TONGA
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Hon Justice James Burchett
Justice Sir David Tompkins
Hon Justice Bryan Beaumont

Supreme Court

Chief Justice:
Hon Justice Gordon Ward

Hon Justice Daniel Finnigan

Land Court

Hon Justice Gordon Ward, Chief Justice
Hon Justice Daniel Finnigan

Magistrates' Court

Chief Magistrate:
Mr Siaosi Fifita

Principal Magistrate:
Mr Palavi Tapueluelu

Ms Vusenga Helu
Mr Latu Mohenoa
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Tukuafu v Siakumi

Supreme Court, Nuku'alofa
Ward CJ
C 583/95

11 January 1999; 15 January 1999

Practice and procedure — strike out application — whether English legislation applies in Tonga
Practice and procedure — whether action for vicarious liability available in Tonga — claim possible

By writ filed on 3 July 1995, the plaintiff sought damages that arose from the death of his son after he was struck by a vehicle driven by the first defendant. No defence was filed by the first defendant and judgment in default was entered on liability against the first defendant with damages to be assessed. The second defendant was the employer of the first. On 13 October, the second defendant filed an application to strike out the claim against it on the ground that the claim by the plaintiff had been satisfied by the default judgment against the first defendant, therefore the claim against the second defendant should be struck out. This was a common law position that had been altered in England by legislation. The applicant (second defendant) contended that the English legislation had no general application in Tonga.

Held:

1. The test as to whether English legislation applies in Tonga was whether local law provided a complete code? If so, that was the end of the matter and local law applied; if not, did the local law expressly or by implication exclude English law?" There was no local law that covered this matter or excluded the English law so the English Act applied. There was a clear right to proceed against the second defendant so the application to strike out failed.
2. The plaintiff claimed against the second defendant on the basis of vicarious liability. As such a claim was possible under the English legislation it was available in Tonga. The trial of the claim against the second defendant must proceed.
3. Costs were ordered to be paid by the second defendant.

Cases considered:

Brinsmead v Harrison (1871) LR 6 CP 584; [1861-73] All ER Rep 465
Kingdom of Tonga v Save (unreported, Court of Appeal, CA 626/93)
Teta Ltd v Ullrich Exports Ltd [1981-88] Tonga LR 127

Statutes considered:
Civil Law Act CAP 25
Civil Liability (Contribution) Act 1978 (UK)
Fatal Accidents Act CAP 34
Law Reform (Married Women and Joint Tortfeasors) Act 1935 (UK)

Counsel for second defendant/applicant : Mrs Taumoepeau
Counsel for plaintiff/respondent : Mr Foliaki

Judgment

By writ filed on 3 July 1995, the plaintiff seeks damages arising from the death of his son after he was struck by a vehicle driven by the first defendant. The claim, under the Fatal Accidents Act CAP 34, was initially made by the father on behalf also of the brother and sister of the deceased. Mr Foliaki for the plaintiff now concedes that the two latter are not covered by the provisions of the Act and seeks to proceed only on behalf of the father.

No defence was filed by the first defendant and application for judgment in default was filed with the Court on 1 September 1995. The case seems to have followed an unhurried course with a series of hearing dates fixed and then adjourned until, on a date in January 1998, judgment in default was entered on liability against the first accused with damages to be assessed. The question of the liability of the second defendant was then set down for trial on 20 July 1998.

The file suggests that, by 21 April, that date was being reserved for the assessment of damages but the question of which matter was to be tried was never resolved because it was again adjourned — this time sine die.

On 13 October, the second defendant filed an application to strike out the claim against it and the hearing today is to consider that application and to determine the liability of the second defendant.

One ground upon which it is sought to strike out is that the brother and sister of the deceased were not beneficiaries protected by section 3 of the Fatal Accidents Act as has already been mentioned. That point has been conceded and, in any event, is no ground to strike out.

It is also suggested that the action was started out of time. The statement of claim pleads that the accident and the death occurred on 4 July 1994. By section 6 of the Act, the action must be commenced within 12 months after the date of the death and, in compliance with that, the writ was filed on 3 July 1995. Mrs Taumoepaeu, for the second defendant, suggests that the death and the date on which it occurred must be proved. In an application to strike out on the ground of no reasonable cause of action, the court can consider the pleadings alone and will grant the application only if they disclose no cause on their face. The matters averred in the claim may need proof before the court can determine the matter but, at this stage, the pleadings clearly suggest facts that, if proved, mean the writ was filed in time. The application on that ground is refused.

The third ground is that damages are claimed solely for bereavement and no such damages are recoverable. Whilst it is clear that such damages are not recoverable, the statement of claim also prays for special and general damages. This ground fails.

The final ground is that "the claim by the plaintiff has been satisfied by the default judgment against the first defendant … therefore the claim against the second defendant should be struck out". Mrs Taumoepeau relies on the position at common law whereby there could only be one action and one judgment for a joint tort. She correctly cited *Brinsmead v Harrison* (1871) LR 6 CP 584; [1861-73] All ER Rep 465 as authority for the proposition that recovery of judgment against one of a number of joint tortfeasors barred further action against any others. She concedes that the position has been altered in England by the provisions of section 6 of the Law Reform (Married Women and Joint Tortfeasors) Act 1935, and the more extensive provisions of the Civil Liability (Contribution) Act 1978, but she questions whether such statutes are of general application and, if so, whether they apply in Tonga by virtue of sections 3 and 4 of our Civil Law Act.

I have no doubt that these English Acts are of general application. The Privy Council has accepted the definition of such statutes as "Acts of Parliament which are of general relevance to the conditions of other countries and in particular, not based on politics or circumstances peculiar to England": *Teta Ltd v Ullrich Exports Ltd* [1981-88] Tonga LR 127.

The test as to whether or not such an Act applies in Tonga has been set out by the Court of Appeal in *Kingdom of Tonga v Save* (unreported, CA 626/93):

> "1. Does local law provide a complete code? If so, that is the end of the matter and local law applies;
> 2. If not, does the local law expressly or by implication exclude English law?"

There is no local law that covers this matter or excludes the English law so the English Act applies. There is a clear right to proceed against the second defendant and the application to strike out fails.

The final matter for determination is the liability of the second defendant. The basis of the second defendant's challenge to liability also relies on the position already taken by Mrs Taumoepeau under the common law. My ruling that the Law Reform (Married Women and Joint Tortfeasors) Act and the Civil Liability (Contribution) Act apply here provides the answer to her challenge on this point also. Mrs Taumoepeau admits that the first defendant was an employee of the second defendant and was acting in the course of that employment at the time of the accident. The plaintiff claims against the second defendant on the basis of vicarious liability. Such a claim is possible under the English Act and is available here.

The trial of the claim against the second defendant must proceed. The second defendant must pay the costs of today.

Fonua v MBf Bank Ltd

Supreme Court, Nuku'alofa
Ward CJ
C 618/98

18-20 January 1999; 29 January 1999

Contract — breach of agreement — no evidence therefore dismissed
Contract — undue influence of bank — no evidence therefore dismissed
Practice and procedure — costs where worthless action — solicitor/ own client

The plaintiff, Fonua, decided to try and purchase $300,000 worth of stock from the restructuring Tonga Electric Power Board (TEPB) for below half price. He approached Kevin Lee to join him in the venture and to help him get the money. They set up a company called Update Electrical Supply (Update). Lee and Fonua then went to the Bank and opened an account in the name of Update on which they were co-signatories. They applied for a loan and, on 18 November, the Bank sent a letter of offer for a loan of $185,000.00 to the plaintiff trading as Update. The letter of offer was a lengthy document setting out in detail the terms of the offer and the plaintiff signed an acceptance on 21 November "as per the abovenamed terms and conditions". The security for the loan included a cash deposit by Lee, a mortgage over the plaintiff's property at Matahau and a letter of pledge on the goods to be purchased from the TEPB. That letter of pledge was signed by the plaintiff on the same day. The loan was to be repaid by installments and the first, a sum of $5,000, was due on 21 December 1997. On 24 November Lee paid $180,000 by personal cheque to TEPB and on 25 November reimbursed himself $180,000 from the Update account. The plaintiff wrote to TEPB asking it to refund the balance to him (the purchase price was $124,100). The TEPB replied refusing to pay and pointing out that, as far as they were concerned, the plaintiff was a stranger to the sale. On 5 December the plaintiff issued a writ against Lee seeking various orders in relation to the goods and, curiously as it was not a party to the proceedings, an order that the TEPB pay the balance of $55,900 to the plaintiff. The goods were by this time at Lee's premises so they could be sold; indeed the plaintiff had helped take them there. On 10 December Fonua obtained an interim injunction restraining Lee from selling or disposing of the stock and allowing the plaintiff to take possession of it. He told the court that he did so because he was concerned that he would be unable to meet the deadline for the first repayment and would lose his property at Matahau. As he clearly needed to sell the stock to raise the money for the first repayment, it was a most unfortunate step to have taken less than two weeks before the date it was due. The Bank was becoming concerned by this time and a meeting was held on 11 December between the plaintiff, Lee and the Bank. It was held in the office of Lee's lawyer and was attended by the

plaintiff's lawyer and a representative of the Bank. Although a draft agreement was made it was never executed by the parties. The Bank representative warned the plaintiff that, if he did not settle with Lee, the Bank would take action for possession of the stock. After the meeting the plaintiff, his accountant and a different lawyer went to see the Loans Manager at the Bank, Mr Yeoh. The Bank officer referred to the court judgment the plaintiff had obtained and voiced the Bank's concern that the loan may not be repaid. He also advised the plaintiff that, if he and Lee did not repair their relationship, the Bank might seek an order from the court to take possession of the goods. The plaintiff told the court that he felt that if he and Lee did not settle as Yeoh instructed, the Bank would get hold of the materials. Notwithstanding, the plaintiff tried unsuccessfully to take possession of the materials on 13 December. On 15 December Yeoh wrote to the plaintiff's lawyer saying that the Bank understood the plaintiff and Lee were on the point of agreeing to settle and offering to release the plaintiff and his securities held under the letter of offer. An agreement was drawn up and signed by Lee, the plaintiff and the plaintiff's counsel on 16 December. The agreement provided that the plaintiff and his securities were to be released from the agreement and then provided that the loan agreement between the Bank and Siua as in the Letter of Offer was to be changed to Lee and the plaintiff was released from all obligations under it. Lee was to continue to have possession of the stock and the plaintiff would have no further interest in its disposition. The plaintiff was to have $10,000 from Lee and the plaintiff should apply to the court to discontinue his action against Lee. On the same day Lee, Fonua and his counsel signed a "Memorandum of Settlement and Discontinuance of Action" which was filed with the Court on 19 December 1997. On 2 January 1998, the plaintiff's lawyer wrote to the Bank thanking them for their assistance in settling the matter and asking for written confirmation of the plaintiff being released from the agreement. On 8 January 1998, the Bank wrote to the plaintiff returning the original charge in escrow and confirming the account had been fully settled and duly closed on 30 December 1997. The plaintiff claimed that he was coerced into settling on those terms. It was correct that he took steps to have the settlement set aside by the Court in January 1998 but he later withdrew that application. The plaintiff claimed the defendant breached the agreement and exerted undue influence.

Held:

1. In considering undue influence, the question for the court was, did the Bank go beyond the normal relationship of customer and client and did it result in a transaction so disadvantageous to the plaintiff that it constituted an advantage taken by the Bank that was only explicable on the basis of undue influence. If the evidence prima facie takes the case to that stage, the defendant will need to call evidence to rebut that explanation. The plaintiff signed the agreement willingly and of his own accord and so his claim of undue influence failed.
2. Where a totally worthless action has been brought it must be reasonable to say that the person who has suffered the inconvenience and expense of defending an action that should never have been brought should not be left having also to pay the costs of fighting it. The defendant was awarded costs and they were to be taxed on a solicitor and own client basis.

Cases considered:

Cooper v Whittingham (1880) 15 Ch D 501

Donald Campbell and Co Ltd v Pollak [1927] AC 732

Gate v Sun Alliance Insurance Ltd (1995) 8 ANZ Insurance cases 61-2512 (NZCA)

National Westminster Bank plc v Morgan [1985] AC 686; [1985] 1 All ER 821

Statutes considered:

Supreme Court Act CAP 10

Counsel for plaintiff : Mr Tu'utafaiva

Counsel for defendant : Mr Waalkens

Judgment

I have already given judgment to the defendant at the close of the plaintiff's case and said I would give my reasons in writing. I now do so. I also heard submissions as to costs and shall rule on those at the end.

In 1997, as part of a restructuring exercise, the Tonga Electric Power Board (TEPB) closed down its house wiring and retail sections. As a result the electrical goods and appliances held by the TEPB and worth approximately $300,000.00 were to be sold. The plaintiff decided to try and purchase all the stock and hoped to get it for something below half price.

He approached a Chinese businessman, Kevin Lee, to join him in the venture and to help provide the money necessary. I do not think it is necessary to set out the details of the arrangement between them and the evidence was far from clear. The plaintiff, Siua Fonua, at best, was unclear and inconsistent in his evidence to the court and evasive and dishonest at the worst. Under pressure he made rash statements and, at one point in cross-examination, made serious allegations against the Loans Manager of the MBf Bank (the Bank), which I am satisfied beyond doubt were untrue. Lee was called as one of the plaintiff's witnesses and his immediate reaction to those allegations confirmed my view. In many aspects of the case his evidence did not support that of the plaintiff. In any areas of dispute between them, I preferred the account given by Lee.

What is clear is that on 6 November 1997 the plaintiff obtained a business licence for a company called Update Electrical Supply (Update). On 15 November, Lee wrote to the General Manager of the TEPB confirming an offer of $124,100.00 to be paid on 21 November for the total stock. It was accompanied by a deposit of $3,500.00 in consideration of the TEPB locking the store between 15 and 21 November. The offer was accepted and the signatures of the representatives of the TEPB were witnessed, inter alia, by the plaintiff.

Lee and Fonua then went to the Bank and opened an account in the name of Update on which they were co-signatories. They applied for a loan and, on 18 November, the Bank sent a letter of offer for a loan of $185,000.00 to the plaintiff trading as Update. The letter of offer was a lengthy document setting out in detail the terms of the offer and the plaintiff signed an acceptance on 21 November "as per the abovenamed terms and conditions". The security for the loan included a cash deposit by Lee, a mortgage over the plaintiff's property at Matahau and a letter of pledge on

the goods to be purchased from the TEPB. That letter of pledge was signed by the plaintiff on the same day.

The loan was to be repaid by installments and the first, a sum of $5,000.00, was due on 21 December, 1997.

It is not necessary to set out the whole of that document but it constitutes the contract that the plaintiff claims was breached by the defendant bank. It sets out the terms of such things as purpose, interest, repayment and security none of which is remarkable. Later it states, under the heading "Events of Default":

> "Upon the occurrence of any of the following events at any time and regardless of whether the event is within or beyond the control of MBfBL and/or the Borrower:"

There are then listed eleven specific events;

> "then, and in any such event, MBfBL may by written notice to the Borrower declare that an Event of Default has occurred and simultaneously or at any time thereafter, irrespective of whether any event mentioned herein is continuing, MBfBL may … by written notice to the Borrower declare all outstanding amount, accrued interest thereon and any other sum then payable under this Letter of Offer to be immediately due and payable."

Of those eleven events, the following should be set out:

> "a) the borrower fails to make any payment of principal or interest or any other payment due under this Letter of Offer whether formally demanded or not; or
>
> c) the borrower ceases or threatens to cease to carry on its business; or
>
> h) a material change has occurred in the financial conditions of the Borrower which in the opinion of MBfBL is likely to prejudice the ability of the Borrower to perform its obligations under this Letter of Offer in accordance with the terms hereof; or
>
> j) 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;"

Lee went to the TEPB on 24 November and paid the sum of $180,000.00 by a personal cheque and, on 25 November, reimbursed himself that sum by a cheque drawn on the Update account using, of course, the loan funds. Quite why the wrong sum was paid is not clear but the plaintiff wrote to the TEPB asking it to refund the balance to him and a letter from his solicitor followed on 2 December. The TEPB replied refusing to pay and pointing out that, as far as they were concerned, the plaintiff was a stranger to the sale.

On 5 December the plaintiff issued a writ against Lee seeking various orders in relation to the goods and, curiously as it was not a party to the proceedings, an order that the TEPB pay the balance of $55,900.00 to the plaintiff. The goods were by this time at Lee's premises so they could be sold; indeed the plaintiff had helped take

them there. On 10 December Fonua obtained an interim injunction restraining Lee from selling or disposing of the stock and allowing the plaintiff to take possession of it. He told the court that he did so because he was concerned that he would be unable to meet the deadline for the first repayment and would lose his property at Matahau. As he clearly needed to sell the stock to raise the money for the first repayment, it was a most unfortunate step to have taken less than two weeks before the date it was due.

The Bank was becoming concerned by this time and a meeting was held on 11 December between the plaintiff, Lee and the Bank. It was held in the office of Lee's lawyer and was attended by the plaintiff's lawyer and a representative of the Bank. Although a draft agreement was made it was never executed by the parties. The Bank representative warned the plaintiff that, if he did not settle with Lee, the Bank would take action for possession of the stock.

After the meeting the plaintiff, his accountant and a different lawyer went to see the Loans Manager at the Bank, Mr Yeoh. The Bank officer referred to the court judgment the plaintiff had obtained and voiced the Bank's concern that the loan may not be repaid. He also advised the plaintiff that, if he and Lee did not repair their relationship, the Bank might seek an order from the court to take possession of the goods.

