstances. The inference drawn by the trial Judge was clearly open to a trial Judge in all of the circumstances. No ground for appellate interference was made out. The appeal against the upholding of the claim of wrongful dismissal failed.

3. The amounts awarded were within a range that was plainly open to the primary Judge to assess as a fair measure of compensation in the circumstances.
4. Both the appeal and the cross-appeal were dismissed. The Board was ordered to pay two-thirds of Mr Koloa's costs of the appeal and of the cross-appeal.

Cases considered:

Courtaulds Northern Spinning Ltd v Sibson [1988] ICR 451; [1988] IRLR 305 (CA)

United Bank Ltd v Akhtar [1989] IRLR 507, EAT

Western Excavating (ECC) Ltd v Sharp [1978] QB 761; [1978] ICR 221 (CA)

White v Reflecting Roadstuds Ltd [1991] ICR 733; [1991] IRLR 331, EAT

Counsel for appellants : Mr 'Etika
Counsel for respondent : Mr Kengike

Judgment

Introduction

Gordon Koloa instituted proceedings in the Supreme Court against his employer, Tonga Water Board ["the Board"], and Saimone Helu [the Board's Manager], claiming damages for breaches by the Board of his contract of employment with the Board in two respects: (1) wrongful suspension; and (2) wrongful dismissal. Mr Koloa claimed compensation for loss of 3 years' salary [ie $23,310], together with the sum of $10,000 for loss of reputation. The primary Judge dismissed the claim for wrongful suspension, but held the Board liable on the claim for wrongful dismissal. On that claim, the primary Judge awarded damages of $6,500 made up as follows: (1) the sum of $1,750 for loss of income; and (2) the sum of $4,750 for humiliation, distress and loss of reputation.

The Board now appeals from the finding against it of liability for wrongful dismissal, and further appeals against the award of damages. For his part, Mr Koloa now cross appeals from the dismissal of his claim for wrongful suspension, and from the award of damages for wrongful dismissal, contending that it was inadequate.

In order to understand the issues that arise on the arguments advanced on the appeal and the cross-appeal, it will be necessary to refer first to his Honour's findings and conclusions.

The Background

The background to the litigation may be summarised as follows:

- Mr Koloa commenced employment with the Board on 1 June 1995. He was appointed to the position of Chief Production Officer "conditional on serving a probation period of 6 months …".
- Mr Helu wrote to Mr Koloa and to the Board's Chief Engineer on 14 August 1995 stating that there was a

serious water level and low pressure problem, and complaining that insufficient was being done about it.

- One of the Board's employees wrote to the Board on 24 August 1995, stating that he was writing on behalf of all other employees [21 in all] working at the Board's compound at Mataki'eua, where Mr Koloa worked. The employee complained about Mr Koloa's working procedures and alleged that Mr Koloa had improperly used the Board's property in several respects then specified.
- Mr Helu wrote to the Board's Chairman on 25 August 1995, recommending (1) that Mr Koloa be suspended; and (2) that Mr Helu investigate the allegations and submit his findings to the Board for its decision. The Chairman approved the recommendations. Mr Helu then wrote to Mr Koloa, directing him to leave the premises and attaching the letter of complaint.
- Mr Koloa wrote to Mr Helu on 28 August 1995, disputing his suspension and providing details of (1) his own equipment which had been used in the Board's operations; and (2) equipment owned by the Board which he had repaired at home.
- In another letter, signed by about half of the employees at the Mataki'eua compound, written to the Board on about 28 August 1995, it was stated that these employees did not consent to the writing of the letter of complaint dated 24 August, purportedly written on their behalf. These employees further stated that, in their opinion, Mr Koloa was honest and responsible.
- Another employee wrote to Mr Helu on 30 August 1995, purporting to confirm some of the allegations made by the other employees, and making some other accusations against Mr Koloa.
- Mr Helu wrote to Mr Koloa on 30 August 1995, requiring a written response within 14 days to the earlier allegations made in the letter dated 24 August.
- Mr Koloa replied on 5 September 1995, responding to the allegations.
- Mr Helu wrote to the Acting Solicitor-General on 13 September 1995, seeking advice, and stating that "(t)he Sub-Committee has recommended that Mr Koloa be dismissed for ineffectiveness…"
- The Board discussed the matter at its meeting held on 15 September 1995. The minutes record the following consideration and decisions:

"(a) Mr Kotoni Koloa, Chief Production Officer:

The Sub-Committee informed the Board that Mr Kotoni Koloa, Chief Production Officer had been suspended as

from 28th August 1995, because of allegations against him. Even though that he was still on probation his conduct and service was unsatisfactory such as the continuous low water level at Mataki'eua. Thus, to terminate the service of this officer.

In reply to the question from the Acting Chairman whether there was any understanding with the Legal Advisor on that matter, the Secretary stated that the Acting Legal Advisor has been advised.

Member S. Taumoepeau also pointed out that to ignore the allegations against this officer from the other officers at Mataki'eua but to terminate his service on the basis that his performance was unsatisfactory while he was still on probation.

The Board approved the Sub-Committee resolutions:

(i) Confirm the suspension of Mr Kotoni Koloa, Chief Production Officer effective as from 28th August 1995 until 15th September 1995.

(ii) That the service of Mr Kotoni Koloa, Chief Production Officer, to the Tonga Water Board be terminated effective as from 15th September 1995.

(iii) Pay Mr Kotoni Koloa, Chief Production Officer the equivalent of his salary as from 28th August 1995 to 15th September 1995 while he was suspended …"

- These decisions were communicated to Mr Koloa by letter dated 18 September 1995.

It will be convenient to deal first with the cross-appeal against his Honour's rejection of the claim for wrongful suspension.

The reasoning of the primary Judge on the claim of wrongful suspension

In this connection, his Honour was not persuaded that any breach of any of the terms of the employment had occurred. The primary Judge said:

> "In the present case, the employee was informed of the allegations against him, his explanation was sought, and he was suspended so that the employer could conduct an investigation, of which his explanation was to be a part. That surely was reasonable. It was not prohibited by any term that may be implied. It was not prolonged beyond the time needed for the employer's consideration of the matter. Though his salary was suspended it was paid in full at the end of the period. That disposes of the plaintiff's claim that his suspension was in breach of his contract. On its facts alone it was not. That part of his claim must fail".

Conclusions on the cross-appeal against rejection of the claim of wrongful suspension.

On behalf of Mr Koloa it is contended that the Board had no power, express or implied, to suspend an employee; so that, it is said, the Board was in breach of its employment contract by purporting to suspend Mr Koloa.

We cannot accept the argument.

It is true that there was no express power to suspend. It is also true that if an employer acts in breach of the employment contract in such a way as to repudiate it, the employee may accept the repudiation and sue for damages for breach (i.e. for constructive dismissal) [see *Halsbury's Laws of England* 4th Ed, 1992 Reissue, Vol 16, p.321]. But, in order to succeed, the employee must show that he or she is "entitled" to terminate the contract without notice by reason of the employer's conduct. [op. cit. at 331]. As Halsbury goes on to explain [at 332]:

> "For these purposes, 'entitled' means contractually entitled, so that an employee seeking to rely on constructive dismissal must show that the employer was guilty of a repudiatory breach of contract, not simply of unreasonable conduct: *Western Excavating (ECC) Ltd v Sharp* [1978] QB 761; [1978] ICR 221 (CA). Reasonableness or otherwise of the employer's conduct may be evidence, but the test remains contractual: *Courtaulds Northern Spinning Ltd v Sibson* [1988] ICR 451; [1988] IRLR 305 (CA). The possible rigour of this rule has, however, been lessened by the development of the implied term of trust and respect (see para 44 ante) with the result that behaviour sufficiently unreasonable to be in breach of that term may be relied on in that way."

Accordingly, we agree with his Honour, for the reasons he gives, that the decision to suspend was, in the circumstances, reasonable. It was not, *a fortiori*, a repudiation by the Board.

The Reasoning at first instance on the claim for wrongful dismissal

His Honour held (and his finding is not challenged in point of principle on the appeal) that there should be implied in the contract of employment the following terms: (1) that the Board would exercise any right it had to dismiss in a reasonable manner; and (2) that neither party would act in a way that undermined the trust of the other. His Honour went on to hold that the Board was in breach of both implied terms. This conclusion, however, is challenged on the appeal. His Honour's reasons for concluding that these breaches had occurred may be summarised as follows:

- After the Board had passed on to Mr Koloa the initial letter of complaint, the Board received (as has been noted) two further letters. One, written by several employees, denied the allegations. Yet this letter was apparently ignored by the Board. The second letter gave details of the earlier allegations, but was not shown to Mr Koloa. This

failure alone indicated that the sub-committee did not carry out a reasonable investigation of the allegations.

- The minutes of the Board's deliberations record that Mr Koloa was not dismissed for dishonesty, but because he was still on probation and his service was unsatisfactory. Yet the unsatisfactory conduct was not specified. The Board did not tell Mr Koloa that low water levels were considered a cause for dismissing him without warning. This was in breach of the implied terms requiring the Board to act in a reasonable and trustworthy way. It was no answer to say that Mr Koloa's appointment was "on probation".

Conclusions on the appeal against the upholding of the claim of wrongful dismissal

On behalf of the Board it is submitted that the actions of the Board were within the terms of the employment contract, in that its conduct should be characterised as no more than the termination of the position of an employee expressly appointed "on probation", where the service had been shown to be "unsatisfactory".

We cannot accept the submission.

The primary Judge said:

> "The [probationary] period should run, in fairness to both parties. If a serious reason arises that by itself justifies the dismissal of the employee, then the probationary employee may be dismissed during the probationary period for that reason. However, if the service is unsatisfactory, it is the employer's contractual duty to act reasonably in exercising its rights. It should first warn the employee about that unsatisfactory service, and continue the probationary period. If no particular serious cause for dismissal arises, the employer generally is unjustified in dismissing a probationary employee for unsatisfactory service until the probationary period has proved that the employee is unsuitable. If the probationer is dismissed at the end of the probationary period for unsatisfactory performance, even then the employer has to be ready to show that that decision was a reasonable one in the circumstances. It cannot be reasonable unless the employee has fallen below an acceptable standard, and has had the opportunity to respond to warnings or else to state his reasons why he should not be dismissed."

We respectfully agree with this analysis. We note, in this connection, that even if the probationary aspect of the appointment is given its full weight, it does not follow that any rights given to the employer in that behalf may be exercised in a way that is not reasonable in the circumstances. Halsbury [op. cit.] says:

> "Certain (or possibly all) express terms giving rights to employers may be required to be exercised reasonably (see para 52 ante), particularly if the term of trust and respect may be viewed as an

> overriding term, as in *United Bank Ltd v Akhtar* [1989] IRLR 507, EAT; and see *White v Reflecting Roadstuds Ltd* [1991] ICR 733; [1991] IRLR 331, EAT (doubting any general requirement of reasonableness but affirming the importance of this term)."

We agree.

In our opinion, the primary Judge correctly held that the limitation of reasonableness is equally applicable to the express provisions that the appointment was "probationary".

The question remains whether there was a breach by the Board of an implied term. On this question, essentially one of fact, the trial Judge said:

> "[Mr Koloa] was not dismissed for dishonesty at all. He was dismissed for unsatisfactory conduct and service while on probation. This unsatisfactory conduct was not specified, and the seven allegations of dishonesty supposedly investigated by the subcommittee were not referred to in the [Board's] minute. The conduct was said to include the continuous low water levels. [Mr Helu's] memorandum about that had been sent to the chief engineer as first recipient, and it did not tell [Mr Koloa] that low water levels were considered a cause for dismissing him without further warning. The [Board] diverted itself onto other matters upon which [Mr Koloa] had had no opportunity to comment. In the minute, and in the evidence of [Mr Helu], there is no record of any consideration of the allegations of dishonesty. It seems to me from reading the minute that the low water level was added, to make the reasoning of the employer stronger".

The primary Judge's conclusion that the Board had acted in the execution of its process in a way that was not reasonable, was, as has been said, essentially factual, albeit a conclusion of secondary fact. In our view, the inference thus drawn by his Honour was clearly open to a trial Judge in all of the circumstances we have described. We are not persuaded that any ground for appellate interference has been made out. This aspect of the appeal must fail.

The findings and conclusions of the primary Judge on the measure of damages

As a matter of principle, his Honour approached the case on the following bases: (a) damages for breach of an implied term are awarded to compensate for that breach; and (b) for wrongful dismissal, damages are assessed with reference to a plaintiff's proved financial loss, and damages can be recovered for distress and humiliation arising from the manner in which the employer carried out the dismissal.

The primary Judge found that Mr Koloa's reputation suffered as the result of his dismissal, and that this was integral with a sense of humiliation and distress; and that to re-establish his workshop, Mr Koloa relied on his reputation. But his Honour also noted that the continuation of Mr Koloa's employment with the Board for an indefinite period was not a foregone conclusion. Accordingly, the trial Judge awarded a sum of $1,750.00 roughly equivalent to 3 months' net salary, for loss of income.

His Honour found that Mr Koloa's humiliation, distress and damage to reputation were "not catastrophic" and would not be permanent. Nonetheless, the idea had circulated that Mr Koloa had been dismissed for dishonesty. For this head of
300 damage, his Honour accordingly awarded the amount of $4,750.00.

Conclusions on the appeal and cross-appeal from his Honour's award of damages

We are not persuaded that the trial Judge's assessment of damages was either excessive (as was contended for the Board) or inadequate (as was submitted for Mr Koloa). On the contrary, in our opinion, the amounts awarded were, in each case, within a range that was plainly open to the primary Judge to assess as a fair measure of compensation in the present circumstances.

Orders

In the result, both the appeal and the cross-appeal will be dismissed.

310 As to costs, since the Board has failed on the substantial question argued before us, that is the wrongful dismissal point, it is appropriate that the Board bear most of the costs of the whole of the appellate proceedings, that is, two-thirds of those costs.

We make the following orders:

1. Appeal dismissed.
2. Cross-appeal dismissed.
3. Order that the Board pay two-thirds of Mr Koloa's costs of the appeal and of the cross-appeal. Make no order for Mr Helu's costs, if any.

Fasi v Fifita

Court of Appeal, Nuku'alofa
Burchett, Tompkins, Beaumont JJ
CA 28/88

11, 20 July 2000; 21 July 2000

Land law — eviction orders — appeal against
Practice and procedure — leave to appeal out of time — granted

A town allotment was part of the hereditary estate of the Crown known as "Napulo" in Fatafehi Road, Kolofo'ou. The appellants commenced proceedings and sought orders in their favour in respect of part of the allotment. Those proceedings were dismissed by the Supreme Court for want of prosecution by orders made on 6 February 1998. On 30 June 2000 the Supreme Court dismissed an application by the appellants to appeal out of time from the earlier judgment. The court also ordered that an eviction order made on 6 April 1999 be executed. The appellants appealed each of the decisions.

Held:

1. The principal issue brought before the court by these proceedings has never been the subject of a full hearing at which the necessary witnesses have given their evidence about the events that occurred. It was not appropriate to attempt to determine the validity of the appellants' claim on what was obviously an incomplete and unsatisfactory statement of agreed facts.
2. To deprive the appellants of the opportunity to test in court their claim to be entitled to remain in occupation, whether as the result of an estoppel, an equity in their favour, an express or implied licence, or some other grounds, may result in an injustice. The court made the observations well aware that many of the problems were due to inactivity or inappropriate actions by them or the counsel then acting for them.
3. The application for leave to appeal out of time was allowed. The appeal was allowed. The orders made by the Supreme Court on 6 February 1998 were quashed. The proceedings were remitted to the Supreme Court for the hearing of the substantive action.
4. The appeal against the orders made by the Supreme Court on 30 June 1999 that declined the appellants' application for leave to appeal out of time was allowed, and the eviction orders that had been made were quashed.

5. The appellants were awarded costs against the first and second respondents. There was no order for costs in respect of the appearance on behalf of the third respondent.

Counsel for appellant	:	Mr Tu'utafaiva
Counsel for second and third respondents	:	Mr 'Etika
Counsel for third respondent	:	Mr Kefu

Judgment

This appeal concerns a town allotment being part of the hereditary estate of the Crown known as "Napulo" in Fatafehi Road, Kolofo'ou. The appellants commenced proceedings seeking orders in their favour in respect of part of the allotment. Those proceedings were dismissed by Lewis CJ for want of prosecution by orders made on 6 February 1998. On 30th June, 2000 Ward CJ dismissed an application by the appellants to appeal out of time from the judgment of Lewis CJ. He also ordered that an eviction order made on 6th April 1999 be executed.

The appellants have appealed against each of these decisions.

Factual background

The allotment was originally registered in the name of Sione Faiva. He died in 1961. His daughter Nau married Semisi Fasi. They are the parents of the appellant Tevita Manu Fasi. That appellant claims that his mother Nau was told by her father that she was to remain on the allotment to care for her mother and him, and that in return for the care she would be given a portion of the allotment for herself and her children. The respondents deny that promise.

When Sione died in 1961 the allotment passed to his wife Lu'ulofia who held it under a widow's interest until she died on 19th June 1981. Upon her death, there being no heirs claim, the respondent Funaki Faiva applied for and obtained registration as the holder of the allotment.

In 1987 the appellant Tevita Fasi and the respondent Funaki Faiva entered into an agreement concerning the allotment. By letter dated 14th August, 1987 Funaki Faiva surrendered his interest in part of the allotment to the appellant Tevita Fasi. The letter recites that the surrender was to recognise the fact that Funaki's aunt Nau, her husband and their children had lived on and cared for the allotment for 43 years.

The appellant Tavita took the letter to the Minister. He was informed that further approvals were required. He obtained one. The appellant was given an assurance that the matter would be placed before Cabinet. No Cabinet decision was ever taken.

The appellant produced a letter signed by the respondent Funaki Faiva dated 10th October, 1992 addressed to the Minister of Lands cancelling the surrender of part of the allotment to Manoa Fatita. The third respondent acknowledged that the letter was received. The respondent Funaki Faiva denies that this letter bears his signature, which amounts to an assertion that the letter was a forgery.

On 6th January, 1993 Cabinet approved an exchange of allotments between the respondent Faiva and the respondent Fifita, as a result of which the allotment with which these proceedings are concerned is now registered in the name of the latter.

The judgment of Lewis J

The original statement of claim in these proceedings was filed on 22nd April, 1993. We were informed from the bar that there was a hearing before Lewis J (as he then was) on 13th March, 1995 at which one of the appellants and a witness gave evidence. We are not aware of the nature or purpose of that hearing. We were also informed that the matter was adjourned to 22nd May, 1995 when the appellants were given leave to file an amended statement of claim, which was done on 28th May, 1995.

The respondents applied to strike out the statement of claim for want of prosecution. The parties filed an agreed statement of facts. According to the judgment of Lewis CJ of 19th March 1996, there was a hearing on 1st March, 1996 at which counsel presented written submissions and addressed argument to the court.

In his judgment the judge sets out the facts in some detail. In their claim the appellants were seeking orders for the exchange of the allotment between the respondent Faiva and the respondent Fifita to be set aside and that the third respondent submit to Cabinet the application of the respondent Faiva of 14th August, 1987 to surrender the allotment and allow the appellant Fasi to apply for it.

After considering some of the legal issues before him, the Judge said that the case cried out for a more just result. Having given his opinion that the appellants must inevitably fail, he went on to note his concern that counsel presented the court with agreed facts, but there was a major issue in dispute that can only be resolved by hearing witnesses concerning the wishes and the promise Nau's father is said to have given her. After referring to the respondent Funaki Faiva's application for surrender in favour of one of the appellants and then withdrawing it, he observed that there was much to be explained about Funaki's behaviour. He went on to say:

> "I am of the opinion that this matter cannot be properly determined as to the real issues given the state of the so-called agreed facts, however if the facts were to be determined at a full hearing the plaintiff must fail for the reasons I have given."

He made no final orders at that stage. Following a hearing on 6th February 1998 at which only counsel for the first respondent was present, he made orders that the action be struck out for want of prosecution, costs against the appellants, that the appellants vacate the town allotment within 28 days, and that the exchange of allotments between the respondents Funaki Faiva and Sosaia Fifita be confirmed.

Conclusion

It is our conclusion that the procedure followed and the decisions reached following the hearing on 8th March, 1996 are unsatisfactory. The result is that the principal issue brought before the court by these proceedings have never been the subject of a full hearing at which the necessary witnesses have given their evidence about the events that occurred. With respect to the Judge, it was not appropriate to attempt to determine the validity of the appellants' claim on what was obviously an incomplete and unsatisfactory statement of agreed facts. This is all the more so when the letter of 10th October, 1992 from the respondent Funaki Faiva to the Minister of Lands cancelling the surrender of his allotment to Moana Fifita is claimed to have been a forgery.

We agree with the Judge that the major issue in the case can only be resolved after evidence about the wishes and the promise Nau's father is said to have given her. We do not agree that if all the facts were ascertained after a full hearing, the appellant's action must fail. The success or failure of the appellant's claim may well depend on how those facts emerge at the hearing.

The appellants or members of their family have been in possession of part of this allotment now for over 50 years. To deprive them of the opportunity to test in court their claim to be entitled to remain in occupation, whether as the result of an estoppel, an equity in their favour, an express or implied licence, or some other grounds, may well result in an injustice. We make these observations well aware that many of the problems in this case have been due to inactivity or inappropriate actions by them or the counsel then acting for them.

Mr Tu'utafaiva advanced other grounds in support of the appeal of a procedural nature. In view of the conclusions we have reached, it is unnecessary to deal with these further grounds.

The result

The application for leave to appeal out of time is allowed. The appeal is allowed. The orders made by Lewis CJ on 6th February, 1998 are quashed. The proceedings are remitted to the Supreme Court for the hearing of the substantive action.

It follows from this that the appeal against the orders made by Ward CJ on 30th June, 1999 declining the appellants' application for leave to appeal out of time is allowed, and the eviction orders that had been made are quashed.

The appellants are entitled to their costs on this appeal against the first and second respondents. We make no order for costs in respect of the appearance on behalf of the third respondent.

R v Motulalo

Court of Appeal, Nuku'alofa
Ward CJ, Tompkins, Beaumont JJ
CA 2/2000

13 July 2000; 21 July 2000

Criminal law — suspended sentence was inadequate — sexual offence

On 21 December 1998 the respondent attempted to have sex with his stepdaughter, then aged nine. The mother and the complainant reported this to the police. When the respondent was arrested the following day, he confessed voluntarily to having committed the offences with which he was charged. The respondent pleaded guilty to one charge of attempted carnal knowledge and one charge of indecent assault of a female child. On 1 February 2000 he was sentenced on the first count to two years imprisonment suspended for two years, and on the second count to 120 hours community service. The Crown appealed against these sentences on the grounds that they were inadequate.

Held:

1. The fact that the offender was the breadwinner for his family was not on its own a proper reason for suspending a sentence. When regard was had to all the aggravating and mitigating features the Court found that there was no justification for suspending any part of the relatively short sentence of imprisonment imposed.
2. The application for leave to appeal was granted. The suspension of the term of imprisonment imposed in respect of count one was quashed. The sentence of community service imposed in respect of count two was also quashed. In lieu thereof, on that count, which was in the nature of an alternative count, the respondent was convicted and discharged. The appeal was allowed.

Cases considered:

Mo'unga v R [1998] Tonga LR 154 (CA)
R v Misinale (Court of Appeal, 23 July 1997, CA 779/97)
R v Petersen [1994] 2 NZLR 533 (CA)

Counsel for appellant : Mr Havea
Counsel for respondent : Mr Veiloso

Judgment

The respondent pleaded guilty to one charge of attempted carnal knowledge and one charge of indecent assault of a female child. On 1 February 2000 he was sentenced on the first count to two years imprisonment suspended for two years, and on the second count to 120 hours community service. The Crown has appealed against these sentences on the grounds that they are inadequate.

The offending

The complainant, then aged nine, is the respondent's stepdaughter. At about 10am on 21st December, 1998, when the respondent and other members of their family were in their home, the respondent and complainant were alone in a room. The respondent told the complainant to have sex with him. The complainant refused. The respondent forced her on to a mattress, and undressed her. The complainant struggled. She ceased to do so when the respondent threatened to strike her with a piece of hose. The respondent having removed his shorts, stroked the complainant's vagina with his penis. He continued to tell the complainant to have sex with him, she continued to refuse. It was at this time that the respondent's wife, the complainant's mother, came home, causing the respondent to desist. The complainant told her mother what had occurred. The mother found the respondent naked under a sheet. The mother and the complainant reported these events to the police. When the respondent was arrested the following day, he confessed voluntarily to having committed the offences with which he was charged.

The respondent

He is aged 37. At the time of the offending he was working on a contract basis earning approximately $100 a week. He was the breadwinner for the family. His wife, the complainant's mother, described him as a hard-working husband who dedicated his life to his family.

His explanation for the offending was that his wife had being denying him sexual relations, and he felt jealous of the complainant because he considered she was being specially treated. The probation officer reported that the respondent appeared remorseful and really regretted what he did.

Following the offending the mother and the children including the complainant left the respondent. After a separation of about a year the mother and children, except for the complainant, returned to him. The complainant has been living with other relatives.

Factors relevant to sentencing

There are several aggravating features. The complainant was entitled to, and no doubt did, regard the respondent as her father, or equivalent to a father. She was entitled to put her trust in him. He abused that trust. He took advantage of his position to impose himself on her in an attempt to satisfy his sexual desire. The young age of the complainant made this conduct all the more culpable.

The attempt at carnal knowledge only failed to become carnal knowledge because of the timely and fortuitous arrival of the mother. A nine-year-old girl is normally incapable of giving informed consent to sexual connection. In any event,

she was actively resisting his attempts to force himself on her. In effect, what the respondent did was equivalent to attempted rape.

A degree of violence was involved. The respondent forced the complainant onto the mattress and threatened to strike her with the hose if she did not cease struggling.

There are some mitigating factors. The respondent, according to the mother, was otherwise a good father and supporter of the family. He was the breadwinner. According to the probation officer, he was remorseful, although that is not unusual with an offender who is facing sentence. He admitted the offending and pleaded guilty at an early stage, thus avoiding the need for the complainant to give evidence of what he was trying to do to her.

The suspension of the sentence

In *R v Misinale* (Court of Appeal, 23 July 1997, CA 779/97) also a Crown appeal against the suspension of a sentence, the Court had this to say on the approach to be adopted when considering whether a sentence of imprisonment should be suspended:

> "In *Mo'unga v R* [1998] Tonga LR 154 (CA), this court commented on the principles to be applied in suspending a sentence at page 4 of the unreported judgment [page 157 of the report]:
>
> > "In New Zealand, where there also are no criteria in the relevant statutory provisions, the Court of Appeal, in *R v Petersen* [1994] 2 NZLR 533, in a judgment delivered by Eichelbaum CJ, said that the suspended sentence is intended to have a strong deterrent effect, so that if the offender is incapable of responding to a deterrent, it should not be imposed. Apart from that, 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 offender 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, the presence of provocation, or coercion by a co-offender.
> >
> > (iv) Where there has been cooperation with the authorities.
> >
> > We see no reason why this approach should not be followed in Tonga."

> These, as the reference makes clear, are not the only factors. 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 or her. There may well be others. But although these are factors that may be taken into account in considering whether, and if so for how long, to suspend part or all of a sentence, the major consideration is whether a suspension is likely to aid in the rehabilitation of the offender. If it is not, or if for any reason rehabilitation is not relevant to the sentence to be imposed, suspension of any part of the sentence is unlikely to be appropriate."

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 a proper reason for suspending a sentence.

Conclusion

The only reason the Judge gave for suspending the sentence was that the respondent's wife appeared before him apparently asking that he not be sent to prison. The Judge also noted that the respondent was the breadwinner and that if he sent the respondent to prison, not only will the family he broken up, as well there will be no money for the family.

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. She was forced to submit to her stepfather attempting to have sexual intercourse with her, and to suffer the significant emotional trauma that is bound to result from such conduct that is likely to affect her for a long time to come. By suspending the sentence allowing the respondent to return to his family, the complainant was herself effectively banished from her family. Separated from her mother and siblings, she has had to live with relatives. She therefore has to suffer in both respects, while the respondent is allowed to go free and virtually unpunished.

With offending of this kind, the wife and mother is placed in an extremely difficult situation. Forced to elect between her husband and her daughter, she frequently supports the husband, but only because she is concerned for the financial and possibly social consequences of a sentence of imprisonment on other members of her family. We doubt that much weight should be placed on the 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 to which we have referred, we are satisfied that there can be no justification for suspending any part of the relatively short sentence of imprisonment imposed.

The sentence of two years imprisonment is itself a lenient punishment for offending as serious as that which occurred in this case. Counsel for the Crown did not seek to have the term of imprisonment increased. Had a longer term of imprisonment been imposed, as could well have been the case, there may have been

grounds, in the interests of rehabilitation and of the family, to suspend a relatively short part of that sentence.

The result

The application for leave to appeal is granted. The suspension of the term of imprisonment imposed in respect of count one is quashed. The sentence of community service imposed in respect of count two is also quashed. In lieu thereof, on that count, which was in the nature of an alternative count, the respondent is convicted and discharged.

To that extent the appeal is allowed.

R v Tofavaha

Court of Appeal, Nuku'alofa
Ward CJ, Tompkins, Beaumont JJ
CA 11/00

13 July 2000; 21 July 2000

Criminal law — manslaughter by negligence — suspended sentence was inadequate

The respondent and two others had, between them, consumed two litres of gin. The respondent then drove at a speed that frightened a female passenger sufficiently for her to ask to be allowed to alight from the vehicle. The respondent was a prison officer and his drinking companions on that night were police officers. At Haveluloto the car swerved to the wrong side of the road and collided with a car coming in the opposite direction. A passenger in that other vehicle was a 23 year old woman who died from her injuries three days later. The respondent pleaded guilty to manslaughter by negligence. The Supreme Court imposed a sentence of two years imprisonment suspended for three years. The Crown appealed on the single ground that the sentence was manifestly inadequate.

Held:

1. The law has always regarded the killing of another person as extremely serious and the penalty must reflect that. There must be a place for sympathy when a court is passing sentence but it cannot be allowed to supplant the duty to order a penalty appropriate to the facts of the offence.
2. The court should always consider reducing the sentence following a plea of guilty but the extent of the reduction should depend on a number of factors including the nature of the offence, the court time saved and the real chances of an acquittal if the case was contested. There was little chance the respondent would have escaped conviction had he contested the charge. Therefore the effect of a plea of guilty was reduced and reduction on the scale allowed was inappropriate.
3. The Court considered the personal circumstances of the respondent and held that the sentence of three years was not, in itself, wrong and, although it considered the reduction for the plea of guilty was excessive, it did not alter that part of the sentence passed. The order that the sentence be suspended was not appropriate and resulted in a sentence that was manifestly lenient. The appeal was allowed.

4. The order was that the sentence of two years imprisonment suspended for three years was quashed and a sentence of two years imprisonment was substituted.

Counsel for appellant : Mr Havea
Counsel for respondent : Mr Veikoso

Judgment

This is an appeal by the Crown against a sentence of two years imprisonment suspended for three years imposed for an offence of manslaughter by negligence on the single ground that it is manifestly inadequate.

The facts accepted by the respondent were that he and two others had, between them, consumed two litres of gin. The respondent then drove at a speed that frightened a female passenger sufficiently for her to ask to be allowed to alight from the vehicle.

The respondent was a prison officer and his drinking companions on that night were police officers. He had previously won the baton of honour and, on the occasion in question, they were celebrating the fact that one of the others had also just won it.

At Haveluloto the car swerved to the wrong side of the road and collided with a car coming in the opposite direction. A passenger in that other vehicle was a 23 year old woman. She was taken unconscious to hospital where she died from her injuries three days later. Those injuries included multiple fractures of the pelvis and injury to her left lung.

The respondent was seen by a doctor who noted abrasions and superficial bruising. He also recorded that the respondent was clinically intoxicated to the extent that his speech was slowed and slurred and he exhibited slight impairment of co-ordination in his gait and finger movement.

When passing sentence the trial judge first indicated that he considered the appropriate sentence for the offence was three years imprisonment but he reduced that by one third because the respondent had admitted the offence from the outset and was, he accepted, remorseful about the death of the young woman.

He then passed to consider whether to suspend the sentence. He continued:

> "To me the choice is the choice of putting a Prison Officer in prison to live among the criminals he formerly served or whether to leave you free so that the Superintendent could consider returning you to your work in the administration office. I think no good will be done to you or to the community if I sentence you to live at Hu'atolitoli and I'm going to suspend the whole of the sentence for three years. I believe your punishment will be in your remorse and in your knowledge of what you have done and that you have fallen from the position in which you were regarded as a man of honour.
>
> It is wrong for the court to hurt you further by making you live in the prison when you have not yourself committed a crime but only an error of judgment. Your error of judgment was serious enough and made it a crime. You did not commit a premeditated

> crime against the State and I think it best not to send you to prison."

He then also disqualified the respondent from driving for three years.

There can be no doubt that this respondent is a man of considerable ability who has done well in his chosen field. A sentence of imprisonment will almost certainly finish that career. The sentencing judge was right to take that into account but we consider he gave it too much weight.

Whatever sympathy the judge may feel for the offender, he cannot escape the fact that an innocent young woman has lost her life as a result of the respondent's actions. The law has always regarded the killing of another person as extremely serious and the penalty must reflect that. There must be a place for sympathy when a court is passing sentence but it cannot be allowed to supplant the duty to order a penalty appropriate to the facts of the offence.

In the present case, the judge made a substantial reduction to the sentence for the respondent's remorse and his immediate and unswerving admission. The court should always consider reducing the sentence following a plea of guilty but the extent of the reduction will depend on a number of factors including the nature of the offence, the court time saved and the real chances of an acquittal if the case was contested. In this case there was little chance the respondent would have escaped conviction had he contested the charge. In those circumstances the effect of a plea of guilty is reduced and reduction on the scale allowed in this case is inappropriate.

We must also disagree with the judge's suggestion that this was not a premeditated crime. The respondent and his companions chose to drink to excess and the respondent then drove. Even after the danger of his actions had been pointed out to him by one of his passengers he continued to drive. He no doubt did not intend the result that ensued but he certainly should have realised that such an act was fraught with the gravest danger.

The learned judge was right to emphasise that this young man has made the most of his talents up to this point in his life and that this offence has jeopardised his future. However that is not a reason for avoiding the consequences of his criminality. He, more than most people, should have realised the consequences of his actions that night yet he behaved in a grossly irresponsible manner. Any person who kills another after choosing to drink and then to drive whilst affected by the alcohol must realise that he will go to prison.

Bearing in mind the personal circumstances of the respondent, the sentence of three years was not, in itself, wrong and, although we consider the reduction for the plea of guilty was excessive, we do not consider we should alter that part of the sentence passed. However, the order that the sentence be suspended was not appropriate in such a case and resulted in a sentence that is manifestly lenient. The appeal must be allowed.

The order is that the sentence of two years imprisonment suspended for three years is quashed and a sentence of two years imprisonment is substituted. We make no order in relation to the period of disqualification from driving.

Fonua v MBf Bank Ltd

Court of Appeal, Nuku'alofa
Burchett, Tompkins, Beaumont JJ
CA 8/99

14 July 2000; 21 July 2000

Costs — solicitor and client basis —exceptional case

The facts of this case are fully stated in the Supreme Court judgment reported at [1999] Tonga LR 4.

Held:

1. While an award of costs on a solicitor and client basis was exceptional, this was an exceptional case which caused needless expense and embarrassment and a waste of the resources that society put into the Court.
2. The Court dismissed the appeal with costs to be taxed between solicitor and client.

Counsel for appellant	:	Mr Tu'utafaiva
Counsel for respondent	:	Mr Waalkens

Judgment

This is an appeal by a Plaintiff who was unsuccessful in an action claiming breach of contract and undue influence against the Respondent, a bank. The Appellant's counsel faced an impossible task, for the alleged breach, the alleged undue influence, and the alleged loss all depended on the oral evidence of witnesses who gave evidence before the trial judge. But the judge described the Appellant, whose own evidence was crucial to his case, as "at best … unclear and inconsistent in his evidence … and evasive and dishonest at the worst". He expressly rejected the Appellant's evidence that he had entered into an agreement of 16 December 1997, with one Lee, as a result of conduct of the bank - conduct which was alleged to have constituted both a breach of its contract with him, and also the exertion of undue influence upon him. His Honour held: "I simply do not believe the plaintiff in that regard"; and I am satisfied beyond any doubt the plaintiff made that [agreement] voluntarily and willingly … ." His Honour went on to describe the claim as "bogus".

Furthermore, the judge accepted Lee's evidence which showed the appellant had suffered no loss at all by reason of his entry into the agreement of 16 December 1997, but, on the contrary, had profited by it to the extent of $10,000.

It is unnecessary to set out the facts in detail. They are fully stated in the judgment under appeal. In summary, the Appellant and Lee decided to buy certain electrical goods for resale at a profit. Lee secured a contract of purchase at $124,100.00, and they applied to the bank for a loan. The bank made a loan to the Appellant (by agreement concluded between it and him on 21 November 1997) upon terms including the making of a cash deposit by Lee, the granting of a mortgage by the Appellant over a property at Matahau and the granting of a security over the goods to be purchased. The loan was to be repaid by instalments, of which the first, in the sum of $5,000, was to be paid on 21 December 1997. The agreement of loan included a not unusual provision enabling the bank to call up the loan, among other things, if "the borrower ceases or threatens to cease to carry on its business", or if "a material change has occurred in the financial conditions of the Borrower which in the opinion of MBfBL [the bank] is likely to prejudice the ability of the Borrower to perform its obligations under [the agreement] in accordance with [its] terms", or if "in the opinion of MBfBL, the Borrower is not carrying on its business and affairs in accordance with sound financial and industrial standards and practices".

Obviously, any persistence by the Appellant, before any of the goods had been resold, in litigation against his joint venturer Lee, so as to destroy the basis of the joint venture, could be regarded by the bank as triggering one or more of the terms we have set out. That is what happened. The Appellant brought proceedings against Lee which disrupted the arrangements previously made for the resale of the goods. The bank then made it clear to the Appellant that if his action was not settled satisfactorily, the bank would apply to the court for an order. It was this warning which the Appellant now says amounted to a breach of contract and to the exertion of undue influence.

In fact, the Appellant, within days, entered into the agreement of 16 December 1997, which was in settlement of his action. The settlement yielded him a payment of $10,000 and the release of the bank's security over his property, while Lee retained the goods and took over the obligation to repay the bank. The agreement was drafted by the Appellant's own lawyer. It involved his gaining something the trial judge found he particularly desired, relief from anxiety about the mortgage, which affected his house.

In these circumstances, and having regard to his Honour's estimation of the witnesses, there is just no basis for a finding that the bank's warning to the Appellant should be characterised as he alleges. Nor can there be any basis for awarding any damages or compensation, in the face of the accepted evidence of Lee that the resale of the goods had not proved to be profitable. The judge, who disbelieved the Appellant, was entitled to refuse to accept his expectation of profit as establishing that a profit would actually have been earned by him.

The final issue is costs. The learned Chief Justice, who was the trial judge, awarded costs to the Respondent on the solicitor and client basis. He did so because the Appellant had persisted in "a thoroughly worthless action", after notice in the pleadings that such a costs order would be sought, and after being given an opportunity to discontinue without paying costs. Plainly, such an order is exceptional; but it is an exceptional case. A claim of this kind causes needless expense and

embarrassment, and waste of the resources that society puts into the Court. In our
80 opinion, his Honour was entitled to exercise his discretion as he did. For the same reasons, this Court dismisses the appeal with costs to be taxed as between solicitor and client.

Misinale v R

Court of Appeal, Nuku'alofa
Burchett, Tompkins, Beaumont JJ
CA 13/99

11 July 1999; 21 July 1999

Criminal procedure — leave to appeal out of time — not granted
Criminal procedure — indictment not bad for duplicity — single criminal enterprise

The applicant was charged with embezzlement contrary to the Criminal Offences Act (Cap 18) and was found guilty on 15 April 1999. He was sentenced to imprisonment for 3 years, of which he was to serve 8 months, the balance to be suspended for two years from the date of his release. On 23 July 1999 the applicant applied to the Court for leave to appeal out of time and for bail pending the hearing of that application and of the appeal. The Court dismissed both applications without a hearing. On 20 October 1999 the applicant filed applications to set aside the Court's decision on the appeal by the Crown against sentence; for leave to appeal out of time against conviction; and for bail pending hearing of the appeal.

Held:

1. It was entirely appropriate for the Solicitor General, as the legal adviser to the Crown, to act for the Attorney General, seeking leave to appeal on behalf of the Crown, and for the party appealing to be named as "Rex" meaning the Crown.
2. The application for leave to appeal was properly brought. Therefore the decision of the Court, granting the application for leave and allowing the appeal in part, was validly made.
3. It was apparent from the statement of the applicant that he regarded his activities as a continuing pattern of conduct over the relevant period. He did not seek further particulars of the charge which is not surprising as he himself had prepared the schedule showing each individual payment that made up the amount stated in the charge. There was no risk of an injustice in regarding the pattern of conduct as a single criminal enterprise. The Court did not regard the charge in the indictment to be bad for duplicity.
4. Even where the actions of an accused could be regarded as a pattern of conduct constituting a single criminal enterprise, it may be preferable, where a number of distinct acts were relied upon, such as where various amounts of money have been taken on different occasions, to lay separate

counts in the indictment in respect of each distinct act. This would overcome any need for further particulars, ensure that the judge or jury considers the accused's culpability in respect of each act, and remove any possibility of the indictment being challenged for duplicity at the trial or on appeal.

5. No ground was made out for extending the time for appealing.
6. The application for bail pending hearing of the appeal was not relevant. It was formally dismissed.

Cases considered:

Director of Public Prosecutions v Merriman [1973] AC 584; [1972] 2 All ER 42
Minister of Lands v Nai [1999] Tonga LR 135 (CA)
Walsh v Tattersall (1996) 188 CLR 77; 139 ALR 27

Statutes considered:

Court of Appeal Act (Cap 9)
Court of Appeal (Amendment) Act 1997
Criminal Offences Act (Cap 18)
Criminal Offences (Amendment) Act 1997

Counsel for applicant : Mr Niu
Counsel for respondent : Mr Havea

Judgment

The applicant has applied to this Court:

- to set aside this Court's decision on the appeal by the Crown against sentence;
- for leave to appeal out of time against conviction;
- for bail pending hearing of the appeal.

The sequence of events

The events to which the charge subsequently brought against the applicant relates are alleged to have occurred between April and October 1995. He was charged with embezzlement. The preliminary hearing in the Magistrates' Court commenced on 9 July 1997 and concluded on 27th August 1997, on which day he was committed for trial in the Supreme Court.

The indictment laid in that Court charged the applicant with embezzlement contrary to s 158 of the Criminal Offences Act (Cap 18). The particulars of offence were:

> "That Hanisi Lotomo'ua Misinale did on various occasions between the months of April and October in 1995 take and convert to his own use the sum $47,310.23 the property of others received in the course of his employment as accountant of Primary Produce Export Limited".

Following a trial by jury, he was found guilty on 15th April 1999. He was sentenced by Finnigan J to imprisonment for 3 years, of which he was to serve 8 months, the balance to be suspended for two years from the date of his release.

There was no appeal against conviction. The Crown applied for leave to appeal against the sentence on the ground that it was inadequate. This Court, by a judgment delivered on 23rd July 1999, allowed the application for leave to appeal, quashed the suspension of the balance of the sentence after the respondent had served 8 months, and in lieu thereof suspended the last 12 months of the sentence for two years from the date of his release. To that extent the appeal was allowed.

On 23 July 1999 the applicant applied to Ward CJ, as a judge of this Court, for leave to appeal out of time and for bail pending the hearing of that application and of the appeal. He dismissed both applications without a hearing. On 20th October 1999 the applications now before the Court were filed.

The application to set aside

The application to set aside the judgment of this Court delivered on 23rd July 1999 is founded on a submission that the appeal by the Crown against the sentence imposed in the Supreme Court was invalid, with the consequence that the decision of this Court was also invalid.

At common law the Crown could not appeal against a sentence imposed on the ground that that sentence was inadequate or inappropriate. In Tonga that rule of law was changed by s 17B of the Court of Appeal Act (Cap 9) as inserted by s 2 of the Court of Appeal (Amendment) Act 1997. That section provides:

> "17B. The Attorney-General, with the leave of the Court of Appeal, may appeal to the Court of Appeal against any sentence pronounced by the Supreme Court in any proceedings in which the Crown was a party and the Court of Appeal shall determine the appeal in accordance with subsection (3) of section 17."

Mr Niu, counsel for the applicant, (who was not counsel for the applicant in the proceedings in the Supreme Court or in the Court of Appeal) submitted that the section required that the Attorney-General makes the appeal on behalf of the Crown. The Attorney-General, he submitted, was required to consider the matter carefully and independently from the Solicitor General and the office of the Solicitor General, who *prima facie* acts on behalf of the Crown. In the present case, he contended, there was no appeal or application for leave to appeal made by the Attorney-General. Accordingly there was no valid appeal that this Court could decide, with the consequence that its decision was of no effect.

We accept, as is apparent from the section, that it is the Attorney-General who, with the leave of the Court of Appeal, may appeal against a sentence imposed in the Supreme Court. In the present case, the notice of application for leave to appeal shows the applicant as "Rex", meaning the Crown. The application is signed by "Crown Counsel" and records that it is "Filed by the Solicitor General …"

Although the Attorney-General is not expressly named in the application, it is clear from its terms that the application is brought by counsel for the applicant, that is the Crown. In view of s 17B, that was in effect an application by counsel for the Attorney-General since, under that section, only the Attorney-General can bring the

appeal on behalf of the Crown. The Solicitor General was acting as counsel for the applicant, just as any lawyer acts as counsel for his or her client. As is accepted practice, counsel prepares and signs the application on behalf of the client. In this case Crown Counsel on behalf of the Solicitor General as counsel for the Crown, that is the Attorney General, signed and filed the application. We do not find anything in the section to support the contention that the Attorney General is required to act independently of the Solicitor General or to be named as the party appealing. On the contrary, it is entirely appropriate for the Solicitor General, as the legal adviser to the Crown, to act for the Attorney General, seeking leave to appeal on behalf of the Crown, and for the party appealing to be named as "Rex" meaning the Crown.

Consistent with this approach is Section 197 of the Criminal Offences Act. It provides that all prosecutions under that Act may be brought by the Attorney-General, and that prosecutions under certain specified sections may be brought either by the Attorney-General or the person aggrieved. Thus the Attorney-General is the person who commences criminal proceedings on behalf of the Crown. Similarly, the Attorney-General is the person who brings appeals against sentence on behalf of the Crown. When the Solicitor General applied for leave to appeal in the name of the Crown, he was doing so for the Attorney-General as the representative of the Crown.

For these reasons, we are satisfied that the application for leave to appeal was properly brought. It follows that the decision of this Court granting the application for leave and allowing the appeal in part, was validly made.

Leave to appeal out of time

In support of the application for leave to commence proceedings out of time Mr Niu relied principally on s 160 of the Criminal Offences Act as it was at the time of the proceedings in the Magistrates' Court. That section then provided:

> "160. In the case of any person intended to be tried in the Supreme Court for embezzlement, falsification of accounts or fraudulent conversion respectively it shall be lawful to charge the offender by summons at the preliminary inquiry in the Magistrates' Court with any number of distinct acts of embezzlement, falsification or fraudulent conversion respectively not exceeding 5 which have been committed against the same person within the space of six months from the first to the last of such acts and to try the offender in the Supreme Court (if committed thereto for trial) either upon all or any of such charges."

It was Mr Niu's submission that the charge in the present case did not comply with s 160 because it did not specify the distinct acts of embezzlement relied upon, and because, in fact, there were 19 separate acts of embezzlement committed on 19 separate days, whereas s 160 permitted the accused to be charged in respect of not more than 5 distinct acts of embezzlement.

In support of the latter submission Mr Niu relied on three schedules produced by the prosecution. He submitted that the schedules showed that the applicant had taken money belonging to others on 19 different occasions on 19 different days. The

schedules, taken on their own and without evidence of what they were intended to represent, do not necessarily establish that there were 19 distinct acts of embezzlement. However, for the purposes of determining this application, we will assume, in favour of the applicant, that each entry in the schedule represented a distinct act.

The schedules were apparently produced by the applicant. On 23rd January 1996 he signed a statement in which he admitted that he had taken the amounts shown in the schedules. These amounts were taken from sums due to persons who had supplied watermelon, squash, and vanilla. At the trial in the Supreme Court the admissibility of this statement was challenged. Following a *voire dire* it was held to be admissible.

On 11th September, 1997 there came into force the Criminal Offences (Amendment) Act 1997. Section 5 of that Act provided:

> "5. Section 160 of the Principal Act is amended by deleting all words after the word "respectively" where it first appears and substituting therefor the following -
> ", unless there are special reasons, no order shall be made preventing the trial at the same time of any number of such offences not exceeding 5, whether alleged to have been committed within 6 months from the first to the last of such offences against the same person or not. Nothing in this section shall prevent an indictment containing more than 5 counts from being presented.""

This amendment came into force after the proceedings in the Magistrates' Court and before the trial in the Supreme Court. We accept Mr Niu's submission that this amendment does not have retrospective effect. If, therefore, the summons in the Magistrates' Court was contrary to s 160 as it was before the amendment, that result is unaffected by the amendment. But the section as amended is the relevant provision for considering whether the indictment presented in the Supreme Court was defective. We conclude that it was not. Even if the offending involved 19 distinct acts, an indictment charging the applicant with such offending does not contravene s 160 as amended.

Section 160, before and after amendment, is procedural in nature. It does not create the offence. It does not go to the jurisdiction of the Court. Rather it prescribes the procedure to be followed at the preliminary enquiry in the Magistrates' Court when charging a person by summons with distinct acts of embezzlement, falsification or fraudulent conversion. If a summons in the Magistrates' Court, or an indictment in the Supreme Court following committal on that summons, does not comply with s 160, that may be a ground for challenging the summons or indictment on procedural grounds. But if there is no such challenge, the jurisdiction of the Supreme Court to try the indictment, and the validity of any resulting conviction, is unaffected. The present question arises, as we have seen, in a transitional context. When an existing statutory provision is amended, the manner in which the amendment comes into effect is frequently covered by transitional provisions. Where there are no such provisions, [as here] it is necessary for the court to draw such inferences as it considers the legislature intended [see Halsbury's Laws of England 4th Ed [Reissue] vol 44(1) at p

771]; *Minister of Lands v Nai* [1999] Tonga LR 135 (CA) at 138. In our view, the inference we have mentioned is what the legislature intended.

Although this ground was not expressly advanced on behalf of the applicant, we have given consideration to whether the indictment offended the rule against duplicity, namely that a prosecutor may not ordinarily charge in one count of an indictment two or more separate offences. On the case as advanced by the applicant, there were 19 distinct acts. But that does not necessarily mean that there were 19 separate offences. A leading authority on this issue is the judgment of Lord Diplock in *Director of Public Prosecutions v Merriman* [1973] AC 584 at 607; [1972] 2 All ER 42 at 59, where he said:

> "The rule against duplicity, viz that only one offence should be charged in any count of an indictment, has always been applied in a practical, rather than a strictly analytical, way for the purpose of determining what constituted one offence. Where a number of acts of a similar nature committed by one or more defendants were connected with one another, in the time and place of their commission or by their common purpose, in such a way that they could fairly be regarded as forming part of the same transaction or criminal enterprise, it was the practice … to charge them in a single count of an indictment."

This statement has been adopted in a number of Australian decisions. In *Walsh v Tattersall* (1996) 188 CLR 77; 139 ALR 27 three of the judges in the High Court considered the rule against duplicity where an employee had been charged with obtaining by dishonest means payments or benefits made under an Act. The count related to payments made to the employee over a period of 12 months. Dawson and Toohey JJ, who on this issue were the majority, considered that the conduct of the employee was a continuing false pretence during that period. If the respondent had regarded the single charge as prejudicial, he could have called upon the prosecution to specify with particularity details of the charge. Where what was involved was one activity of a continuing kind, it was legitimate to bring a single charge.

In the present case, it is apparent from the statement of the applicant that he regarded his activities as a continuing pattern of conduct over the relevant period. He referred to having prepared "… a schedule of deductions from growers' payments", and having covered up missing moneys "by not recording agricultural store sales." It is not surprising that he did not seek further particulars of the charge when he himself had prepared the schedule showing each individual payment that made up the amount stated in the charge. In these circumstances there can be no risk of an injustice in regarding the pattern of conduct as a single criminal enterprise. For these reasons, we do not regard the charge in the indictment to be bad for duplicity.

We add this comment. Even where the actions of an accused can be regarded as a pattern of conduct constituting a single criminal enterprise, it may be preferable, where a number of distinct acts are relied upon, such as where various amounts of money have been taken on different occasions, to lay separate counts in the indictment in respect of each distinct act. This would overcome any need for further particulars, ensure that the judge or jury considers the accused's culpability in respect of each act, and remove any possibility of the indictment being challenged for duplicity at the trial or on appeal.

For the reasons we have expressed, no ground has been made out for extending
260 the time for appealing.

The result

The applications to set aside the decision of this Court delivered on 23 July 1999 and for leave to appeal against conviction are both dismissed. The application for bail pending hearing of the appeal is not now relevant. It is formally dismissed.

Bank of Tonga v Shell Company (Pacific Islands) Ltd

Court of Appeal, Nuku'alofa
Ward CJ, Tompkins J, Beaumont J
CA 19/99

12 July 2000; 21 July 2000

Cheques — liability of bank for failing to inform customer promptly of dishonour — damages

Shell Company (Pacific Islands) Ltd (Shell) specialised in the distribution of petroleum products in Tonga. It held an account with the Bank of Tonga (the Bank). Shell sold petroleum products to a dealership situated in Vava'u known as the 'Unameivaha Service Station operated by Lisa and Sione Mo'unga'evalu (the Operators). Between July 1996 and June 1998 Shell supplied petroleum products on credit to the Operators at various times. In the payment of their account, the Operators deposited at the Vava'u Branch of the Bank various cheques in the sum of $38,395.95 drawn on the MBf Bank. The MBf Bank dishonoured the cheques and returned them to the Bank. The Bank failed to notify Shell of such dishonoured cheques within 30 days. Shell instituted proceedings against the Bank in the Supreme Court claiming $38,395.95 based on two causes of action. First, it was alleged that the Bank had a statutory duty under section 49 of the Bills of Exchange Act to give notice of the dishonour within a reasonable time. The second cause of action, pleaded in the alternative, was that the Bank had a duty in negligence to notify Shell within a reasonable time of the dishonour. The Bank applied to strike out the statement of claim on the ground that it disclosed no reasonable cause of action. The Supreme Court ordered that Shell's first claim, based on breach of statutory duty, be struck-out, but refused to order the strike-out of the second claim based on negligence. The Bank appealed the refusal. Shell brought a cross-appeal from the strike-out of its first claim but did not pursue that. The Court of Appeal was concerned with the negligence cause of action only.

Held:

1. A banker, as its customer's agent in this regard, was bound to use reasonable care and diligence in presenting and securing payment of cheques; accordingly, a banker must always choose the speediest section of the clearing house system when presenting a customer's cheques for payment.
2. The banker has a common law duty to inform its customer promptly of dishonour. The measure of damages to be awarded for breach of such a

duty will depend upon the particular circumstances; generally speaking damages will be awarded to compensate for any losses flowing directly and naturally from the breach.

3. The pleading of the second claim did not indicate any reasonable or arguable basis for the existence of a cause of action for the recovery of the face value of the cheques. Other damages may have been recoverable, but this was not pleaded. The second claim should be struck out, either as disclosing no reasonable cause of action or as unclear. However, since the point was only a pleading question, Shell was granted liberty to amend.

4. The Court ordered that the part of the order made at first instance refusing to strike out Shell's second claim be set aside; in lieu thereof, it ordered that the claim be struck out, with liberty reserved to Shell to amend its statement of claim as it may be advised within 28 days.

5. There was no order made for the costs of the appeal. The cross-appeal was dismissed. The Court ordered that Shell pay the Bank's costs of the cross-appeal assessed at $100.00.

Statutes considered:
Bills of Exchange Act 1882 (UK)
Bills of Exchange Act (Cap 108)

Counsel for appellant : Ms Tapueluelu
Counsel for respondent : Mr Garrett

Judgment

Introduction

Shell Company [Pacific Islands] Ltd ["Shell"] instituted proceedings in the Supreme Court against the Bank of Tonga ["BOT"], claiming judgment on two alternative causes of action pleaded by Shell in its statement of claim as follows:

The first cause of action, for breach of statutory duty, was pleaded as follows:

> "1. [Shell] was at all material times a company specialising in the distribution of Petroleum Products in the Kingdom of Tonga.
> 2. [BOT] was at all material times a bank where [Shell] holds a bank account.
> 3. [Shell] sells Petroleum Products to independent dealerships, one of which is a dealership situated in Vava'u known as the 'Unameivaha Service Station.
> 4. The 'Unameivaha Service Station is operated by Lisa Mo'unga'evalu and Sione Mo'unga'evalu ('the Operators').
> 5. [Shell] supplied Petroleum Products on credit to the Operators at various times between July 1996 and June 1998.

6. In the payment of their account, the Operators deposited at [BOT] (Vava'u Branch) various cheques in the sum of $38,395.95 drawn on the MBf Bank ('the Cheques').
7. The MBf Bank dishonoured the Cheques and returned them to [BOT].
8. [BOT] was under a Statutory Duty pursuant to section 49 of the Bills of Exchange Act (Cap 108) to give notice to [Shell] within a reasonable time that the cheques had been dishonoured.
9. [BOT] took an average of 14 business days to post the dishonoured cheques to [Shell's] account.
10. [BOT] failed to notify [Shell] of such dishonoured cheques the following day in breach of section 49 (n) of the Bills of Exchange Act.
11. As a result of [BOT's] failure to notify, [Shell] suffered loss.

Wherefore [Shell] prays for:

12. Judgment in the sum of T$38,395.95 …"

The second (alternative) cause of action was pleaded in negligence as follows:

"[Shell] repeats paragraphs 1-7 above and says further:
16. [BOT] owed [Shell] a duty to notify [Shell] within a reasonable time of the fact that the cheques had been dishonoured.
17. [BOT] was negligent in its duty to [Shell].
18. Particulars of Negligence
(a) Failure to notify [Shell] for up to 30 days that the Cheques had been dishonoured.
(b) Failure to return the dishonoured Cheques to [Shell], but instead returning them to the Drawer.
19. As a result of [BOT's] negligence [Shell] suffered loss.

Wherefore [Shell] prays for:

Judgment in the sum of T38,395.95 …"

As has been seen, in its first claim Shell relied upon the provisions of s 49 of the Bills of Exchange Act ["the Act"]. Section 49 prescribes certain specific machinery provisions regulating what is to occur upon dishonour of a bill, to be mentioned shortly.

Notice of dishonour itself is dealt with generally by the preceding provision, s 48 of the Act relevantly as follows:

> "48. Subject to the provisions of this Act, where a bill has been dishonoured by non-acceptance or by non-payment, notice of dishonour must be given to the drawer and each indorser, and any drawer or indorser to whom such notice is not given is discharged …"

Under the rules as to notice of dishonour laid down by s 49, it is provided, inter alia -

> "49. Notice of dishonour in order to be valid and effectual must be given in accordance with the following rules: …
>
> (m) The notice may be given as soon as the bill is dishonoured, and must be given within reasonable time thereafter …"

It will be noted that s 49 does not provide that the collecting banker is to give the notice. We will return to this.

BOT applied under O 8 r 6 to strike out the whole of Shell's statement of claim on the ground that it disclosed no reasonable cause of action. A Judge of the Court ordered that Shell's first claim be struck-out, but refused to order the strike out of the second claim. BOT now appeals from this refusal. Shell brought, but no longer presses, a cross-appeal from the strike-out of its first claim. It follows that we are now concerned with Shell's second claim only.

The reasoning at first instance

In refusing to strike out the second claim, the primary Judge said:

> "I turn to the claim of negligent breach of a common law duty. In the pleaded facts for this claim, Shell alleges that BOT failed to notify it within 30 days and 'failed to return the dishonoured cheques to [Shell]'. In the pleadings the duty was not specified, but that can be accepted, because negligence presupposes a duty of care. As well, the statement of claim pleads particulars of the alleged breach. These are claims (a) that BOT failed 'to notify [Shell] for up to 30 days that the cheques had been dishonoured', and (b) that BOT failed, 'to return the cheques to [Shell], but instead returned them to the drawer'. Do these claims raise a reasonable cause of action?
>
> In my opinion the duty claimed is specified and arguable, as a claim of fact and law. No argument to counter that proposition was presented in submissions by counsel for BOT. Along with the claimed breach of duty was pleaded a brief claim that Shell suffered loss as a result, and a prayer for judgment for the total pleaded face value of the cheques. The second cause of action is sufficiently pleaded and will not be struck out."

Conclusions on the appeal

A banker's duties to its customer in regard to the collection of cheques are well established at common law. As its customer's agent in this regard, a banker is bound to use reasonable care and diligence in presenting and securing payment of such cheques; accordingly, a banker must always choose the speediest section of the clearing house system when presenting a customer's cheques for payment (see Holden, The Law and Practice of Banking, Vol 1 at 213).

As a corollary of this general principle, as Holden goes on to explain [at 215], a collecting bank must always give prompt notice to its customer upon dishonour. But

this general law duty should be viewed as something which is quite independent of the operation of ss 48 and 49 for other purposes.

Holden says (op cit):

> Giving notice of dishonour
> "6.32 A collecting bank must always give prompt notice to its customer if any cheque paid in by him for the credit of his account or cashed for him by the bank are dishonoured. The safest course to follow is to send written notice of dishonour to the customer on the same day as the unpaid item is received by the bank. Unless the bank wishes to make a claim against the drawer of the cheque as explained below, the bank will debit the amount of the cheque to its customer's account and return the cheque to him forthwith. This constitutes notice of dishonour.
>
> 6.33 The customer must then give prompt notice of dishonour to prior parties if he wishes to retain their liability. Any failure to give notice of dishonour in accordance with the rules laid down in the Bills of Exchange Act 1882 will usually have the effect of releasing the person to whom proper notice should have been given from liability on the cheque."

Likewise, Penn, Shea and Arora, the Law Relating to Domestic Banking say [at para 9.04]:

> "(xii) If a cheque is dishonoured, the banker must inform his customer as soon as reasonably possible, (so that he can give notice of dishonour to the drawer and others) and will be liable for any losses arising from the delay. The bank itself may give notice of dishonour (as agent) but rarely does. The usual practice is to return the cheque to the customer. Notice of dishonour must be given by the customer in a 'reasonable time' …"

We accept these explanations of the relevant principles.

Whilst the existence of the banker's common law duty to inform its customer promptly of dishonour is plain, the measure of damages to be awarded for breach of such a duty is another question. This will depend upon the particular circumstances, but generally speaking damages will be awarded to compensate for any losses flowing directly and naturally from the breach. Ordinarily, in a case such as the present, that is, the alleged failure to warn of an adverse event, the measure of damages will comprehend expenditure thrown away by the customer as a consequence of the banker's failure to warn the customer of the dishonour of the drawer's cheque. This could pick up any unrecovered cost of goods supplied by the customer on credit to the drawer, where that supply occurs in the customer's ignorance of the dishonour of the cheque as a consequence of the banker's failure to act promptly.

However, this is not the measure of Shell's second claim here. Rather, the claim is for the face value of the cheques. How a claim for that value could be maintained in an action against a bank under the general law for failing to warn a customer

promptly of the dishonour of a cheque collected, did not appear from the pleading or from the argument before us.

It is true that under the modern system of pleading, upon a strike-out application, the question is whether it would be open to the plaintiff upon the pleadings to prove facts at the trial which would constitute a cause of action. But the terms of pleading of the second claim do not, in our view, disclose any reasonable basis to support the claim advanced, that is, a claim for the face value of the cheques. In other words, the pleading of the second claim does not indicate any reasonable or arguable basis for the existence of a cause of action for the recovery of the face value of the cheques. Other damages may arguably have been recoverable, but this was not pleaded. It follows, in our opinion, that the second claim should be struck out, either as disclosing no reasonable cause of action (O 8 r 6(1)(i)) or as unclear (O 8 r 6(1)(iii)). However, since the point is only a pleading question, Shell should be granted liberty to amend.

Costs

The primary Judge awarded BOT its costs of the strike-out of the first claim. Since the cross-appeal was not prosecuted, this order will stand. His Honour also reserved the costs of the application to strike out the second claim, pending the outcome of the substantive action. We see no reason to disturb this reservation, but upon the footing that, in the light of our conclusion on the pleading of this claim, Shell should not, in any event, be allowed its costs of pleading the second claim in its original form.

The costs of the cross-appeal should follow the event; they are assessed at $ 100.00.

The costs of the appeal are more complicated. BOT has succeeded in the appeal, but not on the point it sought to argue. In those circumstances, there should be no order for costs.

Orders

Accordingly, we make the following orders:

1. Leave to appeal granted. Appeal allowed.
2. Set aside that part of the order made at first instance refusing to strike out Shell's second claim; in lieu thereof, order that this claim be struck out, with liberty reserved to Shell to amend its statement of claim in this proceeding, as it may be advised, within 28 days.
3. Make no order for the costs of the appeal.
4. Cross-appeal dismissed. Order that Shell pay BOT's costs of the cross-appeal assessed at $100.00.

R v Puloka

Court of Appeal, Nuku'alofa
Burchett, Tompkins, Beaumont JJ
CA 4/00

20 July 2000; 21 July 2000

Costs — Crown liability — incompetence
Practice and procedure — leave to appeal — filed out of time

On 13 April 2000 the Supreme Court ordered costs to be paid by the Prosecution when the Prosecution could not proceed on that day because a Prosecution witness was not available. The Crown filed an application for leave to appeal from an interlocutory order for costs in a criminal matter on 3 May 2000.

Held:

1. The application was filed out of time. There was no provision empowering the Court to extend that time. The application was dismissed as incompetent.
2. The Court has inherent power to award costs where there has been no appeal because an incompetent application for leave has been dismissed. The Crown must pay the respondent's costs of this incompetent application despite the eliminating costs provision of s 25(1).

Statute considered:
Court of Appeal Act (Cap 9)

Counsel for appellant	:	Mr Tapueluelu
Counsel for respondent	:	Mr Tu'utafaiva

Judgment

This is an application for leave to appeal by the Crown from an interlocutory order for costs in a criminal matter. Costs of the day were ordered by the Supreme Court to be paid by the Prosecution when the Prosecution could not proceed on that day because a Prosecution witness was not available.

Section 17C of the Court of Appeal Act (Cap 9), inserted on 11 September 1997, makes provision for appeal to this Court in certain circumstances after an interlocutory judgment or order in a criminal proceeding. Unless the primary Judge certifies that determination on appeal is proper (and there is no certificate here), an appeal may only be brought with this Court's leave [s 17C(1)].

Moreover, by s 17C(5) it is provided:

> "(5) a notice of appeal or notice of application for leave to appeal under this section shall be given within 10 days of the date of the interlocutory judgment or order from which appeal is made."

In the present case, the application is out of time. His Honour's order was made on 13 April 2000, but the application for leave to appeal was not filed until 3 May 2000. There is no provision empowering this Court to extend that time. It must follow that the application will be dismissed as incompetent.

We would add that, in any event, leave would be granted to the Crown to appeal against an interlocutory order for costs only in the most exceptional of cases.

There remains the question of the costs of this application.

By s 25(1) of the Court of Appeal Act it is provided:

> "25(1) On the hearing and determination of an appeal under this part of the Act no costs shall be allowed to either side."

"This part of the Act" is Part III, dealing with "Appeals in Criminal Cases."

Section 25(1) was in this form before the introduction of the Crown appeal against sentence by s 17B, and before the introduction of s 17C itself. Section 25(1) therefore contemplated only an appeal other than a Crown appeal until 1 September 1997. Moreover, in eliminating costs, s 25(1) speaks of "the hearing and determination of an appeal" as the context. We would not read this provision as excluding the Court's inherent power, in an appropriate case, to award costs where there has been no appeal because an incompetent application for leave has been dismissed. This is such a case. The Crown must pay the respondent's costs of this incompetent application.