The plaintiff told the court that he felt that if he and Lee did not settle as Yeoh instructed, the Bank would get hold of the materials. Notwithstanding, the plaintiff tried unsuccessfully to take possession of the materials on 13 December.

On 15 December Yeoh wrote to the plaintiff's lawyer saying that the Bank understood the plaintiff and Lee were on the point of agreeing to settle and offering to release the plaintiff and his securities held under the letter of offer.

An agreement was drawn up and signed by Lee, the plaintiff and the plaintiff's counsel on 16 December. That agreement sets out the history of the matter and continues:

> "F. The Bank is desirous that this matter is resolved expeditiously and its interest is properly protected.
>
> G. The Bank has agreed in writing that upon settlement of the Court Action it shall take steps to release Siua and the related securities held under the terms and conditions of the Letter of Offer dated 18 November 1997."

The agreement then provided that the loan agreement between the Bank and Siua as in the Letter of Offer was to be changed to Lee and the plaintiff was released from all obligations under it. Lee was to continue to have possession of the stock and the plaintiff would have no further interest in its disposition. The plaintiff was to have $10,000.00 from Lee and the plaintiff should forthwith apply to the court to discontinue his action against Lee. On the same day Lee, Fonua and his counsel signed a "Memorandum of Settlement and Discontinuance of Action" which was filed with the Court on 19 December 1997.

On 2 January 1998, the plaintiff's lawyer wrote to the Bank thanking them for their assistance in settling the matter and asking for written confirmation of the plaintiff being released from the agreement. On 8 January 1998, the Bank wrote to the plaintiff returning the original charge in escrow and confirming the account had been fully settled and duly closed on 30 December 1997.

The plaintiff claims that he was coerced into settling in those terms. It is correct that he took steps to have it set aside by the Court in January 1998 but he later withdrew that application. I am satisfied beyond any doubt the plaintiff made that settlement voluntarily and willingly and with a full appreciation of its meaning and consequences.

From those incidents comes the present claim.

He claims breach of contract the terms of which are encapsulated in paragraph 27 of the statement of claim:

> "27. The Plaintiff says that the defendant breached the agreement as contained in the "Letter of Offer" dated 18 November 1997 and accepted by the plaintiff on 21 November 1997. Particulars of breaches by the Defendant are one or more of the following:
>
> (i) threatening to take possession of the Stock when the Plaintiff's account with the Defendant was still normal and the Plaintiff has not breached the agreement.
>
> (ii) the Defendant interfering in the court actions between the Plaintiff and Mr Li, when the Plaintiff has not breached the agreements, and causing the Plaintiff not to be able to collect money from the sale of the stock to pay for the overdraft.
>
> (iii)The Defendant's threat to take possession of the Stock and also its interference with the Court actions between the plaintiff and Kevin Li caused Mr Li to have the stock and sell it for profit.
>
> (iv)The Defendant's threat to take possession of the stock if the court actions with Kevin Li is not settled and also its interference with the Court actions between the plaintiff and Kevin Li was biased and in favour of Mr Li. Particulars of bias are that the defendant wanted Kevin Li, who was not a party to the agreement between the Defendant and Plaintiff, to have possession of the stock and sell it for his own profit."

On the evidence I have heard from the plaintiffs witnesses, I am at a loss to see exactly what is the breach claimed.

Counsel for the plaintiff says that the Bank had no right to take any action under the contract because there had been no default by the plaintiff. The first payment was not due for some days and, until and unless he failed to pay, they had no right to interfere.

The evidence shows that, on the contrary, there were strong grounds for the Bank to consider there had already been an event of default. The plaintiff had obtained the loan on the basis of a business venture with Lee. The latter was not a party to the loan agreement but he was known by the Bank to be a partner of the plaintiff in the venture and had put up the cash security for the loan. The plaintiff chose to bring a court action against his erstwhile partner that changed the agreed

arrangements for the disposal of the stock of the company. The defendant had agreed the stock was to be sold from Lee's premises and had, himself, helped deliver it there. The injunction he sought and obtained from the court required the removal of that stock from Lee's custody and prevented Lee having any part in its sale. It is difficult to imagine a clearer adverse change in the financial conditions of the plaintiff or one more likely in the short term at least, (and the writ was filed only sixteen days before the plaintiff needed to pay the bank $5,000.00) to prejudice his ability to repay. By the time of the court order there were only eleven days to go.

However, the evidence does not show any action by the bank to declare the monies immediately due because of an event of default. What it did was to try and arrange a settlement that would solve the problems between the plaintiff and Lee and thus allow the sale of the stock to proceed. The draft settlement of 11 December was never signed but it was exhibited to the court and it includes, in the preamble, that the Bank is anxious that the terms, conditions and securities of the loan agreement and its interests are properly safeguarded, and it is desirous that this matter is resolved expeditiously. The terms that followed would have established a business arrangement that allowed the sales to continue from Lee's premises with financial and accounting procedures that would have ensured the plaintiff was fully aware of and able to check the whole sales transaction. Although it was not executed, it shows that six days after the plaintiff had taken out court proceedings and ten days before the first payment was due, the Bank attended a meeting that was clearly trying to save the business and, in that way, safeguard the plaintiff's position.

It was at that meeting that the suggested threat and interference in the court action referred to in paragraph 27 of the claim occurred. On the evidence of that meeting, it appears the Bank's representative may have taken an unfortunately heavy-handed approach but the evidence shows, first, that it was not a threat to take possession of the stock but a warning that, if the matter was not settled satisfactorily, the Bank would apply to the court for an order that it could take possession and, second, that far from forcing the plaintiff into a position whereby he would not be able to collect money from the sale of the stock, the unsigned draft agreement shows the settlement the Bank was trying to obtain was one that would have safeguarded the plaintiff's share of the proceeds.

The agreement that changed the situation was that of 16 December under which the plaintiff was released from the whole loan agreement. The plaintiff's case was that he only signed that because of the continuing effect of the threat to seek an order of possession, which Yeoh had also repeated.

I simply do not believe the plaintiff in that regard. He signed an agreement that let him out of all obligations to repay the loan, freed the home about which he was very anxious as he told the court more than once and allowed him to walk away with $10,000.00.

In view of my finding, it is not necessary to deal with the evidence of the damages claimed but I should mention that, had it been relevant, I do not find the plaintiff has discharged the burden of proving any loss. On the evidence I am satisfied he made an initial agreement with Lee to take a 10% share of any final profit. The plaintiff tells the court that agreement was abandoned. I accept it may have been but there is no credible evidence to support the plaintiff's basis of calculating the sums claimed as lost profits and the evidence of Lee satisfies me that to this date there has been insufficient money received to produce an overall profit and that the chances of

him clearing the purchase sum is remote. If the plaintiff were to succeed, of course, he would have to put the $10,000.00 he obtained from the settlement of 16 December into the balance also. However, I repeat, the evidence of loss of profits fell far short of that necessary to prove his claim.

Returning to the alleged threat, I have already described how, the day before the settlement of 16th, he received a letter from the Bank through his lawyer:

> "We understand that (Fonua) and Mr Kevin Li are on the point of agreeing settlement terms for their Supreme Court action … Upon receipt of evidence of settlement, we shall forthwith take steps to release (Fonua) and the related securities held under the terms and conditions of the Letter of Offer dated 18 November 1997."

The terms of that letter suggest there had been discussion based on the plaintiff's oft repeated anxiety about the house he had offered as security. Be that as it may, the plaintiff saw that letter with his lawyer. He had a day to discuss it and to seek advice on it and then, with his lawyer at his side, he signed an agreement drafted by his lawyer that released him from an obligation he knew he could not meet in time and gave him $10,000.00 long before any profit was likely to be made.

As I have already said, I am satisfied the plaintiff signed that agreement willingly and of his own accord and it was only later that he thought of raising the, I am satisfied, bogus claim that he lost profit because of the undue influence of the Bank.

I have referred to the manner in which the reference to possession was made at the meeting on 11 December but I am satisfied that the Bank was doing no more than advising him of the possible consequences of the situation in which he, by his actions in bringing court proceedings, had placed himself.

The claim as set out in paragraph 27 is one of breach of contract and of undue influence. I find no evidence of breach by the Bank. In considering undue influence, the question for the court is, did the Bank go beyond the normal relationship of customer and client and did it result in a transaction so disadvantageous to the plaintiff that it constituted an advantage taken by the Bank that was only explicable on the basis of undue influence. If the evidence prima facie takes the case to that stage, the defendant will need to call evidence to rebut that explanation.

It always depends on the particular facts of the case. The position has been elegantly stated by Scarman LJ in *National Westminster Bank plc v Morgan* [1985] AC 686 at 709; [1985] 1 All ER 821:

> "There is no precisely defined law setting limits to the equitable jurisdiction of a court to relieve against undue influence. This is the world of doctrine, not of neat and tidy rules. The courts of equity have developed a body of learning enabling relief to be granted where the law has to treat the transaction as unimpeachable unless it can be held to have been procured by undue influence. It is the unimpeachability at law of a disadvantageous transaction which is the starting-point from which the court advances to consider whether the transaction is the product merely of one's own folly or of the undue influence exercised by another. A court in the exercise of this equitable

> jurisdiction is a court of conscience. Definition is a poor instrument when used to determine whether a transaction is or is not unconscionable: this is a question which depends upon the particular facts of the case."

Earlier in the same judgment at 707, Lord Scarman states the position of a bank:

> "It was, as one would expect, conceded by counsel for the respondent that the relationship between banker and customer is not one which ordinarily gives rise to a presumption of undue influence: and that in the ordinary course of banking business a banker can explain the nature of the proposed transaction without laying himself open to a charge of undue influence. This proposition has never been in doubt …"

As I have already stated, I am satisfied this was a case of the Bank offering the type of advice one might normally expect in a customer/client relationship. The Bank was the party to the loan agreement with experience and expertise and was doing no more than warning the plaintiff of the problems he could be facing should the legal proceedings continue. The agreement of 16 December was also far from disadvantageous to him and, on the view I have taken about the merits of the claim for damages, it could accurately be described as advantageous.

The plaintiff's claim fails and I give, as I have already stated, judgment to the defendant.

I now consider the matter of costs. There can be no doubt that the usual rule applies that costs follow the event. The point that now falls for determination is whether the court can and should order those costs on a solicitor and own client basis as has been claimed by the defendant.

Mr Waalkens for the defendant points out that this claim could never have succeeded. His client has been put through the whole inconvenience and cost of contesting a thoroughly worthless action. The fact judgment was given following his submission at the close of the plaintiff's case confirms the total failure of the claim. He points to Mr Tu'utafaiva's reference to nonsuiting the plaintiff when he had, as he told the court, no more evidence to call on liability. Such an order is not available in this court and Mr Tu'utafaiva did not pursue it but Mr Waalkens suggests that counsel's reference to it showed he appreciated the inadequacy of his case.

In further support for his application, Mr Waalkens points out that he sought such costs in his pleadings so the plaintiff knew of his intention at an early stage. Further, on the Friday before the trial was to commence, he served a letter on counsel for the plaintiff in which he offered on behalf of his client, to allow Fonua to discontinue without paying costs - provided he did so that day. The plaintiff did not accept the offer and the trial proceeded.

Mr Tu'utafaiva disputes the right of the court to order such costs. O29 r 3 is, he suggests, clearly referring to party/party costs. Every man, as he correctly points out, is entitled to his day in court but that is a different point and I have never before heard the principle extended to suggest the day must therefore be cheap.

There is no dispute that the court has the power to order costs and section 15 of the Supreme Court Act CAP 10 gives the court a discretion to award them subject only to the terms of the proviso which is clearly not relevant in this case. Such a

discretion must be exercised judicially and the general rule is that a successful party is entitled to his costs but it must be remembered that rule is qualified. It is instructive to consider, for example, one of the early statements on the exact nature of the rule in *Cooper v Whittingham* (1880) 15 Ch D 501 as put by the, then, Master of the Rolls.

> "As I understand the law as to costs it is this, that where a plaintiff comes to enforce a legal right, and there has been no misconduct on his part - no omission or neglect which would induce the Court to deprive him of his costs - the Court has no discretion, and cannot take away the plaintiff's right to costs. There may be misconduct of many sorts: for instance, there may be misconduct in commencing the proceedings, or some miscarriage in the proceedings, or an oppressive or vexatious mode of conducting the proceedings, or other misconduct which will induce the court to refuse costs …"

The position as to the court's discretion has since been modified, see for example, *Donald Campbell and Co Ltd v Pollak* [1927] AC 732, but the rest of his remarks are still good law.

Order 29 governs the question of costs but does not assist on whether an award of costs must be limited to party/party costs or may be made in relation to solicitor/client costs. In those circumstances I am satisfied the discretion given by section 15 extends to making such an order.

Clearly the normal practice, in the absence of anything to the contrary in the judgment, is to tax a party's costs on a party and party basis. What, then, are the circumstances in which a court should order a losing party also to pay the costs normally billed by the solicitor to his client?

The principle in civil litigation is that the successful party should be placed, as much as is possible, in the same position as he would have been had the cause of action not arisen. The power to order costs is part of that principle. In a case where a defendant successfully resists a claim made against him, he may not be seeking any damages but, if he does not receive his costs, he cannot be said to be in the position he was before the litigation.

It has long been the practice in taxation that an unsuccessful party should not have to pay inordinate costs. Equally a successful party should be able to expect reimbursement of the costs reasonably needed to fight the action against him. Where, however, a totally worthless action has been brought, it must be reasonable to say that the person who has suffered the inconvenience and expense of defending an action that should never have been brought should not be left having also to pay the costs of fighting it.

It has long been possible to refuse to order costs even to a successful party where they have been incurred without reasonable cause or there has been undue delay. Similarly the court has power to condemn a lawyer personally in terms of costs where they have been caused by his failure in some way to conduct the proceedings properly. There is no shortage of authority on both but I can find no guidance on the basis upon which the court should order costs at a different rate although I have found some support in the brief note in McGechan of the New Zealand case of *Gate v Sun Alliance Insurance Ltd* (1995) 8 ANZ Insurance cases 61-2512 (NZCA). It would

seem reasonable to use the same test as for other orders of costs that do not abide by the usual rule of following the event.

In this case, the claim was not established and was unlikely ever to succeed. The duty of any lawyer is to advise his client on the chances of success and I assume that counsel in this case did so. When the defence was filed and the lawyer, no doubt, took further instructions on the conduct of the case, it would have been necessary to explain to his client that the defendant was seeking costs on a solicitor/own client basis and that, should he lose, it meant he could be ordered to pay higher costs than in a normal action. On the Friday before the trial was due to commence the defence gave the plaintiff a chance to discontinue with no costs to pay. Despite, no doubt, strong advice from his lawyer about this and the previous advice on his chance of success, the plaintiff chose to proceed to trial on a hopeless case.

The result is that the defendant has been put to the expense and inconvenience of an action he should have never had to face. An Order that the costs he recovers include those incurred as solicitor own client costs will ensure the defendant is out of pocket as little as possible in financial terms.

I order that the defendant shall have his costs and they shall be taxed on a solicitor and own client basis.

I add that there are too many hopeless civil cases being pursued to trial in Tonga. Future litigants must understand that, where their case is totally unmeritorious, the court will consider awarding costs on this basis even where they have not been sought on their opponent's pleadings. Lawyers equally must ensure they give their clients sound and firm advice about the chances of success and the consequences of pursuing a worthless case.

R v Kaufusi

Supreme Court, Nuku'alofa
Ward CJ
Cr 143/97

1, 2 February 1999; 3 February 1999

Criminal procedure — submission of no case to answer — based on credibility of witness
Criminal procedure — theft case stopped — could court convict of receiving on same evidence?

In August 1994 an outboard motor was stolen from a Fisheries Department vessel at Tu'imatamoana wharf. Some months later it was recovered partly dismantled from Onevai island and from a workshop in Nuku'alofa. The accused and the man originally charged with him, Lakalaka, were both living on Onevai at the time of the theft of the motor, each with his de facto wife, and making their living by fishing. Each Friday they would travel from Onevai to Nuku'alofa to sell their catch. Lakalaka pleaded guilty to receiving and was sentenced. The prosecution called him and he provided the only evidence that directly linked the accused to the theft apart from the accused's admission to the police that he was in possession of the motor shortly after it had been stolen. The accused argued there was no case to answer. Two matters of law arose for determination: first, was the court able to allow a submission based on the court's evaluation of the credibility of a witness and if so, in what circumstances; and second, if the court stopped the case of theft could the case proceed on the basis that the court could convict of receiving on the same evidence.

Held:

1. Where there was a submission of no case at the close of the prosecution case, it should be allowed if the submission were that there was no evidence upon which, if it were accepted, a reasonable jury properly directed could convict.
2. The evidence linking the accused to the offence of theft was so discredited and was so manifestly unreliable that a reasonable tribunal could not convict on it. The accused was therefore acquitted on the count of theft.
3. Whilst a jury could be directed to acquit at the close of the prosecution case, they had no power to convict until the conclusion of the case as a whole. Therefore the ability to convict of another offence could only arise at the end of the evidence as a whole. It could not apply at the end of the prosecution case following a successful submission of no case. Where such a submission was made, the court must acquit. There was only one

count and, as the accused was acquitted on that, the case was at an end. He was discharged.

Cases considered:

Practice Note [1962] 1 All ER 448
Practice Note No 1 [1992] Tonga LR 1
R v Galbraith [1981] 2 All ER 1060; (1981) 73 Cr App Rep 124 (CA)

Statutes considered:

Act of Constitution of Tonga (Amendment) Act 1990
Criminal Offences Act CAP 18
Evidence Act CAP 15

Counsel for prosecution : Mr Tapueleulu
Counsel for defendant : Mrs Palalei

Judgment

At the close of the Crown case, counsel for the accused has submitted no case to answer. In order to deal with her submission and in view of my decision, it is necessary to look briefly at the prosecution evidence.