The order of the Court is:

> Application for leave to appeal dismissed as incompetent, with costs.

Tu'i'onetoa v Pohiva

Supreme Court, Nuku'alofa
Ward CJ
C 1262/99

19, 26 June 2000; 24 July 2000

Practice and procedure — preliminary questions — not appropriate

The plaintiff brought an action for defamation in relation to an article published by the defendant in his newspaper. The plaintiff sought to have the court decide preliminary questions of law and fact.

Held:

1. It was only in rare and clear cases that such a course should be followed. The court held that this was not an appropriate case for those issues to be determined before the trial. The case must proceed to trial.
2. There was no order for costs.

Statute considered:

Defamation Act (Cap 33)

Counsel for plaintiff	:	Mr Edwards
Counsel for defendant	:	Mr Tu'utafaiva

Judgment

This is an action for defamation in relation to an article published by the defendant in his newspaper.

The plaintiff has sought to have the court decide preliminary questions of law and fact. It is only in rare and clear cases that such a course should be followed.

At the time of the application, the defendant was not represented and explained to the court that he could not afford a lawyer and had thought he could deal with the case himself. He did not oppose the application on the basis that he felt he did not understand the nature of the application sufficiently. He was advised to instruct a lawyer but, in the meantime to avoid unnecessary delay, I ordered that the case should be listed for determination of the preliminary question and directed that affidavits be filed.

Having now read the affidavits and heard Mr Tu'utafaiva for the defendant, I consider that this is not an appropriate case for those issues to be determined before the trial.

The question of fact relates to a letter that the plaintiff claims was written by the defendant. The defence filed is inconsistent on this point and appears both to be denying and admitting the letter.

The affidavits filed make it clear the defendant admits the letter. What is in issue is the meaning and significance of the letter and other correspondence on the same issue at the time. That is clearly a matter for the jury and I decline to make any other decision on the point at this stage.

The question of law is whether there are grounds to rely on the defences raised under sections 12(a) and (b) and 14 of the Defamation Act (Cap 33)

Again, I decline to rule on this matter at this stage in the proceedings. Whilst the affidavits filed briefly allude to the evidential basis upon which the defendant seeks to rely upon those provisions of the Defamation Act, their effect and value as a defence will require a determination of the evidence which is a matter exclusively for the jury. The court may have to rule at the trial whether or not on that evidence such a defence is available and whether it should be put to the jury and application may be made at that stage. However, I am not satisfied it would be proper for me to rule on the issue at this stage.

I therefore decline to rule on any of the questions raised and order that the case must proceed to trial.

On the question of the costs of this application, I am satisfied it was brought by the plaintiff because of the confused and inconsistent nature of the defence filed. I have declined to consider it further at this stage but the proper order is that there shall be no order for costs.

Fund Management Ltd v Fifita

Land Court, Nuku'alofa
Ward CJ
L 11-17/2000

20 July 2000; 24 July 2000

Practice and procedure — injunction — high risk of injustice — refused

The plaintiffs were sub lessees of land and wished to develop that land; they needed vacant possession to do so. The defendants were occupants of the land. The plaintiffs filed writs on 23 June 2000 that sought an order that declared the plaintiff was the lawful occupier of the land and various orders relating to rent and damages. The plaintiffs applied for an interim injunction for the defendants to vacate the land. The defendants opposed on the general ground that there were a number of arguable points that required a hearing and if the injunction was granted it would effectively decide the action in favour of the plaintiffs.

Held:

1. The grant of an injunction would have a high risk of injustice should the order turn out to be wrong and may well not be adequately remedied by an award of damages. There were matters of defence raised that should be tried in order to ascertain the position. On the other hand, it was equally clear that the necessity for a trial would hold the applicant out of his remedy but such a delay, if he should ultimately succeed in his claim, may be measured in terms of monetary damages.
2. The application for the injunction was refused.

Cases considered:

American Cyanamid Co v Ethicon Ltd [1975] AC 396; [1975] 1 All ER 504
Films Rover International Ltd v Cannon Film Sales Ltd [1987] 1 WLR 670; [1986] 3 All ER 772
Shepherd Homes Ltd v Sandham [1971] Ch 340; [1970] 3 All ER 402

Counsel for applicants : Mr Garrett
Counsel for defendants : Mr Tu'utafaiva
Mr Pulotu appeared in person

Judgment

This is an application for an interim injunction applied for in similar terms in a number of cases numbered 11 of 2000 to 17 of 2000. They all relate to the same piece of land in Nuku'alofa of which the plaintiffs/ applicants in the various actions are sub lessees and of parts of which the various defendants/ respondents are occupants.

The writs filed on 23 June 2000 seek an order declaring the plaintiff is the lawful occupier of the land and various orders relating to rent and damages.

The principal injunctive relief sought is for the defendants to vacate the land. That is not part of the claim but it became clear at the hearing in chambers that the omission was the result of a misunderstanding of the effect of an earlier order of this court. Counsel for the plaintiffs sought to amend his pleadings to include such a prayer and I have given leave for him to do so.

There has only been service of the application upon some of the defendants and all those served oppose the application. Mr Tu'utafaiva for Fifita, Cowley, Vea and Lavulavu has filed written submissions and Pulotu who appeared in person has associated himself with them.

I do not need to deal in any detail with the background of the case or the submissions but, briefly, the plaintiffs wish to develop the land in question and need vacant possession for that reason. The defendants oppose on the general ground that there are a number of arguable points that require a hearing and that, if the injunction is granted, it will effectively decide the action in favour of the plaintiffs.

The general position in relation to interim injunctions has been frequently stated and needs no repetition. The particular feature of this case is that the application is for a mandatory injunction. The courts have always been reluctant to order such an injunction at the interlocutory stage although it will be ordered in an appropriate case.

The position has been clearly expressed by Megarry J in *Shepherd Homes Ltd v Sandham* [1971] Ch 340 at 351; [1970] 3 All ER 402 where he stated that at the interlocutory stage:

> "The court is far more reluctant to grant a mandatory injunction than it would be to grant a prohibitory injunction. In a normal case the court must, inter alia, feel a high degree of assurance that at the trial it will appear that the injunction was rightly granted; and this is a higher standard than is required for a prohibitory injunction."

He explained earlier, at 348, his reasoning.

> "As it seems to me, there are important differences between prohibitory and mandatory injunctions. By granting a prohibitory injunction, the court does no more than prevent for the future the continuance or repetition of the conduct of which the plaintiff complains. The injunction does not attempt to deal with what has happened in the past; that is left for the trial, to be dealt with by damages or otherwise. On the other hand, a mandatory injunction tends at least in part to look to the past, in that it is often a means of undoing what has already been done, so far as that is possible. Furthermore, whereas a prohibitory injunction merely requires

> abstention from acting, a mandatory injunction requires the taking of positive steps, and may … require the dismantling or destruction of something already erected or constructed. This will result in a consequent waste of time, money and materials if it is ultimately established that the defendant was entitled to retain the erection."

The *Shepherd Homes* case concerned the erection of a fence but the principle is the same.

The suggestion of the need for a "high degree of assurance" in the remarks of Megarry J have not been applied so stringently and in the case of *Films Rover International Ltd v Cannon Film Sales Ltd* [1987] 1 WLR 670; [1986] 3 All ER 772 Hoffmann J, whilst acknowledging the differences between the two forms of injunction, suggested that the fundamental principle on interlocutory applications for both prohibitory and mandatory injunctions is that the court should take whichever course appears to carry the lower risk of injustice if it should turn out at the trial to have been wrong.

In the present application, it is clear that grant of an injunction would have a high risk of injustice should the order turn out to be wrong and may well not be adequately remedied by an award of damages. I also accept there are matters of defence raised that should be tried in order to ascertain the position. On the other hand, it is equally clear that the necessity for a trial will hold the applicant out of his remedy but such a delay, if he should ultimately succeed in his claim, may be measured in terms of monetary damages.

I am also reassured by the words of Lord Diplock in relation to all interlocutory injunctions that, where "other factors appear to be evenly balanced it is a counsel of prudence to take such measures as are calculated to preserve the status quo." *American Cyanamid Co v Ethicon Ltd* [1975] AC 396 at 408; [1975] 1 All ER 504.

This is just such a case. I am satisfied that the application must be refused with costs in the cause.

I would add that this case should be listed for hearing as soon a possible and I shall hear counsel on the best way forward to achieve that.

Fund Management Ltd v Fifita (No 2)

Land Court, Nuku'alofa
Ford J
L 11-17/2000

23, 24, 25, 30 October 2000; 7 November 2000

Land law — Royal Family Estate — sub-lease — whether Cabinet consent required — challenge to validity by non-party — burden of proof

The first plaintiff held a sub-lease of the northern half of the property. The second plaintiff held a sub-lease of the southern half of the property. They wanted to develop part of the land by building a two-storey office block. The property concerned was an area of prime commercial land in downtown Nuku'alofa which was part of the Royal Family Estate known as "Finefekai". The seven defendants were all occupants of existing buildings on the land. The plaintiffs sought vacant possession so that they could start on their development project. They served notices to vacate and eviction notices on the defendants. The defendants refused to vacate the property and they challenged the validity of the plaintiffs' sub-leases claiming that they were unlawful and, therefore, null and void. The principal defence was that, although the sub-leases had been approved by Cabinet, as the land in question was Royal Family Estate, Cabinet approval was not required but His Majesty had to satisfy himself that the sub-leases were for projects of general public interest and benefit in terms of section 10(2) of the Land Act. The defendants also alleged that as the plaintiffs had paid significant consideration for the sub-leases, they were invalid because clause 104 of the Constitution made it illegal to sell any land in the Kingdom and section 2 of the Interpretation Act defined "land" as including leaseholds.

Held:

1. As it was the defendants who contended that the sub-leases were invalid, the burden of proving the assertion was on them. They must prove prima facie, as they contended, that the sub-leases were null and void. There was no onus on the plaintiff to prove the validity of the sub-leases unless and until the defendants had made out a prima facie case.
2. Clause 114 of the Constitution applied to sub-leases and hence Cabinet consent was required. The onus was on the defendants to prove their assertion that the sub-leases were not of "general public interest and benefit" and they had failed to do so.

3. It was a misnomer to speak of the creation of a sub-lease as the "sale of land" and the grant of the sub-leases did not amount to a sale of land within the meaning of clause 104 of the Constitution.
4. A deed of sub-lease was a contract which could only impose obligations and confer rights on the parties to it; the defendants were not parties to the sub-leases.
5. Judgment was entered for the plaintiff and various orders were made including an order requiring the defendants to vacate the land.

Cases considered:

GJ Coles & Co Ltd v Federal Commissioner of Taxation (1975) 49 ALJR 188; 6 ALR 83

Ma'umalanga v Tupou [1994] Tonga LR 30

OG Sanft and Sons v Tonga Tourist and Development Co. Ltd, Hamilton and Minister of Lands [1981-88] Tonga LR 26

Russ & Brown's Contract, In re [1934] Ch 34 (CA)

Viliama Hema v Fatani Tavake Hema and Minister of Lands (Land Court, L 48/57, 13 Feb 1959, Hunter J)

Statutes considered:

Interpretation Act (Cap 1)

Land Act (Cap 132)

Counsel for plaintiffs : Mr Niu

Counsel for defendants : Mr Tu'utafaiva

The judgment was appealed to the Court of Appeal and the appeal was dismissed. The Court of Appeal judgment will be reported in a later volume of the Tonga LR.

Judgment

This case is about an area of prime commercial land in downtown Nuku'alofa. It is part of the Royal Family Estate known as "Finefekai."

The first plaintiff holds a sub-lease of the northern half of the property. The second plaintiff holds a sub-lease of the southern half of the property. They want to develop part of the land by building a two storey office block.

The seven defendants are all occupants of existing buildings on the land. The plaintiffs want vacant possession so that they can start on their development project. They have served notices to vacate and eviction notices on the defendants.

The defendants challenge the validity of the plaintiffs' sub-leases. They claim that they are unlawful and therefore null and void. They also claim that any tenancy agreements between the parties are invalid.

The defendants' case is that the sub-leases are void because:

1. His Majesty had not given his required consent to either the sub-leases or to the "sub-division" of the head lease into the two sub-leases.

2. The sub-leases are "sales" of land contrary to clause 104 of the Constitution.
3. The sub-leases were not for a project of "general public interest and benefit" as required by section 10(2) of the Land Act.
4. The sub-leases are incomplete in their contents.
5. The term of each sub-lease had not been approved by the Privy Council as required by section 124(3) of the Land Act.
6. The sub-leases have never been registered as required by section 128(2) of the Land Act.

The defendants, in addition, claim that any tenancy agreements with the plaintiffs are un-enforceable because they are unlawful agreements by virtue of section 13 of the Land Act.

These then are the matters for determination.

The property in question fronts on to Taufa'ahau Road in an area bounded by the Pacific Royale Hotel to the south and the OG Sanft building to the north. It presently consists of what was described in a publication produced in evidence by consent as a "row of ramshackle single and double storey buildings lining the main street."

In July 1918 the southern half of the property was leased for the first time by Her late Majesty to Alfred Cowley the founder of a long established bakery business in Nuku'alofa. The following year (1919) the northern portion was leased to a Mr WA Smith and then there was a smaller area of about 20 perches situated at the rear of the northern block which was not leased but held by one, Sione Tongilava.

The lease of the Cowley block was renewed for different terms up to 1980 but it was not renewed after that date.

The lease of the Smith block was renewed for various terms up to 1961 but it was not renewed after that date.

In 1993, His Majesty Taufa'ahau Tupou IV, King of Tonga, granted a lease of the whole of the land comprising the Cowley, Smith and Tongilava blocks to a Dr Sam Wong, who was described as an "Asian entrepreneur". The lease to Dr Wong which had been approved by Cabinet was registered on 15 June 1993 as lease 5405. The term of the lease was for 50 years expiring on 14 June 2043. Dr Wong proposed to develop an elaborate shopping plaza on the site accommodating three floors of office space along with other floors made up of stores and food outlets.

Although the reasons were not canvassed before me, it appears that Dr Wong's ambitious plans for the site came to nothing. He had obtained mortgage finance from the ANZ Bank using the lease as security but he found himself unable to meet the repayments under the loan.

Towards the end of 1997 the ANZ Bank took possession of lease 5405 from Dr Wong pursuant to its mortgage.

In the months leading up to the Bank becoming mortgagee in possession, Dr Wong had entered into an agreement to sell a sub-lease of the northern half of the land in lease 5405 for US$340,000 to Fund Management Limited, ("Fund Management") the first plaintiff. Fund Management had commenced business in December 1994. The company operates Western Union which is a worldwide

electronic money transfer company. It also holds the franchise in the Kingdom for Avis Rental cars and it operates an IATA accredited tourist agency.

Fund Management had been searching for office space in downtown Nuku'alofa for sometime. Up until last year, Western Union had operated out of an upstairs office and that arrangement had not proved to be satisfactory. Fund Management proposes to develop a two storey office building on its new site.

For reasons, again, which were not fully explored before me, it seems that after Fund Management had paid across the purchase price to Dr Wong the sub-lease arranged between Dr Wong and Fund Management was found to be invalid. The problem appears to be that the sub-lease did not have the approval of Cabinet and it apparently contained a fraudulent ministerial signature. There may also have been an issue over whether Dr Wong could legally sub-lease only half the land in lease 5405.

At about this time the ANZ Bank began to take a more active role in the negotiations between Dr Wong and Fund Management. The Bank was mortgagee to both parties and as soon as the validity of the sub-lease was questioned, the Bank's security position was compromised.

While the problems with the invalid sub-lease were being looked into, Dr Wong approached Fund Management again and offered the company a sub-lease of the southern half of the land for US $220,000 which Fund Management regarded as "a very good price". Fund Management accepted the offer and then set about acquiring the second plaintiff, Tourist Services Ha'apai Limited ("Tourist Services"). The plan was that the sub-lease of the southern half of the property would be held in the name of Tourist Services, a fully owned subsidiary of Fund Management, and the sub-lease of the northern half of the property would remain in the name of Fund Management.

Having set the structure in place, the ANZ Bank as Mortgagee in Possession, then made an application to the Supreme Court under Lease 5405 for formal orders approving the mortgagee sale of the two sub-leases under section 109 of the Land Act.

Chief Justice Lewis made the orders sought on 24 February 1998. His Honour directed the Minister of Lands:

> 1) to approve the two sub-lease application
> 2) to arrange for the sub division of all the land in lease 5405 into equal halves and
> 3) to have prepared and registered the two new sub-leases and
> 4) to have registered the mortgages over the sub-leases in favour of the ANZ Bank.

On 11 March 1998 His Majesty's Cabinet approved the Applications from Fund Management and Tourist Services to sub-lease their respective parts of Lease 5405. The sub-leases were signed up on the 2nd December 1998 and registered on 18 December 1998. The mortgage to the ANZ Bank of $525,000 was registered on 21 December 1998.

Those are the relevant background facts.

In about the middle of June this year each defendant was given formal notice by the respective plaintiffs to vacate the property followed by an eviction notice. They failed to vacate and the present proceedings were issued. They were issued as seven

separate proceedings but for convenience of reference they have been consolidated into the one proceeding and they were dealt with on that basis at the hearing.

I turn now to consider the issues raised by the defendants in their statements of defence. As it is the defendants who are contending that the sub-leases are invalid, the burden of proving the assertion is on them. They must prove *prima facie*, as they contend, that the sub-leases are null and void. There is no onus on the plaintiff to prove the validity of the sub-leases unless and until the defendants have made out a prima facie case.

The first question for determination relates to the alleged failure to obtain His Majesty's consent.

The case for the defendants, in relation to this point is that section 10(2) of the Land Act created a unique category of lease which did not require Cabinet consent but did, so their argument ran, (because the land involved was a Royal Family Estate) require His Majesty to satisfy himself that the sub-leases, like the lease itself, were for a project "of general public interest and benefit" within the wording of the section.

I will deal with the public interest and benefit issue when I look at the third element advanced by the defence, but on the Cabinet consent issue, I cannot accept the defence submission that Cabinet consent is not required to a lease under section 10(2) of the Land Act. Whilst section 10(2) may well create a new category of lease in addition to the 3 categories recognised by the Privy Council in *O G Sanft and Sons v Tonga Tourist and Development Co. Ltd, Hamilton and Minister of Lands* [1981-88] Tonga LR 26, 31, that does not mean that it is unnecessary to obtain cabinet consent to such a lease. Clause 114of the Constitution provides:

> "114. No lease, sub-lease, transfer of a lease or of a sub-lease shall be granted –
> (a) without the prior consent of Cabinet where the term is ninety – nine years, or less, or
> (b) without the prior consent of the Privy Council where the term is over ninety - nine years…"

That clause is of general application. It applies without exception to all leases including leases under section 10(2) of the Land Act.

Clause 114 has equal application to any sub-lease. I do not accept the defendants' submission that it was necessary for His Majesty to give his personal consent to any sub-lease under Lease 5405. In any event, Lease 5405 gave express power to Dr Wong to grant a sub-lease or transfer of the lease provided that he first obtained Cabinet consent and he duly complied with that requirement.

The second aspect of the consent issue was the claim by the defendants that His Majesty had not consented to the "subdivision" of Lease No. 5405.

The thrust of this submission was that because of the "unique" requirement in section 10(2) of the Land Act, that His Majesty may lease for projects of "general public interest and benefit," His Majesty would need to approve any sub-division of the lease so as to ensure that the sub-divided lease still met the purpose prescribed in section 10(2) of the Land Act. Going on from there, the defendants said that as there is, no procedure laid down in the Constitution, the Land Act or the head lease for applying for a sub-division of a lease, the absence of such a provision makes any sub-division of a lease unlawful.

Under this head the defendants also challenged the validity of the Orders made by Lewis CJ on 24 February 1998 where his Honour directed the Minister of Lands to give effect to the sub-division of the lease by dividing the leasehold in two equal halves. The defendants made two points:

(1) The Chief Justice was acting in the Supreme Court jurisdiction whereas under section 149 of the Land Act only the Land Court had jurisdiction and

(2) The Crown was not a party to those proceedings.

At common law a lessee may sub-lease part only of the land the subject of the lease - *GJ Coles & Co Ltd v Federal Commissioner of Taxation* (1975) 49 ALJR 188 at 193; 6 ALR 83.

As there is no prohibition in the Constitution, the Land Act or the Lease itself against the sub-leasing of part only of the land in a lease, the transaction which resulted in two sub-leases of all the land in Lease 5045 cannot, in itself, be unlawful.

The fact that there is no prescribed form of application to sub-lease part only of a lease does not affect the legality of the situation. No application form is prescribed in the legislation for the grant of a sub-lease of all the land in a lease but sub-leases are recognized in both the Land Act and the Constitution. The Chief Registration Officer for Lands, Samisoni Pone, gave evidence about how, in practice, lease application forms were adapted to handle sub-leasing applications and I have no doubt that similar adjustments could be made to the form to cater for applications for the sub-leasing of part only of the land in a lease.

The circumstances surrounding the Orders made by Lewis CJ were not explored before me. Counsel for the plaintiffs stressed, however, that whether or not the Orders were valid does not really matter because the Orders were directed to the Minister, not to Cabinet, and it was the Cabinet that received and approved the two sub-lease applications. I agree with that analysis.

The second ground of defence put forward is that the sub-leases are invalid because they were sold by Dr Wong to the plaintiffs and a sale of a lease or sub-lease in the Kingdom is contrary to Clause 104 of the Constitution. Clause 104 makes it illegal to "sell any land whatever in the Kingdom of Tonga". The defendants rely on section 2 of the Interpretation Act which defines "land" as including "... leaseholds and interests in lands of every description."

The evidence was that Fund Management had paid Dr Wong US$340,000 for the sub-lease of the Northern block and Tourist Services had paid Dr Wong US $220,000 for the sub-lease of the southern block.

The plaintiffs response to this submission is that leases are an exception to the prohibition against sales prescribed in clause 104 of the Constitution and the Interpretation Act cannot override the Constitution.

The plaintiffs referred the Court to the well known excerpt from the speech of His Majesty Tupou I on this subject at the opening of Parliament in 1875 which they say supports that proposition.

It is a misnomer to talk about the sale of a lease with reference to a "sale" of a lessee's interest in a lease. The disposition of a lease by the lessee is at common law effected either by an assignment of a lease or by the creation of a sub-lease. In neither case is it appropriate to describe the transaction as "a sale".

Conversely, the disposition of the freehold landlord's estate in leasehold property is effected either by transfer and registration or by conveyance, in the case of unregistered land.

A reference to a sale of leasehold property, per se, is taken to be a reference to the sale of a lease by the freeholder - *In re Russ & Brown's Contract* [1934] Ch 34 (CA), 43. Given the unique Land Law structure in Tonga, a sale of leasehold by the freeholder in the manner just described could never arise.

The definition of "land" in section 2 of the Interpretation Act upon which the defendants have based this part of their argument is subject to the introductory words to section 2 which read "... unless the contrary intention appears."

A contrary intention very plainly appears if any attempt is made to equate the prohibition against the sale of land in clause 104 of the Constitution with a prohibition against a lessee's right to assign or grant a sub-lease of his interest in a leasehold property for valuable consideration.

For these reasons I reject this ground of the defendants' submissions. The ANZ Bank, as mortgagee in possession was able to grant valid sub-leases to the plaintiffs. The grant of such sub-leases did not amount to a sale of land within the meaning of clause 104 of the Constitution.

The third ground of defence the defendants advance is that the sub-leases were not for a project of "general public interest and benefit" as required by section 10(2) of the Land Act.

The argument under this head is that while His Majesty may have determined that the lease to Dr Wong was for a project of general public interest and benefit, there is a considerable difference between the seven storey shopping plaza proposed by Dr Wong and the two storey office building which Fund Management proposes to develop on its site. Furthermore, no final development proposal has yet been put in place for the Tourist Services site.

The defendants say that while Cabinet has power under clause 105 of the Constitution to determine the terms of a lease or sub-lease, it does not have authority to determine such a matter as whether the purpose of the lease or sub-lease is of "general public interest and benefit".

I cannot accept those submissions. First, as the party making the assertion, the defendants must prove the allegation that the sub-leases are not for projects of general public interest and benefit. The defendants have not done that. On the contrary, the evidence called by the plaintiffs from Mr 'Etueni Mo'ungaloa, the former deputy-secretary at the Royal Palace and from the plaintiffs' chief Executive Officer, Robina Nakao satisfies me that the sub-leases do meet the test in section 10(2). Secondly, under clause 114 of the Constitution, Cabinet must give its consent to a lease or sub-lease of less than 100 years and that provision enables Cabinet to consider and determine all relevant matters pertaining to the lease or sub-lease including, in the context of this case, whether or not the section 10(2) criteria is satisfied. So, in other words, the control mechanism is in place. The consent of Cabinet is a prerequisite to any lease or sub-lease. It must oversee the form and nature of the lease or sub-lease.

The third point I make under this head, and it has equal application to some of the other defences put forward, is that a deed of sub-lease is a contract which can only impose obligations and confer rights on the parties to it. The defendants are not parties to the sub-lease. In *Ma'umalanga v Tupou* [1994] Tonga LR 30, the defendant,

who was a squatter, challenged the validity of the lease over the land he occupied upon the grounds that the lessee, as a United States citizen, should have held a permit before he was entitled to take out the lease. The Land Court agreed that a permit was a necessary prerequisite but it went on to say:

> "If the Minister considers that he was misled by not being told that the plaintiff was a foreigner then it is for him to consider his position and take such action, if any, as he thinks appropriate. I am not persuaded that it is open to the Court to usurp his function and purport to cancel the lease on this ground, or even to direct the Minister to cancel it. Leases are granted only with the consent of Cabinet and any action by the Courts, except upon an application by the Minster supported by a Cabinet Decision, would certainly be inappropriate and, in my opinion, also be incompetent."

The language in the passage may be stronger than I would have used but I concur with the sentiments expressed and the principle has equal application in the present case.

The 4th and 5th grounds of defence advanced by the defendants can be disposed of in quick order. In fact, I am surprised that they are being seriously advanced. In relation to the 4th ground, it is correct, as the plaintiffs admit, that there are some omissions in the sub-lease documents. They should have been filled in and they are probably the result of an oversight on the part of the typist or the draftsman in the Ministry of Lands. Although the omissions are unfortunate they are of a minor nature and they certainly do not invalidate the lease. No one has been misled by the blanks and it would be a relatively simple matter to have them filled in correctly.

Counsel for the plaintiff referred me to an earlier decision of the Land Court in *Viliama Hema v Fatani Tavake Hema and Minister of Lands* (Land Court, L 48/57, 13 Feb 1959, Hunter J). In that case the Court ordered rectification of the register. In the present case, the parties to the sub-lease should take whatever steps are necessary to have the Ministry of Lands rectify the omissions and, if necessary, they are free to approach the Court for assistance.

The 5th ground for challenging the validity of the sub-leases raised by the defendants is that the term of the head lease expires on 15 June 2043 but the term of the sub-leases expire on 14 June 2943 and as the sub-leases are for 945 years the prior consent of the Privy Council should have been obtained under clause 114 of the Constitution.

It is clear, however, that the termination date for the sub-leases should have been shown as 2043 but in altering the words in the printed form which read: "**in the year one thousand nine hundred and**" to provide for the new millennium the typist deleted the words "**one thousand**" and typed in "**two thousand**" omitting to delete the words "**nine hundred and**". The expiry date thus appears as "**the fourteenth day of the month of June in the year two thousand nine hundred and forty three**".

The defendants argue that, having regard to the earlier sub-lease which was found to be invalid or fraudulent, it could not be assumed that there was an innocent mistake on this occasion. This particular allegation was not pleaded but, in any event, I disagree. The error is an obvious oversight and comes within the same category of omission I referred to earlier. Quite apart from that, by its very nature, a sub-lease is a

transfer of something less than the whole of the lessee's interest in the lease, as in a transfer of the unexpired portion of the 1ease less one-day. In other words, a sub-lease could never carry on past the expiry date of the head lease.

There was an additional 6th ground advanced by the defendants which was not pleaded but which was argued. The point was that the sub-leases were not registered under the Land Act because there was no memorial of registration endorsed on the original lease as required by section 128(2) of the Act. It was up to the defendants to prove this allegation to my satisfaction on the balance of probabilities but they have not done so. I am not persuaded that the copy of the lease included in the agreed bundle of documents is a copy of the current head lease rather than an earlier version.

The defendants, in conclusion, submitted that, even if the Court was to hold that the sub-leases were lawful, then the plaintiffs could still not claim the unpaid rent because the tenancy agreements were illegal under section 13 of the Land Act. The defendants say that the illegality arises because, contrary to section 13 of the Act, the agreements were not entered into in the manner prescribed by the Land Act or as approved in writing by the Minister. While the defendants accept that tenancy agreements are permitted in respect of buildings, here the buildings are owned by the tenants themselves and the rental is being claimed by virtue of the 1andlord being the holder of a sub-lease of the land under the buildings. That, the defendants say, brings the agreements within the scope of section 13 and makes them illegal.

The plaintiffs' response is that section 13 is a criminal provision and it must, therefore, be strictly construed. The plaintiffs say that section 13 applies only to a "landholder" and the definition of "landholder" in section 2 of the Land Act does not include lessees. They say that if that had been the intention then it would have been a very easy matter to have specifically included them in the six categories of persons listed in the definition of "landholder" in section 2.

Whilst there is some force in that submission, the defendants point to paragraph (f) of the definition of "landholder" which is: "(f) any person who claims to be entitled to any land or interest in land whether in actual possession or occupation or otherwise". They argue that the wording of paragraph (f) is so broad that it must include lessees.

In my view, it is not necessary to determine whether a lessee is a landholder within the meaning of paragraph (f) because section 13 is concerned only with a landholder who has a "holding". Although "holding" is not defined, it is only paragraph (b) of the definition of "land holder" that refers to a person having a "holding" and that reference is to any Tongan subject holding an hereditary estate (Tofia), a tax allotment (api tukuhau) or a town allotment (api kolo). The lessees in this case do not come within that category of person and section 13, therefore, has no application.

The plaintiffs have succeeded in their claim and they are entitled to judgment.

Remedies

In their prayer for relief, the plaintiffs seek a declaration that they are the lawful occupiers of the respective properties. They seek an order granting immediate vacant possession, damages and costs. In addition, arrears of rental payments are claimed against the first and sixth named defendants. The first plaintiff also called evidence of

arrears of rental owing by the second defendant but no arrears of rental are sought against the second defendant in the pleadings.

Although damages are sought against each of the defendants, there is no evidence that would substantiate such an award apart from a claim for mesne profits and such a claim has been advanced. The concept of mesne profits has been described in the following terms:

> "Where the tenancy has been terminated lawfully, a tenant who refuses to vacate the premises is a trespasser, and the landlord is entitled to "mesne profits", that is, to damages for the rent which would have been obtained but for the tenant's continued occupation. The landlord may claim for the period from the date of service on the lessee of the court process claiming possession to the date when physical possession is recovered, for service of the process constitutes a notional re-entry by the landlord. It is not necessary for the landlord to prove that he could, or would, have leased the premises to someone else in the absence of the trespasser." Land Law, Peter Butt, second edition, para 1591.

I invite counsel for the plaintiffs to file a Memorandum with the Court in due course updating the claim for outstanding rent against the first and sixth defendants and itemising the plaintiffs' claim for mesne profits in respect of each defendant. It may be possible for the parties to reach agreement on the plaintiffs' entitlement to arrears of rental and mesne profits (using the formula set out in the extract quoted above) but if such agreement is not possible then the Court will make appropriate orders.

Judgment is entered for the plaintiffs and the following orders are hereby made:

1) A declaration that the respective plaintiffs are the lawful occupiers of the land described in the pleadings against each defendant.
2) That on or before 1800 hours on Tuesday 21 November 2000, each of the defendants will remove themselves and their possessions and property from the said land which they presently occupy.
3) Judgment against the first and sixth defendants for arrears of rental and against the defendants for mesne profits in such sums as are to be agreed or, failing agreement, to be fixed by the Court upon receipt of a Memorandum from Counsel.
4) Costs in respect of the action in favour of the plaintiffs against each of the defendants (apart from sixth defendant who was not given leave to defend the action) to be taxed if not agreed.

R v Angitoa

Supreme Court, Nuku'alofa
Ward CJ
Cr 1123/99 and 1162/99

24, 25, 26 July 2000; 27 July 2000

Criminal procedure — admissibility of statements
Criminal law — assault — proof of participation

On 30 July 1999 a number of people attended a drinking session in Tatakamotonga at the house of the alleged victim of these offences, Sione Taimani, the complainant. Later, one of the drinkers, Lupeni, attacked a son of the complainant and was then struck in turn by another of the sons. As a result of that blow, he received a cut above the eye. Everyone left then and went to another house. Lupeni had gone to the same house and told those present that he had been cut with a knife at the drinking session. A number of people then went to the complainant's house. The complainant's wife said that she saw the two accused kicking and hitting the door. They rushed in and attacked the complainant. Each accused was charged with housebreaking, wilful damage to property and common assault. The admissibility of the statements that each accused gave to the police was challenged during the trial.

Held:

1. In a case where the suspects were not arrested or in a case where they have been, if the intention is to ask a few questions and immediately release them, there is no need to detain them until a magistrate can be contacted. Even if there had been such a requirement, the Court did not accept it would be ground for ruling that the answers given to the police under caution were inadmissible solely for that reason. The statements were admissible.
2. The Court was satisfied beyond any doubt that one of the accused did attack the door and cause damage to it, that he forced the door open and entered the house, and that he assaulted the complainant. He was convicted of counts 1, 2 and 3.
3. The Court was not satisfied that the other accused assaulted the complainant. He was convicted of wilful damage and housebreaking, counts 1 and 2. He was acquitted of the assault, count 3.