Some time in August 1994 an outboard motor was stolen from a Fisheries Department vessel at Tu'imatamoana wharf. Some months later it was recovered partly dismantled from Onevai island and from a workshop in Nuku'alofa.

The accused and the man originally charged with him, Lakalaka, were both living on Onevai at that time, each with his de facto wife, and making their living by fishing. Each Friday they would travel from Onevai to Nuku'alofa to sell their catch. They travelled in their own boats, the accused with his wife, Olivia, and Lakalaka with his, Litia.

The prosecution called all those people except, of course, the accused and they spoke of a particular Friday in August 1994. The theft is charged as having been committed on the 16 August and the prosecution case is that it occurred during Friday night. Mrs Palelei for the accused points out that, in 1994, the 16th was in fact a Tuesday. Whilst there is some uncertainty as to how each witness was sure he or she was talking of the same Friday in August, I am willing to accept for this purpose that they were all referring to the same Friday and that it was the same day of the next morning that the motor was stolen.

Lakalaka has already pleaded guilty to receiving and has been sentenced. The prosecution called him and he provides the only evidence that directly links the accused to the theft apart from the accused's admission to the police that he was in possession of the motor shortly after it had been stolen.

The evidence the prosecution put forward to link the accused with the theft arises in this way, The four from the island were unable to sell all their catch on the Friday and so they all went to Lakalaka's 'api in Nuku'alofa to spend the night. They had some food and then started to play cards. By that time the accomplice told the court he was drunk and so, when the others played cards, he went to sleep. He awoke some time about two or three in the morning and saw the accused and Olivia were not there. He asked the others in the house and was told they had left. The next morning

he woke after it was light and eventually went to the wharf where Litia alone was selling the fish. He did not see the accused or Olivia that morning. His first knowledge of the outboard was when he saw it hidden on the island a few days later.

The account the accused gave when he was interviewed was that he slept the whole night at Lakalaka's 'api and woke once it was light. He went to the wharf and Lakalaka showed him an outboard hidden under a raincoat in the accused's boat. He realised it was stolen and took it back to the island for Lakalaka.

That undisputed interview clearly is an admission of receiving in terms of section 148(5) and the only evidence that could link the accused to the actual theft, the only offence on the indictment, is that of the accomplice that the accused left the house during the night the motor was stolen. Section 126 of the Evidence Act requires the evidence of the accomplice to be corroborated before I can convict on it; a requirement that, surprisingly, was not mentioned by either counsel. The only corroboration is the accused's admission that he was handling the motor the day after it was stolen, However, as that evidence comes solely from the accused and he denies theft but admits to receiving, it is difficult in the absence of anything else, to see any reason why the court should accept his admission he had the stolen property but reject his reason why.

The critical part of the accomplice's evidence could have been corroborated by the women but, far from supporting Lakalaka's account, they both contradict him on that point. Each woman confirms the other's account that they went to sleep at the 'api and woke in daylight. They went together to the wharf and, together, continued selling the fish leaving both the accused and Lakalaka asleep. Neither described the accused leaving the house and Olivia denied ever leaving in the night herself.

During counsel's submissions, I told counsel that I could not accept the accomplice as a credible witness. The only corroboration was weak and, if I did not consider the witness credible, it could not, in any event, save his testimony.

Counsel for the defence asks the court to say that the evidence cannot stand in such a parlous state. Prosecuting counsel points out, correctly, that assessment of witnesses and evaluation of the evidence is a matter for the conclusion of the case as a whole.

It seems to me that two matters of law arise for determination, first, is the court able to allow a submission based on the court's evaluation of the credibility of a witness at this stage and if so, in what circumstances and second, if the court stops the case of theft at this stage can the case proceed on the basis that the court could convict of receiving on the same evidence.

The first causes no difficulty. Where there is a submission of no case at the close of the prosecution, it should be allowed if there is no evidence upon which, if it were accepted, a reasonable jury properly directed could convict. The correct approach has been explained by Lord Lane CJ in the English case of *R v Galbraith* [1981] 2 All ER 1060; (1981) 73 Cr App Rep 124 (CA) at 127:

> "How then should the judge approach a submission of 'no case'? (1) If there is no evidence that the crime alleged has been committed by the defendant, there is no difficulty. The judge will of course stop the case. (2) The difficulty arise where there is some evidence but it is of a tenuous character, for example because of inherent weakness or vagueness or because it is

> inconsistent with other evidence. (a) Where the judge comes to the conclusion that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict upon it, it is his duty, upon a submission being made, to stop the case. (b) Where however the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence upon which a jury could properly come to the conclusion that the defendant is guilty then the judge should allow the matter to be tried by the jury."

That court also disapproved of the previously used test that a judge could stop the case if, in his view, the evidence was unsafe or unsatisfactory.

In *R v Shippey* [1988] Crim LR 767, Turner J has expanded upon the effect of (b) in the Lord Lane's judgment (above). He drew back from the suggestion that it meant that if there is any evidence to support the charge, the judge had to allow the case to go to the jury He considered that the judge was entitled to make an assessment of the evidence as a whole at that stage of the case.

Both those cases were jury trials. In the present case, I am sitting without a jury and am therefore judge both of fact and law. I have already formed the view on an assessment of the evidence as a whole, that I cannot accept the accomplice is a credible witness. The prosecution case that this is theft must depend on the evidence of the accomplice and the assumption that the accused's admission in interview is untrue at least on that aspect. If I disbelieve the accomplice because his evidence has been so contradicted that it cannot stand and know, therefore, that, if no further evidence is called, no reasonable jury could convict. Is it right that the accused should be put to his defence? I think not. I am exercising summary jurisdiction similar to that of a magistrate. The position in such circumstances has been explained by Lord Parker CJ in a Practice Note reported in [1962] 1 All ER 448. Although rulings on the law should not be given in practice directions, the terms of this note have been accepted for many years as a correct statement of the law:

> "A submission that there is no case to answer may properly be made and upheld (a) when there has been no evidence to prove an essential element in the alleged offence; (b) when the evidence adduced by the prosecution has been so discredited as a result of cross-examination or is so manifestly unreliable that no reasonable tribunal could safely convict on it.
>
> Apart from these two situations a tribunal should not in general be called on to reach a decision as to conviction or acquittal until the whole of the evidence which either side wishes to tender has been placed before it."

This advice is directed at Magistrates who are judges of fact and law. Clearly, applying the test of whether the evidence has been so discredited or is so manifestly unreliable will necessitate an assessment of the evidence as a whole. To that extent only a Magistrate or Judge sitting without a jury may, following a submission of no

case, go further in considering the credibility and weight of the prosecution evidence than would a judge sitting with a jury.

The evidence in this case linking the accused to the offence of theft with which he is charged has been so discredited and is so manifestly unreliable that I do not believe a reasonable tribunal could convict on it. The accused must be acquitted on the count of theft.

Before leaving this point, I would suggest that Practice Direction No 1 of 1992 in this Court (which, incidentally, falls into the same error as Parker LCJ and purports to rule on a point of law) incorrectly states the position in relation to a submission of no case in the Magistrates' Court.

That would normally be an end of the matter but the unchallenged evidence already before the court of the accused's interview amounts to a clear admission of receiving. Having ruled there is no case for the accused to answer on the charge upon which he stands indicted, is it possible to allow the case to continue nonetheless because the evidence could support a conviction of another offence?

Section 42(3) of the Criminal Offences Act provides;

> "(3) Where on a person's trial on indictment for any offence except treason or murder, the jury find him not guilty of the offence specifically charged in the indictment but the allegations in the indictment amount to or include (expressly or by implication) an allegation of another offence falling within the jurisdiction of the Court of trial, the jury may find him guilty of that other offence or of an offence of which he could be found guilty on an indictment specifically charging that other offence."

Although it has been in the Act for many years, I would suggest this provision was, until 1990, in breach of Article 13 of the Constitution which provided that, subject to exceptions in relation to attempt and alternative verdicts of theft, embezzlement and fraudulent conversion, "no one shall be tried on any charge but that which appears in the indictment, summons or warrant for which he is being brought to trial."

Section 42 clearly went behind the protection of Article 13. However, by section 5(iv) of the Act of Constitution of Tonga (Amendment) Act 1990, a new paragraph was added:

> "(d) any Act may provide that a person charged with an offence may be convicted of another offence (not being a more serious offence) arising out of the same circumstances."

That would appear to mean that a part, at least, of the provisions of section 42 no longer breaches the Constitution.

In this case, receiving is no more serious than theft as the power to sentence is the same as if the accused had committed theft. The terms of section 42 are wide and counsel for the prosecution suggests that the court can invoke them at any stage of the trial.

He also suggests section 149 of the Criminal Offences Act allows an alternative verdict in this case. I do not accept that is a correct interpretation of the section. It allows alternative charges of theft and receiving to be charged in the same summons

and the court to convict on one or the other. It only applies when there are two charges.

In this case there is no alternative count on the indictment. The prosecution may be wise to consider including an alternative in any case where the evidence might support either or both. The Crown case here has always been that the accused stole the motor and so the prosecution presumably put the interview forward as an untrue account by the accused in which he was attempting to shift the blame to his, then, co-accused. This may explain the absence of an alternative count of receiving even though the evidence contained compelling evidence of that offence.

However, having now found that there is insufficient evidence to put the accused to his defence on the count upon which he has been indicted, is it right to allow him to be put to his defence on the case of receiving revealed on the evidence so far? If it is, how is the prosecution to cross-examine the accused if he should decide to give evidence? Would counsel for the Crown be entitled to ask the accused if he did in fact steal the motor? If he said he did and so, possibly, lost the protection of autrefois acquit in accordance with Article 12 of the Constitution, could this court then convict him of the very offence of which it had just acquitted him, the trial having been allowed to proceed on an allegation of a different offence.

Common sense seems clearly against it but the law gives little guidance. I cannot accept that, having faced a trial on an offence that the prosecution has failed to establish prima facie, the accused should have to face a charge upon which, until the collapse of the indicted offence, he had never been told he stood accused.

I consider the answer is found in the terms of section 42. That section gives the jury the power to return a conviction of an alternative charge when they have acquitted him of the offence charged. Whilst a jury can be directed to acquit at the close of the prosecution case, they have no power to convict until the conclusion of the case as a whole. That must mean that the ability to convict of another offence under the section can only arise at the end of the evidence as a whole. It cannot apply at the end of the prosecution case following a successful submission of no case. Where such a submission is made, the court must acquit.

In this case there is only one count and, having acquitted the accused on that, the case is at an end. He must be discharged.

Attorney General v Tupouniua

Supreme Court, Nuku'alofa
Ward CJ
C 199/99 and C 200/99

23 February 1999; 25 February 1999

Constitutional law — outstanding order against candidates in election — names removed from ballot
Elections — candidates had outstanding orders against them — names removed from ballot

On 17 December 1998, the Prime Minister issued writs of election for a general election to be held on 11 March 1999. On the same day, the Supervisor of Elections, in accordance with section 8 of the Electoral Act, published notices that nominations of candidates would be received on 12 January 1999 between 10.00am and 3.00pm. Properly supported nominations for each of the defendants were received by the Returning Officer for Tongatapu and the necessary deposit paid. Subsequently the Registrar of the Supreme Court advised the Supervisor that there were judgment debts outstanding against each defendant on 12 January. It is provided in the Constitution that no person may be chosen as a representative if an order has been made against them in any Court in the Kingdom for the payment of a specific sum of money and that payment remains outstanding on the day on which such person submits his or her nomination paper to the Returning Officer. The Attorney General sought the following remedies in each case: 1) a Declaration that the Defendant's Candidacy as Representative of the People in the 1999 General Elections to the Legislative Assembly was unconstitutional and therefore invalid; 2) an Order disqualifying the Defendant's candidacy as Representative of the People in the 1999 General Elections to the Legislative Assembly; 3) an Order to remove the Defendant's name from the Roll of Candidates for the 1999 General Elections to the Legislative Assembly; and costs.

Held:

1. The issue was the effect that a court order outstanding on nomination day had on the candidacy of the person nominated, in terms of clause 65 of the Constitution. The answer was in the same clause and was that such a person "may not be chosen" by ballot as a representative of the people.
2. The remedy of an election petition or the orders that flow from a conviction under section 20 may prevent the defendants from being able to take their seat in the Assembly but both of those remedies required the constitutional provision to have been breached before they were available.

3. The following declaration was made: that the Defendant's Candidacy as Representative of the People in the 1999 General Elections to the Legislative Assembly was invalid because it could lead to a breach of the Constitution.
4. The court could not rely on the defendants withdrawing their candidacy so it was ordered that the defendants' names be removed from the Roll of Candidates for the 1999 General Elections to the Legislative Assembly.
5. Had the defendants withdrawn their candidacy, this action would not have been necessary. It was ordered that the defendants should each pay half of the plaintiff's costs of the joint action to be taxed if not agreed.

Cases considered:

Sanft & Fuko v 'Aho & Kingdom of Tonga [1990] Tonga LR 35

Statutes considered:

Constitution of Tonga CAP 2
Electoral Act 1989

Counsel for plaintiff	:	Solicitor General
Counsel for defendant Tupouniua	:	Mr Tu'utafaiva
Counsel for defendant 'Ilavalu	:	Mr Hola

Judgment

Although these are two separate actions they both involve the same issues, Counsel have agreed that they can and should be tried together. In each case there is a minor conflict of fact but all essential matters are undisputed. The substantive issue in both cases is the meaning and effect of clause 65 of the Constitution and the jurisdiction of the court to determine it and remedy any breach.

On 17 December 1998, the Prime Minister issued writs of election for a general election to be held on 11 March 1999. On the same day, the Supervisor of Elections, in accordance with section 8 of the Electoral Act, published notices that nominations of candidates would be received on 12 January 1999 between 10.00am and 3.00pm.

Properly supported nominations for each of the defendants were received by the Returning Officer for Tongatapu and the necessary deposit paid. Subsequently the Registrar of the Supreme Court advised the Supervisor that there were judgment debts outstanding against each defendant on 12 January.

Clause 65 of the Constitution as far as relevant provides:

> "Representatives of the people shall be chosen by ballot and any person who is qualified to be an elector may be chosen as a representative, save that no person may be chosen against whom an order has been made in any Court in the Kingdom for the payment of a specific sum of money the whole or any part of which remains outstanding or if ordered to be paid by instalments the whole or any part of such instalments remain outstanding on the day on which such person submits his nomination paper to the Returning Officer …"

I can deal with the facts as they relate to each defendant briefly.

Mr Tupouniua did not dispute he owed a debt of $1,554.14 under a judgment in the Chief Police Magistrates Court and, indeed, he paid the sum in full on 12 February 1999. A late amendment to the statement of claim pleaded a further debt of $6,260.50 outstanding from a judgment of the Supreme Court in 1996. The defendant gave evidence that he and the judgment creditor had agreed in late 1996 or early 1997 that he need not pay. There is nothing on the file to record such an agreement but it is also apparent that, despite the size of the sum, there has been no action to enforce the judgment since late 1996. In the other case, however, the defendant did pay the debt, albeit after his nomination, and so, on balance I accept his evidence that there was such an agreement in the earlier action between the defendant and the person he named. Unfortunately the judgment creditor was a corporation and the position within that corporation of the person with whom the agreement was made has not been demonstrated. Whether that agreement is or could be a discharge of the judgment debt is a matter I cannot decide on the scant evidence before me. That is no criticism of counsel. The nature of this case is such that it is in everyone's interest to have it resolved as quickly as possible and I am grateful to all counsel for the speed with which they have prepared their cases and for the willingness of the defence to abridge all time limits.

However, the exact significance of the 1996 judgment debt need not be determined because there is, as I have already said, no dispute that the later judgment debt was outstanding on January 12.

Miss 'Ilavalu admits there was a series of judgments against her in the Magistrates' Court during 1998 which ordered her to pay sums totaling $4,902.62 and she admits those sums were still outstanding on 12 January. She also admits a distress warrant has been executed but the only item seized was a computer which has not yet been sold. There is a vast gulf between the bailiff and the defendant as to the likely price it will achieve at auction. The bailiff told the court that it is not working and would be unlikely to realise more than $100.00 whilst the defendant suggests its value is $7,000.00. I do not need to resolve that issue.

The defendant tells the court that, because of the value she believed the computer to be worth, she assumed it was sufficient to cover all her debts.

I do not believe her evidence as to her belief about that but, even if it is true, it does not change the situation as far as the judgment debts are concerned. There is no suggestion of any other arrangement with her creditors and the judgment debts remain outstanding until paid in full. Following default by a judgment debtor, there is frequently application by the judgment creditor for distress. However, until any goods seized have been sold and the full judgment sum paid to the court by the bailiff, the judgment is outstanding. Even where a judgment debtor knows the goods seized will be sold for more than the total debt, he is still indebted to the judgment debtor until the sum has been paid.

I am satisfied beyond doubt that there had been an order of a court in the Kingdom for payment of a specific sum of money against each defendant and that, on 12 January, 1999, that sum or a part of it was still outstanding.

The Attorney General seeks the following remedies in each case;

1. A Declaration that the Defendant's Candidacy as Representative of the People in the 1999 General

Elections to the Legislative Assembly is unconstitutional and therefore invalid;

2. An Order disqualifying the Defendant's candidacy as Representative of the People in the 1999 General Elections to the Legislative Assembly;
3. An Order to remove the Defendant's name from the Roll of Candidates for the 1999 General Elections to the Legislative Assembly;

and costs.