Statute considered:
Police Act (Cap 35)

Counsel for prosecution	:	Miss Tupou
Counsel for both accused	:	Mr Veikoso

Judgment

Each accused is charged with housebreaking, wilful damage to property and common assault. The offences all relate to the same incident on the 30 July 1999. On that day, a number of people attended a drinking session in Tatakamotonga at the house of the alleged victim of these offences, Sione Taimani, whom I shall refer to as the complainant. The group included the accused 'Asaloni, and the complainant.

The early events are relevant and not disputed. The group had started drinking about midmorning and was drinking spirits and home brew for some of the time and then home brew only. Many of the drinkers were drunk including the complainant and 'Asaloni. Later, one of the drinkers, Lupeni, attacked a son of the complainant and was then struck in turn by another of the sons. As a result of that blow, he received a cut above the eye.

When that occurred, the complainant ordered everyone out of the house and went to rest after asking his wife, who was also present, to prepare him some food.

By that time it would appear that 'Asaloni had gone home and, on his own account, had taken a shower and then gone to a nearby house where a number of people were practicing for a show. Included in that group was the other accused, Siai.

Lupeni had gone to the same house and told those present that he had been cut with a knife at the drinking session. A number of the people at the practice then went to Sione's house and it is the events following their arrival there that are the subject of these charges.

The complainant and his wife Litia gave evidence. Litia described how, when the others arrived, she heard a banging on the door of the house and, when she looked through the louvres by the door, saw 'Asaloni and Siai kicking and hitting the door. When that had no effect, 'Asaloni picked up and used a concrete block and Siai used a piece of wood. At the same time she could hear 'Asaloni shouting, "beat" and "kill".

She ran to warn her husband but, as he got up, the door to the house opened and the two accused rushed in. Her husband was naked and ran back to the bedroom to get the bedcover to wrap around himself but, before that and as he was just at the entrance to the bedroom, 'Asaloni hit him on the top of his head with the brick. Siai then struck him on the back of the neck with the wood.

Both accused then followed him into the bedroom and continued to punch and kick him. At some stage they were joined by two others who joined in the beating of the complainant.

The attack stopped when the father of the two accused arrived and chased them out. He then sat down and apologised to the complainant. Litia cleaned up the blood from her husband's face and saw that he had a bruise on the top of his head, cuts to his mouth, a swollen neck and bruises to the body.

The complainant told the court that he did not go to the doctor that day. However, the next day the pain was bad and so he went then but there is no medical evidence of the injuries.

On 11 August, the police officer assigned to the case went to Tatakamotonga and saw 'Asaloni and asked him to go to the police station with him. He agreed and was interviewed there under caution and charged. The officer had been asking about Siai as well and, when he heard the message, he too went to the police station on his bicycle. He was also interviewed under caution and charged.

The admissibility of these statements was challenged by the accused and I held a trial within a trial. The grounds of challenge were, first, that the answers were wrongly recorded or were fabricated which goes to weight but does not otherwise affect their admissibility.

The second ground was that the officer had not followed the requirements of sections 21 and 22 of the Police Act. The officer's evidence was that he had only asked them to accompany him to the police station. When he had finished questioning them he released them because, he said, they told him they were leaving. The accused claimed they had been arrested and it is true that the officer recorded a question in his interview of 'Asaloni as; "Do you know the reason why the police arrested you?" He told the Court that was a mistake.

On the evidence before me, I am satisfied beyond reasonable doubt that the officer did not arrest these two men. The manner in which they came to accompany him to the police station and of their release support that view. Mr Veikoso submitted that they should not have been questioned until they had been taken before a magistrate. I do not accept that is the result of the provisions of section 22 of the Police Act. In a case such as this where the suspects were not arrested or in a case where they have been, if the intention is to ask a few questions and immediately release them, there is no need to detain them until a magistrate can be contacted. Even if there had been such a requirement, I do not accept it would be ground for ruling that the answers given to the police under caution are inadmissible solely for that reason.

'Asaloni told the officer that he went to the house and took a brick and smashed it on the door. The door opened and he entered and punched Sione down. He said that Sione attacked him so he threw punches at him. He said he did this because he was angry that he had injured the accused's cousin.

Siai also referred to the fact that he was angry when he saw the injury to Lupeni. He was asked whether Litia had allowed him to enter the house and he said she had not and was asked why he entered to which he replied that he entered to beat up Sione.

Both accused gave evidence at the trial.

'Asaloni told the court that he struck the door with a brick but denied that he caused it to open. It was, he explained, opened by the complainant. He said that the complainant was brandishing a piece of wood and the accused attacked him and they both fell inside. He admitted to punching Sione but denied using a brick to hit him. He also stated that Siai never came into the house and that only the other two had been involved in the attack on Sione.

Siai agreed he was angry and went to the house. When he arrived, he saw one of the complainant's sons by the door and grabbed him and pulled him down. They struggled but another person, Fine, held him and stopped him fighting. He denied

entering the house or attacking the door or the complainant. He never, he said, had a piece of wood.

A number of other witnesses were called all of whom were either friends or relatives of the accused. They all supported the suggestion that Siai did not go into the house. I do not set out their evidence but they differed in the details of what he was doing outside whilst the attack on Sione was taking place in the house. I was not impressed with any of the eye-witnesses other than the complainant and his wife and the accuseds' father. One was declared hostile and acknowledged he had not spoken the truth and I disregard his evidence in its entirety. The others I am satisfied beyond any doubt were attempting to shift the blame from Siai.

The burden is on the prosecution throughout to prove the case against each accused beyond reasonable doubt. I have considered the case against each accused separately.

In the case of the accused 'Asaloni, he mentioned that, when the door was opened, Sione was holding a piece of wood and so he tackled him. The suggestion of self-defence was not raised but I have to consider it if the evidence could support such a suggestion. I have done so and am satisfied to the required standard that it was not a case of self-defence. Indeed I go further and am satisfied that the complainant never had a piece of wood at any stage.

I am satisfied beyond any doubt that 'Asaloni did attack the door with a brick and caused damage to it. I am also satisfied to the same standard that the attack on the door forced it open and that he then entered the house. Once in, he attacked the complainant and struck him with the brick once on the top of his head. Thereafter he continued the attack with his fists and feet.

The result of the attack on the door was to cause wilful damage and he is convicted of count two. By that attack he was able to break into the house with the intent when he did so of assaulting Sione. That is housebreaking and he is convicted of count one. I am equally satisfied that he assaulted Sione and he is convicted on count three.

The case against Siai causes me more difficulty. As I have stated I am satisfied the witnesses were trying to cover up for him to a greater or lesser extent. I found both the complainant and his wife credible witnesses and both told how Siai came into the house and joined in the assault. Litia was certainly accurate in her account of the other two joining in and also the arrival of the accuseds' father. In his interview, the accused appeared to agree with the police that he did enter the house.

I found the accuseds' father a credible witness. He told how he struck the accused, 'Asaloni with a piece of wood as he left the house. He said he had brought the wood with him.

As I have stated, I attach little weight to the evidence of the eye-witnesses generally. I accept that Litia saw the people attacking the front door clearly enough and there is no reason to doubt that she was accurate in her account of that. However I am not satisfied to the required standard of a criminal trial that the complainant and his wife could not have been mistaken in their statement that Siai was in the house. At that time, there were a number of people attacking the complainant. The wife had already seen him with a piece of wood and later that piece of wood was in the house when the accuseds' father came in and chased the others out. I feel there is risk that those incidents may have affected the recollection of Litia and I must therefore acquit Siai of the assault.

I am satisfied beyond reasonable doubt that he did attack the door with a piece of wood and he is convicted of wilful damage on count two. He had gone to the house in anger at the injury to his cousin. That anger led him to join in the attack on the door and the resultant forcing of it to open. I am satisfied he was doing that with the intention of forcing an entry into the house in order that Sione should be attacked even if he did not subsequently carry out that purpose and he is convinced of housebreaking on count one.

To'a v National Pacific Insurance

Supreme Court, Nuku'alofa
Ward CJ
C 839/99

1 August 2000; 2 August 2000

Insurance law — balance of probabilities — reckless, dangerous driving — insurers not liable

In 1997 the plaintiff bought a car for use as a taxi by way of a loan from the Bank of Tonga for $7200. The loan was conditional on the borrower also arranging insurance for the vehicle and so the plaintiff took out a policy with the defendant company. The premium was paid directly by the bank to the defendant and the amount added to the plaintiff's loan account. The policy states that the sum insured was $7200. On 31 January 1998, the plaintiff was driving the insured vehicle and collided with a van causing considerable damage to the van and writing off the insured vehicle. The plaintiff was subsequently charged and pleaded guilty to negligent driving. He claimed under the policy and the insurance company paid $5500 on the basis that the value of the written off vehicle was $6000 less an excess of $500. Subsequently the other driver sued the plaintiff and obtained judgment in the Supreme Court against him for the damage to his vehicle in the sum of $3114, interest at 10% and costs of $1000. The plaintiff brought an action for the balance between the sum paid for the plaintiff's vehicle and the insured sum of $7200, for the sum awarded against him for the damage to the third party, for $3900 loss of earnings whilst waiting for the payment by the insurance company and for a further $500 for the loss of the use of the vehicle during the same period for his non commercial use of it.

Held:

1. The Court was satisfied that the defendant paid the market value at the time and there was no liability to pay any other figure under the policy for the damage to the plaintiff's vehicle.
2. The fact the plaintiff pleaded guilty to a lesser offence was not proof of the manner of his driving. The Court was satisfied that the plaintiff's driving was reckless and dangerous. The exclusion clause was brought into effect so the insurance company was not liable for any claim by the plaintiff arising out of the accident.
3. The claim was dismissed with costs to the defendant.

Counsel for plaintiff : Mr Fifita
Counsel for defendant : Mr 'Etika

Judgment

In 1997 the plaintiff bought a car for use as a taxi by way of a loan from the Bank of Tonga for $7200.00. A cheque for that amount was prepared by the bank and made payable to the vendor. The loan was conditional on the borrower also arranging insurance for the vehicle and so the plaintiff took out a policy with the defendant company. The premium was paid directly by the bank to the defendant and the amount added to the plaintiff's loan account. The policy states that the sum insured is $7200.00.

On 31 January 1998, the plaintiff was driving the insured vehicle and collided with a van causing considerable damage to the van and writing off the insured vehicle. The plaintiff was subsequently charged and pleaded guilty to negligent driving.

He claimed under the policy and the insurance company paid $5500.00 on the basis that the value of the written off vehicle was $6000.00 less an excess of $500.00. Subsequently the other driver sued this plaintiff and obtained judgment in the Supreme Court against him for the damage to his vehicle in the sum of $3114.00, interest at 10% and costs of $1000.00.

This claim is for the balance between the sum paid for the plaintiff's vehicle and the insured sum of $7200.00, for the sum awarded against him for the damage to the third party, for $3900.00 loss of earnings whilst waiting for the payment by the insurance company and for a further $500.00 for the loss of the use of the vehicle during the same period for his non commercial use of it.

During the trial the plaintiff also sought to allege that the defendant had failed to advise the plaintiff properly about the scope of the policy. That was not pleaded but I have no hesitation in saying that I accept that the plaintiff was given a sufficient explanation and, in any event, the policy document is clear in its terms. The plaintiff is an educated man and his work at that time required a familiarity with English - the language of the written agreement.

The defence is that the sum paid was the market value of the vehicle and so was the proper amount and also that the driving of the plaintiff was reckless or dangerous and so was covered by one of the exclusions under the policy. Had the company known the true facts of the driving, it would not even have paid out the sum of $5500.00. The defence was also based on the suggestion that the contract of insurance was between the defendant and the Bank of Tonga and not the plaintiff but that is clearly incorrect on the evidence and has been abandoned by the defendant.

The first issue is the claim for payment of the balance between the sum paid and the amount insured. The cover under the policy is plainly set out in section 1 of the policy and includes under "Amount Payable";

> "We may choose either:
>
> a) to repair your vehicle OR
> b) pay you the amount of the loss not exceeding the market value of your vehicle … at the time of such loss …"

The defence called evidence that the cash price of the vehicle when it was purchased was $5800.00 and that their engineers had placed a value of between $5500.00 and $6000.00 on it at the time of the loss. No separate evidence of value was called but the plaintiff agreed in evidence that the cash price he had paid when he purchased the vehicle was $5800.00.

I am satisfied that the defendant paid the market value at the time and there is no liability to pay any other figure under the policy for the damage to the plaintiff's vehicle.

The second point is more important because, if the defence is correct, it would exclude the whole claim including the sum actually paid.

The policy includes under the heading "General Exclusions":

> "You are NOT covered for any loss, damage, injury or liability while any vehicle in connection with which cover benefits are granted under the Policy is:
>
> (c) Being driven in a reckless/dangerous manner."

As the party relying on the exclusion, the burden is on the defence to prove that the driving was reckless or dangerous. It was the plaintiff who called evidence that, when the accident occurred, the other driver was travelling in the opposite direction and saw the plaintiff's vehicle driving towards him in a zigzag manner. He pulled in to the left hand side of the road. The other vehicle went across the road and back three times before it ran head on into his vehicle on the plaintiff's offside of the road at about 40 kph. The plaintiff's evidence was that he could not challenge that account because he was very tired at that time. Anyone who continues to drive when so tired that he is likely to fall asleep at the wheel is clearly driving recklessly.

Counsel for the plaintiff suggests that, as the plaintiff was only convicted of negligent driving, the defence cannot rely on recklessness. I disagree. The fact the plaintiff pleaded guilty to a lesser offence is not proof in this court of the manner of his driving. I must decide the issue on the evidence before me in this court and the standard of proof is on the balance of probabilities. However, on the evidence as a whole including that called by the plaintiff, I am satisfied beyond any doubt at all that the plaintiff's driving on that day was reckless and dangerous.

In those circumstances I find that the exclusion clause is brought into effect and the insurance company is not liable for any claim by the plaintiff arising out of this accident.

The claim is dismissed with costs to the defendant.

Vaiangina v Police

Supreme Court, Nuku'alofa
Ward CJ
C 14/00

4, 7 August 2000; 7 August 2000

Criminal procedure — change of plea — not allowed
Criminal procedure — sentence — imprisonment should be used in default of payment rather than as substitute

The appellant appeared before the Magistrates' Court on 31 May 2000 and pleaded guilty to a single charge of drunken driving contrary to section 25(2)(b) of the Traffic Act (Cap 156). He was sentenced the same day to imprisonment for one month and disqualified from driving for 9 months. He appealed against conviction and sentence on the grounds that he was not given a chance to change his plea from guilty to not guilty, that he did not have a lawyer, and that the sentence was too harsh.

Held:

1. There was nothing to suggest that he pleaded guilty without understanding the nature of the charge or without intending to admit the charge. The court would not allow a change of plea just because the accused regretted the sentence passed or that he now felt he had a defence. The appeal against conviction was dismissed.
2. The magistrate must first decide whether it was appropriate to order a fine or imprisonment or both. It was clear he reached the decision that the appropriate penalty was a fine of $250. When the appellant said that he did not have the money at court to pay the fine the magistrate should have fixed a period of imprisonment in default of payment instead of substituting an order of imprisonment.
3. The appeal against sentence was allowed. The sentence of one month imprisonment was quashed and a fine of $250.00 was substituted. The appellant had 28 days to pay and was to go to prison for one month in default of payment

Statute considered:
Traffic Act (Cap 156)

Counsel for appellant : Mrs Vaihu
Counsel for respondent : Mr Pouono

Judgment

This is an appeal against conviction and sentence. I have already dismissed the appeal against conviction and allowed the appeal against sentence. I have given brief reasons but said I would give a written judgment and I now do so.

The appellant appeared before the Magistrates' Court on 31 May 2000 and pleaded guilty to a single charge of drunken driving contrary to section 25(2)(b). He was sentenced the same day to imprisonment for one month and disqualified from driving for 9 months.

He now appeals on the grounds:

> "1. A request for a change of plea from guilty to not guilty and also a chance for the accused to have a lawyer for he did not have a chance for a lawyer to advise him legally.
> 2. The judgment given is too much, not married, with no job plus no former convictions."

The first ground here is that he should be allowed to change his plea. The authorities on this are clear and numerous. Such a change will not be allowed unless the plea was equivocal or the appellant demonstrates to the court that he did not understand the nature of the charge or that he was guilty of it. In order to ascertain any possible equivocation, the appellate court will only consider the record of what happened in the lower court.

The record in the present case shows that the charge was read to him and he was asked if he wanted a lawyer. He replied he did not and was guilty. He was then asked formally what was his plea to the charge and replied again, "Guilty".

The prosecution facts were outlined and he disputed the fact of having been taken to hospital as was stated by the prosecutor. It was then pointed out by the magistrate that there was a letter from the doctor who examined the accused. The accused then apologised and repeated he was guilty.

That doctor's report states succinctly that, at 11.00am on 1 January 2000, the appellant smelled of liquor was unable to walk in a straight line and was under the influence of liquor.

Mrs Vaihu tells the court that he had been drinking the night before but was not drunk when arrested and was never taken to see a doctor. He pleaded guilty because he did not realise it was a serious offence and wanted to get it over and done with.

I do not accept there is anything to suggest that he pleaded guilty without understanding the nature of the charge or without intending to admit the charge. Neither is there anything on the record to suggest the plea was in any way equivocal. The court will not allow a change of plea just because the accused regrets the sentence passed or even that he now feels he has a defence. Similarly, there is no reason why he should now have a lawyer when he specifically chose to go ahead without one at the lower court. There is no reason for this court to interfere with the plea in the court below and the appeal against conviction is dismissed.

When the magistrate passed to consider sentence, the record shows the following:

> "Court: This is a very serious crime that you have committed in regard to travelling on a public road. There is evidence here showing that you were so drunk that you did not know when you

were taken to the hospital for tests. This crime, either imprisonment or pay money. Do you have $250.00?

Accused: No, sir.

Court: You will be in prison for one month.

Accused: Yes, sir.

Court: Ruling for you to work in prison for one month. Suspension of your driving licence for nine months…"

The penalty for an offence under section 25(2)(b) is a fine not exceeding $500.00 or imprisonment not exceeding 2 years or both.

90 In such a case the magistrate must first decide whether it is appropriate to order a fine or imprisonment or both. It is clear he reached the decision that the appropriate penalty was a fine of $250.00. Having done so he was right to ask the appellant whether he had the money in order to decide whether to give time to pay and, if so, how long.

The appellant did not have the money at court and so the magistrate should have fixed a period of imprisonment in default of payment. This is the case even if the magistrate did not feel it was appropriate to allow time to pay. However, what he did was to substitute an order of imprisonment and that was wrong.

The appeal against sentence is allowed. The sentence of one month
100 imprisonment is quashed and a fine of $250.00 is substituted. The appellant has 28 days to pay and will go to prison for one month in default of payment.

His Royal Highness Prince Lavaka v Tafolo

Land Court, Nuku'alofa
Ward CJ
L 20/00

15 August 2000; 15 August 2000

Practice and procedure — leave to commence action out of time — legislation clear so refused
Land law — preservation of land — estate holder's duty

The applicant succeeded to the title of Lavaka on 14 July 1980, the title having been vacant since the death of the previous Lavaka in 1964. Shortly after succeeding to the title, the applicant went overseas and returned in 1985. On his return, he discovered that a tax allotment known as Heukalae on his estate had been vested in one Siaosi Tafolo, the brother of the late Lavaka's wife, one month after she surrendered it in 1978. He took no action at that time because the land was being used for farming purposes. He was unaware of the time limit imposed on such actions by section 170 of the Land Act. He discovered that the land was occupied by the proposed defendant, Sione Tafolo, the heir of Siaosi Tafolo, and that he was using the land for quarrying operations. He considered the quarrying was destroying the land for the future. He asked Sione Tafolo to vacate the land and was met with a refusal. The applicant wanted to bring an action to challenge the validity of the registration of the land in the name of Siaosi Tafolo by the, then, Minister of Lands. That occurred in August 1978 and so was well outside the 10 year period of limitation imposed by section 170. The applicant sought leave ex parte to commence an action out of time.

Held:

1. As pressure for land continued to increase, so did the estate holder's duty to preserve his land for future generations to use for the purposes envisaged by the drafters of the Land Act. Such changing times may require changes in the law but that is not a matter for the court.
2. The terms of section 170 were clear and the application was refused.

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

Counsel for plaintiff : Mr Garrett

Judgment

The applicant, who is the present holder of the noble title of Lavaka, seeks leave ex parte to commence an action out of time notwithstanding the provisions of section 170 of the Land Act.

I refused the application and said I would give brief reasons in writing, I now do so.

Section 170 provides:

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

The applicant succeeded to the title of Lavaka on 14 July 1980, the title having been vacant since the death of the previous Lavaka in 1964. Shortly after succeeding to the title, the applicant went overseas and returned in 1985. On his return, he discovered that a tax allotment known as Heukalae on his estate had been vested in one Siaosi Tafolo, the brother of the late Lavaka's wife, one month after she surrendered it in 1978.

Although the applicant at the time considered that this registration should not have occurred, he took no action because the land was being used for farming purposes. He was also unaware of the time limit imposed on such actions by section 170.

Recently he has discovered that the land is now occupied by the proposed defendant, Sione Tafolo, the heir of Siaosi Tafolo, and that he is using the land for quarrying operations. As the estate holder, it is the applicant's duty to take care of the people and the land in the area and he considers the quarrying is destroying the land for the future.

He has asked Sione Tafolo to vacate the land and has been met with a refusal.

The action he wishes to bring is a challenge to the validity of the registration of the land in the name of Siaosi Tafolo by the, then, Minister of Lands. That occurred in August 1978 and so this action is well outside the 10 year period of limitation imposed by section 170.

He seeks to bring the action because of alleged misfeasance by that Minister of Lands and because there have apparently been a number of similar cases where other noble title holders have lost pieces of their estates in similar circumstances. It is therefore a matter of fundamental importance to be able to correct such matters.

I have every sympathy with the applicant. If, as he says, this problem has arisen in other cases where, because a title has been left vacant for some years or for any other reason, there has been an incorrect or improper disposal of part of a noble's estate which has only come to his attention after the time limit under section 170, there should be some provision to correct it. The law should not unreasonably or arbitrarily hold a man out of his rights. At the same time, the law has always protected the right of a lawful land holder to peaceful occupation of his land.

I do not, at this stage, know the full facts and cannot say whether or not this action would have succeeded, but the limitation imposed by section 170 prevents it ever being tested in court. Unfortunately the court can only apply the law as it stands. If there is to be any modification of the law, that is a matter for the Legislative Assembly. If there was a wrong, the time to remedy it has gone.

The provisions of clause 20 of the Constitution against retrospective legislation may effectively prevent this particular case being solved in this way but Parliament may consider it appropriate to consider some provision to prevent the repetition of this problem in the future either by amendment of the Land Act or by laws to control the use of land for purposes not connected with farming. Alternatively, some control may be effected by bringing the regulations made under section 22 up to date.

The days where there is more than sufficient land to go round are fast passing. As pressure for land continues to increase, so does the estate holder's duty to preserve his land for future generations to use for the purposes envisaged by the drafters of the Land Act. Such changing times may require changes in the law but, as I have said, that is not a matter for the court.

The terms of the present section are clear and the application must be refused.

R v Pongi

Supreme Court, Nuku'alofa
Ford J
Cr 813/99

31 July 2000; 16 August 2000

Criminal law — fraudulent conversion as a Government servant — abuse of trust

The accused was an acting supervisor in the printing section of the Government Printing Department at Nuku'alofa. In June 1999, the Printing Department, on instructions from the Tonga Rugby Union, printed the admission tickets to the "EPSON CUP" game between Fiji and Tonga scheduled to be played on Saturday 26 June 1999. The accused was charged with fraudulent conversion as a Government servant, and with theft from the Tonga Rugby Union of a number of admission tickets to the game. He contended that he was not guilty of fraudulent conversion of the surplus tickets because they had never been entrusted to him as a Government servant and in relation to the theft charge the accused argued that the Crown had failed to prove that the surplus tickets belonged to the Tonga Rugby Union.

Held:

1. The accused was able to obtain access to the surplus tickets by virtue of his employment as a Government servant in the Government Printing Department and in taking the tickets, as he did, he abused the trust that had been placed in him. The accused was found guilty on count 1.
2. The evidence showed that the accused knew that, whether the surplus tickets were owned by the Tonga Rugby Union or the Government Printing Department, he had no colour of right to them. It was immaterial whether the surplus tickets were owned by the Rugby Union or the Printing Department. The accused was found guilty on count 2.

Cases considered:

R v Deakin [1972] 3 All ER 803
R v Gregory [1972] 2 All ER 861

Statute considered:

Criminal Offences Act (Cap 18)

Counsel for Crown : Mr Kefu
Counsel for defendant : Mr 'Etika

Judgment

The accused is an acting supervisor in the printing section of the Government Printing Department at Nuku'alofa. In June 1999, the Printing Department, on instructions from the Tonga Rugby Union, printed the admission tickets to the "EPSON CUP" game between Fiji and Tonga scheduled to be played on Saturday 26 June 1999. The accused was charged with fraudulent conversion as a Government servant, and with theft, of a number of admission tickets to the game. He denied the charges and elected trial by judge alone.

The material facts are that on Monday 21 June 1999 the accused arrived at the Printing Department to work the evening shift in the printing section from 4:20 pm to 11:20 pm. The day shift had already printed the ticket order for the Tonga Rugby Union and the only job the accused was required to carry out in relation to the tickets was to make a note of the time when the tickets were passed on from the printing section to the bindery section.

The tickets were duly collected by someone from the bindery section and collated in bundles of 50 for collection by the Tonga Rugby Union. The accused was unable to recall how many tickets the Rugby Union had ordered but, in all events, it transpired that there was a surplus of tickets. During the course of the evening the Rugby Union collected its order of tickets from the bindery section and some surplus tickets were left sitting on a table. In the normal course of events, a supervisor would have asked someone to destroy the surplus tickets but, on this occasion, before that happened, the accused uplifted the surplus tickets, numbered them and took them home. There were over 40 tickets in the bundle the accused took.

There is no dispute over any of those matters. The accused made a statement to the police and gave evidence in his own defence. He said that the purpose of taking the tickets was to give them out to his kava drinking friends and other people, including children.

The Crown called 'Isileli Viau who is a life long acquaintance of the accused. Mr Viau said that he had been drinking kava with the accused on the Thursday before the rugby match and he asked the accused whether the Rugby Union gave out complimentary tickets to printing department staff. Mr Viau said that in response to this question, the accused gave him a ticket to the game but he (Mr Viau) did not turn up to the match because the next day, which was the day before the match was due to be played, he heard an announcement over the radio that only tickets containing the seal of the Tonga Rugby Union would be recognized as genuine tickets. There was no seal on the ticket that Mr Viau had received from the accused. Mr Viau said that he did not pay the accused any money or give him any gifts in exchange for the ticket.

The Crown then called constable Sila who was the police officer who carried out the investigation into the case. He produced the handwritten notes of his interview with the accused and a document referred to in the course of the hearing as a "confession". The interview notes consisted of some 39 questions and answers. Constable Sila noted that the accused had written the answers in his own handwriting. The accused said in his statement that he took about 10 red tickets and 10 blue tickets

for grandstand seating and 26 yellow tickets for seating in other parts of the field. He was asked whether he had received any money from the tickets and he said that his wife had received $22.00 from selling 2 tickets for $5.00 each and another two tickets for $6.00 each. In his evidence, the accused said that he did not give the tickets to his wife but she had taken them from the pocket of his shirt and she had sold them even though he had told his wife that the tickets were not to be sold. He said that he was not aware that his wife had received $22.00 for the tickets until the constable came to take him to the police station and it was the constable who mentioned that $22.00 had been paid for the tickets. That proposition was not put to the police constable, but, in any event, I do not accept that part of the accused's evidence. I find that the accused was aware from the outset that his wife had received the $22.00 for the tickets.

The accused is charged, first, with fraudulent conversion by a Government Servant contrary to section 53 of the Criminal Offences Act (Cap 18). Section 53 reads as follows:

> "every person who being employed as or acting in the capacity of a Government servant fraudulently converts to his own use or to the use or benefit of any other person or in any manner fraudulently disposes of any money valuable security or thing of any description whatever or any part thereof which has been entrusted to or received by him by virtue of his employment as a Government servant shall be liable to imprisonment for any period not exceeding 10 years."

In relation to this first charge Mr 'Etika concentrated his submission on what the Crown prosecutor had described as the 5th element needed to be proved to establish a charge under section 53, namely, that at the material time the accused was entrusted with the ticket by virtue of his employment as a government servant. Mr 'Etika submitted that at the time the surplus tickets were taken, the tickets had left the printing section where the accused worked and had been taken through to the bindery section. Mr 'Etika submitted that the Crown had not proved that the accused had breached the duty entrusted in him to print the tickets because the tickets had, in fact, been printed by the day shift. The thrust of Mr 'Etika's submission, in other words, as I understand it, in relation to section 53 was that at the time the accused took the tickets, they were not in his trust in the printing section of the Government Printing Department where he worked but in the bindery section.

Mr Kefu in response said that even though the tickets may have physically been in the bindery section of the Government Printing Department, the evidence is that the accused was still entrusted with those tickets in that he was employed by the Government Printing Department and in that capacity he had access to them. As Mr Kefu put it, "he was still involved in the process". Mr Kefu said that the narrow interpretation of the section argued for by the defence was inconsistent with the object of the section which in his submission, was intended to prevent public servants working in government departments from breaching the trust that had been based in them by the government and the public.

I accept Mr Kefu's submissions. The accused was able to obtain access to the surplus tickets by virtue of his employment as a Government servant in the Government Printing Department and in taking the tickets, as he did, he abused the trust that had been placed in him.

There is no serious challenge to any of the other elements needed to be proved to establish a charge under section 53. The accused had acknowledged in his confession and under cross examination that what he did had been wrong and illegal. I find the accused guilty on count 1.

Count 2 is a charge of theft contrary to ss 143 and 145 of the Criminal Offences Act (Cap 18). The particulars in the indictment in relation to count 2 read as follow:

> "Lilifa Pongi of Tofoa, on or about the days between 21 June 1999 and 26 June 1999, you did dishonestly take without colour of right a number of admission tickets to the International Rugby Union game between Tonga and Fiji valued at $400.00, with intent to deprive the Tonga Rugby Union Committee permanently of those admission tickets and with the intention of converting the admission tickets for the use of yourself and others without the consent of the Tonga Rugby Union Committee."

Mr 'Etika's submission in relation to the charge of theft was essentially that a distinction had to be drawn between the tickets which the Tonga Rugby Union had uplifted from the Government Printing Department and the surplus tickets which the accused had taken. He submitted that the surplus tickets were no longer the property of the Tonga Rugby Union but they were the property of the Government Printing Department and they were awaiting destruction by someone in the department. They, therefore could not in his submission, be regarded as having been stolen from the Rugby Union.

Mr 'Etika drew attention to the evidence which showed that the tickets uplifted by the Tonga Rugby Union had then had the Union's seal stamped on them and he submitted that as the surplus tickets, which the accused had uplifted, did not have the Rugby Union's seal stamped on them, it could not be said that they belonged to the Union. He went on to submit that the only way the Crown could make out the charge was to prove that the Tonga Rugby Union had received a short fall in the number of tickets it had ordered or that the accused had printed further tickets in addition to the number ordered by the Rugby Union. He submitted that the Crown's case failed on both these points and that as the tickets taken by the accused were surplus to the Rugby Union's order they did not belong to the Rugby Union as alleged in the indictment.

In answer to these submissions, Crown counsel said that even though the surplus tickets had not been stamped with the Rugby Union's seal they were still the property of the Tonga Rugby Union because the Rugby Union had placed the printing order.

Mr Kefu said that the tickets state on their face that they are the Tonga Rugby Union Committee's tickets and regardless of whether the Rugby Union had uplifted them from the Printing Department or not they were still the property of Tonga Rugby Union.

I am not prepared to accept that submission from the Crown. It may well be correct. It is equally likely, however, on the evidence, that the surplus tickets were the property of the Printing Department as Mr 'Etika submitted.

The Crown is required to establish all elements of the charge beyond reasonable doubt. The evidence as to ownership, however, was simply insufficient to satisfy me

that at the material time the surplus tickets were the property of the Tonga Rugby Union as alleged in the indictment and I am not prepared to speculate.

No authorities were cited to me but Archbold in 'Criminal Pleading, Evidence and Practice' (1993 edition) 1-128 states:

> "Where it is common knowledge that the property named in an indictment belongs to some person or institution (e.g. in the case of an outstanding work of art), it may be unnecessary to particularize the ownership of the property; but where the property is of a common or undistinctive type, for the sake of clarity, and in order that the defendant may know exactly with what he is charged, the name of the owner should be stated in the particulars of offence …"

Archbold goes on to refer to *R v Gregory* [1972] 2 All ER 861, where the prosecution charged the accused with handling stolen goods and the name of the owner of the property was alleged in the particulars in the indictment. The allegation in the particulars in the indictment that the named person was the owner of the stolen goods was wholly unsupported by the evidence and the trial judge directed at the close of the evidence that the words "the property of X" should be struck out as the words were in any event surplusage. On appeal, it was held that the trial judge's direction was wrong. The words, in the circumstances, were not surplusage and to allow an amendment at so late a stage was to run the risk of an injustice being done. The conviction was quashed.

While the decision in that case might appear to provide support for Mr 'Etika's principal submission that the Crown has not established that the surplus tickets were the property of the Tonga Rugby Union, I consider that the decision in *R v Gregory* very much depends on the particular facts of that case. There the evidence at trial established that the property in question, a starter motor, could not have been stolen from the particular individual named in the indictment particulars as the owner because the starter motor, produced in court had not been manufactured at the time the named owner's starter motor had been stolen.

I think the present case is much more akin to *R v Deakin* [1972] 3 All ER 803, 806. In the *Deacon* case the stolen goods were described in the indictment particulars as the property of the British Railways Board but the evidence was insufficient to establish the charge that the goods were indeed the property of the British Railways. Phillamore LJ delivering the judgment of the Court of Appeal said:

> "In the course of his able argument before us counsel for the appellant has submitted a number of points. First, he says that the recorder should have found there was no case to answer as there was, insufficient evidence to support the charge that the goods were the property of British Railways. That in effect is dealt with by the observations which I have just made, but if indeed it could be said that that was wrong, this court thinks that the words in the count attributing ownership of the goods to British Railways did not in the circumstances of this case constitute a material averment and there was overwhelming evidence that the appellant knew the goods were stolen."