The power of the court to make a declaration is well established. However the power is discretionary and it will not normally be made where the declaration sought is that a person is disqualified for breach of a provision which provides a penalty for its breach.

In both the present cases, the defendant signed a declaration on the nomination form that there was no court order outstanding in the terms of clause 65. That was clearly untrue and, by section 20 of the Electoral Act, it is an offence wilfully to give false information to the returning officer in such circumstances. It is the duty of the Supervisor to report a possible occurrence of such an offence to the Attorney General who, if there are reasonable grounds, shall prosecute the offender. A penalty is prescribed and, should such a person have been elected, the court has the power to declare the election void.

In this case, the declaration sought relates entirely to the terms of clause 65. Section 20 creates an offence proof of which would require evidence of matters far beyond the terms of clause 65. I am satisfied this is a case in which I can make a declaration if the circumstances merit it.

I have already found that both the defendants had orders outstanding on the date they submitted their nomination papers. Proof of that fact has posed no difficulty. What consequences flow from that is a much more vexed question.

In *Sanft & Fuko v 'Aho & Kingdom of Tonga* [1990] Tonga LR 35, Martin CJ found that the Supervisor has no power to refuse to accept a nomination paper that is apparently in order nor to reject a nomination once accepted and I agree with his finding. I would echo his plea for regulations governing the manner in which objections to nomination may be made and determined. Almost a decade after Sanft's case, there are still no regulations and in that lacuna lies the origin of this case.

In that case, Martin CJ expressed reservations as to whether a complaint such as this can be considered by any means other than an election petition. In the present case, if either candidate stands and is elected, his right to have been chosen when there had been a breach of clause 65 could be challenged by a petition.

Part V of the Act deals with election petitions and section 25(1) provides that:

> "No election and no declaration of poll shall be questioned except by a petition …"

My reading of the provisions of Part V satisfies me that such a petition can only be brought after the election has taken place. The repeated use of the past tense and the fact that the respondent must be the person elected all point to that fact.

Martin CJ was considering an application the day before the election for an injunction to prevent the Supervisor removing the applicant's names from the list of

candidates for the same reason as in the present case so, despite his reservations, he accepted he had jurisdiction to that extent. As in this case, the need for a speedy decision deprived him and counsel of the luxury of lengthy research. He applied the usual test in deciding whether to grant the application and continued:

> "If an injunction is granted, no hardship is caused to anybody. Eligibility can still be challenged by way of an election petition after the election. If it is refused, the plaintiffs would suffer hardship - they would lose the opportunity to be elected: even if the election were set aside on a later election petition they would go into a further election at an obvious disadvantage. Unless it is obvious that the plaintiffs are disqualified, the balance of hardship is clearly in favour of allowing them to remain as candidates."

That decision was based on his conclusion that the only procedure available to challenge any part of the conduct of the election was by way of an election petition.

I cannot accept that is correct. Clause 90 of the Constitution gives the Supreme Court jurisdiction in all cases in law and equity arising under the Constitution and Laws of the Kingdom with the exception only of matters within the exclusive jurisdiction of the Land court.

The issue that must now be resolved is the effect, under the terms of clause 65, a court order outstanding on nomination day has on the candidacy of the person nominated. The answer is in the same clause and is that such a person "may not be chosen" by ballot as a representative of the people. Why I must respectfully disagree with my learned predecessor is that, if the only way the candidacy may be challenged is by election petition, then the remedy only becomes available if and when the person has in fact been chosen in breach of the terms of clause 65.

As I have said, regulations could clarify the position beyond any doubt but, in their absence, I cannot accept an interpretation of the law which means that, in order to avail oneself of the machinery to uphold a provision of the Constitution, it is necessary to breach the very provision one wishes to uphold.

Mr Tu'utafaiva for Tupouniua ingeniously suggests the answer is in the use of the word "may". Whereas clause 65 states that representatives "shall be chosen" by ballot, he suggests it only states that a person who falls foul of the provisions of the last part of the clause "may be chosen". That is not the meaning of the word in this context. It is not an example of the common drafting practice under which the words "shall" and "may" are used to denote mandatory and discretionary provisions. The use of the word "may" in clause 65 has the normal meaning that no person can or will be chosen and is clearly intended to disqualify him from election.

It is clear that the requirement that a candidate should sign the declaration on the nomination paper is to ensure they are not in breach of this clause. As I have already stated, the Supervisor, or the returning officer on his behalf, has no power to decide whether that is right or wrong. Once it is signed and all other requirements are satisfied, he must accept the nomination.

Having subsequently discovered there may have been a breach of clause 65, what can he do? Section 20 provides one remedy but the fact that a candidate has signed the declaration on Form 4 when he is, in fact, in breach of clause 65 does not necessarily mean that the candidate will be convicted of an offence in a criminal trial.

In the present case, the Supervisor has reported the matter to the Attorney General who has chosen to seek a ruling from the court.

Having heard the evidence and the admissions of the defendants, I am satisfied that they are in breach of clause 65. Thus, if they stand and are elected and are then either convicted of an offence under section 20 or challenged by an election petition, the election must be declared void. If prevented from standing at this stage, they will lose the opportunity to be chosen but I cannot agree with Martin CJ that allowing their candidacy to continue will cause no hardship to anybody.

Quite apart from the substantial cost to the general revenue of an inevitable by-election, every properly nominated candidate is entitled to assume that all other candidates are also eligible to be chosen. If the defendants are allowed to stand, votes may be cast for them that would otherwise have been cast for the valid candidates. It is no remedy to decide the matter by an election petition because, if the candidate who is in breach of clause 65 is chosen, he would, if he then pays his judgment debts, be entitled to stand in the by-election that was necessitated solely by his unconstitutional election in the general election. That cannot be fair to the candidates who have taken care to ensure they are properly qualified at the right time for the general election.

Even less fair is the situation that would arise if they stand unsuccessfully because there can then be no election petition. Thus the other candidates will have no way of testing what would have been the result had the votes received by the defendants been cast for the qualified candidates.

Further, if the defendants are allowed to continue as candidates, they might be chosen and the voters, as a result, would have become instruments by which a breach of the Constitution is occasioned.

As I have already said, the remedy of an election petition or the orders flowing from a conviction under section 20 may prevent them from being able to take their seat in the Assembly but both of those require the constitutional provision to have been breached before they are available.

The constitutional provision bears directly on the candidacy of each person nominated. Only by stopping the person who is in breach of the requirements of clause 65 standing as a candidate can the court with certainty avoid any possibility of his being chosen in breach of the Constitution. Despite the false declaration, the nominations of the defendants are valid. For that reason, no doubt, the declaration sought refers to the validity of the defendants' candidacy not their nomination.

I cannot make the declaration in the terms sought but I do make it in the following terms:

> "That the Defendant's Candidacy as Representative of the People in the 1999 General Elections to the Legislative Assembly is invalid because it could lead to a breach of the Constitution".

The plaintiff also seeks orders to prevent the defendants' candidacy continuing. The declaration I have made should be sufficient to persuade a genuine candidate to withdraw but I appreciate it may not have that effect. As I have stated, a way around the defendants' present problem could be to continue to run for the position and, if they are successful, wait for the almost inevitable petition. Once the election has been declared void as a result, then by paying their debts before the day for nominations in the by-election, they could stand as valid candidates for the same seat.

Whatever the motives and intentions of the defendants, if the court does not also make an order in the terms sought, a totally unacceptable situation could arise. If they are chosen and there is insufficient ground to prosecute for wilfully giving false information and no person eligible under section 26 to present an election petition does so, the candidate chosen in breach of clause 65 would be able to continue to sit as a Representative. However fanciful or remote that possibility, the fact it is possible strengthens my view that the court must have the power to ensure the constitution is not breached in this way. The court cannot rely on the defendants withdrawing their candidacy. I order therefore that the defendants' names shall be removed from the Roll of Candidates for the 1999 General Elections to the Legislative Assembly.

The plaintiff also seeks costs. It is admitted that, on 12 February in the case of Tupouniua and on 4 February in the case of 'Ilavalu, the Supervisor notified them of the information he had of an existing order outstanding at the time of the nomination. In each case the defendant refused to withdraw his or her candidacy. Had they withdrawn, this action would not have been necessary. I order that the defendants should each pay half of the plaintiff's costs of the joint action to be taxed if not agreed.

Kaufusi v Kingdom of Tonga

Supreme Court, Nuku'alofa
Ward CJ
C 1310/98

18 February 1999; 1 March 1999

Practice and procedure — pleading did not identify person or body that had malice — struck out

The plaintiff filed a claim for malicious prosecution. The statement of claim averred that the defendant prosecuted the plaintiff on two charges: one of falsification of accounts and the other of knowingly dealing with a forged document. At the trial the plaintiff was acquitted when the trial judge found there was no prima facie case against him. The statement continued that there was no reasonable or probable cause for the proceedings and the defendant instituted and carried on the prosecution maliciously. Before filing a defence, the defendant moved to have the proceedings struck out on the grounds that the statement of claim disclosed no reasonable cause of action, that it was unclear, or may delay the fair trial of the action, and that it was otherwise an abuse of process. The basis on which the defendant suggested the pleadings were unclear related to the identity of the defendant and of the person or body that had malice.

Held:

1. The use of the word "unclear" provided a wider ground for striking out and it must include any case where the pleading was so unclear that the other party could not know with any certainty the case he had to answer.
2. If malice was to be established, it was necessary to know who was claimed to have shown that malice and that the malice related to the institution of the prosecution. Without that it was impossible to defend.
3. Further amendment of the pleading would not help. The plaintiff could never succeed and it was a proper case to order a strike out and, for the same reason, the appropriate order was that the plaintiff's action be dismissed with costs to the defendant.
4. The ruling also applied to the parallel case of *Tu'itupou v Kingdom of Tonga* No.1309/98 save for the order for costs. The defence was given liberty to apply to re-instate that action on five days notice.

Statutes considered:
Crown Proceedings Act CAP 13

Counsel for plaintiff : Mr Edwards
Counsel for defendant : Solicitor General

The case went on appeal and the Court of Appeal decision appears at page 118.

Judgment

This is a claim for malicious prosecution. Before filing a defence, the defendant has moved to have the proceedings struck out on the grounds that the statement of claim discloses no reasonable cause of action, it is unclear or may delay the fair trial of the action and it is otherwise an abuse of process.

The first ground of challenge must be decided on the pleadings alone and no evidence may be considered.

The statement of claim avers that the defendant prosecuted the plaintiff on two charges, one of falsification of accounts and the other of knowingly dealing with a forged document. At the trial the plaintiff was acquitted when the trial judge found there was no prima facie case against him. It continues that there was no reasonable or probable cause for the proceedings and the defendant instituted and carried on the prosecution maliciously.

The particulars of malice are set out in detail as follows:

(a) In preparing the prosecution the defendant or its counsel ought to have known there was no case or evidence against the plaintiff.

(b) The defendant or its counsel was grossly ignorant of the law.

(c) During the first week of March, 1997, the plaintiff and his counsel William Edwards were asked to meet with Crown counsel Mrs Simiki and Miss Tapueluelu. The plaintiff was asked to plead guilty and if so the Crown Counsel would ask for the court for a conviction and discharge. If the plaintiff refused to plead guilty the Crown would file more charges against the plaintiff. The plaintiff refused to plead guilty and as a result he was indicted with an additional 16 charges without any preliminary hearing in the Magistrates' Court on or any evidence adduced in the Supreme Court for the purpose of any such further charges.

(d) The plaintiff was intimidated and threatened to plead guilty and on or about 13 March 1997 was charged with an additional 16 charges.

(e) There were 11 people suspended from the Treasury and two people from the Ministry of Health. There were 7 people from the Treasury who were reinstated and treated differently from the plaintiff and others notwithstanding that they were all alleged to have committed the same improper conduct.

(f) The work of the plaintiff in the Treasury was carried out openly and on instructions and authorisation of the

Accountant General and also at the request of other Ministries.

(g) That the said arrangement between the Treasury and other Ministries were agreed upon by the Heads of Department involved and authorized by Accountant General.

Later in the statement of claim in paragraph 8 further particulars are supplied:

> "That the additional charges against the plaintiff were brought recklessly and without the proper procedures being applied to lay the proper foundation for the said charges. The court refused to proceed with the said additional charges."

In considering whether there is a reasonable cause of action shown, the statement of claim refers to a prosecution having been instituted and that it was determined in the plaintiff's favour. Whether it was without reasonable cause is a matter of evidence and so long as it has been pleaded it reveals a basis for the cause of action. Of the particulars of malice subparagraphs (a) and (e) and paragraph 8 could reveal a reasonable cause of action and so the first ground of objection fails. However, I must further consider the identity of the defendant in relation to the submission that the pleading was unclear.

In determining whether the pleadings are unclear or may delay the fair trial of the action or that they are an abuse of process, the court may consider evidence. The plaintiff has not sought to produce any. The defendant has produced an affidavit by the Chief Establishment Officer in the Prime Minister's Office.

That affidavit sets out a little of the background. He deposes to the fact that, in 1993, the acting Auditor General filed a report that suggested there were irregularities in the payments of overtime by staff in the Treasury. Cabinet considered the matter and, in October of that year, suspended a number of civil servants including the plaintiff. Having sought the plaintiff's explanations, Cabinet decided, in January 1994, to dismiss him. A letter was then sent to Cabinet by a senior Treasury official asking it to reconsider the decision, which it did but, in March 1994, the decision was reaffirmed.

At the time of the decision in January to dismiss the plaintiff, Cabinet also resolved to refer the matter to the Ministry of Police to consider charges and such charges were laid. It was those that were dismissed for failure to establish a prima facie case. The judgment in that case is exhibited to the affidavit and shows that the grounds, upon which the trial Judge found the evidence failed, related to a failure by the investigating police officer to ask the accused whether he did actually work the overtime that formed the basis of the charge. The learned trial Judge considered that, on the evidence produced by the prosecution, "a jury may be left suspicious of him but it could never be said that there is sufficient evidence … to enable the jury to reach a verdict." He concluded; 'Initially I formed the view at the close of the Crown case that there may be cases to answer. On a reconsideration of the evidence and the record of interview I have reversed my opinion."

Order 8 rule 6(1)(iii) provides that a pleading may be struck out if it is unclear, or may otherwise prejudice or delay the fair trial of the action. The first part of this subrule is, as far as my researches a reveal, unique to this jurisdiction. There is no corresponding provision in the English Rules of the Supreme Court from which the

remainder of the Order is clearly derived. The provision in the corresponding English rule that has been replaced by "unclear, or may otherwise prejudice or delay the fair trial" is that the pleading "may prejudice, embarrass or delay the fair trial".

Embarrassment has been said to occur if the plaintiff's case is in such an unintelligible form that the defendant is unable to meet it. The pleading should state the facts which will put the defendants on their guard and tell them what they will have to meet when the case comes on for trial.

I can find no authority to assist with the meaning or scope of the word "unclear" used in our rule. Far too many actions in this Court are commenced by, and tried on, unclearly worded pleadings and so the power to strike out under this provision must be based on something substantially more. Clearly when the rule was made, there was an intention to convey something different from a possibility it may embarrass the other side. The use of the comma followed by the words "or otherwise" in our rule also show that it was intended to mean something other than that it would delay the fair trial. I take it therefore to be a wider ground for striking out and that it must include any case where the pleading is so unclear that the other party cannot know with any certainty the case he has to answer.

The basis on which the defendant suggests the pleadings are unclear relates to the identity of the defendant and of the person or body that had malice. By the Crown Proceedings Act, the Government is properly sued in the name of the Kingdom as has been done. The problem is that, if malice is to be established, it is necessary to know who is claimed to have shown that malice and that the malice related to the institution of the prosecution. Without that it is impossible to defend.

No doubt in an attempt to clarify this point, the writ names the defendant as the Kingdom of Tonga sued in respect of the Ministry of Finance. However, apart from the averment that the plaintiff was employed by the defendant and the evidence of the Chief Establishment Officer that he was in the Treasury, there is no other mention of the Ministry of Finance in the statement of claim.

Paragraph 2 of the claim states; "the defendant is sued in respect of the Audit Department, Cabinet and Crown Law." The Solicitor General who appears for the defendant complains that he has no indication from the pleadings who is actually being sued.

I have some sympathy with his predicament. It is he who has to prepare the defence. In order to do so he is entitled to know exactly who is, in truth, being sued. Clearly if it is a Government servant acting in the course of his employment, the Kingdom should be joined as a party but no individual is named. Malice requires a personal state of mind. Who is the person who is alleged to have held the malice that led to the prosecution and in which of the three departments of Government named does he work?

I have already pointed out that the Ministry named in the title of the action is not mentioned. In view of paragraph 2 of the claim, I must take the remaining references to "the defendant" as being made in terms of that paragraph.

Like the Finance Ministry, the Audit Department and Cabinet never again appear nor is any allegation made specifically against a member of either. It appears from the affidavit of the Chief Establishment Officer that there was a report by the acting Auditor General and that the Cabinet, amongst other steps, referred the matter to the police for investigation. If that was their involvement, there needs to be some

explanation in the claim as to why the plaintiff is alleging malice by them. There is none and the defendant is right to say that it is unclear.

That only leaves Crown law. Paragraph (a) of the particulars of malice could be a basis of an allegation of malice if it is being suggested that they actually deliberately ignored or failed to check whether there was a case and prosecuted whatever but the words "ought to have known" read with paragraph (b) appear to be suggesting incompetence and ignorance rather than malice. I do not accept that either ignorance or incompetence is a basis for a claim of malice.

Paragraphs (c) and (d), if proved, would suggest a most unfortunate approach to the case by counsel in the Crown Law Department but I do not accept it shows any allegation of malice in relation to the institution of the prosecution.

The affidavit of the Chief Establishment Officer discloses nothing to suggest the procedure by which the prosecution was brought was anything but the usual one for instituting a criminal prosecution. The matters he describes show a reasonable and probable cause of the prosecution. The allegation set out in subparagraphs (c) and (d) and paragraph 8 may suggest an improper meeting and intimidating actions. This is not the time to decide that, but I am satisfied that, even if proved, they are not a basis upon which malice could be established.

The Solicitor General's problem about the identity of the person who actually held the malice is further compounded by subparagraphs (e), (f) and (g). If re-instatement of others and different treatment of them is put forward as evidence of malice, then the pleadings must disclose who that person or body was and the manner in which the plaintiff was treated differently and maliciously. It would certainly not appear to be the Crown Counsel named in the preceding subparagraphs.

Apart from the intimidating actions alleged to have been done by Crown Counsel and the fact that the case was stopped by the Judge at the close of the prosecution case, nothing is pleaded to suggest there was anything unusual in the way this case was referred to the police. There is nothing to suggest that, having done so, Cabinet tried to influence the investigation. The police having investigated the case, however incompletely or incompetently, brought charges. There is nothing to suggest the charges that were eventually tried followed anything but the usual course in the magistrates' court. There is nothing to suggest that the conduct of the trial was motivated by anything improper other than the allegation in subparagraph (a). The Judge's ruling shows that the failure of the evidence was a failure by the investigating officer to ask some all-important questions and that, even without them in the prosecution case, he was, for some time at least, uncertain. None of these matters is clarified.

On those grounds I feel the defendant's complaint is justified. The case on the statement of claim is unclear to the extent that I do not consider the defendant can possibly know the case he has to answer in order to draft a defence.

The application of the defendant is that the writ be set aside and the claim be dismissed. The power of the court to strike out pleadings is one that should only be exercised in the clearest cases. It is an important principle that every man is entitled to his day in court. There is clear authority also that, rather than strike out a defective pleading, the court should always consider whether the defect could be cured by amendment.

This action started as a claim not only for malicious prosecution but also for wrongful dismissal and unfair treatment. I ordered that those were matters for judicial

review and that, as the defendant was so very far out of time, they would be struck out. I gave time to the plaintiff to amend his pleading and pointed out the need to set out the allegation of malice. Having had time to do so, the present statement of claim has filed. I do not think, therefore that further amendment would help. On the pleading before me, the plaintiff could never succeed and I am satisfied it is a proper case to order that it is struck out and, for the same reason, I consider the appropriate order is that the plaintiff's action be dismissed with costs to the defendant.

This ruling applies to the parallel case of *Tu'itupou v Kingdom of Tonga* No.1309/98 save for the order for costs. The defence have liberty to apply to re-instate that action on 5 days notice.

Ramanlal and Sons Ltd v Teta Tours Ltd

Supreme Court, Nuku'alofa
Finnigan J
C 304/93

13, 14 January 1999; 11 March 1999

Agency — whether acting as principal or agent — held that liability as principal was not negatived
Contract law — interpretation — whether direct relationship or agency relationship

Ramanlal was the owner of the Pacific Royale Hotel. Teta was the owner of Tour and Travel Agencies. Teta was the agent for, or representative of, Hawaiian Airlines ("HAL") in Tonga. Teta was selling air tickets for HAL and was providing tour and transport facilities for passengers and tourists. In 1989, Ramanlal agreed to provide accommodation for passengers represented by Teta, on account of and for payment by Teta. At the same time, Teta would provide tours and transport for guests of Ramanlal and air tickets for Ramanlal's employees on account. Instead of settling these accounts by monthly payments, they balanced the respective debts and allowed each other equal credit to cancel whichever debt was the less, and the party still owing paid the balance to the other. The arrangement had ended in 1992, and since then the parties had attempted a "final accounting", which was largely a question of fact [not itself complex] although there was room for the application of the law of principal and agent. Hawaiian Airlines became defunct and could not pay the plaintiff. The plaintiff proceeded on the footing that the defendant, while agent for Hawaiian Airlines, incurred the debts that the plaintiff claimed were owed, in its own name. The plaintiff also alleged that Hawaiian Airlines, before it became defunct, paid to the defendant the sums which it now claimed, and on both grounds sought payment from the defendant. However, the major cause of difficulty throughout was that the plaintiff's attempts failed to produce primary evidence of the claimed payments by Hawaiian Airlines to the defendant. The accountants had "found" that only $16,969.06 was owed to Ramanlal, and that they had "assessed" Teta's part of that debt as being only $469.53, with $16,499.53 "payable" by HAL. Ramanlal's position was that the dealings of the parties throughout were direct dealings, creating contractual relations between them — hence its claim was only for the balance due "in an equalizing process"; whereas Teta's position, on the other hand, was that, when requesting accommodation, it was only the agent and thus not liable; whilst in the supply of airline tickets, Teta was contracting direct with Ramanlal, which was liable to Teta in that respect.

Held:

1. In making their contra arrangement, the parties made a contract between themselves, upon which one could sue the other and establish liability. They did business under this contract for more than 10 years. Far from negativing its personal liability in making the arrangement which it did, the defendant assumed liability. The claims raised by the defendant for protection under the law of agency were ill-founded.
2. The defendant was liable to the plaintiff for the costs of the plaintiff's services in supplying accommodation for Hawaiian Airlines passengers. The plaintiff was liable to the defendant for the costs of the defendant's services in supplying transport and airline tickets.
3. The report of the accountants was accepted and judgment was entered accordingly for the plaintiff on its claim, in the sum of $16,969.06 and for the defendant on its counterclaim in the sum of $26,221.25. The plaintiff was to pay the defendant $9,252.19. Interest was to run on that sum at 10%, the rate sought by each party, from the date of judgment until paid.

Cases considered:

Ariadne Steamship Co Ltd v James McKelvie and Company [1922] 1 KB 518 (CA)

Yeung Kai Yung v Hong Kong and Shanghai Banking Corporation [1981] AC 787; [1980] 2 All ER 599 (PC)

Counsel for plaintiff : Mr Niu

Counsel for defendant : Mr Vaipulu and Mr Lemoto

The case went on appeal and the Court of Appeal decision appears at page 170.

Judgment

Introduction

These are competing claims between two parties that formerly for many years did business together. In the course of their businesses, for more than ten years, each used the services of the other and each rendered monthly accounts to the other. Instead of settling these accounts by monthly payments, they balanced the respective debts and allowed each other equal credit to cancel whichever debt was the less, and the party still owing paid that balance to the other.

Now the arrangement has ended, indeed it ended in 1992, and the parties since then have attempted to assess by a final accounting which party still owes the other. This is largely a question of fact, although there is room for application of the law of principal and agent. The fact situation is not itself complex, but the litigation has been lengthy and has been complicated by deficiencies in the documentary evidence. The parties have twice abandoned trials part-heard in order to settle, and have had four separate hearings in the Court. There was even a hearing, on 26 and 27 October 1998 to determine whether or not the parties had settled the matter. After determining that they had not, the Court insisted that the parties either settle or come to a final hearing.

As may be imagined, the absence of some documentary evidence has been a disadvantage to the Court as well as to the parties in the final determination of the issues, but from the evidence which has been presented, a well-founded resolution is possible.

The Competing Claims

The services provided by the plaintiff to the defendant were in the form of accommodation for Hawaiian Airlines passengers. The services provided by the defendant were in the form of Hawaiian Airlines tickets for officers and employees of the plaintiff, and in addition, tours and airport transfers for the plaintiff's employees and for customers.

The claim and counter-claim as amended and litigated in this final hearing are simple enough. The plaintiff claims that it owes the defendant $20,495.73, and that the defendant owes it $29,665.08, and sues for the balance, $9,159.35. The defendant admits that the plaintiff owes it $20,495.73, and denies that it owes $29,665.08.

In its amended counterclaim the defendant claims $26,221.25. It wholly relies on some calculations that were made by a committee of two accountants appointed, one by each party, during the course of the litigation and in one of the attempts to settle. The two accountants calculated that the total amount owing by the plaintiff to the defendant is $26,221.25. In its pleading the defendant overlooks the sum calculated as due by itself to the plaintiff, which is $469.53. It does however admit liability for this amount, and so its counterclaim must, if successful, be offset by that amount, to $25,751.72.

Each party seeks interest at 10% if awarded judgment, and costs.

In his closing submissions, Mr Niu on behalf of the plaintiff continued the plaintiff's admission of only $20,495.73, identifying that sum as the amount due for Hawaiian Airlines tickets bought by the plaintiff. There were however other services purchased by the plaintiff, i.e. tours and airport transfers for its customers and staff, and the quantum of the plaintiff's debt was fixed at $26,221.25 in a detailed process by the accountants appointed by the parties. The parties had terminated part-heard a previous hearing of these claims in order to have the accountants assess as accurately as possible what each owed the other, with a view to settling the claims out of court. The assessment that they did was not just a balancing-out. It was a calculation of the parties' indebtedness from an independent assessment of all the invoices that the parties were able to make available to the accountants. I heard evidence from one of the accountants in an earlier hearing, in October 1998, and I have assessed their conclusions for myself. I cannot find any basis at all in the evidence for rejecting or amending their findings. Theirs was the first and best assessment that was carried out.

The accountants found that the plaintiff owes $26,221.25, and that only $16,969.06 is owed to the plaintiff, and they assessed the defendant's part of that debt as being only $469.53, with $16,499.53 payable by another party not yet mentioned, Hawaiian Airlines. The plaintiff does not accept that assessment of what it owes, and it does not accept the accountants' assessment of the debt owed by the defendant.

Hawaiian Airlines has become defunct, and cannot pay the plaintiff. The plaintiff proceeds on the footing that the defendant, while agent for Hawaiian Airlines, incurred the debts that the plaintiff claims are owed, in its own name. The plaintiff also alleges that Hawaiian Airlines, before becoming defunct, paid to the

defendant the sums which it now claims, and on both grounds seeks payment from the defendant. However, the major cause of difficulty throughout has been that the plaintiff's attempts have failed to produce primary evidence of the claimed payments by Hawaiian Airlines to the defendant. Another difficulty for the plaintiff has been its inability to produce evidence of quantum of the respective debts which overpowers the calculations of the two accountants.

The assessment undertaken by the accountants was not only expert, it was done on examination of all the available accounting evidence. Unless the plaintiff has shown some errors in that assessment, it has given the Court no basis on which to try to do better what the experts have already done.

The Issues

In essence then, the two issues are whether the defendant owes the plaintiff more than its admitted $469.53, and whether the plaintiff owes more than its admitted $20,495.73. In the light of the pleadings and the closing submissions of both counsel I settle the issues in the following form:

1. Does the defendant owe the plaintiff $29,655.08? What the plaintiff is seeking is reimbursement for accommodation supplied to Hawaiian Airlines passengers at the request of the defendant. The defendant denies liability, on the ground that, although it was Hawaiian Airlines' agent, the plaintiff was always dealing direct with Hawaiian Airlines for payment. The accountants, upon whom the defendant relies in its counterclaim, have assessed the defendant's debt, on the facts but not on the law, as $469.53.
2. Does the plaintiff owe the defendant $26,221.25? This is the sum assessed by the accountants as the plaintiff's debt to the defendant. The plaintiff admits $20,495.73, but the accountants assessed the higher amount. The plaintiff admits the lower amount on the footing that it dealt with the defendant direct for purchase of airline tickets.

The plaintiff's position is that the dealings of the parties throughout were direct dealings, creating contractual relations between them. Hence its claim is for only the balance due in an equalising process. The defendant's position is that when requesting accommodation it was only the agent and was not liable for payment, and did not pay, while in the supply of airline tickets it was contracting direct with the plaintiff and demands payment from the plaintiff.

In response to the plaintiff's claim, the defendant submits that the airline's accommodation vouchers were usually sent by the plaintiff direct to the airline for collection, and were not paid by the defendant. The evidence of the plaintiff's witness however is that the accommodation costs were paid by the defendant with its own cheque, whether or nor it had had reimbursement from the airline. A letter dated 7 August 1992 from the defendant to the plaintiff was produced in evidence. The letter, and the plaintiff's response dated 9 October 1992, seem to show clearly a course of conduct whereby the defendant paid to the plaintiff money due both on its own

account and on account of Hawaiian Airlines. As both letters stated, the defendant was invoicing the airline for the money claimed from it on the Hawaiian Airlines' account by the plaintiff, and was paying the Hawaiian airlines account with funds provided by the airline. There is confirmation of this in another letter that was produced, although written after these proceedings were commenced. In this letter dated 3 May 1994 written to plaintiff's counsel, the financial controller of the airline stated that for payment of all its creditors in Tonga the creditors billed the defendant, and the airline provided funds to the defendant, which paid the creditors using its own accounts and cheques. I note but do not rely upon the airline's letter, even though it was written in the course of preparation and for the purposes of these proceedings, because it is not necessary to do so.

The plaintiff comments, not unreasonably, that the counterclaim contradicts the defendant's denial of liability for the accommodation, because if as agent of Hawaiian Airlines it was not liable to pay for Hawaiian Airlines' accommodation then as agent of Hawaiian Airlines it is not entitled to collect the debt due for tickets. Its submission is that the defendant in selling the tickets was contracting on behalf of the airline, which provided the service to the plaintiff, and cannot sue to recover for itself the money owed to the airline.

The defendant responds that it is entitled to recover the ticket money for itself because, as the evidence showed, it was selling travel to the plaintiff (and to other travellers) by a credit arrangement. Its witness said in evidence that this was an arrangement between the defendant and the plaintiff. It sold the airline's tickets to the plaintiff without requiring payment and thereby allowed credit to the plaintiff so that the persons travelling could travel even before payment. The defendant was agent for the airline under a general sales agreement. The defendant's witness said that the general sales agreement, and IATA regulations, (neither of which I have seen) required payment to the airline on a strict and frequent basis, for every ticket sold. The letter from the airline confirms that. To comply with the general sales agreement and retain its agency, the defendant says it was paying the airline for the tickets on their due dates from its own funds. The evidence does not disclose whether the plaintiff knew that the defendant was paying for the tickets itself, but the defendant says that as an agent under a general sales agreement with the airline it was required to pay and did pay, and that what it seeks is reimbursement for itself.

The Question of Law in the First Issue

I turn now to the first issue. The question is whether in the circumstances of this case, where the defendant was agent for Hawaiian Airlines in arranging accommodation, the plaintiff can sue the defendant to recover the accommodation charges.

The defendant has submitted on this point that the defendant has not had money from the airline for payment of these costs, and that it never stated or accepted personal liability. The plaintiff's submission is that this is one of those cases where the agent may be held liable on a contract made by the agent as agent. To establish the point at law, it relies on the facts. On its behalf, Mr Niu points first to the long history of the parties' dealings. For ten years or more they exchanged services with each other and paid each other in credits with cash payment of the balance. Included in these general dealings were some direct party-and-party dealings, the defendant

providing transport for the plaintiff's guests and staff as required and the plaintiff, being liable for payment. The accommodation services were kept distinct in their accounts, as is shown by their letters of 7 August and 9 October 1992, but this, in his submission, was because the defendant's payments for accommodation of Hawaiian Airlines passengers were invoiced not only by the plaintiff to the defendant, but by the defendant to the airline, because the airline reimbursed the defendant. Over the ten years, in his submission, the plaintiff had looked only to the defendant for payment. Confirmation of that fact, he submitted, is given by the airline itself in its letter of 3 May 1994. In that letter, the airline financial controller stated that the airline provided the funds to the defendant but the defendant made the payments through its own accounting system. She stated that all sums claimed from it by the defendant under the general sales agreement, for such payments as the plaintiff's claim had been paid to the defendant. There was, Mr Niu pointed out, no airline invoicing, for the airline tickets, because the airline was not involved. The arrangements were between the plaintiff and defendant alone.

It needs also be said, but just in passing, that if, as the airline financial controller said, the airline has already paid the defendant (of which the plaintiff has tried in vain to find evidence), then the plaintiff has a good claim for money held on its behalf by the defendant. That however as a cause of action in these proceedings, I expressly put aside.

For payment from the defendant for the supply of accommodation, the plaintiff relies upon the general principle of law stated by Atkin LJ in *Ariadne Steamship Co Ltd v James McKelvie and Company* [1922] 1 KB 518 (CA) at 535-6, and in particular the following dictum at 536:

> "In a case where there is doubt whether a party contracting as agent intends a qualified assent, i.e. assent on behalf of the principal only, or an unqualified assent, i.e. assent on his own behalf also you must look to the body of the contract to see whether [that person] was intended to be a party or not. If the contract does not purport to be made with him, but with some one else, or uses words which make it plain that the only contracting party is [that person]'s principal … [that person] will not be chargeable."

In Mr Niu's submission, the circumstances show that the parties were contracting in a contra arrangement for an exchange of services, each in its own name, even though the services involved the clients of the defendant's principal. He points to the evidence of the main witnesses for each party, that the object of the arrangement was to reduce the transfer of actual cash between them for mutual services supplied, and he submits that, in making the arrangement to contra the charges for accommodation, even though the funds for that were supplied by its principal, the defendant was making itself a party to the contract for supply. He relies upon the following dictum of Lord Scarman in *Yeung Kai Yung v Hong Kong and Shanghai Banking Corporation* [1981] AC 787 at 795; [1980] 2 All ER 599 (PC) at 604:

> "The true principle of law is that a person is liable for his engagements (as for his torts) even though he is acting for another, unless he can show that by the law of agency he is to be

> held to have expressly or impliedly negatived his personal liability."