Likewise, in the present case, the evidence is overwhelming that the accused knew that, whether the surplus tickets were owned by the Tonga Rugby Union or the Government Printing Department, he had no colour of right to them whatsoever. In
220 the circumstances, it seems to me to be immaterial whether the surplus tickets were owned by the Rugby Union or the Printing Department.

For these reasons, I find the Crown has established to my satisfaction beyond reasonable doubt that the accused is also guilty of the second count in the indictment.

R v Matangi

Supreme Court, Nuku'alofa
Ward CJ
Cr 57/00

21 August 2000; 21 August 2000

Criminal procedure — admissibility of statements — improper advice of accused's rights from police

The accused was 13 at the time of the arrest. The officer told how he asked him if he wanted to be taken in front of a magistrate and was told by the accused that he did not and he wanted to go to the police station so his statement could be recorded. At the police station he was told of his right to have a lawyer, parent or friend present and the accused said they should continue. At the end of a voir dire the accused submitted that the statements made by the accused should not be admitted because the police did not give the accused proper advice as to his rights as they should have actively encouraged him to seek a lawyer and because the accused was subjected to physical violence by the police before the interview.

Held:

1. There is no right for a person arrested to waive the requirements of section 22 of the Police Act. It was a matter for the officer alone and he should not have offered such a choice. That would apply to any person arrested.
2. The officer knew where the boy's mother lived and it would have been very easy to obtain her attendance had he wanted to ensure the interview was fair. The officer stated that did not approach the mother.
3. The Court did not consider the statements in the case were taken fairly and they were excluded.

Case considered:

Teisina v R [1999] Tonga LR 145 (CA)

Statute considered:

Police Act (Cap 35)

Counsel for prosecution : Miss Tupou
Counsel for accused : Mr Fifita

Judgment

Mr Fifita for the accused submits at the end of a trial within a trial that the statements made by the accused should not be admitted on two grounds:

1 That the police did not give the accused proper advice as to his rights because they should have actively encouraged him to seek a lawyer. Mr Fifita cites *Teisina v R* [1999] Tonga LR 145 (CA) as authority that there is a duty on an officer to give such encouragement. I do not accept that is authority for any such duty and neither do I consider there is any such obligation on the officer in this case. *Teisina*'s case was about the fairness of the interview and confession. It set a requirement for fairness over and above the strict letter of the law.

In this case, the accused was 13 years old at the time of the arrest. The officer told how he asked him if he wanted to be taken in front of a magistrate and was told by the accused that he did not and he wanted to go to the police station so his statement could be recorded. At the police station he was told of his right to have a lawyer, parent or friend present and the accused said they should continue.

I do not accept there is any right for a person arrested to waive the requirements of section 22 of the Police Act. It is matter for the officer alone and he should not have offered such a choice. That would apply to any person arrested but to consider that it is an appropriate decision on such matters for a thirteen years old defies belief.

The officer agreed that he knew the accused had been living at home with his mother until shortly after the alleged offence about 6 weeks previously but had then been told by the mother that the accused did not live there anymore. The accused had been arrested that day very close to his home but the officer had again been told that he no longer lived there. Whether or not that was true, the fact remains that the officer clearly knew where the mother lived. Had he wanted to invite her to the interview, he knew exactly where she lived and that she had been at home at least a short time before. It would have been very easy to obtain her attendance and had he wanted to ensure the interview was fair, I would have expected to hear evidence from the officer that he had at least tried. However, the contrary was the case. He simply stated he did not do so and appeared to consider that was sufficient. It was not.

On that ground alone I do not consider the statements in this case were taken fairly and I shall exclude them.

2 The second ground is that the accused was subjected to physical violence by the police before the interview. The officer denied it and the matter was left as a single question in cross examination. The accused did not give evidence on the voir dire and so his side is not known. That would not normally be sufficient to establish such an allegation but, in this case the prosecution called the thief to give evidence of the theft of the money. He was put forward as a credible witness and he gave evidence of an assault by this officer. It would be impossible on such

evidence to be satisfied beyond reasonable doubt that the statement was taken without duress. That would have resulted in the same order that the statements should be
80 excluded.

Ika v Tuli

Supreme Court, Nuku'alofa
Ward CJ
C 438/00

22 August 2000; 22 August 2000

Practice and procedure — strike out application — cause of action disclosed — application refused

The plaintiffs/respondents were the children of Malia Malu who died on 8 February 1999. Following her death, the body was taken to Vaiola hospital and placed in the mortuary. It was submitted that, as the result of a failure by the defendants to regulate the temperature, the body decomposed and was seen in that condition by members of the family. As a result, the funeral had to be held earlier than intended and, as a direct consequence, some of the family living abroad were unable to return in time to attend. The plaintiffs claimed negligence and damages for suffering from the emotional distress this caused them. The defendants applied to strike out the action on the ground that it disclosed no cause of action. The application was considered on the pleadings alone.

Held:

1. The fact there was no property in a dead body did not prevent a duty arising in relation to it.
2. The statement of claim revealed facts that could demonstrate a duty of care and a failure to perform that duty. Whether that was the case or not or whether the plaintiffs were in a sufficient relationship of proximity was a matter for evidence at the trial.
3. The ground for the claim was set out in the pleadings. The application to strike out was refused with costs to the plaintiffs.

Cases considered:

Anns v Merton London Borough Council [1978] AC 728; [1977] 2 All ER 492
Hedley Byrne & Co Ltd v Heller & Partners Ltd [1964] AC 465; [1963] 2 All ER 575
Home Office v Dorset Yacht Co Ltd [1970] AC 1004; [1970] 2 All ER 294
M'Alister (or Donoghue) v Stevenson [1932] AC 562; [1932] All ER Rep 1
Williams v Williams (1882) 20 Ch D 659; [1881-5] All ER Rep 840

Rules considered:
Supreme Court Rules 1991

Counsel for applicant	:	Mr Bloomfield
Counsel for respondents	:	Mr 'Etika

Judgment

The plaintiffs/respondents are the children of one Malia Malu who died on 8 February 1999. Following her death, the body was taken to Vaiola hospital and placed in the mortuary. It is alleged that, as the result of a failure by the defendants to regulate the temperature, the body decomposed and was seen in that condition by members of the family. As a result, the funeral had to be held earlier than intended and, as a direct consequence, some of the family living abroad were unable to return in time to attend.

The plaintiffs claim negligence and damages for suffering from the emotional distress this caused them.

The defendants apply under O 8 r 6(1) to strike out the action on the ground that it discloses no cause of action. By rule 6(2), the application must be considered on the pleadings alone.

The first basis for the application is that there is no property in a dead body and therefore no cause of action can arise from such a dead body. Insofar as there is a claim that these alleged events: "greatly embarrassed and humiliated their deceased mother …" it is clear there can be no claim and that part of the pleadings is struck out. However, the fact there is no property in a dead body does not prevent a duty arising in relation to it.

Counsel cited the case of *Williams v Williams* (1882) 20 Ch D 659; [1881-5] All ER Rep 840 but that case does not help him on this point. Whilst it is often cited as an authority for the proposition that there is no property in a dead body, it is also authority for the fact that duties may still arise from it. In that case, Kay J ruled that the executors have a right to the possession of the body and have a duty to bury it.

The second and main thrust of the application is that the pleadings do not disclose facts to demonstrate a sufficient proximity between the defendants and the plaintiffs or a duty to them in terms of *Anns v Merton London Borough Council* [1978] AC 728.

Anns' case established a two-stage test of the existence of a duty of care based on the decisions in the trilogy of cases they cite at 751; *M'Alister (or Donoghue) v Stevenson*, *Hedley Byrne* and the *Dorset Yacht Co*. The first stage is to establish there is a "sufficient relationship of proximity or neighbourhood" between the alleged wrongdoer and the person claiming to have suffered damage and, if that is demonstrated, to ask whether there are considerations which might "negative, or reduce or limit the scope of the duty or the class of persons to whom it is owed."

The claim here is one of negligent performance of a duty of care. That is a clear cause of action. The statement of claim reveals facts that could demonstrate a duty of care and a failure to perform that duty. Whether that is the case or not or whether the plaintiffs were in a sufficient relationship of proximity is a matter for evidence at the trial.

The final ground is that the pleadings do not articulate the basis of the damages claimed. The claim is for unliquidated damages of $20,000.00 and exemplary
80 damages of $10,000.00 because the "pain, inconveniences suffered by the plaintiffs physically and emotionally are irreparable … and greatly embarrassed and humiliated her surviving children for life with the living rumour".

This is not a time to comment on the merits of that claim. I am satisfied the ground for the claim is set out in the pleadings.

The application to strike out is refused with costs to the plaintiffs.

Tuaimei'uta v Prema

Supreme Court, Nuku'alofa
Ford J
C 873/99

15 August 2000; 29 August 2000

Misrepresentation — Nike jeans — reasonable examination would have shown they were not Nike

In April 1999 the plaintiff, Mr Tuaimei'uta, bought 70 pairs of cheap jeans from the defendant's general merchandise store which had the name "Nike" embroidered on a label on the back pocket. He then transported 50 pairs of the jeans back to Australia with the intention of selling them at a profit but they were seized by Customs officers at Sydney airport. Customs warned the plaintiff that the consignment breached the Australian Commerce (Import) Regulations because the clothing was not marked with the country of manufacture and Nike International's Sydney solicitors threatened to sue the plaintiff for breach of trade mark because the garments were not genuine Nike products. To avoid these consequences, the plaintiff agreed to forfeit the goods. He sued the defendant for the costs of the jeans plus expenses.

Held:

1. The plaintiff did not satisfy the Court, to the required standard, that the jeans carried the logo and the Court was not prepared to accept that they did.
2. The defendant made no representations to the plaintiff at any stage as to whether the jeans were genuine Nike products.
3. The jeans did not carry the Nike logo and for that reason it should have been apparent to the plaintiff upon inspection that they were not the genuine product of the Nike International company. Other factors which should have alerted the plaintiff were the fact that the store was a general merchandise store and not a specialist store dealing in brand labels, and the obvious cheap price of the jeans.
4. The claim was dismissed and the defendant was entitled to costs.

Case considered:

Harlingdon and Leinster Enterprises Ltd v Christopher Hull Fine Art Ltd [1991] 1 QB 564; [1990] 1 All ER 737 (CA)

Counsel for plaintiff : Mr Niu
Counsel for defendant : Mr 'Etika

This decision was appealed successfully to the Court of Appeal. The appeal judgment will be reported in the next volume of these reports.

Judgment

The plaintiff Mr Tuaimei'uta is a Tongan subject but he has lived for the last eleven years in Victoria, Australia. In April 1999, on a trip back to Tonga he bought 70 pairs of cheap jeans from the defendant's general merchandise store which had the name "Nike" embroidered on a label on the back pocket. He then transported 50 pairs of the jeans back to Australia with the intention of selling them at a profit but they were seized by Customs officers at Sydney airport.

Customs warned the plaintiff that the consignment breached the Australian Commerce (Import) Regulations because the clothing was not marked with the country of manufacture and Nike International's Sydney solicitors threatened to sue the plaintiff for breach of trade mark because the garments were not genuine Nike products. To avoid these consequences, the plaintiff agreed to forfeit the goods. He now sues the defendant for the costs of the jeans plus expenses.

The facts are relatively straightforward. Only the plaintiff and the defendant gave evidence. Both were reasonably reliable witnesses but, with one exception, I found the defendant's evidence more reliable and to the extent that there may have been inconsistencies in what they told the court, I prefer the evidence of the defendant.

The one exception I refer to related to the evidence which the defendant gave about her original purchase of the jeans from a market in Thailand. She was asked early on in her cross-examination if she believed they were genuine nike products when she made the purchase. She answered "yes". However, I do not believe that statement. The defendant immediately afterwards realised that she had made a mistake and that accounted for noticeable periods of hesitancy in some of the answers she subsequently gave. The truth of the matter is that she either did not believe they were genuine or, at best, did not turn her mind to that particular issue. Her position was summed up in an answer she later gave to the court, namely, that she was only interested in the fact that the jeans carried the name "Nike".

There was a dispute over whether the jeans carried the well-known Nike International logo which was described as a "tick" or "boomerang" shape. The plaintiff said they did. The defendant maintained that the logo was not on the jeans.

The plaintiff was not cross-examined on his assertion but the issue was not raised by the defendant in her evidence in chief so no issue of unfairness arises. The defendant's statements on the matter were made under cross-examination.

The pleadings on this aspect of the case are unclear. The statement of claim does not refer to a "logo" as such but to a label "with the word and mark of "Nike" which is a well known brand name of the products of an American company called Nike International Ltd." The statement of defence acknowledges that the jeans were "labelled Nike" and paragraph 15 refers to "garments with the logo "Nike" attached" but because a clear distinction between the word 'Nike' and the Nike logo was never

made in the statement of claim, I find it more probable than not that the reference to "logo" in paragraph 15 of the statement of defence is, in the context, simply a generic references to the name 'Nike' on the label and not a specific reference to the 'tick' or "boomerang" shaped "logo" of Nike International.

This is a civil case and the burden of proof, which is on the balance of probabilities, rests upon the plaintiff. The plaintiff had with him some type of garment (it was not produced) and he showed it to the court to display the logo in question. His evidence was that of the 70 pairs of jeans he purchased, he gave 20 to his brothers and cousins in Tonga to wear and only 50 pairs were taken back to Australia. It surely would have been possible for him to acquire and formally produce to the court a pair of the jeans he had left in Tonga to establish one way or the other whether they carried the Nike logo. He did not. He has not satisfied me, therefore, to the required standard, that the jeans carried the logo and I am not prepared to accept that they did.

It was submitted on behalf of the plaintiff that the plaintiff had told the defendant when he purchased the jeans that he was taking them back to Australia to sell. The defendant denied that proposition and I do not accept it. At best, I accept what the plaintiff indicated early on in his evidence, namely that he may have said something to the staff when he first entered the store about taking them back to Australia but that was a passing remark made in the context of asking the staff if he could speak to the owner of the store about negotiating a discount on the purchase price if he purchased a significant quantity of jeans. The staff concerned were not involved in the sale transaction.

I find as a fact that the defendant made no representations to the plaintiff at any stage as to whether the jeans were genuine Nike products. The defendant agreed to discount the plaintiff's first purchase of 30 jeans from $25 to $22 and she agreed to discount the second purchase a few days later of 40 jeans from $25 to $21 but she made no representations to the plaintiff, nor did she know he was going to take them back and try and sell them in Australia. The defendant knew other retailers were selling the same product in Tonga and that the same jeans were being worn around the streets of Nuku'alofa.

The plaintiff says that the jeans were hanging up for sale in the shop and the Nike label was clearly displayed to the customers and that, in itself, amounted to a misrepresentation because the jeans were not the genuine product of Nike International but they had been purchased by the defendant from a market in Thailand.

It is true that there can be a sale by description even though the buyer is buying something which he selects in a shop.

> "… there is a sale by description even though the buyer is buying something displayed before him on the counter: a thing is sold by description, though it is specific, so long as it is sold not merely as the specific thing but as a thing corresponding to a description e.g. woollen under garments, a hot-water bottle, a second-hand reaping machine, to select a few obvious illustrations."
> - Benjamin's, "Sale of Goods", 5th ed, 1997, paragraph 11-008.

But for goods to be sold by description, the buyer must have entered into the contract of sale in reliance on the description of the goods given to him expressly or implicitly by or on behalf of the seller.

> "Sales of specific goods may also be by description provide that they are bought by the buyer in reliance at least in part, on the description that is either expressly given or which can be inferred from the circumstances and which identifies the goods. It follows that the only sales which are not by description are sales of specific goods that are either sold without any description, express or implied, or do not include a statement about them as an essential part of their identity."
> - "Laws of New Zealand, Sale of Goods" para 92.

The defendant in the present case made no representations to the plaintiff about the jeans. The issue then becomes whether the existence of the word "Nike" on the label on the back pocket was sufficient in itself to amount to an express or implied description of the jeans as the genuine products of Nike International.

The following passage from Sutton, "Sales & Consumer Law" 4th edition (1995) would indicate that words on a garment can, in appropriate circumstances, give rise to a sale by description:

> "8. 11 Where identification is possible without further description, such as in the case of a shirt displayed in its carton on a shop counter, and a customer purchases it by pointing to it and indicating that he or she will have it, there would seem to be identification without description. Nevertheless, it is submitted that it is a sale by description at least to the extent that the words of specification on the garment or carton delineate the goods and indicate the kind of clothing agreed to be bought. It is not a sale of specific goods sold as such, and the words go beyond mere matters of quality and form part of the identification of the goods."

The proposition just stated, however, would not, in my view, apply in a case where upon reasonable examination by the buyer it should have been apparent that the word of specification on the garment which the buyer relied on would not support the description of the garment which the buyer was alleging. In *Harlingdon and Leinster Enterprises Ltd v Christopher Hull Fine Art Ltd* [1991] 1 QB 564 at 572; [1990] 1 All ER 737 (CA), Nourse LJ in holding that a sale by description could arise even when the buyer had identified and selected the goods went on to say, "provided that their deviation from the description is not apparent on a reasonable examination."

In the present case, I have found that the jeans did not carry the Nike logo and for that reason it should have been apparent to the plaintiff upon inspection that they were not the genuine product of the Nike International company.

The fact that the store was a general merchandise store and not a specialist store dealing in brand labels, and the obvious cheap price of the jeans, are other factors which should have alerted the plaintiff and put him on inquiry but he did not ask the defendant any questions as to the geniuness of the products.

My conclusion, therefore, is that this was a contract for sale of specific articles, namely jeans containing the word 'Nike' on the back pocket, without any super-added
170 description express or implied by the vendor defendant.

For these reasons, I find that the plaintiff has failed to make out his case. The claim is dismissed and the defendant is entitled to costs to be agreed or taxed by the court.

Tapueluelu v Police

Supreme Court, Nuku'alofa
Ford J
Cr 11/2000

1 September 2000; 11 September 2000

Criminal procedure — right of appeal from Court of Inquiry — no right

In 1999 a Court of Inquiry was set up pursuant to s 15 of the Prisons Act (Cap 36) to investigate a number of charges against the appellant. On 3 May 2000 the Court of Inquiry found the appellant guilty of one of the charges made against him and fined him the sum of $25 and failing payment in one week, ordered one weeks imprisonment. On 15 May 2000 the appellant filed Notice of Appeal seeking an order quashing the conviction. The respondent challenged the appellant's right of appeal and submissions from both parties were called for on this preliminary issue.

Held:

1. For the appellant to succeed, he must be able to point to some statutory basis that gave him the right to appeal. The Court found nothing in the Supreme Court Act that would enable the appellant to have appeal rights.
2. The Court struck out the appeal and fixed costs of $150 in favour of the respondent.

Case considered:

R v Medical Appeal Tribunal, ex parte Gilmore [1957] 1 QB 574

Statutes considered:

Prisons Act (Cap 36)
Supreme Court Act (Cap 10)

Counsel for appellant : Mr Tu'utafaiva
Counsel for respondent : Ms Simiki

Judgment

In 1999 a Court of Inquiry was set up pursuant to s 15 of the Prisons Act (Cap 36) to investigate a number of charges against the appellant. On 3 May 2000 the Court of Inquiry found the appellant guilty of one of the charges made against him and fined him in the sum of $25.00 and failing payment in one week, ordered one weeks imprisonment. On 15 May 2000 the appellant filed Notice of Appeal in this

court seeking an order quashing the appellant's conviction. Ms Simiki, appearing for the respondent challenged the appellant's right of appeal and I called for submissions from both parties on this preliminary issue. I am grateful to both counsel for their helpful submissions.

Mr Tu'utafaiva, for the appellant, frankly accepts that there is no express statutory right of appeal against a determination of a Court of Inquiry constituted order s 15 of the Prisons Act (Cap 36). He stresses, however, that there is nothing in the Prisons Act which states that, a decision of the Court of Inquiry shall be final. He said that it was "inconceivable and highly unjust" for the appellant not to have a right of appeal against what he submitted was a conviction of a criminal offence.

Mr Tu'utafaiva then went on to submit, in the alternative, that the Supreme Court had a residual jurisdiction to hear an appeal of this nature by virtue of s 4 of the Supreme Court Act (Cap 10) because, as the Prisons Act gave the appellant no right to appeal from a decision of the Court of Inquiry, the situation, as Mr Tu'utafaiva submitted, would be covered by the final part of s 4 which gives the Supreme Court a residual jurisdiction "in any other matter not specifically allotted to any tribunal".

Finally, Mr Tu'utafaiva, in anticipation of the respondent's submission that the appellant's only remedy was judicial review, submitted that his client should not have to endure the time consuming and costly exercise of applying for judicial review.

Ms Simiki submitted that an appeal is entirely a creature of statute and if Parliament had intended to give prison officers the right to appeal against the determinations of a Court of Inquiry, it could very easily have done so and she referred to other legislation where, in not dissimilar circumstances, appeal rights are specifically provided for.

Ms Simiki then dealt with the specific submissions raised by Mr Tu'utafaiva and went on to say that, although at Common Law the Courts always had an inherent right to review or control inferior jurisdictions such as the statutory tribunal in this case, the appellant could not challenge the decision of the Court of Inquiry through the appeal process.

I agree with Ms Simiki. For the appellant to succeed, he must be able to point to some statutory basis giving him the right to appeal. In *R v Medical Appeal Tribunal, ex parte Gilmore* [1957] 1 QB 574, Denning LJ considered the historical powers of the court to review the decisions of an inferior tribunal and said:

> "Finally, in 1823 the Court of King's Bench in it's golden age presided over by Abbott C.J. summed up the whole matter by saying that is certiorari always lies, unless, it is expressly taken away, and an appeal never lies unless it is expressly given by the statute."

I respectfully concur with this analysis of the legal principles.

I do not see anything in s 4 of the Supreme Court Act which would enable the appellant to have appeal rights in the circumstances of the present case.

Mr Tu'utafaiva's other submission was that there was nothing in the Prisons Act which says that a decision of a Court of Inquiry "shall be final" and he submitted that this Court could infer from that omission that Parliament could not have intended to deprive a person in the appellant's position of a right of appeal.

It is true that some legislation setting up statutory tribunals will specifically provide that the decision of the tribunal "shall be final" or words to that effect. In the

80 *Medical Appeal Tribunal* case I have referred to, Lord Justice Parker considered the expression "shall be final" and said that the expression "shall be final" is "strictly unnecessary". I, respectfully, share that view. I do not think the omission of such words from the Prisons Act helps Mr Tu'utafaiva's case.

The appeal is struck out. I fix costs in favour of the respondent in the sum of $150.00.

R v Manu

Supreme Court, Nuku'alofa
Ward CJ
Cr 1219 and 1220/99

2, 3, 4, 5, 9, 10 October 2000; 23 October 2000

Criminal law — forgery — needed original documents for proof

The two accused were husband and wife and owned and operated a wholesale and retail business known as JM Store. They had a business licence so to do. In the course of their business they imported goods from abroad. Such goods were subject to duty, port taxes and wharfage all of which were calculated on the CIF value of the shipment. The invoices upon which the charges were based all relate to consignments of goods ordered from an Auckland company known as Fresha Exports Ltd and shipped either from New Zealand or the United States. The prosecution alleged a similar course of fraud by the accused through forged documents. The defence contested the admissibility of many of the prosecution documents.

Held:

1. The Court did not accept that the documents produced were properly certified copies of the original invoices and so the Court could not accept the documents as copies of the originals. They were clearly demonstrated to be copies of copies which, as the result of subsequent alterations, cannot have been the same as the originals. The various heresay accounts of their nature and origin were not evidence of those facts. Where forgery was to be proved by the prosecution, photocopies were not sufficient and the original should have been produced.
2. The prosecution failed to prove the falsity of the documents presented to the Tonga customs to the required standard in a criminal trial.
3. In all the counts, under both section 172 of the Criminal Offences Act and section 210(1)(e) of the Customs and Excise Act, the prosecution case depended on proof that the documents were forged. Both accused were acquitted on all the remaining counts.

Statutes considered:

Criminal Offences Act (Cap 18)
Customs and Excise Act (Cap 67)

Counsel for prosecution : Mr Tapueluelu
Counsel for both accused : Mr Tu'utafaiva

Judgment

These accused are jointly charged in an indictment of twelve counts of which 6 counts charge Knowingly Dealing with Forged Documents, contrary to section 172 of the Criminal Offences Act, and six corresponding counts charge Fraudulently Evading Customs Duty on Imported Goods, contrary to section 210(1)(e) of the Customs and Excise Act.

No evidence was adduced in relation to counts 5 and 6 and their corresponding counts 11 and 12 and the accused were both acquitted on those counts at the end of the prosecution case.

In counts 3 and 4 and 9 and 10, some of the documents listed in the indictment have not been the subject of evidence and those particular invoices have been deleted. This applies to invoices 13867, 13975 and 13980 in counts 3 and 9 and to invoices 15049, 1567, 15134, 15256 and 1617 in counts 4 and 10. The court has ordered that those invoice numbers be deleted and the accused are acquitted of the charges relating to those invoices.

The prosecution case in summary is that the two accused are husband and wife and own and operate a wholesale and retail business known as JM Store. They have a business licence so to do. In the course of their business, they import goods from abroad. Such goods are subject to duty, port taxes and wharfage all of which are calculated on the CIF value of the shipment.

The invoices upon which the charges are based all relate to consignments of goods ordered from an Auckland company known as Fresha Exports Ltd and shipped either from New Zealand or the United States. The prosecution alleges a similar course of fraud by the accused in each case.

The prosecution case is that, when the goods arrived in Nuku'alofa, the accused would produce a forged invoice purporting to be from Fresha. The dues they then paid as a result of that invoice were less than the amount to which they were properly liable because they understated the true value of the goods and also falsely stated that the value was CIF when it was, in fact, C&F. They further avoided any requirement to produce evidence of payment by falsely stating the consignment was prepaid when it was not.

When the various documents had been collected, the second accused was seen by the police and, apart from acknowledging that he operated JM store and identifying some of the allegedly false invoices, declined to answer the questions put to him by the police.

Neither accused gave evidence or called witnesses at the trial and so the case depends entirely on the evidence of the Crown witnesses.

At the outset of the trial, counsel for the defence indicated that he would be contesting the admissibility of many of the prosecution documents. I directed that the trial should proceed and I would then hear the objections at the end of the case and rule on their admissibility before considering the evidence in the documents themselves. I deal with that aspect of the case first.

The manner in which the prosecution sought to prove each element of the case was, as I have already stated, generally similar. I take, as an example, one of the invoices charged in counts 1 and 7 - number 13540 - all documents of which were produced to the court as Exhibit 6.

The bundle included a document headed "Certified Invoice" dated 23/12/96. It was from Fresha to JM Store and was for one full container load of 850 X 20 Kg Cartons Lamb Flaps with a selling price of NZ$33,660.00. That price was stated to be C & F. The section headed "Terms of Delivery and Payment" is blank. With the "Certified Invoice" is another invoice with the same date and number and relating to the same order which stated that payment was due by 06/02/97. That invoice also stated that insurance was the importer's responsibility under his marine open policy and it included various fees bringing the total C & F value up to NZ$33,770.00. Both copies were signed for Fresha by a Maria Mold. There is also a bill of lading for the same consignment issued on the same date.

The prosecution case is that those are the original and genuine documents.

When the goods arrived at Nuku'alofa a customs entry form was produced to the customs officers at the wharf by one of the accused or by one of their employees on their behalf. It was supported, as is required for clearance, by an invoice. That appears to be in the same form as the other "Certified Invoice" and it bears the same date and invoice number and refers to the same container of 850 cartons of lamb flaps. However there are substantial differences from the other "Certified Invoice". The selling price is quoted as NZ$28,050.00 and that is said to be the CIF value. In the section for "Terms of Delivery and Payment" is the word "pre-paid". The document has been signed for Fresha by a Shelagh Little. On the strength of that document, the customs officers calculated the various dues and they were paid.

The customs officer who was in charge of the investigation, Kelemete Vahe, gave evidence that, working on the basis that the first was the genuine invoice and the second a forgery, he estimated a total sum of T$1947.43 had been evaded on this consignment. He set out the basis of his calculation in another summary document he had prepared and which was also part of the bundle of documents produced as exhibit 6.

The other invoices produced which, on the prosecution case, are from New Zealand are signed in various names by employees of Fresha including some in the name of Shelagh Little. However, all those submitted by the accused to the customs in Tonga are signed in the name of Shelagh Little.

The only other document in that exhibit is a copy of an application by J M Store for an overseas transfer to Fresha of T$29,172.51 which was the equivalent on the exchange rate at the time of NZ$33,770.00. That application was dated 7/2/97 and is, the prosecution suggests, plainly the payment for this consignment according to the price and the terms of payment in the original invoice.

A number of receipts for telegraphic transfers were produced by employees of either the Bank of Tonga or the ANZ bank. There is no dispute that they are properly produced and admissible. The prosecution case is that they match the payment advice on the New Zealand invoices in the same way as occurred in exhibit 6.

On the face of those documents, the case could not be clearer but, as I have stated, the defence challenges the admissibility of the original documents from New Zealand. They were not, they say, produced properly and cannot be evidence of the

truth of their contents. Without that, the very foundation of the prosecution case has not been laid and it must fail.

Mr Vahe explained how the investigation arose from complaints by other traders and he examined the invoices that had been tendered at the time of entry. He then wrote to JM Store requiring them to produce all their invoices. That inquiry related to imports from another supplier in Fiji and the request was ignored.

Further examination, however, revealed a similar state of affairs in relation to goods from Fresha and Mr Vahe then contacted the New Zealand customs and asked their assistance. The officer instructed to deal with the case there was Royce Davis. He gave evidence that he asked Fresha to supply various invoices, bills of lading and copies of telegraphic money transfers. Copies of these were then sent to him by courier and he forwarded them to Tonga.

He also made a report to his superiors in New Zealand that his examination of the copies of invoices and comparison with five randomly selected payments revealed very little resemblance to the "CIF" figures on the documents produced for clearance in Tonga. The discrepancies ranged from 6.9% to 53.02%. Of those five payments, two (invoice 13540 [count 1] and 13778 [count 2]) relate to the charges that the court is still trying.

Mr Davis went through the documents that had been exhibited in the trial and identified which were the documents he received from Fresha. They are the invoices and bills of lading the prosecution put forward as genuine.

When the documents arrived in Tonga, Mr Vahe worked on them and then passed them to Chief Inspector Soaki of the Tonga police. She was able to identify the various bundles of exhibited documents as the actual documents she had received from the Tonga customs.

Late in the trial, counsel for the prosecution sought an adjournment to adduce further evidence in relation to the documents. Counsel for the defence objected on the undisputable ground that this should have been done before the case came to trial.

However, I allowed a short adjournment and counsel then recalled Mr Davis who told the court that the customs law in New Zealand placed a duty on exporters and importers to keep all relevant documentation for 7 years. I accept that as a correct statement of that aspect of the law in New Zealand.

Mr Vahe was then recalled to explain that he had, during the trial, requested the New Zealand customs to send the original invoices but they had told him they were unable to find them. However, he asked that they certify true copies of the originals and that was done. Mr Vahe produced those certified copies.

With those documents is a memorandum from a Greg Smith of New Zealand customs stating that he took them to Fresha and saw the company accountant Brian Cambie certify them as true copies. Each of the suggested original invoices has a stamp for Fresha, signed by Cambie, to say that it is certified true copy. Quite apart from the hearsay element of that part of the evidence, it is noteworthy that there is nothing to say of what they were certified to be copies. Further examination shows that the documents certified were copies of the copy documents that had been worked on by the Tonga customs. They included the Tongan customs stamp and, in some cases, the calculations written on the document by the Tongan officers. From that it is plain that none of them can be true copies of the original invoices and leaves unexplained with which documents Mr Cambie compared them and certified them to be true copies.

All were photocopies (and poor ones) and Mr Vahe told the court that they were of the copies he had received from New Zealand originally which would appear to be correct.

Mr Tu'utafaiva submits that these documents are not and cannot amount to evidence of their contents. Without that, there is no evidence to say that the invoices produced by the defendants to the customs in Tonga were not true, accurate and original invoices.

By section 62 of the Evidence Act, the contents of any document must be proved by producing to the court the document itself unless it falls within one of the exceptions listed in sections 66 or 67. Mr Tapueluelu for the Crown submits these invoices fall into exception (e) of section 67 which allows secondary evidence of the existence and contents of a document when the original is a document of which a certified copy is permitted by the Evidence Act or any other Act in force for the time being in the United Kingdom to be given in evidence. He points to section 92 as making these copies certified copies under the Act.

Section 92 falls in Part V of the Act which deals with Public Documents but, as Mr Tapueluelu points out, section 92 refers only to 'a document' unlike the other sections in that Part which refer to 'public documents'. I cannot accept these invoices fall within that section. I am satisfied section 92 is limited to public documents and these invoices are certainly not such documents.

I do not accept either that these are properly certified copies of the original invoices and so, even if I had found certified copies of the original invoices would fall within that exception, I could not accept these documents are copies of the originals. On the contrary, they are clearly demonstrated to be copies of copies which, as the result of subsequent alterations, cannot have been the same as the originals. The various heresay accounts of their nature and origin, of course, are not and cannot be evidence of those facts.

However, I think the prosecution efforts to produce these copies ignores the main point. Whatever document the prosecution is producing to prove its case against these accused, it must be properly produced by a witness who can speak to its provenance. Where is the witness to say that these were accurate invoices or even that they were the actual invoices issued by Fresha? Where is the witness to say that the invoices produced by the accused to the customs here were not issued by Fresha? Where is the witness to say that the signature on those invoices is or is not that of Shelagh Little? Where is the witness to say that the money paid on the various telegraphic transfers was received by Fresha and credited to a particular shipment? Where is the evidence that there were no other transactions at the relevant time between Fresha and the accused or that no sum has been paid to correspond with the invoices produced to the Tonga customs?

I accept that New Zealand law requires companies such as Fresha to keep documents relating to imports and exports. That may make those documents an exception to the hearsay rule but it still needs evidence from someone who can testify that they are the documents that have been retained under that duty. There is no such admissible evidence.