In my opinion, far from negativing its personal liability in making the arrangement which it did, the defendant assumed liability. The contract which it made, and for many years carried out, was that it would provide commercial services for the plaintiff (transport and airline tickets), and would accept in payment a credit against what it owed the plaintiff for services (accommodation when it required it for its airline agency customers). It seems to me that the plaintiff was entitled to sue on that contract had the defendant not honoured it, and, had the defendant wished, it could have joined the airline as a third party or claimed in turn under its own contract with the airline.

In my assessment therefore, in making their contra arrangement, the parties made a contract between themselves, upon which one could sue the other and establish liability. They did business under this contract for more than 10 years. The claims now raised by the defendant for protection under the law of agency are ill-founded.

I turn now to the second issue, the debt claimed by the defendant from the plaintiff. The parties agree in the pleadings that the services supplied by the defendant to the plaintiff were not just airline tickets, but included transport services. The plaintiff as an integral part of its claim has admitted liability in contract for a debt to the defendant, but has not admitted the quantum sought by the defendant. The basis of the admission as to liability is the plaintiff's assertion that each party contracted directly with the other, and that the debit accrued by each is a debt by one to the other in contract. The basis of the defendant's claim for more than the plaintiff admits, which is set out in the amended statement of defence and amended counterclaim, is simply that the higher amount is what was calculated when the accountants made the assessment. The defendant does not challenge the plaintiff's claim that the parties are in a set-off situation, or advance any other claim in law to support its counterclaim. The plaintiff argues in submissions that the counterclaim must fail. This is because the defendant, in both its amended statement of defence and in its amended counterclaim identifies Hawaiian Airlines as its principal. Thus, in the plaintiff's submission, it is claiming as agent, even though it says it is not. The plaintiff submits that when it sold the tickets it sold them as agent, and as agent it cannot recover for itself the debts of the principal.

I find however that the counterclaim has the same basis as the claim - simple contract between principals. The difference is only in quantum. Thus, in respect of the plaintiff's debt to the defendant, the defendant's counterclaim is admitted by the plaintiff except as to quantum.

This becomes clear on examination of the facts. What was the relationship between the parties in the provision of the transport services by the defendant, and in the provision of the airline tickets? In the provision of transport services, there is no room for doubt. There was a direct party-and-party contract relationship. In the provision of airline tickets also, I have no doubt that the relationship was the direct relationship. It was a relationship whereby the defendant provided airline tickets of its principal Hawaiian Airlines, not on the terms of Hawaiian Airlines, but on its own terms. The defendant, by the evidence of its own witness, satisfied the airline with payments from its own funds, and had a separate contract for payment with the

plaintiff. Putting that a different way, the defendant acted outside the terms of its general sales agreement when selling Hawaiian Airlines tickets to the plaintiff, and thus outside the terms of its agency. In consideration of the supply of Hawaiian Airlines tickets to the plaintiff without requiring prompt payment, it created its own contract for payment direct with the plaintiff. In my opinion, if ever unpaid by the plaintiff on their agreed credit terms, the defendant was always entitled to sue for payment on this contract, just as the plaintiff is suing now.

Decision of the Claim and Counterclaim

On that basis therefore, the competing claims of the parties as to liability are to be resolved in this way. The defendant is liable to the plaintiff for the costs of the plaintiff's services in supplying accommodation for Hawaiian Airlines passengers. The plaintiff is liable to the defendant for the costs of the defendant's services in supplying transport and airline tickets.

Turning to quantum, I can say only that no better basis for assessment of the quantum of each party's debt has been supplied to me than the report prepared by the two accountants. I accept that assessment, and find that the amount owed by the plaintiff to the defendant is $26,221.25. The evidence does not support the lower amount admitted by the plaintiff. I find that the amount owed to the plaintiff by the defendant is the total of the two sums assessed by the accountants as due to the plaintiff, namely ($469.53 plus $16,499.53), i.e. $16,969.06. The evidence does not support the higher sum claimed of the plaintiff. Offsetting the lesser sum against the greater, I find that the balance is a sum of $9,252.19, that sum being payable by the plaintiff to the defendant. Judgment is entered accordingly for the plaintiff on its claim, in the sum of $16,969.06 and for the defendant on its counterclaim in the sum of $26,221.25. The plaintiff is to pay the defendant $9,252.19. Interest will run on that sum at 10%, the rate sought by each party, from the date of this judgment until paid.

Costs

The plaintiff has been successful in its claim and the defendant successful in its counterclaim, but the plaintiff is liable to the defendant. I have considered the merits of the actions of both parties in conducting this litigation. In all of the circumstances, I decline an order for costs.

R v Fotu

Supreme Court, Nuku'alofa
Ward CJ
Cr 285/99 and Cr 286/99

15 March 1999; 17 March 1999

Criminal procedure — bail when murder charge — discretion of the Court

These were two unrelated cases except that the charge in each case was murder and the accused in each applied for bail. The issue was whether the basic mandatory requirement to grant bail as set out in sections 3(1) and 4(1) of the Bail Act 1990 applied where the court was deciding an application in a case of murder or treason. In other words, did the Court in such cases have to follow the position under the rest of the Act and say, "I must grant bail unless …" or is it entitled to say, "I will only exercise my discretion to grant bail if …".

Held:

1. As with every discretionary power, the court will only exercise it for a good reason and such reason should be stated. Those reasons may be different from and outside the strictures of the general provisions in the remainder of the Act but, as the liberty of an unconvicted person was involved, the court will always incline towards the grant of bail.
2. In the case of Fotu, which involved an unprovoked attack on the deceased, if his case was proved the likely sentence the accused would receive was such that there was a very high chance he would not answer to his bail. Similarly, such an incident left a serious risk of reprisal by the deceased's family. The public had a right to be protected from such a risk. The application for bail was refused.
3. In the case of Faleafa, where the case against the accused was based on his participation as an accomplice to the murder, the court considered that he would answer to his bail and it should be granted with strict terms. He was released on his own recognisance of $2000.00 and two sureties of $1000.00 each only one of which may be a member of his immediate family. He was to surrender any passport he possessed to the court and he would report to the Police station at Nukunuku every Friday and Saturday between 8.00 and 9.00pm.

Statutes considered:
Bail Act 1990

Counsel for prosecution : Mr Tapueluelu
Counsel for applicants : Mr Tu'utafaiva

Judgment

These are two unrelated cases except that the charge in each case is murder and the accused in each has applied for bail.

The position with regard to bail is now covered by the terms of the Bail Act, 1990, as amended. In the case of an unconvicted person, section 3(1) provides the general rule that every person who is arrested or charged with a criminal offence shall be released on bail until the date he is next due to surrender to custody. The rule is subject to the remaining provisions of the Act and, of those, section 4(1) and (2) deals with the manner in which this rule is to be applied where the offence is punishable with imprisonment.

Section 4(1) repeats the mandatory requirement to grant bail but sets out the grounds on which the Court or a police officer may refuse it. Section 4(2) requires the court or police officer when making the decision under subsection (1) to have regard to all the relevant circumstances and makes specific reference to four such matters.

Section 3 (2) provides, however:

> "(2) A person charged with murder or treason may be granted bail only by the Supreme Court or Court of Appeal."

Counsel have addressed me on the meaning and scope of that provision.

Briefly, counsel for the defence suggests that the requirement that such cases may only be dealt with by the higher courts does not remove the mandatory requirements of section 4(1) when making the decision. Counsel for the prosecution points out that section 3(2) sets these two offences apart and suggests that excludes them from any mandatory terms in the following section. In support she points out that sections 4(1) and (2) cover all offences punishable with imprisonment but, whilst these two offences are punishable in this way, they are the only offences in the criminal law which are also punishable by death.

Although there have been many applications for, and grants of, bail in cases of murder since the passing of the Bail Act, it appears this particular point has never been formally determined. The significance of the point is, of course, whether the basic mandatory requirement to grant bail as set out in sections 3(1) and 4(1) also applies where the court is deciding an application in a case of murder or treason. In other words, does the Court in such cases have to follow the position under the rest of the Act and say, "I must grant bail unless …" or is it entitled to say, "I will only exercise my discretion to grant bail if …"

The terms of the Act satisfy me that it was not the purpose of section 3(2) to limit to the higher courts the exercise of exactly the same power as that applied by all courts and the police in every other case. Neither can I see any purpose in such a provision. The general rule set out in section 3(1) states that a person "shall be released" on bail. Similarly, section 4 requires that a person "shall be granted bail unless". Section 3(2) uses the word "may" and it is clear the use of a different word in that subsection was deliberate.

Counsel's suggestion that these two offences carry the death penalty is a reflection only of the fact they are the two most serious offences under the criminal

law. That is the reason the Act gives a wider discretion to grant or refuse bail. The court is not bound by the more rigid requirements of the Act as a whole but, because the offences are so serious, the exercise of the power is limited to the higher courts.

Having said that, no court will be blind to the general principles of the Act. As with every discretionary power, the court will only exercise it for a good reason and such reason should be stated. Those reasons may be different from and outside the strictures of the general provisions in the remainder of the Act but, as the liberty of an unconvicted person is involved, the court will always incline towards the grant of bail.

In the case of Fotu, the prosecution case is that he was drinking and was involved in an unprovoked attack on the deceased. Later he returned to the scene with a machete and struck more than one blow at the neck and shoulders of the deceased. He later admitted his part to the police. If that case is proved, the likely sentence the accused will receive is such that I think there is a very high chance he will not answer to his bail. Similarly, I share the concern of the police as stated by counsel for the prosecution, that such an incident leaves a serious risk of reprisal by the deceased's family. The public has a right to be protected from such a risk. The application for bail is refused.

In the case of Faleafa, the prosecution case is that the accused joined two friends who were attacking another by punching him. The victim eventually escaped but had received a stab wound to the neck that severed a vital blood vessel. The accused has denied using a weapon and prosecuting counsel tells the court his case against this accused is based on his participation as an accomplice to the murder.

In his case I consider he will answer to his bail and I see no reason why I should not grant it with strict terms. He will be released on his own recognisance of $2000.00 and two sureties of $1000.00 each only one of which may be a member of his immediate family. He will surrender any passport he possesses to the court and he will report to the Police station at Nukunuku every Friday and Saturday between 8.00 and 9.00pm.

Ramanlal & Sons Company Ltd v Cater

Supreme Court, Nuku'alofa
Ward CJ
C 278/99

19 March 1999

Creditors' remedies — application for writ of ne exeat regno — declined

In June 1998 one Robert Allan booked into a hotel owned by the plaintiff company, the Pacific Royale Hotel, and by September had run up a total bill of approximately $10,000. When he was approached about it, Allan explained that he worked for an organisation known as the National Professional Minor Football League Conference Limited ("NPMFLC") and that his "boss" was the present defendant, Cater. A few days later the manager of the hotel received a telephone call, from a man who identified himself as Cater, assuring him that he would cover Allan's bill. Shortly after, this was confirmed in a letter on NPMFLC Inc notepaper, dated 29 September, in which Cater stated that he would soon be in Tonga. Allan continued to stay at the hotel until he unexpectedly died on 26 February 1999. Shortly, before that date the defendant had arrived and also booked into the hotel. By 5 March 1999 the total bill was $44,020.12. During the period of Allan's stay, there had been negotiations by the NPMFLC to purchase the hotel; these negotiations fell through and it appeared the defendant was preparing to leave Tonga. On 5 March, the plaintiff applied ex parte for orders that the defendant be restrained from leaving the Kingdom unless he lodged sufficient security in court or, alternatively, that he remain in Tonga until the plaintiff's claim has been determined. An interim order was made that the defendant should not leave the Court's jurisdiction and should attend in chambers on the following Monday, 8 March. It was also ordered that the defendant should surrender his passport to the court and that was done. The defendant did not deny the existence of the debt to the hotel. It was accepted by the plaintiff that, since the order of 5 March, the defendant had paid the portion of the hotel bill incurred by him personally. The defendant told the court that he was one of three directors of the NPMFLC and was also its chief executive. He admitted the letter of 29 September but in his defence, filed on 9 March, denied it was a guarantee of the whole bill and that any offer was made by him on behalf of the NPMFLC in his capacity as chief executive. Any obligation it may have created was between the hotel and the NPMFLC. There were two limbs to the plaintiff's application: 1) that the defendant should lodge sufficient security in Court before he left the country; and 2) the application for a writ of ne exeat regno.

Held:

1. The question was whether, by allowing the defendant to leave the jurisdiction, the plaintiff would be prejudiced in relation to the proof of its case. The writ of ne exeat regno was issued to facilitate the obtaining of judgment and not as an aid to execution.
2. The defendant's absence would not interfere in any way with the pursuit of the claim to judgment. If the action was successful, the plaintiff would then be able to pursue the judgment debt with the methods of execution available even if the debtor remained abroad.
3. The application was refused. The defendant's passport was to be returned to him and the interim Order of 5 March was set aside.
4. The question of the costs of the application and any possible claim against the undertaking given by the plaintiff at the ex parte application were to be determined at the conclusion of the main action.

Cases considered:

Drover v Beyer (1879) 13 Ch D 242
Felton v Callis [1969] 1 QB 200; [1968] 3 All ER 673

Statutes considered:

Debtors Act (UK)

Counsel for plaintiff : Mr Appleby and Mr Garret
Counsel for defendant : Mr Foliaki

Judgment

In about June of last year, one Robert Allan booked into the Pacific Royale Hotel, which is owned by the plaintiff company. Although he appears to have booked in under his own name, he told the staff that he was involved with an American football company. By September he had run up a total bill with the hotel of approximately $10,000.00 and, understandably, the management was becoming concerned.

When he was approached about it, Allan explained that he worked for an organisation known as the National Professional Minor Football League Conference Limited and that his "boss" was the present defendant, Cater. A few days later the manager of the hotel received a telephone call, from a man who identified himself as Cater, assuring him that he would cover Allan's bill. Shortly after, this was confirmed in a letter on NPMFLC Inc notepaper, dated 29 September, in which Cater stated that he would soon be in Tonga. It included the following paragraph;

> "I understand that you are not running a free board and care facility and you want to be certain that you will be paid. I do not know what the present balance on Mr Allan's bill is, but I would be willing to pay an additional $2,500.00 over and above whatever that bill is upon my arrival in Tonga. I ask that you

consider my offer and please do not put Mr Allan out of the Pacific Royal Hotel."

The hotel management was, surprisingly, receptive to his plea and Allan continued to stay at the hotel until he unexpectedly died on 26 February this year. Shortly, before this the defendant had arrived and also booked into the hotel. By 5 March 1999 the total bill was $44,020.12.

During the period of Allan's stay, there had been negotiations by the NPMFLC to purchase the hotel and, if it had been finalised, no doubt the costs of the two men's stay would have been taken on with the rest of the hotel's business. However, the sale negotiations fell through and it appeared the defendant was preparing to leave Tonga. On 5 March, the plaintiff applied ex parte for orders that the defendant be restrained from leaving the Kingdom unless he lodged sufficient security in court or, alternatively, that he remain in Tonga until the plaintiff's claim has been determined.

On the affidavit evidence before me, I made an interim order that the defendant should not leave the jurisdiction of this court and should attend in chambers on the following Monday, 8 March. I also ordered that he should surrender his passport to the court and that was done.

There have been a number of hearings in chambers since that date in order to present evidence to ascertain the defendant's position vis a vis the NPMFLC and the position of that organisation in Tonga.

Hard evidence has been surprisingly difficult to obtain but the defendant does not deny the existence of the debt to the hotel. It is accepted by the plaintiff that, since my order of 5 March, the defendant has paid the portion of the hotel bill incurred by him personally. The defendant has told the court that he is one of three directors of the NPMFLC and is also its chief executive. He admits the letter of 29 September but in his defence, filed on 9 March, denies it was a guarantee of the whole bill and that any offer was made by him on behalf of the NPMFLC in his capacity as chief executive. Any obligation it may have created was between the hotel and the NPMFLC.

From the evidence that has been provided, I am also satisfied of the following:

1. The NPMFLC started business in 1990 and was incorporated in the State of Alabama in June 1993.
2. The officers of the corporation are the defendant as president and chief executive officer, and two senior vice presidents, a lawyer and the defendant's wife.
3. The NPMFLC has established an American football team in Tonga and also teams in Fiji and the Cook Islands.
4. The team in Tonga is owned by the NPMFLC (75%) and Vision Tonga Ltd (25%) and employs at least three people beside the team members.
5. In order to establish the team in Tonga, the NPMFLC has supplied equipment for the whole team of uncertain present value.
6. The NPMFLC was engaged in active negotiations for the purchase of the Pacific Royale Hotel through a Tonga based agent and consultant and initial offers of finance were made by local financial houses for this purchase.

7. Those offers have since been withdrawn but I am not satisfied upon the evidence available at this stage that the defendant or his agent here knew of that withdrawal at the time of my Order of 5 March.
8. This defendant has left hotel and travel bills in Fiji and Cook Islands, which remain unpaid following failure of the arrangements he had made with those hotels for payment.
9. There is another action filed against him in this court by a bank relating to a dishonoured cheque.

Many of these matters have little bearing on the application before me for determination but they have come to light in the attempt by the defence to establish the bonafides of the NPMFLC and the plaintiff's attempts to demonstrate that the defendants actions are fraudulent and/or that this is a case where the court is entitled to lift the corporate veil and examine the NPMFLC because they allege it is no more and no less than the defendant.

The question for determination is whether the Court, having prevented the defendant from leaving pending this application, can continue to detain him in Tonga. As I have stated there are two limbs of the plaintiff's application.

The first is that he should lodge sufficient security in court before he leaves. It is clear that the so-called security they seek is the sum required in full settlement of the hotel bill. I do not think I have power to make such an order and neither should the court in a case such as this where the plaintiff allowed such a bill to be incurred and there is at least an arguable defence that the deceased man's estate or the NPMFLC may be the proper defendant.

The second ground is based on the writ of ne exeat regno. I am satisfied that such a writ is available here and the terms on which it will be ordered are the same as in England. The question is whether this is an appropriate case for the issue of such a writ. It is a draconian measure and will only be issued in very clear cases. Already as a result of the original order, the defendant has remained in the jurisdiction for nearly two weeks more than he intended. If the writ is continued he could be here for many months before the case is tried.

There are four requirements for the issue of the writ and the court must be satisfied, on sworn evidence, of them all. They are that:

1. The action is one in which the defendant would formerly have been liable to arrest at law;
2. A good cause of action for at least $100 is established (the sum under the Debtors Act in England is GBP50.00)
3. There is probable cause for thinking the defendant is about to leave the country unless he is arrested; and
4. The absence of the defendant from the country will materially prejudice the plaintiff in the prosecution of his action; per Megarry J in *Felton v Callis* [1969] 1 QB 200 at 210; [1968] 3 All ER 673.

The evidence presented to me on 5 March was sufficient to persuade me that the writ should issue at least to enable the court to hear from the defendant but I was

concerned at the time about the real prejudice to the prosecution of the plaintiff's action. It is to this that the hearings have been directed. There is no dispute that the first three requirements are satisfied. Although the evidence of the actual sum still outstanding to the hotel is not clear, there is no dispute that it is very substantially beyond the limit set by section 6 of the Debtors Act.

The plaintiff's endeavours have been directed largely to demonstrating that this is in truth a case of fraud, that the defendant should not therefore be entitled to hide behind the corporation and that they will in that way be able to prove his personal liability. The defendant has striven to demonstrate the bonafides of the NPMFLC and of future sources of finance.

With respect to counsel, I consider the decision of the court is more fundamental. The question is whether, by allowing the defendant to leave the jurisdiction, the plaintiff will be prejudiced in relation to the proof of its case. It is well established that this writ is issued to facilitate the obtaining of judgment and not as an aid to execution; *Drover v Beyer* (1879) 13 Ch D 242; *Felton v Challis*. Unfortunately for the plaintiff, the more I hear; the clearer it becomes that the whole purpose of these proceedings is to obtain payment of the debt before the hearing of the claim. Nothing has been produced to me that suggests any way in which the absence of the defendant from the country will prevent or even delay the obtaining of judgment in this action. There has been no suggestion, for example, that he will be needed to give evidence for the plaintiff or that there will be a need for discovery or that, if there was, it would not be complied with or that he will remove vital evidence from the country on his departure. All the evidence has been directed to the suggested fraud and the insubstantial nature of the NPMFLC.

In *Felton v Challis*, Megarry J refers to comments made by James LJ in *Drover*'s case (from the Law Journal Reports but not included in the Chancery Division Report):

> "… often the absence of a defendant "may be very embarrassing to the plaintiff in regard to obtaining the fruits of his action," as James LJ is reported as observing in *Drover v Beyer* without it materially prejudicing him in prosecuting the action. He added:
>
> > 'Indeed, it may be said that the defendant's absence from England will facilitate the plaintiff's action because judgment will go by default.'
>
> In the present case I have no evidence whatever before me to show that the defendant's absence from England would materially prejudice the plaintiffs in the prosecution of their action. I can well see that his absence may very materially prejudice the plaintiffs in obtaining the fruits of their action; but that is not the test."

The writ is issued with caution. In *Drover*'s case, the writ was sought to prevent the departure back to Germany of the surviving owner and master of a vessel that had foundered of the English coast because it was considered necessary to question him about insurances he had in Germany. The writ was refused. In the present case, I am not satisfied the defendant's absence would interfere in any way with the pursuit of

the claim to judgment. If the action is successful, the plaintiff will then be able to pursue the judgment debt with the methods of execution available even if the debtor remains abroad.

The application is refused. The defendant is to have his passport returned to him forthwith and the interim Order of 5 March is set aside. The question of the costs of the application and any possible claim against the undertaking given by the plaintiff at the ex parte application shall be determined at the conclusion the main action.

Jewett Cameron South Pacific Ltd v Tu'uholoaki

Supreme Court, Nuku'alofa
Ward CJ
C 818/94

25 February 1999; 29 March 1999

Practice and procedure — application to set aside a judgment in default of defence — application granted

On 20 September 1995 judgment in default of defence against the defendants jointly and severally was entered. The defendants were to pay the sum of $32,386.00 and interest at 10% from date of judgment, costs and disbursements. On 19 October 1998 application to set the judgment aside was filed with the Court. There was a long period between judgment and application to set it aside. The original claim was for the unpaid balance of the cost of a building largely constructed in 1992 and was filed on 12 September 1994. On 25 September 1994 the second defendant replied to the solicitor for the plaintiff stating that she was "refusing to appear in court over this case and legally you should know that I was never been part of this contract". On 20 October 1994, the plaintiff's solicitor responded to the second defendant and said that he had sent a copy of the letter to the plaintiff and "we will contact you when we have a response". Later it stated; "We are treating your letter as an informal defence or explanation for the time being and we will contact you if we have any need for further information." Judgment in default of defence was granted ex parte on 20 September 1995.

Held:

1. In order to have a summary judgment set aside, the defence must establish with potentially credible evidence on affidavit that there is a real likelihood that the defendant will succeed on the facts.
2. If the second defendant was correct, she may have had a defence to the action. Similarly, depending on the attitude the court took to the letter from the plaintiff apparently adjusting the quotation down, the first defendant had a reasonable chance of success.
3. The application was granted and the judgment in default of defence entered on 20 September 1995 is to be set aside on the payment into the court of a sum equal to the judgment sum without interest but including the costs and disbursements ordered i.e. a total sum of $33.147.50. Failure to pay that amount into Court by 1 June 1999 would mean the judgment was not set aside. More time than usual had been allowed for that payment to be made so it was also ordered that the defendants, their family, servants

or agents should not in the meantime make any attempt to dispose of or otherwise deal with the house built under the contract.

Cases considered:

Evans v Bartlam [1937] AC 473; [1937] 2 All ER 646

Counsel for plaintiff/respondent	:	Mr Appleby
Counsel for defendants/applicants	:	Mr Niu

Judgment

This is an application to set aside a judgment in default of defence against the defendants jointly and severally to pay the sum of $32,386.00 and interest at 10% from date of judgment, costs and disbursements. The judgment was entered on 20 September 1995 and application to set aside was only filed with the Court on 19 October 1998.

It is necessary briefly to consider the background to this application in view of the unusually long period between judgment and application to set aside.

The original claim was for the unpaid balance of the cost of a building largely constructed in 1992. It was filed on 12 September 1994. Personal service was effected on the second defendant on 19 September 1994. The first defendant was abroad and so the second defendant was asked for and supplied her address over the telephone in November 1994. As a result, an application for service by registered post was granted and the writ and statement of claim and a copy of the order for service by registered post was sent to the first defendant at 3 Albert Street, Lidcombe, Sydney. It was also ordered that a further copy of the same documents should be served on the second defendant with a notice that service had been effected on the first defendant in the way ordered. This was done by personal service on 9 March 1995.

On 25 September 1994 the second defendant had replied to the solicitor for the plaintiff stating that she was "refusing to appear in court over this case and legally you should know that I was never been part of this contract". It continues with details of the reason why she considered herself not a party. She also stated that she had contacted her sister in Sydney who had indicated a willingness to return and appear in court but that she would not be available until December 1994. Although the defendant never filed this letter with the court, it was exhibited to the affidavit supporting the application for judgment in default of defence.

What has recently appeared, and was not placed before the judge considering the application for Judgment in default, is a reply from the plaintiff's solicitor to the second defendant dated 20 October 1994. He said that he had sent a copy of the letter to the plaintiff and "we will contact you when we have a response". Later it stated; "We are treating your letter as an informal defence or explanation for the time being and we will contact you if we have any need for further information."

Judgment in default of defence was granted ex parte on 20 September 1995. It was served personally on the second defendant on 17 October 1995. It is stated in one of the documents that it was dispatched by registered airmail to the second defendant the same day.

No payment was forthcoming and, on 9 March 1998, application was made for a Certificate of Judgment in order to enforce the judgment in New South Wales under

the Reciprocal Enforcement of Judgments Act. It is not apparent on the documents before this Court precisely when that judgment was registered but on or about 4 September 1998 the defendants both moved the Supreme Court of New South Wales to have the order registering the judgment set aside. This was supported by an affidavit from each of the defendants and was apparently granted.

The affidavit of the first defendant states in paragraph 11:

> "11 At no time was the process of the Supreme Court of Tonga, by which purported proceedings were commenced for the recovery of the alleged debt, served upon me, and by which judgment was purported to be obtained on 20 September 1995, against myself and the other defendant to the proceedings herein, my sister Valeti Tu'uholoaki.
>
> 12 Further, at no time prior to the service upon me of the order of this Court registering the judgment of the Supreme Court of Tonga, was the said judgment of the Supreme Court of Tonga brought to my attention."

In her affidavit to this Court, she explains that she moved from the address to which the documents were sent and never received them. The dates would suggest she moved after the first postal service of the writ but it was clearly well before the service, if there was such service, by post of the judgment. She admits that her sister did tell her of the action when it was first served on the sister.

No doubt, therefore, the affidavit to the Court in New South Wales is true in the careful way the words are framed. However, by that wording I am satisfied she was intending to give the court in Australia the impression she knew nothing of the case and that is manifestly untrue on her own later affidavit.

The second defendant's affidavit to the Supreme Court of New South Wales at paragraphs 13 and 14 uses identical words save for the change of her sister's name. In her case that is not true and can have only been used as a deliberate attempt to mislead the court in Australia. I am willing for the purposes of this application to accept that she was misled by the letter from the plaintiff's solicitor into thinking she needed to do no more unless and until she heard from him but there is clear evidence that she was served with the judgment. Had she accepted that and relied on the solicitor's letter, I would have considered for these purposes that she could be truthful but her denial of having had the judgment brought to her attention is clearly false and taints her evidence generally.

By Order 13 rule 3, where there has been a judgment in default of defence, "if the defendant satisfies the Court that

> (i) there was good reason for his failure to file a defence in time; and
>
> (ii) he has an arguable defence"

the court has a discretion to set aside any summary judgment. English cases have established the basis upon which the court will decide.

The defence must establish with potentially credible evidence on affidavit that there is a real likelihood that the defendant will succeed on the facts. The merits of the case is the most important consideration in all such cases and where there is a real

possibility of success the defendant should not be denied his day in court. The classic statement of the principle is by Lord Atkin in *Evans v Bartlam* [1937] AC 473 at 480; [1937] 2 All ER 646 referring to the, then, equivalent rules in England which gave a discretionary power to a judge in chambers to set aside a default judgment:

> "The discretion is in terms unconditional. The Courts, however, have laid down for themselves rules to guide them in the normal exercise of their discretion. One is that where the judgment was obtained regularly there must be an affidavit of merits, meaning that the applicant must produce to the Court evidence that he has a prima facie defence. It was suggested in argument that there is another rule that the applicant must satisfy the Court that there is a reasonable explanation why judgment was allowed to go by default, such as mistake, accident, fraud or the like. I do not think that any such rule exists, though obviously, the reason, if any, for allowing judgment and thereafter applying to set it aside is one of the matters to which the Court will have regard in exercising its discretion. If there were a rigid rule that no one could have a default judgment set aside who knew at the time and intended that there should be a judgment signed, the two rules would be deprived of most of their efficacy. The principle obviously is that unless and until the Court has pronounced a judgment upon the merits or by consent, it is to have the power to revoke the expression of its coercive power where that has only been obtained by a failure to follow any of the rules of procedure."

When assessing the chances of the defence succeeding on the facts, the court may need to assess the credibility of the defendants because that may affect the likelihood of the trial court believing the evidence. On the affidavits that each of the defendants has filed here and in New South Wales, I have formed the view that the second defendant has lied and is not credible. The first defendant has also demonstrated a willingness to mislead even if that has been achieved without a tangible lie.

In such a case I would normally not hesitate to refuse the application especially when it is made so long after the judgment. It seems often to be forgotten that the concept of fairness applies to all parties and not just to the applicants. The inordinate delay will, if this application succeeds, no doubt cause the plaintiff real hardship. The second defendant has certainly simply sat on her hands knowing that this action was in existence and I am far from satisfied the first defendant was being honest in her assertions to the court in New South Wales. In particular, I simply do not believe that the second defendant did not contact her sister after she received the judgment in September 1995. The two defendants are educated people; the first defendant gives her occupation as Accountant and the second as Manager. The second received a judgment against her sister and herself jointly and severally but apparently did nothing and then, in her affidavit to the court in New South Wales, lied about it. Neither has made any attempt to sort out the disputes about the standard of the building or to pay the balance they admit is owing under the contract let alone the judgment sum.

However, having said that, I have to accept that, if the second defendant is correct, she may have a defence to the action. Similarly, depending on the attitude the

court takes to the letter from the plaintiff apparently adjusting the quotation down, the first defendant has a reasonable chance of success.

I shall grant the application and order that the judgment in default of defence entered on 20 September 1995 shall be set aside on the payment into the court of a sum equal to the judgment sum without interest but including the costs and disbursements ordered i.e. a total sum of $33.147.50. It appears both defendants are at present out of the jurisdiction so I shall order that they have until 1 June 1999 to pay that sum into court. Failure to do so by that time will mean the judgment is not set aside. I have allowed more time than usual for that payment to be made so I also order that the defendants, their family, servants or agents shall not in the meantime make any attempt to dispose of or otherwise deal with the house built under this contract.

The costs of the application to set aside shall be paid by the defendants in any event to be taxed if not agreed.

Finally, I have found it necessary to form and state my view of the veracity of the defendants. Should I conduct the trial, the defendants may not feel they are having a fair hearing in a case where the main issues depend on the credibility of the various witnesses. I shall order that the trial shall be conducted by a different judge and that this Ruling and Order shall not remain on the copy of the file that is placed before him.

Practice Direction No 2/1999

Re: Divorce Proceedings

A number of cases have come to light recently where the petition omits ot mention a child or children born during the marriage or that the petitioner is pregnant at the time of the hearing of the petition. This is frequently because the petitioner is claiming that the father of the child is a person other than the respondent.

Such a practice is wrong and contrary to law. A child conceived during a marriage is a child of the family whether the petitioner claims her husband is the father or not and whether or not the husband acknowledges it is his child. Until there is a Court Order that the child is illegitimate, it is legally a legitimate child of the family (section 44, Evidence Act CAP 15) and must be identified in the proceedings.

This practice frequently occurs in cases where a petitioner is represented by counsel and all practitioners must ensure they advise their clients of the position. If, having been so advised, the client refuses to make proper disclosure, counsel should decline to take the petition further.

In future, in any case in which it is discovered that such an omission or false statement has been made in the petition or to the Court, the case will be referred to the Attorney General for failure to bring a material fact before the Court. If he should decide to intervene, the Court may require the petitioner to show cause why the decree nisi should not be revoked.

Gordon Ward
NUKU'ALOFA, 30 March 1999 CHIEF JUSTICE

Vaioleti v Tonga Development Bank

Supreme Court, Nuku'alofa
Ward CJ
C 179/99

18 March 1999; 7 April 1999

Practice and procedure — leave to apply for judicial review of dismissal — employment governed by contract — leave refused

The applicant was employed by the respondent Bank in May 1996 as a probation loans officer and, by December 1998, had risen to senior loans officer. In that month she was dismissed. She sought leave to apply for judicial review of the decision to dismiss her. The relief she sought was a declaration that her dismissal was unlawful, certiorari to quash the decision and mandamus to reinstate her. She alleged in her affidavit in support that the Bank was a statutory body and that the dismissal did not follow proper procedure, it was unfair and unlawful and a breach of natural justice.

Held:

1. In determining whether a case was appropriate for judicial review, the court must consider whether it was an action that required the enforcement of private or public law rights.
2. In order to qualify for judicial review, there must be some statutory restraint on the exercise by the public body of its powers of dismissal but, even in such cases, judicial review may be refused if the dismissal was rooted in contract and not in the exercise of a statutory power per se, and, even where it was rooted in statute, the statute must create a restriction on the public body in its capacity as a public body and not as an employer generally.
3. The Bank was a statutory body but there was nothing to suggest the applicant's employment was governed by anything other than contract and her remedy lay in a claim in private law. Leave was refused.

Cases considered:

Malloch v Aberdeen Corporation [1971] 1 WLR 1578; [1971] 2 All ER 1278

R v Derbyshire County Council ex p Noble [1990] ICR 808; [1990] 1 RLR 332 (CA)

R v East Berkshire Health Authority, ex parte Walsh [1985] QB 152 (CA)

Ridge v Baldwin [1964] AC 40; [1963] 2 All ER 66

Counsel for applicant	:	Mr Fifita
Counsel for respondent	:	Mrs Vaihu

Judgment

The applicant was employed by the respondent Bank in May 1996 as a probation loans officer and, by December 1998, had risen to senior loans officer. In that month she was dismissed.