The burden is on the prosecution to prove a criminal case. Even if the originals had been produced in court by the customs officers, the truth or otherwise of their contents would need evidence from the relevant officers in Fresha. No evidence of that nature has been called from Fresha either orally or by written statement.

The prosecution suggests that the signature of Shelagh Little on the invoices from Tonga is a forgery and that the Court can decide if that is so. Clearly section 76 allows the court to do so and it is clear the signature on the Tonga invoices appear somewhat different from that on the other invoices signed by Shelagh Little but where is the evidence that one is genuine? Without it the court can make no meaningful comparison and there is authority that, where forgery is to be proved by the prosecution, photocopies are not sufficient and the original should be produced.

If the prosecution really contends that the court can accept the documents produced by the customs officers as evidence of their contents, how is the court to decide about the documents (and original documents in this case) submitted by the accused to the Tonga customs and also produced in court by the customs officers? Would the same test not require the court to accept them as truth of their contents also and if so how can the court be satisfied that the prosecution has proved their falsity?

Cases such as this involving evidence from abroad pose evidential problems but they are matters that could and should have been covered by proper evidence. They have not been and the result is that the prosecution has failed to prove the falsity of the documents presented to the Tonga customs to the required standard in a criminal trial. In all the counts, under both section 172 of the Criminal Offences Act and section 210(1)(e) of the Customs and Excise Act, the prosecution case depends on proof that the documents were forged. Both accused are acquitted on all the remaining counts.

Commissioner of Inland Revenue v National Pacific Insurance

Supreme Court, Nuku'alofa
Ward CJ
C 121/2000

27 October 2000; 31 October 2000

Income tax — notice of assessment — should contain time within which to object

On 18 January 1999 the plaintiff prepared and issued notices of assessment for the five tax years starting in July 1993. The total amount stated in those notices was $196,602.14 and they were sent to the managing director of the defendant in Apia with a covering letter explaining that "the company had been re-assessed as required by section 34 of the Income Tax Act". On 8 April 1999, the defendant's agent sent a notice in writing on Form 2 of the Second Schedule to the Act objecting to the amount of tax assessed on the basis that the defendant had been taxed at the wrong rate following incorrect classification as a non-resident insurance company. The plaintiff disallowed the objection on the basis that it was out of time. The plaintiff submitted that the time given for payment in the notice of assessment was the time determined for objection.

Held:

1. The right to object in section 77 was not a provision that directly imposed a financial burden but, as it gave a unilateral power to the authorities to limit the right of the person taxed to challenge the assessment, the Court considered that it should similarly be strictly interpreted.
2. The terms of section 77 gave the authorities the power to determine the time within which objection must be made and the Court found that the wording of section 77(1) made it mandatory that such time should be specified by being stated on the notice of assessment. Such a restriction on the taxpayer must be clearly stated. The notices of assessment issued on 18 January 1999 did not contain any such time period. Therefore there was no time limit determined by the notice of assessment and the time within which the defendant could give notice of objection was unrestricted. As a result, the notice of 8 April 1999 was not out of time and the Commissioner had a duty under section 77(2) to consider it.
3. The Court adjourned without further order so counsel could decide how the case should proceed.

Cases considered:
David v Da Silva [1934] AC 106
Hough v Windus (1884) 12 QBD 224 (CA)

Statute considered:
Income Tax Act 1976

Counsel for plaintiff	:	Mr Tapueluelu
Counsel for defendant	:	Mr Ring and Mr Garrett

Judgment

The Plaintiff brings this action for the recovery of tax due from the defendant on assessments for tax year 1993/4 and the following four tax years. The liability of the defendant depends on the interpretation of the terms of the Income Tax Act and the answer to that may effectively conclude the case. An agreed statement of facts has been filed and this hearing has been to determine the true meaning and effect of the relevant part of the Act.

The defendant is registered as a company incorporated abroad trading as a business in Tonga

On 18 January 1999, the plaintiff prepared and issued notices of assessment for the five tax years starting in July 1993. The total amount stated in those notices was $196,602.14 and they were sent to the managing director of the defendant in Apia with a covering letter explaining that "the company had been re-assessed as required by section 34 of the Income Tax Act". There was a separate notice of assessment for each tax year but, apart from the figures, they were in identical form. They were headed "Notice of Assessment (Companies)" and cited the year of assessment and an assessment number. They continued:

> "I have to inform you in accordance with the Income Tax Act 1976, I have assessed the Income Tax payable by your company in respect of the Income derived by it during the year ended …" the various calculations were then set out with the total tax payable. Beneath that was stated:
>
> "A penalty of $2 or 25% of the tax payable, whichever is the greater is chargeable on any amount remaining unpaid after 18 February 1999".

It is then signed and dated 18 January 1998 (which is clearly an error and should be 1999).

The defendant did not pay the tax demanded or any part of it. On 24 February 1999, the: Deputy Commissioner issued a Notice (on form IR 102) stating that $237,058.84 (the total together with the penalty for unpaid tax) was outstanding. It continued:

> "Action may be taken to recover the amount outstanding unless the tax is paid or you have contacted this office … within 30 days from the date of this notice. Of course, consideration for payment

> by installments can be made for reasons of hardship if direct contact is made to the above address.
>
> Payment will avoid the issue of a summons …"

On 8 April 1999, the defendant's agent sent a notice in writing on Form 2 of the Second Schedule to the Act objecting to the amount of tax assessed on the basis that the defendant had been taxed at the wrong rate following incorrect classification as a non-resident insurance company. There followed correspondence questioning the agent's authorisation to act for the defendant but which is irrelevant for the purposes of this hearing. However, in the first reply by the acting Deputy Commissioner dated 12 April 1999, it was stated:

> "In reply we disallow the objection [the agent] made on 8th April 1999. Your firm's right of objection ended on the 18th February 1999 and the Department received no objection by then.
>
> Furthermore, the issue of the appropriate tax rate is out of the question. The certificate of registration clearly stated this firm "as a company incorporated outside Tonga but establishing a place of business at Nuku'alofa, Tonga". There is no question as the non-resident status of this company.
>
> The 25% penalties have now been imposed (refer to copy of IR 102 attached).
>
> Thus the tax arrears and penalties stand to be paid. Failure to do so by the 19th April 1999 would give us no choice but to proceed with legal action to recover the arrears.
>
> Trust the above clarifies the current status of your company's tax arrears."

The right to object to an assessment of tax is contained in section 77 of the Act. I set it out in full:

> "77. (1) Any person objecting to the amount at which he is assessed or considering that he has been wrongfully assessed may, personally or by his agent, within the time determined in the notice of assessment give notice in writing to the Commissioner in Form 2 of the Second Schedule to this Act that he considers himself aggrieved for the cause aforesaid: otherwise such person's right of appeal shall cease and the assessment made shall stand and be valid and binding notwithstanding any defect, error or omission that may have been made therein or in any proceeding required by this Act or any regulation hereunder:
> Provided that the Commissioner, either before or after the expiry of the time so determined, may in his discretion give a taxpayer further time in which to appeal.
> (2) The Commissioner shall consider such objection and may either allow or disallow it either wholly or in part.

> (3) The Commissioner shall give a written notice to the person objecting of his decisions upon any objection and shall state in such notice the time within which such person may exercise the right of further appeal as provided in subsection (4) of this section.
>
> (4) Any person objecting to the decision of the Commissioner under subsection (3) of this section may, within the time determined under such subsection (3), give notice to the Commissioner in Form 3 of the Second Schedule hereto that he desires to appeal from such decision to the Court of Review, and such appeal shall be heard and determined as hereinafter provided."

The plaintiff's case is simply that the time given for payment in the notice of assessment is the time determined for objection. Mr Tapueluelu for the Commissioner suggests that it is plain the Commissioner has determined the date and made it the date for payment also. Any taxpayer would appreciate that he must object before the date for payment.

He seeks further support from section 41(1) which imposes the duty on the Commissioner to make assessments in respect of every taxpayer and continues:

> "… and shall send a notice of assessment to every taxpayer stating therein the amount upon which tax is payable, the amount of the tax and the date by which the amount of such tax is to be paid."

It imposes no obligation to state a time within which objection must be lodged and the date of payment is, therefore, he suggests, intended to be that date also. In section 77(1), the words following the colon provide that, if the taxpayer fails to object, he loses the right of appeal and the assessment stands. That, Mr Tapueluelu submits, is then the date of payment.

Mr Ring, for the defendant, asks the court to take the plain meaning of the words in the section. The phrase "within the time determined in the notice of assessment" requires a specific time to be stated. The Act does not define the word "determined" and he points to the definition in the Shorter Oxford English dictionary which includes:

> "Settle or fix beforehand (now especially a date); ordain, decree"

It is a word that clearly requires some specificity and precision.

It is relevant to note that, if the Commissioner disallows the objection, there are rights of further appeal under section 77. The first is to the Court of Review and subsection (3) requires the Commissioner to state, in the notice of his decision, the time within which the right of appeal may be exercised. Subsection (4) refers to that time as "the time determined under subsection (3)". There is no doubt that the word is being used there as a reference to a specific time.

Mr Ring points to section 41(1) in support of his argument also. That section places a duty on the Commissioner to state three things in the notice of assessment, one of which is the date by which the tax is to be paid. The right created by section 77 is an additional matter which brings with it the imposition of a further duty on the authorities to determine the time within which any objection is to be lodged. The

separate nature of the two sections and the duties imposed makes it clear, he suggests, that the date to be determined in the notice is additional to the date for payment.

I am satisfied that the Act imposes a requirement in section 77 separate from and additional to those under section 41. It clearly requires the notice of assessment to include a determinate time within which any objection must be lodged. That may be the same as the time allowed for payment but will not necessarily be the case and each must be separately decided.

The notices of assessment sent on 18 January 1999 included all the requirements of section 41(1). What they plainly did not include was any extra determination to satisfy the requirements of section 77.

The powers given to the Commissioner and the tax authorities under the Act are considerable. The Commissioner must under section 41, for example, state the date by which the tax assessed is to be paid but there is no other restriction on his discretion to allow a short or a long time to pay or, indeed, to allow any time at all. Similarly unrestricted is the power of the authorities to limit the time for lodging an objection.

It has long been a principle of statutory interpretation that statutes which encroach on the rights of the subject are to be interpreted strictly so as to respect those rights (referred to as the "recognised rule" by Bowen LJ in *Hough v Windus* (1884) 12 QBD 224 (CA) at 237). In *David v Da Silva* [1934] AC 106 at 114, it was further held that, where there is any ambiguity, the construction which favours freedom of the individual should be adopted. So it is with statutes which impose financial burdens and, where a subject is to be taxed, the language of the statute must clearly impose the obligation. The distinction between such strict interpretation and a more liberal approach has become less clear in recent cases but the requirement of an equitable interpretation still means that such provisions should be clearly stated.

The right to object in section 77 is not a provision that directly imposes a financial burden but, as it gives a unilateral power to the authorities to limit the right of the person taxed to challenge the assessment, I consider it should similarly be strictly interpreted.

The terms of section 77 give the authorities the power to determine the time within which objection must be made and I find that the wording of section 77(1) makes it mandatory that such time should be specified by being stated on the notice of assessment. Such a restriction on the taxpayer must be clearly stated and it would be a simple matter to do so but, in the present case, it was omitted from the notice of assessment entirely. There was, therefore, no time limit determined by the notice of assessment and the time within which the defendant could give notice of objection was unrestricted. As a result, the notice of 8 April 1999 was not out of time and the Commissioner has a duty under section 77(2) to consider it.

I shall adjourn without further order so counsel can decide how the case should now proceed.

Valikoula v Toa

Supreme Court, Nuku'alofa
Ward CJ
C 746/98

7 November 2000; 7 November 2000

Creditors' remedies — liability for costs of bailiff — execution creditor personally liable

On 21 June 1999, the plaintiff was awarded judgment against the first defendant in the sum of $3,114 with interest. On 25 July 2000 a writ of distress was issued on the application of the plaintiff. It was executed on 18 August 2000 and a van, T3149, seized. Following execution, the Bank of Tonga gave notice of claim in relation to the van and the bailiff notified the execution creditor on 11 September 2000. Two days later the execution creditor gave notice that he admitted the claim of the Bank and, on the bailiff's application hearing to be relieved of possession of the van, the court ordered its immediate release to the Bank on 9 October 2000. However at that application, the bailiff also sought an order against the execution creditor for all costs incurred in the execution of the writ up to the admission of the bank's claim. The plaintiff opposed that claim.

Held:

1. The test the bailiff must apply was whether the goods appeared to be in the possession of the judgment debtor. If there was a claim to ownership which was not admitted by the execution creditor nor admitted within seven days as allowed under section 13, its resolution was a matter for the court and the bailiff must apply to the court for the claimants to interplead.
2. Where the bailiff acted properly he was entitled to the reasonable costs incurred in the execution from the execution creditor. The execution creditor gave notice that he admitted the adverse claim within seven days of his receipt of the bailiff's notice so he was only liable for the fees and expenses incurred by the bailiff prior to his notice of admission.
3. If any property other than the van was seized, the bailiff's expenses were to be taken out of its proceeds of the disposal in accordance with section 23 of the Bailiffs' Act. If the execution produced no other goods, the judgment creditor who sought the issue of the writ was personally liable for the costs.

Case considered:
Fatai v Fakaulu (Supreme Court, C 956/99)

Statute considered:
Bailiffs Act 2000

Rules considered:
Rules of the Supreme Court (UK)

Counsel for execution creditor : Mr Fifita
Counsel for bailiff : Mr Bloomfield

Judgment

On 21 June 1999, the plaintiff was awarded judgment against the first defendant in the sum of $3,114.00 with interest. On 25 July 2000 a writ of distress was issued on the application of the plaintiff. It was executed on 18 August 2000 and a van, T3149, seized.

Following execution, the Bank of Tonga gave notice of claim in relation to the van and the bailiff notified the execution creditor on 11 September 2000. Two days later the execution creditor gave notice that he admitted the claim of the Bank and, on the bailiff's application to be relieved of possession of the van, the court ordered its immediate release to the Bank on 9 October 2000.

However at that application, the bailiff also sought an order against the execution creditor for all costs incurred in the execution of the writ up to the admission of the bank's claim. The plaintiff/ execution creditor has opposed that claim on the following grounds:

> "1. The plaintiff was not notified by the bailiff that he had executed distress warrant (sic) and further if executed what goods seized and the nature of the goods.
> 2. The law is clear on what the bailiff can seize from the judgment debtor and the bailiff officers cannot do more.
> 3. The plaintiff did not say at any stage that the van T3149 can be seized nor said that it was the property of the judgment debtor.
> 4. The court in issuing distress warrant did not order that the said van be seized as happened in civil case *Fatai v Fakaulu* (Supreme Court, C 956/99).
> 5. The matter of executing distress warrant is the sole responsibility of the bailiff department. It should be exercised with great care which always reflect justice. It cannot seized anything then claim the costs on innocent party."

Those grounds were supported by an affidavit from the judgment debtor to say that he had told the bailiff that he did not own the car himself but had purchased it by a loan

from the bank and they had joint ownership. He complained that the bailiff still took the vehicle.

That affidavit and the grounds set out above show a lack of understanding of the nature and purpose of a writ of distress, of the role of the bailiff and of section 23 of the Bailiffs Act, No. 5/2000. I have refused the application and ordered that the execution creditor shall pay the bailiff's costs up to the notice of admission of the claim.

It may avoid similar waste of the court's time in future if I briefly set out my reasons.

Any practitioner seeking the issue of a writ of distress would be wise to check, if possible, that the judgment debtor has property liable to seizure and worth seizing. If he has information, for example, that a suitable item of property is owned or has just been acquired by the judgment debtor, he may consider it expedient to apply for a writ in order to have it seized. In such a case he might ask the court to order that the execution is limited to a particular item and the court may endorse the writ accordingly but, once the writ is issued, the bailiff is under a duty to obey the court order and execute it. He has no duty to report to or consult with the judgment creditor or his lawyer and they cannot control or limit his actions except by application to the court.

The test the bailiff must apply is whether the goods appear to be in the possession of the judgment debtor. It is not uncommon for the bailiff to be confronted with suggestions that the property does not belong to the judgment debtor but to another or that others have a legal interest in it. It is not the bailiff's function to ascertain the truth or otherwise of such statements. If there is a claim to ownership which is not admitted by the execution creditor or not admitted within seven days as allowed under section 13, it's resolution is a matter for the court and the bailiff must apply to the court for the claimants to interplead.

If the bailiff has acted properly, he is entitled to the reasonable costs incurred in the execution from the execution creditor.

Under Order 17 rule 2 of the English Rules of the Supreme Court, where the execution creditor gives notice that he admits the adverse claim within seven days of his receipt of the bailiff's notice as occurred in the present case, he is only liable for the fees and expenses incurred by the bailiff prior to his notice of admission.

I have not been advised whether, in the present case, any property other than the van was seized. If it was, the bailiff's expenses shall be taken out of its proceeds of the disposal in accordance with section 23 of the Bailiffs' Act. The amount retained from the proceeds of sale to satisfy the judgment debt may properly be increased to cover those expenses in addition to the judgment debt but the bailiff has first claim and so his costs are deducted before any money is paid towards the debt.

If the execution produced no other goods, the judgment creditor who sought the issue of the writ is, himself, liable for the costs.

R v Toma

Supreme Court, Nuku'alofa
Ford J
Cr 42/00

29 September, 27 October 2000; 9 November 2000

Criminal law — indecent assault — needs only basic intent — intoxication no defence

On 15 July 1999 the complainant, Kololiana Naufahu, went with two of her overseas business partners and her trusted friend and driver, Olivia Fifita, to the Waterfront Bar. The complainant was allegedly indecently assaulted by the accused. The accused denied that he committed the offence in the manner alleged. The accused also claimed that he did not have the required intention (mens rea) because of his state of intoxication.

Held:

1. When considering the relevance of intoxication, it was necessary to distinguish offences of specific intent and offences of basic intent. Indecent assault came within this latter category of offence.
2. Although the accused was very drunk, he was not so grossly intoxicated on the night in question that he could not form any conscious intent at all.
3. The Crown proved every element of the charge beyond reasonable doubt; the accused was convicted.

Cases considered:

Director of Public Prosecutions v Majewski [1977] AC 443; [1976] 2 All ER 142

R v O'Connor (1980) 146 CLR 64; 29 ALR 449

Statute considered:

Criminal Offences Act (Cap 18)

Counsel for Crown : Mr Bloomfield
Counsel for accused : Mr Tu'utafaiva

Judgment

On 15 July 1999 the complainant, Kololiana Naufahu, went with two of her overseas business partners and her trusted friend and driver, Olivia Fifita, to the

Waterfront Bar/ Cafe in Ma'ufanga (the "Waterfront"). The Crown case is that within a very short time of her arrival at the bar, the complainant was indecently assaulted by the accused. The accused denied the charge and the case proceeded to trial.

The elements which the Crown must prove beyond reasonable doubt to establish a charge of indecent assault are well established. First, the Crown has to prove that there was an assault on the complainant. An assault is any intentional application of force. Any degree of force is sufficient. Secondly, the Crown must prove that the assault was indecent. There is no fixed legal definition of indecency and so the test applied by the Courts is whether what was done would be considered indecent according to commonly accepted community standards. Finally, the Crown has to establish that the complainant did not consent to what occurred and that the accused did not honestly believe that the complainant consented.

Prior to going to the Waterfront, the complainant and her group had attended an invitation only function to mark the opening of a refurbished hairdressing salon. The complainant was cross-examined at considerable length as to how much alcohol she had consumed at that function but she was adamant that, although she had been present for some 3 ½ hours, she had consumed only a very small quantity of wine and this was confirmed by the other Crown witness.

The complainant's version of what happened at the Waterfront was that when her group arrived, one of the Italian partners she was with went to the bathroom and the other partner went to order drinks. The complainant sat on a low stool at the bar, facing the bar. Her friend Olivia stood at the bar with her back half turned towards her and they started talking. She says that next thing she felt a man standing close behind her back almost leaning against her back. She told him to move away but he proceeded to put his two hands on her head and ran them down the side of her face towards her breasts. At that point, she was angry and shocked and she said that the shock of someone doing that to her upset her greatly. She said that she pushed the accused away and told him to get lost and she yelled out, "who is this man"? She told his friends to take him away. But he did not go away. He came up and started touching her friend Olivia.

The complainant said that the next thing she knew was that the accused was back at her again and this time he grabbed both her breasts and then ran his hands down to her buttocks and by then she was on her feet and she shoved him backwards - pushing him on the chest or shoulders. She then called the police.

That basically is the plaintiff's account of what happened. She said she had travelled the world extensively in the course of her business career but she had never felt so degraded and humiliated in her life. She said that nothing like that had ever happened to her before. She said that it was all the more embarrassing because the incident occurred when she was hosting her overseas business partners.

The complainant is a prominent businesswoman. She explained in her evidence the special significance of the conduct she had described in Tonga where traditionally woman enjoy a higher status than men. She said that in Tonga no man ever touches a woman like that unless she is a whore or his own woman.

The other witness called by the Crown was Olivia Fifita. She is a married woman with children. She is a taxi driver by occupation and the complainant is one of her main customers. Because she was the driver, Mrs Fifita had not been drinking at all on the night in question. She gave her recollection of what had happened.

The accused gave evidence and called two witnesses. He did not have to of course because the onus lies with the Crown throughout to establish every element of the charge. The accused did not deny that he had come into physical contact with the complainant at the Waterfront on the night in question but he said that he had been drinking heavily and he had no recollection whatsoever of the evening. He called evidence from his drinking friend, Maliu Takai, but he had no recollection of what had happened. The other witness called by the accused was Kisione Valu and the defence relies heavily on Mr Valu's account of what happened.

Mr Valu said that he was at the Waterfront at the bar and he saw the accused, who was a lifetime friend, enter the bar with Maliu. He said that the accused came and talked to him but he was very drunk and he was swaying back and forth. He gave evidence about how the accused had "swayed" backwards and come in contact with the complainant. He described the complainant's reaction and he said that after the complainant threatened to call the police, the accused apologised to her and he (Mr Valu) took hold of the accused and led him out of the restaurant.

Because none of Mr Valu's evidence had been put to the complainant in cross-examination, I allowed the Crown to recall the complainant to hear her reaction to two of the matters he had said which directly affected the complainant.

I say at once that I did not form a favourable impression of Mr Valu as a witness. I have serious doubts about his story and wherever there is a conflict between the evidence of the complainant and Mr Valu's evidence, I have no hesitation in rejecting Mr Valu's account of the facts.

That, however, is not the end of the matter. The question I have to ask myself is whether the Crown has proved that each of the elements of the charge made against the accused has been established beyond reasonable doubt. It is not up to the accused to prove his innocence.

The complainant and Mrs Fifita were cross-examined extensively by counsel for the accused on every detail of the incident and the cross-examination did reveal some inconsistencies in their account of exactly what happened but it is not often that witnesses give identical accounts of an incident - no matter how traumatic, and the concessions obtained in cross-examination in this case do not, in my judgment, cause me to have any doubts about the substance of the Crown case.

As an alternative to the accused's denial that he committed the offence in the manner alleged, he submits that he did not have the required intention (mens rea) because of his state of intoxication.

When considering the relevance of intoxication, it is necessary to distinguish offences of specific intent, in other words, offences where an intention to cause a specific result is an element and offences of basic intent where the only relevant intention is the intent to do the physical act which is required as part of an actus reus of a non-purposive kind. Indecent assault comes within this latter category of offence.

In *Director of Public Prosecutions v Majewski* [1977] AC 443; [1976] 2 All ER 142, the House of Lords held in substance that on the trial of an accused for an offence of basic intent, evidence of self induced intoxication was irrelevant and therefore inadmissible if tendered solely to raise a doubt as to the voluntariness of, or as presence of an intention to do, the physical act involved in the crime charged.

An identical question came before the High Court of Australia in *R v O'Connor* (1980) 146 CLR 64; 29 ALR 449. The majority of the High Court declined to follow *Director of Public Prosecutions v Majewski*, holding that evidence of intoxication

(either by alcohol or drugs, or both) was relevant and admissible to the issues of voluntaries and intent in offences of both specific intent and basic intent.

The common law principles relating to intoxication as laid down by the majority in *R v O'Connor* have equal application in Tonga by virtue of section 21 of the Criminal Offences Act the relevant parts of which provide:

> 21(1) Save as provided in this section intoxication shall not constitute a defence to any criminal charge.
> (2) …
> (3) …
> (4) Intoxication shall be taken into account for the purpose of determining whether the person charged had formed any intention specific or otherwise in the absence of which he would not be guilty of the offence.
> (5) …

In other words, intoxication can never be a defence in criminal proceedings but is a factual matter which bears upon the existence or the non existence of an ingredient of the offence itself.

The evidence in the present case satisfies me that although the accused was very drunk, he was not so grossly intoxicated on the night in question that he could not form any conscious intent at all and that is the real test.

In my view, the Crown has succeeded in proving every element of the charge beyond reasonable doubt. Much was made of the delay on the complainant's part in lodging her formal complaint with the police but she explained that she was allowing the accused the opportunity of making an apology for his actions in the customary Tongan way but no apology was forthcoming. I found the complainant's explanation both plausible and convincing. In summary, I found both her and Mrs Fifita to be truthful and impressive witnesses and I have no doubt that the complainant found the incident deeply offensive in the manner that she described quite dramatically to the court.

The accused is convicted and I will now hear counsel on sentencing.

Tukuafu v Police

Supreme Court, Nuku'alofa
Ford J
Cr 12/2000

27 October 2000; 9 November 2000

Criminal procedure — fresh evidence available — retrial ordered

The appellant, Kalisi Tukuafu, was convicted in the Magistrates' Court at 'Eua on 24 May 2000 on charges of being drunk in a public place and of using abusive language in a public place. He appealed against conviction. The appellant applied for leave to call fresh evidence from a Mr Anitoni Vailea. The appellant had subpoenaed Mr Vailea to attend the Magistrates' Court when the case was called but the witness had not been served with the subpoena and so he did not turn up for the hearing. The appellant claimed that the subpoena was not served because the police did not want the witness to appear. The Crown opposed the application on the basis that at the time the witness did not appear the Magistrate offered counsel the opportunity to have the case adjourned but counsel declined the opportunity and advised the Court that he elected to close his case.

Held:

1. The Court concluded that, given the serious nature of the appellant's unproven allegations against the police, it was expedient in the interests of justice, that it should hear the fresh evidence and made the order accordingly.
2. The Court heard the evidence and held that it was in the interests of justice to order a retrial to enable the fresh evidence to be put before the Court.
3. The appeal was allowed, the convictions entered against the appellant were quashed and the case was remitted to the Magistrate Court for trial de novo on both charges.

Case considered:

Watt (or Thomas) v Thomas [1947] AC 484; [1947] 1 All ER 582

Statute considered:

Magistrates' Courts Act (Cap 11)

Counsel for appellant : Mr Kengike
Counsel for respondent : Mr Tapueluelu

Judgment

The appellant, Kalisi Tukuafu, was convicted in the Magistrates' Court at 'Eua on 24 May 2000 on charges of being drunk in a public place and of using abusive language in a public place. He appeals against conviction.

As part of his appeal, the appellant applied for leave to call fresh evidence from a Mr Anitoni Vailea. The appellant had subpoenaed Mr Vailea to attend the Magistrates' Court when the case was called but he had not been served with the subpoena and so he did not turn up for the hearing.

The application was opposed by the Crown and I heard submissions from both counsel. The appellant's argument was that when the subpoena was issued on 22 May the police prosecutor had kept the subpoena himself rather than hand it over to one of his colleagues to serve on the witness and that he (the prosecutor) had intentionally not served the subpoena on Mr Vailea because he had not wanted him to be available as a witness for the appellant in the case the police were bringing against him on 24 May.

The Crown opposed the application principally upon the ground that the record shows that at the hearing, when counsel for the appellant told the learned Magistrate that he had subpoenaed another witness who had not turned up, the Magistrate offered counsel the opportunity to have the case adjourned but counsel declined the opportunity and advised the Court that he elected to close his case.

While the Court is always reluctant to admit fresh evidence of a witness when counsel has made a deliberate decision not to call him, the present case does not quite fall into that category. Here the appellant says that he would have called Mr Vailea and the only reason he did not do so was because the police prosecutor had not served the subpoena upon him and so he was unavailable to be called.

Section 79 of the Magistrates' Courts Act allows the Supreme Court in its discretion to admit fresh evidence on the hearing of an appeal if good cause is shown.

After hearing the submissions I concluded that, given the serious nature of the appellant's unproven allegations against the police, it was expedient, in the interests of justice, that I should hear the fresh evidence from Mr Vailea and I made an order accordingly.

The police case against the appellant is that he was drunk and using abusive language in a street in downtown Ohonua in the early hours of the morning. He was, therefore, arrested and handcuffed to a power pole outside the TCF store.

The appellant gave evidence and he denied he was drunk and he denied that he had used abusive language in the street. The appellant's case is that after finishing his work as DJ at a local disco at about 3am he attended a kava party in the local hall. He says that he had consumed only one cup of kava and he and one, Toio Lauteau, were sitting together at the kava party when Constable Latiu came into the hall and, without giving any reasons, handcuffed the appellant and Lauteau together. After a period the Constable released Toio but he took the appellant over and handcuffed him to the power pole outside the TCF store.

The appellant called a witness who had noticed him hand-cuffed to the power pole on his way to work that morning and he (the witness) had gone to the Police Station to get the police to come and unlock the appellant. He called another witness who had been working with the appellant at the disco and he said employees were prohibited from drinking on duty and the appellant was not drunk when he had finished work at about 3 a.m. that morning.

Toio Lauteau was called as a witness by the police. He confirmed Constable Latiu's evidence. He said that the appellant was very drunk; that he had 100 cups to drink and that he was using abusive language to the police.

Clearly there was a major credibility issue for the Magistrate to determine. Both sides could not be right. The learned Magistrate seemed to be fully aware of the significance of Toio's evidence. In his decision, he concluded:

> "Toio proved that the Accused was drunk and also was using insulting words and the Court believed him."

Normally, that would be the end of the matter on the issue of credibility. The Court has said many times that it will not interfere when a magistrate has made a finding on the facts unless it is clearly unsound. The principle is well summed up in the following extract from the head-note to the report of the speeches of the House of Lords in *Watt (or Thomas) v Thomas* [1947] AC 484; [1947] 1 All ER 582.

> "When a question of fact has been tried by a judge without a jury and it is not suggested that he had misdirected himself in law, an appellate court in reviewing the record of the evidence should attach the greatest weight to his opinion, because he saw and heard the witnesses, and should not disturb his judgment unless it is plainly unsound."

That brings us to the fresh evidence of Mr Vailea.

One of the claims made by the appellant was that he was sitting at the kava party alongside Toio when Constable Latiu came in and, for no reason, handcuffed the two of them together. He handcuffed one of the appellant's hands and one of Toio's hands. That proposition was put to Toio in cross-examination, however, and he denied it. He said that he was not locked to the appellant. He said he was never locked together with the appellant. The Magistrate obviously believed that statement.

Mr Vailea's fresh evidence was directly relevant to this aspect of the case. He said that he was playing music at the kava party which finished about 4 a.m. and he can remember Constable Latiu coming in and handcuffing one of the appellant's hands and one of Toio's hands and he said that the appellant had not done anything before the officer handcuffed him. Mr Vailea said that Constable Latiu then released Toio but left the appellant handcuffed and then he (Constable Latiu) left the hall. After that, Mr Vailea left the kava party and went home. He did not see how the appellant came to be handcuffed to the power pole.

I formed the view that Mr Vailea's evidence was relevant and credible and that it should have been before the learned Magistrate when the case against the appellant was heard.

The appellant had advanced other grounds of appeal but in my judgment, none of them established any error of law or material irregularity on the part of the learned Magistrate.

In all the circumstances, however, I am satisfied that it is in the interests of justice to order a retrial to enable the fresh evidence to be put before the Court. Accordingly, the appeal is allowed, the convictions entered against the appellant in the Court below on 24 May 2000 are quashed and the case is remitted to the Magistrate Court for trial de novo on both charges. Every effort should be made to

have the case heard at the next session of the Magistrates' Court at 'Eua commencing on 20 November, 2000 when I understand a different Magistrate will be presiding. I also make an order that the prosecution of the re-trial be handled by someone other
130 than the original police prosecutor.

I make no order as to costs.

Pozzati v Fumera

Supreme Court, Nuku'alofa
Ford J
C 558/96

4 October – 3 November 2000; 21 November 2000

Creditors' remedies — writ of distress — ranked according to time of delivery of original
Creditors' remedies — bailiffs — duties do not extend to seizure of company shares

On 16 June 1997, the plaintiff (judgment creditor) obtained judgment against the defendants (the judgment debtors). The judgment debtors appealed and the Court of Appeal dismissed the appeal but made some minor amendments to the Orders and awarded the judgment creditor interest and costs. After taxation of costs, the amount judgment was entered for against the judgment debtors was $140,814.63. The judgment creditor made considerable efforts to obtain execution of the judgment and included various garnishee orders and writs of distress. The judgment creditor alleged that the first judgment debtor in particular was deliberately trying to evade distress. The judgment creditor was focused on executing judgment against two particular identified assets: a van which was seized by the bailiffs in October 1999; and the shares of the judgment debtors in the Oasis Company Limited.

Held:

1. The Court ruled that the new writ of distress issued by the Court on 18 November 1999 was to rank according to the time of delivery of the original writ, namely, 5 August 1999. As the van was jointly owned by the first judgment debtor and the Oasis company at that point in time, the seizure was not invalidated.
2. The Court ordered that the van was to be sold by auction in accordance with the direction contained in the original writ of distress. The proceeds of sale were to be paid to the Registrar of the Supreme Court pending further order in relation to dispersal of the funds.
3. The duties and functions of bailiffs do not extend to the seizure of company shares.
4. The judgment creditor was successful in his application to have the seized van sold by the bailiff and so was entitled to costs on that part of the application. Even though the judgment creditor did not succeed in his application for orders to have the bailiffs seize and sell the judgment

debtors' shares in the Oasis company there was no award of costs in favour of the judgment debtors in the interests of the overall justice of the case.

5. The bailiff's costs were a first charge on the proceeds from the sale of the van.

Cases considered:

Advanced Exports NZ Ltd v Sione Tupouniua (A No 749/94, Ward CJ)
Robinson v Jenkins (1890) 24 QBD 275 (CA)

Statutes considered:

Bailiffs Act 2000
Charging Orders Act 1979 (UK)
Judgments Act 1838 (UK)
Magistrates' Courts Act (Cap 11)

Rules considered:

Supreme Court Rules 1991

Counsel for plaintiff	:	Mr Foliaki
Counsel for defendants	:	Mr Tu'utafaiva
Counsel for the bailiffs	:	Mr Bloomfield

Judgment

On 16 June 1997, the plaintiff ("judgment creditor") obtained judgment from Lewis J in this Court against the defendants ("the judgment debtors"). The judgment debtors appealed and the Court of Appeal delivered its judgment on 7 August 1998 dismissing the appeal but making some minor amendments to the Orders that had been made in the Supreme Court and awarded the judgment creditor interest and costs. After taxation of costs, the amount judgment was entered for against the judgment debtors was $140,814.63.

A memorandum dated 27 July 2000 filed by counsel for the judgment creditor shows the very considerable efforts the judgment creditor has made to obtain execution of the judgment. These efforts include various garnishee orders and writs of distress. The judgment creditor alleges, with some justification I believe, that the first judgment debtor in particular, has been deliberately trying to evade distress.

At this point, the judgment creditor is focused on executing judgment against two particular identified assets -- (1) a motor vehicle (the "van") which was seized by the bailiffs in October 1999 and (2) the shares of the judgment debtors in the Oasis Company Limited. I will deal with each in turn.

The Van

Pursuant to a writ of distress dated 5 August 1999, the bailiff on 5 October 1999 seized a van, registered No. L4466, and it has apparently been kept at the Longolongo police compound since that date. At the date of seizure the van was registered in the joint names of Luigi Fumera, the first judgment debtor, and the Oasis Company Ltd.

The writ of distress had commanded the bailiff to seize the property of the first judgment debtor, Luigi Fumera. The error in naming the first judgment debtor only in the writ and omitting the name of the second judgment debtor, Simonetta Maccio, was the result of an oversight on the part of the Court. The omission was not caused by any fault on the part of the solicitors acting for the judgment creditor. There is a long line of authority at common law, however, which provides that where a judgment is against two or more persons jointly then the writ of distress must issue against them jointly otherwise it is irregular. That, then, was the position in this case. The van had been seized by the bailiff under an irregular writ.

On the 21st October 1999 the judgment creditor's solicitors wrote to the registrar pointing out the irregularity in the writ of distress and asking for the matter to be rectified. A copy of the letter was sent to the solicitor acting for the judgment debtors.

On 26 October 1999 Finnigan J, acting in response to the solicitors letter, ordered a new writ of distress to be issued showing the name of both judgment debtors and his Honour directed the bailiffs to continue holding the vehicle that had been seized. A new writ complying with this direction was issued on 18 November 1999.

It appears that what had happened in the meantime, however, was that on 2 November 1999 ownership of the van was transferred into the name of the Oasis company only. On 25 November 1999 the bailiff received notice from the solicitor acting for the Oasis company (who is the same solicitor acting for the judgment debtors) claiming sole ownership of the van. He asked the bailiff to either return the van to the company or initiate interpleader proceedings. On the same day, the bailiff's solicitor issued a notice of claim form in the usual format acknowledging the claim to ownership by the Oasis company.

On 29 November the solicitors acting for the judgment creditor filed formal notice disputing the claim to ownership by the Oasis company. The judgment creditor claimed that the transfer of ownership on 2 November to the Oasis company showed that the first judgment debtor, Fumera, had "tried deliberately and unlawfully to evade distress by getting his name off the ownership registration of the van." The judgment creditor went on to draw the Court's attention to the fact that the judgment debtors were the majority shareholders in the Oasis company.

That, then, is the relevant background relating to the van. As I have noted, it had been seized under an irregular writ.

At common law an irregularity of this nature did not nullify the proceedings nor any step taken in the proceedings. An application could have been made by anyone claiming an interest in the van at any time after seizure to have the writ of execution set aside as being irregular because it did not name both judgment debtors and any such application would have been considered and dealt with on its merits. In saying that, however, it does not necessarily follow that in this particular case an application by the Oasis company to set the execution aside would have been granted. The Court may well have elected to waive the irregularity and set the matter right by simple amendment. Such course was open to it (Halsbury, 4th ed, vol 17, 460).

In any event, no application was made by the judgment debtors or the Oasis company to set the execution aside. Instead, the bailiff's return was duly filed and on 26 October 1999 when Finnigan J ordered rectification of the writ he specifically directed the bailiffs to continue holding the seized vehicle.

His Honour ordered a new writ to be issued naming both judgment debtors. He could have simply ordered an amendment to the original writ of distress. Halsbury states:

> "If there is a defect or error in any writ, endorsement or return the court may allow it to be amended upon such terms as may be just. As a general rule an amendment should be allowed if it can be made without injustice." Vol 17, para 425.

In a note to the same paragraph, Halsbury referred to an 1833 decision with the comment "(where the application was for a new writ, although this is not now the practice)".

In the present case, instead of amending the original writ, a new writ was issued. Nevertheless, in all the circumstances of this case, it is clear to me that the justice of the case required the Court to amend the writ in such a way that the judgment creditor would suffer no prejudice as result of the Court oversight in issuing an irregular writ in the first place.

For that reason, I rule that the new writ of distress issued by the Court on 18 November 1999 shall rank according to the time of delivery of the original writ, namely, 5 August 1999. As at that point in time, the van was jointly owned by the first judgment debtor and the Oasis company but joint ownership of the property does not invalidate the seizure. Thus, Halsbury says:

> "Where goods belong to the judgment debtor jointly or in common with some other person, they may be seized under a fieri facias unless the co-owner has become solely entitled by survival upon the death of the debtor before delivery of the writ." – vol 17, para 482.

I understand that the van is still in the bailiff's custody at the police compound where it has been held since seizure in October 1999. It is exposed to the elements and is deteriorating. I now order that it be sold by auction in accordance with the direction contained in the original writ of distress. The proceeds of sale are to be paid to the Registrar of the Supreme Court pending further order in relation to dispersal of the funds.

The Shares

On 13 May 1999, the judgment creditor filed an application for orders that the bailiff and the judgment creditor seize and dispose of the judgment debtors' shares in the Oasis company and for a writ of distress. A company search filed with the application showed that the Oasis company had 350,000 shares of T$1.00 each allotted as follows:

Salesi Lasike	35,000
Simonetta Maccio	101,500
Luigi Fumera	115,500
Raccardo Guerra	98,000

The application was served on the judgment debtors' counsel on the same day.

No action was taken in response to the application. On 21 October 1999 the solicitors acting for the judgment creditor wrote to the Court Registrar saying that they wished to have the Judgment enforced by seizing and selling the company shares. Finnigan J made a file Minute on 26 October that the solicitors for the judgment creditor were "to advise the Court how the bailiffs might seize the company shares". It is not clear from the Court file whether that particular Minute was ever conveyed to the judgment creditor's solicitors. In a formal Notice filed on 1 December 1999, the solicitors for the judgment creditor asked for a fixture so that the issues regarding the shares could be heard together with the interpleader proceedings relating to the van.

On 6 March 2000, following a Chambers hearing, Finnigan J ordered counsel acting for the bailiff to file an expanded interpleader proceeding including the claimed shares. That step was taken on 22 March and 19 May was set as the hearing date for the interpleader action. It appears from the Court file that on 19 May, counsel attended before his Honour and the matter was adjourned until 25 July. For reasons which are not obvious from the Court file, but no doubt are related to Justice Finnigan's retirement, that fixture did not proceed.

I saw counsel in Chambers on 7 September and again on 25 October and made timetable orders for submissions to be filed and for submissions in response and a reply. The timetable I had prescribed was adhered to.

The brief point at issue is whether the bailiff can, pursuant to a writ of distress, seize the judgment debtors' shares in the Oasis Company Limited.

Counsel for the judgment debtors says that all the judgment creditor can do to enforce judgment is to apply for a writ of distress and once the writ is issued it is the bailiff who "takes it on from there". He argues that the bailiff does not have power to seize and sell shares in a company pursuant to a writ of distress.

Counsel for the judgment creditor argues that the writ of distress commands the bailiff to seize the "property" of the judgment debtors and therefore he can seize the judgment debtors' shares "as their personal property". He also says that the Court has authority under Order 26 Rule 7(3) of the Supreme Court Rules to make orders and give directions to seize and sell the judgment debtors' property, including the company shares.

A writ of distress commands the bailiff to seize the debtor's "property" (with stated exceptions). Order 26 Rule 7(2) states that a writ of distress shall be executed in the same manner as is prescribed in the Magistrates' Courts Act for the execution of distress warrants. Section 54 of the Magistrates' Courts Act which used the terminology "goods" rather than "property" set out the manner in which warrants of distress were to be executed but that provision has now been repealed by the Bailiffs Act 2000. The new Act does not contain any particular procedures for executing writs of distress apart from in the case of a special seizure pursuant to section 8. In general, apart from complying with the provisions of the Act itself and any specific directions from the court, a bailiff carrying out execution under the new Act will be expected to comply with recognised common law principles.

Shares in a company are choses in action. The learned authors of Lipton & Herzberg's *Company Law*, 5th ed, p 177 state:

> "Shares are personal property … Being of an intangible nature, they are regarded as choses in action. This means that ownership

> of shares confers certain rights on shareholders which are enforceable by law. Although shares are intangible property or choses in action, the law treats them as property in the usual sense. They may be bought and sold, bequeathed and given as security. A share is a bundle of rights and obligations which are determined by the law and the company's memorandum and articles of association."

Although company shares have property characteristics, as choses in action they are not seizable at common law by writs of fieri facias (Halsbury 4th ed, vol 17, para 468, note 1). The writ of fieri facias is the common law equivalent of a writ of distress. It commands the sheriff to seize in execution of the debt "the goods, chattels and other property" of the judgment debtor.

An exception to the common law principle that choses in action were not seizable came with section 12 of the Judgments Act 1838 (UK) under which the Sheriff was empowered to seize money or banknotes, cheques, bills of exchange, promissory notes, bonds, specialties or other securities for money belonging to the judgment debtor but, from my research, it does not appear that this statutory exception has ever been extended to authorise the seizure under fieri facias of company shares.

So although the command to a bailiff in the writ to seize "goods" or "property" of the judgment debtor may appear to be comprehensive, it has long been recognised that, apart from the exception just referred to, choses in action cannot be seized under such a writ.

Pennington's *Company Law* 4th ed, p 744, referring to the situation in the company liquidation context, says:

> "For the purpose of these provisions goods include all chattels personal, including chattels which cannot be seized and sold under a writ of fieri facias. In such cases execution is levied by the court appointing a receiver or making a charging or garnishee order, and the sheriff has no part to play. It would appear therefore that, despite the width of the definition of goods, the statutory duty imposed on the sheriff to account to the (creditor) does not apply in such cases. This interpretation does not make the statutory definition of goods meaningless, because in addition to tangible things, certain choses in action, such as bank notes and negotiable instruments can be seized under a fieri facias, and the sheriff may therefore be accountable to the (creditor) for them or the proceeds of realising them."

The judgment creditor in the present case places reliance on *Robinson v Jenkins* (1890) 24 QBD 275 (CA) at 279. There, the Court of Appeal accepted that shares in a company were choses in action but went on to hold that a chose in action may be the subject of an interpleader under the Interpleader Act (UK) which applied to disputes involving any "debt, money, goods or chattels". The Court held that the shares in dispute were "chattels". *Robinson v Jenkins*, however, was not a case involving seizure pursuant to a writ of fieri facias. It was a situation where two persons were claiming the right to the same shares which were held by the defendant (a

stockbroker) who had no interest in the shares. The Court held that given that particular situation, it was appropriate for the defendant to be granted relief by way of interpleader. The case is not authority which over-rides the comment in Halsbury noted above that choses in action are not seizable by writ at common law.

On this aspect of the case, therefore, I find against the judgment creditor. I do not believe that the duties and functions of the bailiff do extend to the seizure of company shares.

In my view, the appropriate procedure to be followed when a judgment creditor seeks to enforce a judgment against a judgment debtor's shares in a company is to seek a charging order under section 1 of the Charging Orders Act 1979 (UK) in accordance with Order 26 Rule 11 of the Supreme Court Rules. In appropriate circumstances the application could include an application for the appointment of a receiver pursuant to order 26 rule 10.

Charging orders may be imposed on the security of any stock of any registered company, (Halsbury 4th ed, Vol 17, para 556).

> "A person who has obtained judgment against a shareholder for an ascertained sum of money may levy execution on his shares registered in the company's register of members by obtaining an order of the court charging the shares with payment of the judgment debt." *Pennington's Company Law*, 4th ed, 348.

The charging order procedure provided for in Order 26 Rule 11 was recently followed and applied by this Court in *Advanced Exports NZ Ltd v Sione Tupouniua* (A No 749/94) where Lewis ACJ made an Order charging the judgment debtor's shares in a company called Prince Hotel Ltd.

In the present case, the judgment creditor, having been successful in his application to have the seized van sold by the bailiff, is entitled to costs on that part of the application. Costs are to be agreed or taxed. Even though the judgment creditor has not succeeded in his application for orders to have the bailiffs seize and sell the judgment debtors' shares in the Oasis company, I am not disposed, in the interests of the overall justice of the case, to make any award of costs in favour of the judgment debtors.

Counsel for the Bailiff has filed submissions on costs. He argues that the Bailiff's actions in seizing the van under the original irregular writ were carried out in good faith and his reasonable costs in the matter should be a first charge on the subject matter. I agree and hereby make a direction to that effect.

Lasalosi v Hausia

Supreme Court, Nuku'alofa
Ford J
C 16/00

31 October 2000; 28 November 2000

Tort — defamation — can be publication to one person only
Defamation — damages — limited to action pleaded — reduced

The respondent, Kanongata'a Hausia, was the builder and owner of the Hideaway Resort on the island of 'Eua. The respondent claimed that Pita (his employee) had told him that he (Pita) had been told by Vika Lasalosi (the appellant) that "Taina" (who was Vika's sister) had told her (Vika) the story that the resort was financed out of selling marijuana. In 2000 the respondent brought an action in defamation against the appellant which was heard in the Magistrates' Court at 'Eua on 27 March. The respondent succeeded and was awarded damages in the sum of $500 plus court costs. The appellant appealed against the decision. Her grounds were that the Magistrate erred in fact and in law and that the learned Magistrate's decision was against the weight of the evidence.

Held:

1. The first ground of appeal was that the Magistrate erred in law in not giving the appellant (who was not legally represented) the opportunity to make a closing address in her defence. The court found no basis for this ground in the official transcript.
2. The second and third grounds of appeal were that the Magistrate erred in law and in fact in concluding that the respondent had proved his claim and the Magistrate's decision was against the weight of evidence. The court found no basis for interfering with the Magistrate's decision.
3. On the ground that the damages awarded were excessive the court held that the appellant was being made to pay for telling the story to the police and for spreading the rumours when these matters were not pleaded, proved, or even put to the appellant in evidence. The only evidence of publication of the drug story was to Pita and if damages were going to be awarded, then they had to be assessed on that basis.
4. Publication of a defamatory statement to one person only does give rise to a recognised cause of action, even if that person disbelieved the statement.
5. The damages award needed to be commensurate with the extent of the publication. The damages award was excessive having regard to the extent

of the publication. The appeal was allowed and the judgment of the learned Magistrate was varied by substituting an award of $100. The court fee fixed at $21 remained.

Cases considered:

Bekker v Wrack [1937] NZLR 549

Cocker v Police Department (Supreme Court, Cr App 1251/98, 5 March 1999, Ward CJ)

Hough v London Express Newspaper Ltd [1940] 2 KB 507; [1940] 3 All ER 31 (CA)

Morgan v Odhams Press Ltd [1971] 2 All ER 1156 (HL)

Piukana v Akeripa (Supreme Court, C App 47/99, 3 March 1999, Finnigan J)

Watt (or Thomas) v Thomas [1947] AC 484; [1947] 1 All ER 582

Statutes considered:

Defamation Act (Cap 33)

Magistrates' Courts Act (Cap 11)

Counsel for appellant : Mr Tu'utafaiva

Counsel for respondent : Mr Kengike

Judgment

The respondent, Kanongata'a Hausia, is the builder and owner of the Hideaway Resort on the island of 'Eua. The resort was opened to the public in August 1999.

Earlier this year the respondent brought an action in defamation against the appellant, Vika Lasalosi, which was heard in the Magistrates' Court at 'Eua on 27 March. The respondent succeeded and was awarded damages in the sum of T$500.00 plus court costs. The appellant appeals against the decision. Her grounds are that the Magistrate erred in fact and in law and that the learned Magistrate's decision is against the weight of the evidence.

The respondent's case in the Magistrates' Court was that in about October 1999 at the "Maxi hall" at Futu the appellant had told one of the respondent's employees, Pita Kengike, that the Hideaway resort belonged to the respondent and Senituli Manu's sons and it was alleged that she then went on to say, "they'll come to the opening of the resort because they are shareholders and they deal in marijuana together … and that is how the Hideaway was built from dealing in marijuana". (Why the opening of the resort was referred to in the future tense when the evidence shows that it had been opened in August 1999, is not clear from the record).

The respondent gave evidence and said that Pita had told him that he (Pita) had been told by Vika that "Taina" (who is apparently Vika's sister) had told her (Vika) the story that the resort was financed out of selling marijuana.

This hearsay evidence seemed to go unchallenged. The respondent went on to explain how he had frequent visits from the police and they had told him of the rumours that he was dealing in marijuana on the island and he said that he was very upset by the stories and they damaged his reputation. He said that the appellant had telephoned him and had come to see him at some stage and she had denied that she

had told anyone the story and she had said that, in fact, it was his own employee, Pita Kengike, who had told her the story.

Pita Kengike who works as a plumber at the Hideaway, gave evidence. He said that it had been the appellant who had called him over one day at Maxi's nightclub (on a date unspecified) and that she had told him the story about the respondent's involvement with drugs. Pita's wife, Valenisia Kengike also gave evidence for the respondent.

The appellant, who was not legally represented, gave evidence. She denied that she had made the allegation to Pita. She said that it was Pita, in fact, who had told her the story. She also called her neighbour Selu Paui and she said that she was with the appellant when Pita made the allegations to them both that Mr Hausia and one of Senituli Manu's sons dealt in marijuana.

So, there was a sharp conflict in the evidence. Each side, as it were, blamed the other. The Magistrate had to weigh up this conflict in the evidence and make a decision on credibility. He did that. He found against the appellant.

This Court will not interfere with a Magistrate's finding on the facts unless it is plainly unsound. The governing principle was well summed up in the head note in *Watt (or Thomas) v Thomas* [1947] AC 484; [1947] 1 All ER 582:

> "When a question of fact has been tried by a judge without a jury and it is not suggested that he has misdirected himself in law, an appellate court in reviewing the record of the evidence should attach the greatest weight to this opinion, because he saw and heard the witnesses, and should not disturb his judgment unless it is plainly unsound.
>
> The appellate court is, however, free to reverse his conclusions if the grounds given by him therefore are unsatisfactory by reason of material inconsistencies or inaccuracies or if it appears unmistakably from the evidence that in reaching them he had not taken proper advantage of having seen and heard the witnesses or has failed to appreciate the weight and bearing of circumstances admitted or proved."

The first ground of appeal is that the Magistrate erred in law in not giving the appellant the opportunity to make a closing address in her defence.

The official transcript of the evidence provides no basis for this ground of appeal. On the contrary, the record shows that the Magistrate went out of his way to assist the appellant who was conducting her own defence. He said:

"*This is that time for you the defendant to give submissions and I will help you because you don't have any lawyer. You will give submissions emphasising the weight of the evidence you called. Do you want to make your submission*." The transcript records the appellant's answer as follows: "*No, your worship. That is all my witnesses*." Counsel for the appellant queried the accuracy of the transcript before the court but it is consistent with the court clerk's hand written notes and so I reject this ground of appeal.

The second and third grounds of appeal were dealt with together. They were that the Magistrate erred in law and in fact in concluding that the respondent had proved his claim and the Magistrate's decision was against the weight of evidence.

Under this head, counsel looked at the different elements needed to be established to prove a claim in defamation and in relation to this case he focussed attention on the finding by the Magistrate that, prior to the hearing, the appellant had approached the police prosecutor in 'Eua for advice on how to conduct her own case and the police prosecutor had then planned with the appellant and her witness, Selu, that they should put the blame on Pita. Evidence along these lines had been given by Pita's wife, Valenisia, who the Magistrate described as an "important witness".

Counsel for the appellant said that it was very unlikely that a police prosecutor would concoct a plan for a party to tell lies in Court and, in any event, that proposition had never been put to the appellant in cross-examination and so she had not been given an opportunity to respond to the allegation. In fairness to counsel for the appellant, however, who had not been counsel at the Magistrates' Court hearing, when he carefully examined the Court translation again he conceded that the proposition had, in fact, been put to the appellant and she had given a response so counsel did not pursue the particular point any further. He did, however, criticise the accuracy of the transcript in that it recorded the answers given in cross-examination but not the questions. Counsel is correct, the standard of the transcripts coming before this Court from the Magistrates' Courts leaves much to be desired.

Under section 77 (c) of the Magistrates' Courts Act, the clerk is required to forward to the Registrar of the Supreme Court with any notice of appeal a "correct transcript" of the proceedings. Whilst it may not be essential to have a record of questions asked of a witness in his evidence-in-chief it is very important that the clerk should record both the questions and the answers during cross-examination. If the clerk has difficulties keeping up with an exchange between counsel and the witness then he should immediately make that known to the presiding Magistrate. Chief Justice Ward was referring to this situation in *Cocker v Police Department* (Supreme Court, Cr App 1251/98, 5 March 1999, Ward CJ) when he said:

> "I am well aware of the difficulties faced by the clerk in the Magistrates' Court when taking the record but he must ensure that it is accurate. If, for any reason, he is unable to record the proceedings accurately, he must point that out to the magistrate and ask him to allow a break or at least to pause long enough to allow him to catch up."

In the present case, however, I do not consider that the transcript is so defective that an injustice has resulted.

Although the finding that the appellant had planned with the police prosecutor to put the blame on Pita does seem rather extraordinary, the magistrate did see and hear the witnesses and this "plan theory" was put to the appellant in cross-examination and she was given the opportunity to respond. In other words, the Magistrate made a finding of credibility against the appellant which may seem harsh, but it was a finding that was open to him on the evidence and this Court is not going to interfere.

The appellant's next ground of appeal was that the award of T$500 to the respondent was excessive in the circumstances of the case because there was no evidence that the respondent had suffered any damage to his reputation as a result of the one utterance made by Pita to Vika.

Counsel referred to section 2(1) of the Defamation Act which reads:

> "Defamation of character consists in speaking or in writing, printing or otherwise putting into visible form any matter damaging the reputation of another or exposing another to hatred, contempt or ridicule or causing him to be shunned."

and he submitted that this provision required proof of actual damage. Turning to the evidence, counsel argued that even if it is accepted that the appellant made the statement to Pita that was a statement made to one person only and there is no evidence to show that Pita believed it or thought any the less of the respondent because of it.

The appellant noted that the summons issued by the respondent made the allegation that the appellant had told the marijuana story to only the one person, namely, Pita. That was the extent of the alleged publication of the defamatory remarks made against the appellant. It was not alleged that it was the appellant who had told the police. It was not alleged that it was the appellant who had been spreading the rumour to others around the island. There was only the one alleged publication by the appellant, namely, the publication to Pita.

The appellant submitted that when one looks at the evidence to see how Pita reacted when he was told the story by the appellant it is apparent that Pita said nothing to indicate that it made any impression on him or that he believed the story or took it seriously. The appellant said that the evidence, in fact, showed that it was regarded as a joke and Counsel pointed to a passage in the respondent's evidence in-chief where, in speaking about the drug rumour, the respondent said: "my staff usually made a joke of it saying, look at the dealer driving by."

When counsel for the respondent made his submissions in this Court in response, he referred to the respondent's evidence about the frequent visits of the police to the resort and he said that while it was true that there was no evidence that the appellant had passed the information on to the police, she had been working together with the police prosecutor to "plan her case" - the inference the court was supposed to take from that submission, no doubt, being that the appellant must have passed the story on to the police.

But, as counsel himself conceded, there is no evidence of that; the proposition was never put to the appellant and it was not pleaded as part of the respondent's claim.

I consider that there is some substance to the points made by the appellant. Applying the balance of probabilities test, from my perusal of the transcript and the decision, it is difficult to avoid the conclusion that in being ordered to pay such a substantial part of the respondent's claim as damages, the appellant was effectively being punished by the Court for passing the story onto the police and for spreading the rumour generally around 'Eua when that was never part of the respondent's claim.

In his closing address in the Magistrates' Court, counsel for the respondent said:

> "The plaintiff said that the police have frequently visited his premises because of what was said."

In his decision, the learned Magistrate seems to have picked this point up and relied on it. He said:

> "Mr Hausia said that he was upset about the police frequently searching his place because of the rumours."

Further on, the Magistrate said, when listing the elements involved in establishing the defamation claim, he had to look at, "if there were any such rumours did it defame the plaintiff."

It is apparent to me from these passages that the appellant was being made to pay for telling the story to the police and for spreading the rumours when these matters were not pleaded, proved, or even put to the appellant in evidence. The only evidence of publication of the drug story was to Pita and if damages are going to be awarded, then they have to be assessed on that basis.

In *Bekker v Wrack* [1937] NZLR 549, the plaintiff, who had claimed $400 damages against the defendant for alleging she was an abortionist and unchaste, recovered from a jury an award of only one farthing. The trial judge ordered a new trial and the defendant appealed to the Court of Appeal against that decision. The appeal was allowed and the order for a new trial was set aside on the grounds that the verdict was explainable in that the respondent had suffered no damages as the two persons to whom the slanders were published did not believe them.

In *Piukana v Akeripa* (Supreme Court, C App 47/99, 3 March 1999, Finnigan J), Finnigan J was dealing with a case where the defendant had told another person that the female plaintiff had been caught with a man in the bedroom of the soccer team's house. The plaintiff sued and recovered $200. The defendant successfully appealed. Finnigan J concluded that as there was no evidence from any witness that the defendant statement had made the plaintiff an object of general ridicule and there was no evidence that anybody other than the one person had heard what the defendant had said, he would allow the appeal and set aside the judgment.

There are obvious similarities in the present case.

The question then is whether a plaintiff has an actionable cause of action in defamation under section 2(1) of the Defamation Act when the publication is made to one person only and the evidence, on the balance of probabilities, is that the person disbelieved the allegation.

Piukana v Akeripa would seem to indicate that in such circumstances a plaintiff cannot succeed and any award should be set aside. *Bekker v Wrack* on the other had, would suggest that a plaintiff still has a cause of action and the proper course is to allow the award to stand with the extent of the publication being reflected in the damages award.

In *Hough v London Express Newspaper Ltd* [1940] 2 KB 507; [1940] 3 All ER 31 (CA) at 35 Goddard, L said:

> "If words which impute discreditable conduct to my friend are used, he has been defamed to me, although I do not believe the imputation, and may even know that it is untrue."

That dictum was approved by the House of Lords in *Morgan v Odhams Press Ltd* [1971] 2 All ER 1156. The relevant extract from the headnote to their Lordship's speeches in that case states:

> "The contention that, if defamatory words concerning A are published to B who utterly disbelieves them, A would have no

> cause of action is fallacious. Apart from any question affecting the measure of damages, A's rights would be unaffected by the circumstance that B in fact disbelieved the words"

Lord Reid, in his speech was even more emphatic (page 1163):

> "One other matter I must mention at this stage. One of the witnesses thought that the article referred to the plaintiff but completely disbelieved it; he thought it was rubbish. It was argued that he must be left out of account because no tort is committed by making a defamatory statement about X to a person who utterly disbelieved it.
>
> That is plainly wrong. It is true that X's reputation is not diminished but the person defamed suffers annoyance or worse when he learns that a defamatory statement has been published about him. There may be no clear authority that publishing a defamatory statement is a tort whether it is believed or disbelieved. But very often there is no authority for an obvious proposition: no one has had the hardihood to dispute it."

From my review of the authorities I have concluded that publication of a defamatory statement to one person only does give rise to a recognised cause of action, even if that person disbelieves the statement.

Lord Reid said that in such a situation it could not be said that the plaintiff's reputation had been diminished and damage to one's reputation is one of the elements in the definition of defamation in the Defamation Act, but the definition of defamation includes more than damage to reputation; it includes such things as ridicule and the respondent's evidence in this case indicates that he was exposed to a certain amount of ridicule from his staff and Pita, of course, was one of the respondent's staff members.

Whether it was Pita who had passed the story on to the others on the staff and if so, whether the appellant could then be, held liable for the republication or repetition by Pita, as being the natural and probable consequence of her initial publication, is not something which the Magistrate made any finding on. He did not have to, of course, because republication was not pleaded. Even without that, however I am satisfied that the respondent had a valid cause of action and he was entitled to recover for the slander.

That then brings me to the issue of damages. The amount awarded against the appellant is not a large amount having regard to some of the recent awards in defamation cases in the Kingdom but weighed against the amount claimed of T$600, it is indeed a significant award and if, as I have concluded, it was based on the misconception that the respondent was entitled to recover against the appellant for all the damages resulting from publication of the story to the police and others on the Island then the award is clearly excessive.

Having said that, I am not disposed simply to award a nominal sum like the farthing awarded by the jury in the *Bekker* case. The defamation was a serious one and if it had been widely published it would have entitled the respondent to recover significant damages.

I see the respondent's situation being in many ways akin to the type of the case the learned authors of Gatley refer to (8th ed, Para 887) when they say:

> "For all this, there are occasions where a man has been defamed publicly or in a quarter in which his reputation is important to him, or damaging rumours have been widely circulated of him, and an action for defamation may be the only way of clearing his name. It was a long tradition in English public life that a person in such a position should bring an action to clear his name where possible, and failure to do so might be taken as a tacit admission of the charges made."

In the present case the respondent took decisive steps to try and stop the circulation of the rumours. He does not plead that the appellant was the source of the rumour but he sued her as one who he proved told someone else the story and he has been successful. To that extent he has cleared his name but the damages award needs to be commensurate with the extent of the publication and, I believe, that that is where the judgment under appeal is wrong. The damages award is excessive having regard to the extent of the publication.

I, therefore, allow the appeal and I vary the judgment of the learned Magistrate by deleting the award of T$500 damages and substituting therefore an award of T$100. The court fee fixed at T$21 is to remain.

The award is to be paid within 14 days of the date of delivery of this judgment failing which it will attract interest at the rate of 10% per annum as from the date of this judgment. The court fee is also to be paid within 14 days from the date of judgment.

Although the appellant has been successful in this appeal I consider that the justice of the case will best be served by my making no award of costs and I, therefore, decline to do so.

R v Tau'aika

Supreme Court, Nuku'alofa
Ford J
Cr 209/00

23, 24, 27-30 November, 1, 5-8, 13, 14 December 2000; 15 December 2000

Criminal law — rape — conflicting evidence — complainant lied — acquitted

The complainant, an 18-year-old student, claimed that she was sexually assaulted in her home in the early evening on 31 August 2000. The accused was charged with housebreaking and rape and denied the charges. He claimed that he had had sex with the complainant earlier that day but that it was consensual. At the time of the alleged rape he was fixing a motorbike.

Held:

1. The Court evaluated the conflicting evidence and found that the complainant had made up the rape story.
2. The accused was acquitted on all counts.

Statute considered:

Criminal Offences Act (Cap 18)

Counsel for the Crown	:	Ms Simiki and Mr Sisifa
Counsel for accused	:	Mr Tu'utafaiva

Judgment

In the early evening of Thursday 31 August 2000, the complainant, an 18 year-old student, was confronted by a male intruder and sexually assaulted in the bedroom of her home as she was getting ready to take a bath. After a 13 day trial that is about the only evidence on which there was no dispute between the Crown and the accused. The accused, however, who was charged with housebreaking and rape, denied strongly having had anything to do with the sexual assault.

The complainant and her family reside at Mataika, a village on the outskirts of Nuku'alofa. They are originally from Vava'u. The family migrated to Tongatapu in January of this year principally to allow the complainant to pursue a diploma course in tourism which she had commenced last year as part of the community development training programme at seventh form, Tonga High School. Her normal school hours were from 12 to 4 pm Mondays to Thursdays. There were no classes on Fridays.

The accused, Walker Tau'aika, is also originally from Vava'u. Throughout the trial, he was referred to often simply as "Walker" and for ease of reference I will follow that same approach.

Walker is 27 years of age. The complainant had first noticed him from time to time "hanging around" the streets when they lived in Vava'u but the first time they had spoken to each other was only six days prior to 31 August this year. In brief, the complainant's account of her contacts with Walker over that six-day period is as follows:

Friday, 25 August.

The complainant said that on that day she met Walker for the first time at a car wash shop at Fanga when she was with her new-found friend, Salote. Walker had a distinctive car. It was a small two door white car with a shark painted on either side of it. The windows were tinted and they appeared to be black from the outside.

Walker offered to take the two girls into town and drop them off at school and they accepted. Walker drove the car, the complainant sat in the rear scat behind him with Salote alongside her. Walker's friend, Sioeli, sat in the front passenger seat. Before dropping the girls off at the Memorial Hall by their school, Walker drove out to a house at Havelu and after going inside he came back out to the car and they continued on their way to town. The complainant said that during that section of the journey she noticed Sioeli smoking something and exhaling it into an empty soda can and then he inhaled the smoke through a hole that had been cut in the side of the can. At that point, the complainant noted a distinctive smell that she had never encountered before. She said that "the guys" told her it was marijuana. She was upset because the smoke came across to the back of the car and, as the rear windows could not be opened, she started to feel a headache. The complainant said that on that same trip she noticed Walker wearing a gold chain around his neck. She observed it while he was sitting in front of her.

That same Friday evening the complainant was at home in her bedroom when she heard music coming from a car radio and her name being called out. She looked out the window and saw that the call was coming from Walker's "shark car". She did not recognise the voice calling out but one of her younger brothers called back that she was not home and so the car left.

Monday, 28 August.

The complainant said that she next saw Walker again during the afternoon of Monday 28 August for a short period. She was walking with Salote and Walker drove up in his distinctive car and dropped off another person called Sione Nau.

When Walker came back to pick up Sione Nau about an hour later he asked the girls to go for a ride but the complainant refused. He asked her if she wanted money to buy something to eat and when she said, "yes", he gave her $10.

Tuesday, 29 August.

On the following day, Tuesday 29 August, the complainant said that at about 3pm she was walking up to Salote's house so that they could go to the 3pm to 4pm class at school together when Walker drove up and asked her if she wanted to get into his car. Again, she refused.

Thursday, 31 August (the morning).

On the morning of Thursday 31 August, the complainant was standing at a bus stop by her home waiting for a bus to take her into town where she planned to hand in an assignment to one of her tutors who worked as an assistant manager at the Dateline Hotel. While she was waiting on the bus stop at Mataika, Walker drove up and told her to get into his car and he would take her to school. She refused and she caught the bus which came along at the same time. Then, after waiting unsuccessfully for over an hour to see her tutor, the complainant caught another bus from the Dateline Hotel back to her school and when she alighted from the bus shortly before 2pm, Walker drove up, stopped his car and gave her some biscuits and another $10.

That summarises the complainant's account of her contacts with Walker prior to the incident on the evening of Thursday, 31 August.

On the Thursday afternoon, the complainant had an exam which finished at 4 pm and then she caught a bus home. She changed her clothes and visited a neighbour with her mother for a short period and later, after her father had arrived home from work sometime after 5 pm, she made a brief visit to the family plantation where her parents and younger siblings had gone to collect taro. From there, she proceeded to make her own way back home stopping off at a relative's house for a short time.

When the complainant arrived home, she put on the kettle in preparation for her bath and then walked towards her bedroom to fetch a towel which was hanging on the bedroom door. The Crown's case is that at that point, the complainant noticed someone in her bedroom rummaging through her school bag; he was about the same build as her and he was dressed in black. She told the police that he was wearing a balaclava. She thought it might have been someone playing joke. Out of curiosity she walked over and tapped the person, on the back. As he turned around she could see his eyes through the one hole in the hood and she could smell the same distinctive marijuana smell she had encountered in the shark car six days previously. She also recognised the gold chain the person in her bedroom was wearing as being the chain worn by Walker on that occasion.

At that point, the complainant took fright and ran out of the bedroom into the living room but the man grabbed her from behind and she fell to the floor losing consciousness. A few minutes later, Crown counsel continued in her opening, the complainant gained consciousness and realised that she was no longer in the living room but she was lying beside her bed. She was experiencing an excruciating pain from her vagina area and she noticed that her panties had been pulled down around her thighs. She started crying.

At approximately 6 pm her parents arrived home and heard their daughter crying. She told them that a male person had come into the house and had sexually assaulted her. At that stage she was sitting upright alongside her bed with her legs stretched out and her hair was dishevelled. She was still wearing her singlet properly but her lava lava was down around her legs - some of it was covering her legs and her pants were halfway down around her thighs. There was blood around her vagina and all over the crotch area of her panties. The complainant told the Court that she lost her virginity on the 31st August.

The complainant's mother left the house yelling and shouting and asking God why he had brought this problem on the family. The father also left the house trying to find the offender. At that point, a neighbour, Vaisioa Sikulu, came across to help.

She entered the bedroom and spoke to the complainant. The complainant asked her to hand her the school bag which was on the bed. She did so and when the complainant tipped out the contents, apart from school material, a wrist watch also fell out of the bag. The watch was later identified as Walker's.

The police were contacted at about 6.30 pm and the complainant was taken to hospital where she was examined by a medical practitioner who prepared a report and gave evidence. The doctor told the Court that her examination showed a recent tearing of the hymen with fresh bleeding and bruising inside the vagina consistent with recent intercourse. There was no sign of any other external bodily injury or trauma and the doctor gave no evidence about any findings of semen.

The police took a statement from the complainant following her release from hospital on the evening of 31 August and another statement on the following day, 1 September. Because of illness, the sergeant who took the initial statement had to arrange for another police officer to take the second statement.

Walker was arrested at 7 am on Saturday 2 September. He was kept in the cells but because of the sergeant's illness, a statement was not obtained from him until the Sunday evening. That statement covered his movements on Thursday 31 August. Prior to giving the statement, Walker had been formerly charged. On Tuesday 5 September a further detailed statement was taken from Walker covering his movements during the six days leading up to Thursday 31 August.

The accused elected to give evidence. He did not have to because the onus remains on the Crown throughout to prove beyond reasonable doubt every element of each charge. Walker gave his account of his meetings with the complainant prior to 31 August. In summary, what he said was:

Friday, 25 August.

He and Sioeli picked up Salote and the complainant at the car wash at Fanga at about 12 noon and then they went cruising in the shark car on the east side of Tongatapu to Fatumu and then Fua'amotu beach before he dropped them back at school at about 4 pm. Walker said he had arranged with the complainant to go out again at 9 pm that same evening. He later heard from Salote that the complainant was busy and would not be going. He, nevertheless, drove around to her place with Sione Nau and asked a friend of his, Tevita Lasitani, who lived locally, to point out the complainant's house. He said in his statement to the police that Sione and Tevita called out for the complainant and when they were told she was not home they drove away. In cross-examination, he acknowledged that he had also called out.

Monday, 28 August.

Walker said that on the Monday evening when he returned to pick up Sione Nau from the shop where he was waiting with the complainant and Salote, the complainant got into his car and they talked and he asked her if she would be his girlfriend and she had said "yes" and they then arranged to go for a cruise in the car the following day. He said that he then gave the complainant $20.

Tuesday, 29 August.

Walker said that about 11 am on this day, he and Sione Nau picked up the complainant and Salote and they went cruising to the west side of Tongatapu out to Ha'atafu before returning to the east side and driving out to Fua'amotu beach and then Lavengatonga where they parked. Initially Walker was driving and then they changed

around and Sione Nau took over the driving while Walker sat in the back seat with the complainant. Walker said that he was kissing the complainant and sucking her breasts. He said that at Lavengatonga he and the complainant, remained in the back of the car while Sione Nau and Salote sat outside under a tree a short distance away from the car. He said that he then attempted to have sex with the complainant. He said that she took off her own pants and underwear and at the same time he took off his pants but he then saw that the complainant was crying. She asked him whether he loved her and he said that he did. Although he started to have intercourse there was no penetration because he felt sorry for her. He said that she was embarrassed because of the presence of her friend, Salote. Walker said the complainant suggested to him that they wait and "do it properly later on". Walker agreed. He said that they then arranged to go out again at 10 am on Thursday, 31 August, and, because she did not have a watch, he gave the complainant his own wrist watch and before giving it to her, he set the time to coincide with the time showing on the car clock. The complainant, according to Walker, then put the watch on her wrist.

Thursday, 31 August.

Walker's account of his movements on Thursday 31 August were recorded in some detail in the first statement he gave to the police. In essence, he said that, in accordance with the arrangement they had made the previous Tuesday, he picked up the complainant sometime after 10 am that morning. He then described their movements up until the time he said he dropped her off back near her community school at about 2 pm.

Most significantly, Walker said that during this period he and the complainant drove out to an allotment at Sopu. The allotment is owned by a Sione Filipe who was described in evidence as a wealthy Tongan businessman. He stores containers on part of the land and runs a 2 acre pigs sty on another section of the property. Walker enjoys a close association with Filipi and, apparently, from time to time he carried out caretaking work for him at a nightclub he also owns called "Little Orphan" on some basis which was never satisfactorily explained. In all events, Walker says that he parked his car under a "fau" tree at the southern boundary of the pigs sty area of the allotment and he proceeded to have sex with the complainant in the back seat of his shark car. He said that he ejaculated inside the complainant's vagina. He described how, after the love-making, the complainant became upset, first, when he queried why there was no bleeding if she had been a virgin as she claimed and later, when in response to her suggestion that they go away somewhere together, Walker disclosed that he was a married man. Walker said that in her anger, the complainant grabbed the gold necklace he had around his neck and pulled it and broke it. He says it fell onto the floor of the car and he has never worn it from that point on. He also told the Court that during the love-making session a man who he knew only as Mapu, who worked as a caretaker on the allotment at Sopu, approached the car and saw the complainant and himself while they were actually having sex.

Walker said that when he dropped the complainant back at school at about 2 pm, they had an arrangement to go out again at 10 pm that evening. The arrangement was that the complainant and Salote would after school go to the complainant's home and Salote would then invite her, in front of her mother, to come and stay with her for the night. The idea was that Walker would then pick the complainant up from Salote's home at about 10 pm and they would go cruising.

Walker said that on the Thursday evening at the time of the alleged sexual assault, he was helping an acquaintance Feleti Tamanika, fix parts to his (Feleti) motor bike at a garage at the Little Orphan.

Both the complainant and Walker were expertly cross-examined at considerable length and it became obvious from an early stage that one or other of them was giving false evidence. It is fair to say that the tell-tale signs the Court looks for on issues of credibility began to appear at a fairly early stage but the certainty that the Court requires in order to determine the outcome of a criminal trial came, in the end, not from the main protagonists, but from lesser players each of whom had their own story to tell. Much of this evidence related to the various meetings between the complainant and Walker between the 25th and 31st of August. Although of no direct relevance to the housebreaking and rape charges, those earlier incidents had a crucial bearing on the issue of credibility.

My conclusion, after studying intently every aspect of the demeanour of all the witnesses called by both sides over this lengthy trial, is that, in general terms, each witness did his or her best to assist the Court with their honest recollection of the events they described. There was only one notable exception. Only the one witness who set out to deliberately lie and deceive the Court and that witness, I'm afraid to say, was the complainant herself. Not only have I concluded the accused is not guilty of the crimes of housebreaking and rape with which he has been charged but I have reached the firm conclusion that the rape or sexual attack described so graphically by the complainant never, in fact, took place. In my considered opinion, it was all a fabrication - a lie, but it very nearly resulted in the conviction of an innocent man.

I do not propose to detail every aspect of the lengthy trial which drew me inexorably to the conclusion that the complaint was a fabrication but I will refer to just some of the relevant matters. First, there were so many question marks raised over the circumstances of the alleged rape itself such as:

- Why, not one person in the close-knit neighbourhood saw any sign of a man or of a vehicle in the area at the time the incident allegedly happened which was about 6 pm when it was still broad daylight?
- How the alleged sexual intercourse took place while the complainant's panties were positioned halfway around her thighs?
- If the flow of blood had come from the rape, how does one account for the blood on the crotch of the pulled-down panties?
- Why there was no evidence of blood on the floor of the bedroom, if that is where the rape was supposed to have taken place?

Secondly, the complainant's description of her attacker:

- How she noticed the gold necklace around the accused's neck (which on demonstration in Court was tight-fitting) when he was supposedly wearing a hood over his head.
- Her description in Court of the gold necklace as being one of the most important features which enabled her to

identify the assailant as Walker as soon as she saw him and her statement in cross-examination that she noticed the necklace on her attacker as soon as she entered the bedroom and yet she did not even mention the gold necklace in her statement to the police that evening.

- How the complainant was able to identify the attacker as being Walker before she lost consciousness but was not able to confirm that again in her own mind until the following morning after she had lay awake all night thinking about it was never satisfactorily explained to the Court. In her evidence in chief she was asked:

  "You say you recognised this person when you saw the chain, when he faced you -- who was it? When I saw his face I was then sure -- certain that this person was Walker."

  Later in evidence in chief, after the complainant acknowledged that she was unable to tell the police on the night what her attacker looked like, the following exchange took place:

  "When were you sure the person you saw that particular evening was Walker? After I was taken to hospital I came home and I was unable to sleep. Just before dawn I tried to remember everything I could about this person and my conclusion was that the person was Walker. What did you think to confirm it was Walker? First, his eyes. Secondly, his gold chain and thirdly, the smell of marijuana, confirmed my suspicions.

There was no medical evidence that would explain this phenomenon - how the complainant could be certain the man was Walker as soon as she saw him but was unable to tell that to the police or relay her certainty in this regard to anyone until the following morning.

Then, again without going into all the details, there were a number of inconsistencies in the complainant's description of the "attack" on her and what caused her to lose consciousness. She said in her evidence:

- "When he turned around I knew that it looks as though he was trying to grab me so I turned around myself and ran towards the living room. I was very frightened because I do not know why he turned around and tried to grab me. I ran straight into the wall -- the wall of the living room. As I ran towards this wall there was a table located by the wall. Before I reached the table, I felt something grab me from behind then I fell on the floor and lost consciousness. Do you remember how you fell -- front or back? I was being grabbed from the back and I fell to the back. I do not know if I was being punched."

- The complainant's neighbour, Vaisioa Sikulu, told the court that when she talked to the complainant a short time after the incident, she had told her that, "they had struggled and the man punched her and she fell on the floor in the living room."

The complainant's statement to the neighbour that she had been "punched" was no doubt the reason that prompted the Crown to cross-examine Walker about his boxing ability and his apparent trademark punch of a left hook to the jaw of his opponent when he represented Tonga and Oceania in his younger days. However, there was no evidence whatsoever of any outward abrasions or bruising to the complainant's jaw or any other part of her body.

Apart from these unsatisfactory aspects of the complainant's evidence about the so-called sexual attack, there were other dubious aspects in her story which, as it were, sounded the alarm. She never did explain, for example, why it was so necessary for her to wait at the Dateline Hotel for over an hour simply to hand in some assignment to her tutor. Why did she not leave the assignment under the tutor's door? In her evidence in chief she said that she had gone to the Dateline to give her tutor an assignment. Under cross-examination, however, when asked if she had an appointment to see the tutor at the hotel that morning, she said, "no". When she was then asked why she had gone to see him that morning she said that there had been a handout of an assignment given to the class and she had not been able to get one. Why these two different explanations for the trip to the Dateline Hotel were given was never explained. A receptionist on duty at the hotel at the time was called by the Crown. She was unable to recall having seen the complainant waiting in the reception area on the day in question but she conceded that, because of her other duties, she would not necessarily have noticed her. Coupled with this evidence, was the extraordinary co-incidence of Walker driving past the complainant's school just at the time that she was alighting from the bus she had caught from the Dateline.

But quite apart from all these unsatisfactory features in the complainant's evidence, there was, as I have indicated the absolutely compelling evidence of other witnesses which confirmed in virtually all respects the accused's account of his contacts with the complainant up to the evening of 31 August.

If the complainant was prepared to lie under oath about those other incidents then what possible credence can this court give to her evidence about the alleged rape.

One of the compelling witnesses I refer to in this regard is Mapu Naulangi, the man who actually saw Walker and the complainant having sex in the back seat of the shark car at the allotment in Sopu. He is a family man 47 years of age. He has been a lay preacher in the Free Church of Tonga for several years. Mapu had started working for Sione Kelepi as caretaker of the allotment earlier in that month of August. For some reasons, which I cannot understand, he was never interviewed by the Police. He said that on the morning in question, he was waiting by a shed on the allotment for a man to come and fill one of the containers with gas. He noticed Walker's car as it entered the allotment and travelled over to the southern boundary of the pigs sty where it parked. He knew it was Walker's car. He had seen it two or three times previously. He carried on with his work for a period then, out of curiosity, he walked up to the car and saw through the open front passenger window a girl lying on her

back in a "crouching position" in the back seat with Walker on top of her. Both were naked from the waist down and they were engaged in sex. Mr Naulangi said that Walker looked up and saw him and he felt ashamed because he thought the girl was Walker's wife and so he walked away outside the fence where he stayed for some 10 minutes. When he returned, Walker and the girl were outside the car. Walker was sitting on the front bonnet and the girl was leaning on him. Walker told Mapu that he and the girl were just good friends. I found Mr Naulangi to be a patently truthful witness.

I will not review all the other evidence but I have taken it into account. For the avoidance of doubt, however, I record that I accept the explanation given in this Court by one of the other Crown witnesses, Tevita Lasitani, for his earlier inconsistent statement about Walker's watch. I accept Walker's story about his giving the watch to the complainant at the time and place he said.

Lasitani was, apparently, not the only Crown witness to change his story. In his closing submissions yesterday afternoon Counsel for the accused reminded the Court that in his original statement to the police detailing events on the day of the alleged rape, Walker had said that in the evening on his way to the Little Orphan where he helped Feleti Tamanika carry out repairs to his motorbike, he (Walker) was stopped by a police constable on the By-pass road and was told to put a safety tie on his Helmet. This was potentially important evidence because Feleti Tamanika was called by the defence and he said that Walker arrived at the garage where he was working on his motorbike at about 5.45 pm. Obviously, Walker could not have been at the Little Orphan garage and in the area of the complainant's home at Mataika at the same time and in his statement Walker named the policeman who had stopped him on his motorbike on his way to the Little Orphan.

In all events, the Crown proposed to call the policeman concerned but the policeman was indisposed with a medical condition. The Court, therefore, made arrangements for the policeman's evidence to be taken at his home but on the morning that the evidence was to be given, the Court was informed that the Crown had decided not to call the policeman as a witness. Counsel's submission yesterday, on behalf of the accused, was that in the absence of evidence to the contrary, Walker's statement about being stopped by the policeman about the same time that he was supposed to be at the rape scene would have to be accepted as unchallenged.

At the very end of the Crown's submissions, I invited the prosecutor to comment on this particular submission and she then informed the court that the reason the Crown did not call the policeman was because he had initially given a statement to the police in which he said that he did not see Walker that day but when she went to see him at his home to make the final arrangements for the taking of his evidence, he had changed his story and he now said that he did see Walker that afternoon as Walker had said and because of the change in story, the Crown "came to the conclusion that his evidence should be excluded". I must say that if the Court had been aware of this information at the time then it would have insisted on the policeman's evidence being taken. The position, in this regard, is well summed up in the following passage from Halsbury, 4th edition, Vol 11, paragraph 286:

> "… there is a wide discretion in the prosecution whether it should call them (witnesses), either calling and examining them, or calling and tendering them for cross-examination; if the evidence

> of a witness is capable of belief, the prosecution is under a duty to call him, even though the evidence he is going to give is inconsistent with the case sought to be proved; the prosecution's discretion must be exercised in a manner which is calculated to further the interests of justice and is at the same time fair to the defence."

The thrust of the Crown's attack on the evidence called on behalf of the accused was that the seven witnesses, with one exception, were family members or work mates and the stories they told were so remarkably consistent with the accused's account that the only sensible conclusion that could be drawn was that Walker, at some stage, had got together with them and concocted their evidence to fit in with the statement he had given to the police.

That is one explanation, although given the thoroughness of the Crown's cross-examination, the accused would have needed to concoct a very detailed and elaborate script. Another explanation, and it is the one which I do not have any difficulty accepting, is that the witnesses called on behalf of the accused, who were not in any event all family members or work mates, were telling the truth.

In this regard one witness I want to make special reference to is the complainant's former friend, Salote 'Ova. She was not a family member or work mate of Walkers. Salote had been subpoenaed by the Crown but not called as a witness. The accused elected to call her as a defence witness. It is fair to say that Salote had been presented by the Crown as the turncoat who, after the alleged rape, had betrayed the complainant and sided with Walker to fabricate false evidence about the cruising out to the east in Walker's car on Friday 25 and the even longer cruising trip on Tuesday 29 August. I record, however, that I found Salote to be an important and an honest witness and her evidence turned out to be quite crucial to the case.

At the end of her evidence, Salote was asked by the Court why she believed the complainant denied the cruising in Walker's car. The answer given by Salote, which I accept, was that the complainant was afraid of her parents. In my opinion, that is also the most likely explanation for the complainant's false rape allegation. The complainant is the eldest of six children. Her mother told the Court the reason the family moved from Vava'u to Tongatapu at the beginning of the year was to enable their daughter to continue her schooling. The parents were obviously proud of her. At the same time, the mother impressed as being a strong minded person with a religious upbringing and possessing high moral standards.

When, in the absence of truthful evidence, the Court looks for the most likely explanation of what happened on that Thursday evening at Mataika, it is difficult to avoid the conclusion that it was a case of the complainant suddenly being overwhelmed by the enormity of the events of the day. Whether the bleeding from the hymen found on the panties and around the vagina area had, in fact, taken place closer to the time of intercourse at Sopu or whether, for some reason, the bleeding was delayed or perhaps even the result of a period was not fully explored. The doctor seemed to accept without difficulty that the bleeding could have been 4 hours old. That brings it closer to the time of the intercourse at Sopu. In cross-examination the complainant accepted that if she was having her period, that could be an explanation for the blood on the crotch of the panties.

In all events, I believe that the most likely explanation of what really happened is that when the complainant was in her bedroom alone preparing for her bath and she saw the blood she suddenly became overwhelmed by the realisation that she had lost her virginity to a married man who, for that reason, could never be her boyfriend. She may have even contemplated the possibility of pregnancy. She became fearful at the prospect of her mother, in particular, learning the truth. She began to cry uncontrollably and when her mother confronted her a relatively short time later, she made up the rape story. Everything else flowed from there.

In re-examination the complainant was asked:

> "Did you have intercourse before 31 August? I am sure that I haven't had intercourse before 31 August. Tell the Court what time you lost your virginity. To my recollection it was 31 August".

This answer disguised the fact that the loss of virginity had taken place, not in her bedroom at Mataika, but, in the back seat of the "shark" car in the pigs sty on Sione Filepi's allotment at Sopu.

In the opening paragraph of this Judgment, I said that after a 13 day trial, the only evidence upon which there was no dispute between the parties was that on Thursday 31 August, the complainant was confronted by a male intruder and sexually assaulted in the bedroom of her home as she was getting ready to take a bath. The irony of that statement in the light of my conclusions, has not escaped me.

Before the case began, I made an Order at the request of Crown counsel, endorsed by counsel for the accused, that, for the protection of the complainant's identity, all the evidence relating to the case would be heard in camera pursuant to section 119 of the Criminal Offences Act. As it turns out, if it were not for the embarrassment her family members, in particular her parents, might otherwise suffer, I would now not hesitate, if I could, to rescind that Order so that the complainant might suffer the ignominy and shame from exposure that she deserves.

The accused, Walker Tau'aika, is acquitted on all counts and is freed from this Court.

Vaotangi v Vaotangi

Supreme Court, Nuku'alofa
Ward CJ
C 19/00

18 December 2000; 18 December 2000

Practice and procedure — challenge to accuracy of court record — needs affidavit evidence — challenge failed
Family and domestic relationships — maintenance — evidence of means not heard — new trial ordered

The respondent brought a claim in the Magistrates' Court for maintenance. The claim was "for $100.00 for past maintenance and $70.00 for future maintenance due to the fact that you left your wife and 3 children without any maintenance". The magistrate heard the case on 14 September 2000. He asked if the appellant defended the claim and was told he did not wish to do so. The magistrate made orders for past maintenance of $100 and future maintenance of $50 per week. The appellant appealed against those orders on three grounds. The first two were based on a challenge of the accuracy of the court record as to whether the appellant was asked if he had a lawyer and that he did not dispute the right to maintenance. The third ground was that the magistrate's decision to allow the respondent's claim was based on no evidence placed before the court.

Held:

1. Where, on appeal, a challenge was made to the accuracy of the record, the appellant should supply affidavit evidence of the suggested inaccuracy. Without it, the appellate court was unable to consider anything beyond the record itself. The first two grounds of appeal stemmed from the suggested error. There was no evidence before the Court and so they failed.
2. Where the magistrate was determining the amount of maintenance that should be paid, he should hear evidence of means. He clearly did not in this case and the case must be returned for such evidence to be produced. To that limited extent, the appeal was allowed.
3. The magistrate's order of the amount of maintenance was quashed and the case was remitted to a different magistrate to hear evidence and determine the sum de novo.

Case considered:

Taufa v Ma'u [1994] Tonga LR 97

Counsel for appellant : Mr Tu'utafaiva
Counsel for respondent : Mr Fakahua

Judgment

The respondent brought a claim in the magistrates' court for maintenance. The claim was "for $100.00 for past maintenance and $70.00 for future maintenance due to the fact that you left your wife and 3 children without any maintenance".

The magistrate heard the case on 14 September 2000. He asked if the appellant defended the claim and was told he did not wish to do so. It continues:

> "Ct: Do you have a lawyer?
> Deft: Yes Sir, but I wish to represent myself as I do not dispute this claim for maintenance. Sir, I wish to say a few words. The reason why I left home was because my wife chased me from home saying that it is not my home but hers and that's why I left home.
> Ct: That's all right we are not hearing a case about you leaving home. The reasons why we are here today is about maintenance of your wife and three children; it does not mean that you leave home and you don't have to provide for your wife and three children.
> Deft: Sir, I do not dispute this claim for maintenance.
> Ct: All right, I will order for the maintenance of your wife and your children. Firstly, order for past maintenance of $100.00 to be paid. Lawyer's fee $100. 00. Court fees of $8.00. Future maintenance $50.00 per week starting from 18/09/00. All these to be paid in 2 weeks if not a warrant of distress to be issued."

The appellant appeals against those orders on three grounds. The first two are based on a challenge of the accuracy of the court record. Mr Tu'utafaiva tells the Court that he was instructed to represent the appellant that day but was delayed because he had been detained in the Supreme Court. He only reached the magistrates' court at about 11.00 by which time the case had been concluded. He explains that his instructions in this case were to dispute the propriety of the maintenance order as well as the amount to be paid.

He challenges the statement in the record that the appellant was asked if he had a lawyer and that he did not dispute the right to maintenance. He tells the court that his client denies that is correct Mr Fakahua, for the respondent, was at the lower court and supports the general accuracy of the record.

As long ago as 1994, I pointed out in the case of *Taufa v Ma'u* [1994] Tonga LR 97 that where, on appeal, a challenge is to be made to the accuracy of the record, the appellant should supply affidavit evidence of the suggested inaccuracy. Without it, the appellate court is unable to consider anything beyond the record itself. It is not sufficient for counsel to speak of it from the bar table.

In the present case, counsel could not agree about the accuracy of the record and so the court needed evidence upon which to resolve the dispute. Even where counsel agree both that there is an inaccuracy and its exact nature, there will still need to be an affidavit to demonstrate the error and the correct version.

The first two grounds stem from the suggested error. There was no evidence before the Court and so they fail.

The third ground, is that the magistrate's decision to allow the respondent's claim was based on no evidence placed before the court. It would appear from the record that the magistrate might have considered that the appellant's statement that he did not dispute the claim for maintenance extended to an acceptance of the amount. That would have been a reasonable assumption but I consider that it could equally have been a statement simply that he did not dispute liability.

In all cases where the magistrate is determining the amount of maintenance that
90 should be paid, he should hear evidence of means. He clearly did not in this case and the case must be returned for such evidence to be produced. To that limited extent, the appeal is allowed.

The magistrate's order of the amount of maintenance is quashed and the case is remitted to a different magistrate to hear evidence and determine the sum de novo.

Fonua v Yeoh

Supreme Court, Nuku'alofa
Ward CJ
C 716/00

19 December 2000; 19 December 2000

Practice and procedure — 'unless' order not complied with — not extended

The plaintiff in this action previously brought a claim against the MBf Bank in the Supreme Court and lost (*Fonua v MBf Bank Ltd* [1999] Tonga LR 4). The Court found that it had been a worthless case and ordered costs on a solicitor/own client basis. The plaintiff took the case to appeal and it was dismissed (*Fonua v MBf Bank Ltd* [2000] Tonga LR 319 (CA)). This action was another attempt to litigate the same case. The defence applied to strike out the action or, alternatively, for security for costs. Counsel for the plaintiff insisted there were new elements in this case and he was given 14 days to file an amended statement of claim. A hearing date was set for the applications a week after the expiry of the 14 days and the amended statement of claim had not been filed. The Court gave further time but the defence asked that the question of security be heard then; the Court agreed. The basis of the application was that, not only was the case a re-run of the previous action and therefore likely to be unsuccessful, but the costs of $18,000 for the previous case had not been paid. The Court allowed further time to file the amended statement of claim and ordered that, unless the plaintiff deposited $18,000 security for costs by the next hearing date the action would be struck out. The money was not paid. Counsel for the plaintiff asked for further time.

Held:

1. There was no evidence of the extent and effect of the extraneous circumstances that prevented him complying with the "unless" order. There was also no attempt to explain why the earlier order for costs was not paid and why the plaintiff was likely to be able to pay his costs in the present action should he have been unsuccessful.
2. The plaintiff's failure to pay was intentional and deliberately ignored the order of the court.
3. The Court did not consider this a proper case to exercise its discretion to extend the "unless" order and, as the plaintiff failed to obey, the action was struck out with costs to the first and third defendants.

Cases considered:

Birkett v James [1978] AC 297; [1977] 2 All ER 801
Jokai Tea Holdings Ltd, Re [1992] 1 WLR 1196; [1993] 1 All ER 630
Samuels v Linzi Dresses Ltd [1981] QB 115; [1980] 1 All ER (CA)
Whistler v Hancock (1878) 3 QBD 83

Counsel for plaintiff : Mr Fifita
Counsel for first and third defendants : Mrs Vaihu
No appearance for second defendant

Judgment

The plaintiff in this action previously brought a claim against the MBf Bank in the Supreme Court and lost. The Court found that it had been a worthless case and ordered costs on a solicitor/own client basis. The plaintiff took the case to appeal and it was dismissed. The Appeal Court referred to the order of costs and said:

> "Plainly such an order is exceptional; but this was an exceptional case. A claim of this kind causes needless expense and embarrassment, and waste of the resources that society puts into the Court. In our opinion his Honour was entitled to exercise his discretion as he did. For the same reasons, this Court dismisses the appeal with costs to be taxed as between solicitor and client."

The previous claim arose from an agreement between the plaintiff and the present second defendant. The present first defendant was the manager of the MBf bank responsible for the financing that agreement. The present action is, in essence, another attempt to litigate the same case.

Not surprisingly, the defence applied to strike out the action or, alternatively, for security for costs. Counsel for the plaintiff, however, insisted there were new elements in this case and I gave him 14 days to file an amended statement of claim. A hearing date was set for the applications a week after the expiry of the 14 days and the amended statement of claim had not been filed. I gave further time but the defence asked that the question of security be heard then. I agreed.

The basis of the application was that, not only was this a re-run of the previous action and therefore likely to be unsuccessful, but the costs of $18,000 for the previous case had not been paid.

I allowed further time to file the amended statement of claim and ordered that, unless the plaintiff deposited $18,000 security for costs in this case by the next hearing date (set in five weeks time), the action would be struck out. The money was not paid.

Counsel for the plaintiff has asked for further time. He points out that the plaintiff is owed money by clients. He is in particularly straitened circumstances at the moment because one company with whom he had a substantial contract had ceased trading. He had asked the bank for a loan to meet the security but it had refused. He asks for two more months because, he says, he is owed enough money to meet some of the security and should receive it by then. No evidence of the nature of these sums was given nor of the identity of the debtors nor of the nature or age of the

debts. Like so many matters raised by the plaintiff they are vague and speculative - long on expectation and short, very short, on substance.

The defendant accepts all these matters as demonstrating the reason for their concern that the plaintiff is in fact a man of straw. I agree. It should be remembered that these actions all relate to the money ordered as security in the present action. They make no mention of the sum still outstanding for the earlier case. That has been outstanding for a long time and, if the plaintiff is as successful a business man as he would have the court believe, he would presumably have had substantial sums in his hands during that period.

Mr Fifita, for the plaintiff, points out that, even when there has been a failure to comply with an "unless" order, the court always has a discretion to allow more time. That is plainly correct and I accept the principles on that stated in *Samuels v Linzi Dresses Ltd* [1981] QB 115; [1980] 1 All ER (CA). However, it must still be a matter of discretion. In that case, Roskill LJ finally set the principle in *Whistler v Hancock* (1878) 3 QBD 83 to rest and continued:

> "In my judgment, therefore, the law is that a Court has power to extend the time where an "unless" order has been made but not been complied with; but that it is a power that should be exercised cautiously and with due regard to the necessity for maintaining the principle that orders are made to be complied with and not to be ignored. Primarily it is a question for the discretion of the master or the judge in chambers whether the necessary relief should be granted or not."

In *Re Jokai Tea Holdings Ltd* [1992] 1 WLR 1196 at 1202; [1993] 1 All ER 630 Browne-Wilkinson VC confirmed the reasoning in the *Samuels* case and then passed on to consider the class of case described in *Birkett v James* [1978] AC 297; [1977] 2 All ER 801, where the delay (as it was in that case) had been intentional and contumelious. He continued:

> "The basis of the principle is that orders of the court must be obeyed and that a litigant who deliberately and without proper excuse disobeys such an order is not allowed to proceed. The rationale of such penalty being that it is contumelious to flout the order of the court, if a party can explain convincingly that outside circumstances account for the failure to obey the peremptory order and that there was no deliberate flouting of the court's order, his conduct is not contumelious and therefore the consequences of contumely do not flow…
>
> In my judgment, in cases in which the court has to decide what are the consequences of a failure to comply with an "unless" order, the relevant question is whether such failure is intentional or contumelious. The court should not be astute to find excuses for such failure since obedience to orders of the court is the foundation on which its authority is founded. But if a party can clearly demonstrate that there was no intention to ignore or flout the order and that the failure to obey was due to extraneous

> circumstances, such failure to obey is not to be treated as contumelious and therefore does not disentitle the litigant to rights which he would otherwise have enjoyed."

The plaintiff here pleads extraneous circumstances as preventing him complying with the unless order. However, as I have stated, there is no evidence, beyond counsel's observations, of the extent and effect of those circumstances in relation to this case. Further, there is no attempt to explain why the earlier order for costs, which is understandably the prime cause of the defendants' concern in this case, has not been paid and why, therefore, the plaintiff is likely to be able to pay his costs in the present action should he be unsuccessful.

I am satisfied that the plaintiff's failure to pay is intentional and deliberately ignores the order of the court.

I do not consider this is a proper case to exercise my discretion to extend the "unless" order and, the plaintiff having failed to obey, the action is struck out with costs to the first and third defendants.