She now seeks leave to apply for judicial review of the decision to dismiss her. The relief she seeks is a declaration her dismissal was unlawful, certiorari to quash the decision and mandamus to reinstate her. She has alleged in her affidavit in support that the Bank is a statutory body and that the dismissal did not follow proper procedure, it was unfair and unlawful and a breach of natural justice.

Although the original application for leave is ex parte, I considered it would be helpful if I heard submissions from both parties as to whether the fact that the respondent bank was a statutory body was sufficient to give it the requisite element of public law to make judicial review the appropriate remedy.

In determining whether a case is appropriate for judicial review, the court must consider whether it is an action that requires the enforcement of private or public law rights. The definition of public law is not clear and modern case law is continually changing the distinction between private and public law rights. Moreover, judicial review has been allowed in some cases involving substantial elements of private law and refused in some where there is undoubtedly a public law element. In general terms, the more a case involves the enforcement of private law rights, the less likely it is that the court will consider it is a suitable case for judicial review. However, if there is no apparent common law remedy open to the aggrieved party, the court will be slow to refuse that party the opportunity of judicial review. It is important to remember also that, although the remedies of declaration and injunction are now included in the scope of Order 27 (following the English RSC Order 53) those remedies may also be appropriate and available in a private law action.

This is a case of dismissal from employment. The employee's remedy in such a case usually lies in the field of private law and so is not susceptible to judicial review. However, the courts have granted a right to judicial review in cases of this nature where there is a sufficient element of public interest.

The applicant suggests her dismissal was in breach of natural justice. It was not so long ago when those words had almost magical qualities in obtaining leave to apply for judicial review but the courts in England have moved away from that position to a large extent. For example, in *R v East Berkshire Health Authority, ex parte Walsh* [1985] QB 152 (CA) the applicant was a senior nursing officer who claimed to have been dismissed in breach of the rules of natural justice. The Court of Appeal held that such an allegation involved infringement of a purely private law right and had no element of public law. Purchas LJ said, "In my judgment the inquiry ought to be directed to the rights alleged to be infringed and the remedies sought rather than the status enjoyed, qua contract or appointment, by the applicant." The court moved away from the limiting remarks of Lord Wilberforce in *Malloch v Aberdeen Corporation* [1971] 1 WLR 1578; [1971] 2 All ER 1278 where he

suggested that the only employment cases from which the rules of natural justice were excluded were "pure master and servant cases".

In order to qualify for judicial review, there must be some statutory restraint on the exercise by the public body of its powers of dismissal but, even in such cases, judicial review may be refused if the dismissal was rooted in contract and not in the exercise of a statutory power per se (*R v Derbyshire County Council ex p Noble* [1990] ICR 808; [1990] 1 RLR 332 (CA)), and, even where it was rooted in statute, the statute must create a restriction on the public body in its capacity as a public body and not as an employer generally; *Ridge v Baldwin* [1964] AC 40; [1963] 2 All ER 66.

In the present application, the Bank is a statutory body but there is nothing to suggest the applicant's employment was governed by anything other than contract and her remedy must lie in a claim in private law. Leave is refused.

Tukuafu v Kingdom of Tonga

Supreme Court, Nuku'alofa
Finnigan J
C 1023/98

25 March 1999; 7 April 1999

Administrative law — suspension of school pupil — natural justice — requirements fully met
Administrative law — ultra vires — suspension of school pupil — principal had no power to suspend

On 22 June 1998 the principal of Tonga High School, Mrs Maka the second defendant, had reason to believe young girls had been consuming alcohol on the school premises during school hours. In the school rules this was classified among the most serious offences. For such offences the penalty prescribed was at the discretion of the principal and the Education Department. For less serious offences upon repetition the rules prescribed suspension, so suspension was one of the options open to the principal. One of the young girls was Salome Tukuafu, aged 14, the applicant (by her next friend, her father). Mrs Maka instituted inquiries and interviewed Salome and a number of students who gave information. After consulting the Deputy Director of Education, who expressed the view that, to be effective, any punishment should be immediate (the practice being that, for serious offences such as drinking alcohol, a suspension was usually immediate), Mrs Maka decided on Monday 29 June that Salome should be suspended from the school for a period. Salome's father believed that his daughter drank the alcohol unknowingly. However, Mrs Maka made further investigations, which satisfied her that what she had originally concluded was in fact correct — that Salome "did drink and she did it knowingly". Salome was suspended for three weeks and served her suspension. Salome sought a declaration that the suspension was invalid as being ultra vires, or that the decision to impose it was made in breach of the rules of natural justice.

Held:

1. The applicant had been free to approach the second defendant, and had done so in order to say what she had to say. She had been given as well the opportunity of having her father present so that he could hear, assess, and question the evidence upon which the second defendant had reached her decision to suspend. The second defendant could not have done more to involve the father in the process. There was no breach of the rules of natural justice.
2. The suspension was the act of the principal.

3. The power to suspend was delegated to the deputy director and he could not delegate it (the maxim *delegatus non potest delegare* applies). The Principal exercised the power and so acted outside her powers; the deputy director did not exercise his powers.
4. Costs were awarded to the applicant, against the second defendant. They were to be agreed or taxed.

Statutes considered:
Education Act CAP 86

Counsel for applicant	:	Mr Edwards
Counsel for respondents	:	Solicitor-General

The case went on appeal and the Court of Appeal decision appears at page 127.

Judgment

This is an application for Judicial Review. In particular the applicant seeks a remedy in the nature of certiorari, quashing a decision of the second defendant, who was principal at Tonga High School. That was a decision whereby the applicant, a pupil, was suspended from attendance at the school for three weeks from 13 July 1998.

There is no issue that this remedy may be sought in the present circumstances. The two issues are whether the second defendant applied the rules of natural justice, and whether the second defendant had power at law to suspend the applicant.

The parties have had legal representation of a high degree of skill, and are entirely clear that this is not a review of the merits of the applicant's behaviour or of the second defendant's decision about that behaviour. I accept the ample authorities cited to me on that point.

The Remedy

The applicant's claim is that the procedure adopted by the second defendant in making the decision to suspend was in breach of natural justice, because she relied upon certain evidence which she did not make known to the applicant. She did not give the applicant the opportunity of refuting it or making representations about it.

In the alternative, her claim is that the second defendant's action was taken without authority because the power to dismiss pupils was a statutory power, which had not been given to her.

The Facts — The First Part of the Application

Briefly, the facts are that on 22 June 1998 the second defendant had reason to believe the applicant had been consuming alcohol on the school premises during school hours. In the school rules, which are not challenged as to validity, this was classified among the most serious offences. For such offences the penalty prescribed was at the discretion of the principal and the Education Department. For less serious offences upon repetition the rules prescribed suspension, so suspension was one of the options open to the principal.

On Wednesday 23 June the second defendant began an enquiry by asking questions of the applicant and several other pupils. The applicant at first denied the allegation but later went to the principal and said she was now aware that when she drank from her bottle on the day in question some alcohol had been added to her drink without her knowledge. Other pupils gave their accounts, including the one said to have added the alcohol. She advised the deputy director of education of her enquiry. In his reply he told her it was essential that if there was any punishment, it should be made immediate for the school rules to be effective. On Monday 29 June the second defendant made a decision to suspend the applicant, and telephoned the applicant's mother. The applicant's father came to the school that day. He wanted to talk with the pupils who had provided the evidence on which the second defendant had made her decision. This was arranged. The second defendant and the applicant's father met all those pupils in a group.

After that, the applicant's father asked the second defendant to carry on her investigation.

In the days that followed, the second defendant sought further information as requested. Three pupils, none of whom had said anything before, made statements to her, in writing at her request. She approached a fourth who had given answers in her earlier enquiry, and explained to her that she was "the only person who was with the group who really knew what happened", and asked for that pupil's account in writing. On receiving and reading those statements, on or after Monday 6 July, the second defendant decided they were only further evidence of what she had already concluded. One of the statements in particular, she thought "confirmed that the [applicant] not only drank the alcoholic mixture, she did it with full knowledge that it was an alcoholic drink".

On Thursday 9 July she wrote to the applicant's parents and advised them:

> "… after careful deliberation over additional information that I have gathered on the alleged drinking incident where your daughter and a few of her classmates were involved. I have made a definite decision, and that decision is to suspend your daughter…
>
> Strong and compelling evidence points out that not only your daughter did consume alcohol on Friday 12 June 1998, in school uniform and at school, but that she did this knowingly…"

On 13 July she wrote to the deputy director and advised the names of three pupils whom she had suspended for the drinking incident, including the applicant. She advised the names of 5 other pupils as well, whom she had suspended for other reasons. She sought the deputy director's decision.

The Submissions

Both counsel made able submissions. I have taken the time to read all of the authorities which Mr Edwards supplied in full, and the statutory provisions to which he referred me. I have also considered fully the able submissions of Mr Taumoepeau on behalf of the defendants, and the authorities that he also provided in full. The submissions of both counsel were of a high order and are the foundation for my decision.

Decision of the First Part

The application is in two parts. In the first part, Mr Edwards, correctly, restricted himself to the second stage of the second defendants' enquiry. He seeks review of the decision because of what followed after the visit by the applicant's father. Up till that time the applicant had had every opportunity to comment upon and question the allegations about her and the things said by the other students. She had been free to approach the second defendant, and had done so in order to say what she had to say. She had been given as well the opportunity of having her father present so that he could hear assess and question the evidence upon which the second defendant had reached her decision to suspend.

That last-mentioned point is crucial. It must be remembered that before the applicant's father heard and questioned the other students the second defendant had already made her decision. She had announced it to the applicant's mother and father. What happened after that was her response to the father's request that he be allowed to become involved in the process. She did nothing to suspend the applicant, and agreed to the father's involvement. After that the father asked her to reconsider her decision. Instead of acting on her decision she did what the father asked, and conducted further enquiries. This was in accordance with the rules of natural justice. She approached one other pupil who may have had some information, and found that she did. Two pupils by themselves approached her. What they said she had them put in writing. She asked a fourth, who had given oral answers during the first part of the enquiry, and who had been present during the questioning by the applicant's father, to put her statement in writing. Those four statements were before the Court in evidence. None of them contained new information that was favourable to the applicant. What one of them contained, the second defendant said she found compelling. It was not however compelling her to a decision; it was compelling only as confirmation of the decision that the applicant and her parents knew she had already reached.

There was no obligation of fairness on her to disclose to the applicant the new evidence because it confirmed that the applicant had knowingly drunk alcohol at the school. It confirmed to her that what she had already decided was right, and that decision had been reached by a fair process.

As it happened, after confirming her decision, the second defendant did show the four written statements to the applicant's father. She made it clear why she had confirmed her decision. She could not have done more to involve him in the process. In doing so, she made him aware that, whether or not they were telling the truth, a substantial number of the pupils had accused his daughter of consuming alcohol at school, and not merely on 12 June 1998. He might perhaps have chosen to address that, rather than pursue these proceedings.

The application, in its first part, must fail.

The Second Part — The Facts and Decision

I turn to the second part of the application. It is said that the necessary chain of authority did not exist to permit the second defendant to exercise the power to dismiss. The power to dismiss pupils in government schools arises from the general power in s 18(2) of the Education Act CAP 86. That power, to control all government schools, is the Minister's. Under ss 8 and 9 of that Act the Minister must appoint a

director of education and such other officers as he may deem necessary, and the director must carry out the Minister's directions. Under s 8(2) the Minister may give directions, consistent with the Act, in other words he may delegate his powers, to the director and any other officer of the Ministry.

These are the statutory provisions upon which the Solicitor-General relied in submitting that the necessary delegation of power was made, to enable what occurred.

The process followed by the Principal, from her affidavit, was this:

> "… on Thursday 9 July 1998, I wrote a letter to the [applicant's] parents informing them of my decision to suspend the [applicant] beginning on Monday 13 July 1998 …
>
> … on Monday 13 July I saw the [applicant] at school and called her in asking her whether her parents had received my letter of 9 July 1998. I told her that the letter was her suspension … I rang her mother [and] told her what I [had] told the [applicant] …
>
> … on the same day, I sent a Savingram to the Deputy Director of Education, Viliami Takau informing him of my decision to suspend the [applicant] and others. This also sought his endorsement …"

The savingram dated 13 July 1998 was headed "Suspension Cases", and was, in part, as follows:

> Please be advised that the following students are suspended for reasons detailed hereunder:
>
> [Names and reasons set out. For three of the names the reason for suspension was the same — "Drinking in the school compound and in uniform on June 12 1998". One of those three was the applicant, and she was stated to have been suspended from that day, 13 July. For one of those three students, the period of suspension was stated to be "Indefinitely until recommendation for dismissal is approved". The savingram contained a recommendation that that particular student be dismissed, with reasons. The power to dismiss that is given to the Minister in s 18(2) of the Education Act is not one that he has delegated.]
>
> For your information and decision, please.
>
> Yours faithfully, [etc].

Mr Edwards pointed out that the present situation in respect of delegation of the Minister's powers is set out in the affidavit of Viliami Takau, who is the deputy director of education responsible for all government schools at the secondary level. In the affidavit the deponent states that the power to suspend students from secondary schools was usually exercised by the Minister himself. However, the affidavit annexed a copy of the Minister's approval, by internal memorandum on 26 February 1998, for delegation of this power, among other powers, to the director, for exercise by the relevant deputy director, except in controversial matters, which were reserved

for the director. The affidavit annexed another internal memorandum, which authorised the implementation of that delegation from 5 May 1998. The affidavit establishes that Viliami Takau was the relevant deputy director in June and July 1998. In the affidavit he states that "the authority to suspend a student from a secondary school is, in practice, exercised by the deputy director for each division". That practice he described in detail as follows:

> "… the usual procedure for the suspension of a student from a Government school at the secondary level is that the principal of the School must consult me before any action is taken. The principal must then investigate the matter and then make a recommendation to me on the appropriate course of action. I would then endorse the principal's decision if I deem fit to do so. However in cases involving serious offending, it is the usual practice for punishment to be implemented immediately in order for the school rules to be effective.
>
> … in the week of 22 June 1998 the Principal of Tonga High School, Lia Maka … informed me verbally that a group of students were suspected of consuming alcohol on the school premises. I then informed the Principal that the usual criteria had to be fulfilled before any decision is made, which involves gathering evidence and informing the parents of the student. I also informed her that because of the offending in this case, it is essential that any punishment should be made immediate for the rules to be effective."

About the suspension in the present case he went on to say:

> "… on 13 July 1998 I received a Savingram from the Principal recommending the suspension of several students including the [applicant] …
>
> … on 14 July I discussed this matter with the Director of Education, Paula Bloomfield. We agreed that the proper course of action was to suspend the [applicant]. The Director then informed the Principal by telephone that we endorsed her recommendation, and that he would send a Savingram to confirm the Director's endorsement.
>
> … on 21 July 1998 I sent a Savingram, which confirmed the endorsement of the Principal's recommendation. …"

That 21 July savingram commenced:

> I refer to your Savingram of July 13 on the above-stated subject and would like to confirm that the Ministry endorses your decision.

The questions raised in these proceedings are, (i) who exercised the power and suspended the student, and (ii) was that exercise of the Minister's power in

accordance with the law that governs delegation of statutory powers? It may be said that the power to suspend students from government schools is created by the legislation and must be exercised in accordance with the legislation, because it is a power to infringe rights. If the power is not exercised as the law directs, then it is not exercised.

Who suspended the student? The answer is to be found in the actions taken, rather than the words used. But first the words: the Principal told the student, her parents and the deputy director that she had decided and carried out the suspension. And that is the truth. She stopped the student attending classes from 13 July until 3 August. For his part, the deputy director's action, and his words, occurred over a week later. His words were "the Ministry endorses your decision".

After considering the evidence of what occurred, I cannot escape the conclusion that the words are what happened. On 9 July the Principal wrote to the parents, saying she had decided to suspend, and on 13 July she told the student the same, and the suspension started that day. Only after these events had occurred did the Principal write to the deputy director and advise that she had decided to suspend, and had suspended. Only after that, on 21 July, over a week into the 3-week suspension, did the deputy director play any part in the suspending action. What he did was endorse, on behalf of the Ministry, which has no powers in the matter, the action of the principal.

So clearly, I find, the suspension was the action of the principal. Was that in accordance with the law? Authority for the Minister to delegate the power to suspend is clear. The chain of delegation is also clear. The Minister approved a proposal that his power to suspend be delegated to the director, for exercise by the relevant deputy director. The delegation to the deputy director was not made by the director, and thus did not offend against the maxim *delegatus non potest delegare* (the person receiving delegated power cannot delegate it to somebody else). The delegation down to deputy director level was made by the Minister, the holder of the power, and was within the authority given to the Minister to do that by s 8(2) of CAP 86. Thus the deputy director lawfully had been given the power to suspend pupils in government schools.

Did the principal have the power to suspend? Clearly no. That power was delegated to the deputy director and he could not delegate it. The Principal exercised it. She acted outside her powers, and the deputy director did not exercise his.

What is the outcome? I have found that the second defendant adopted a fair procedure in reaching her decision, and it follows that the decision cannot be challenged as unfairly reached. I have found however that the wrong procedure was used in putting the decision into effect. So, something that cannot otherwise be challenged was done by the wrong person. There has been no injury caused to the applicant by that. No award in damages is warranted. I note that Mr Edwards on behalf of the applicant refrained from putting any great emphasis on this aspect of the application, and that I think was the correct thing to do. I make no order.

However, the applicant seeks her costs and is entitled to them. Costs are awarded to the applicant, against the second defendant. I expect they should be paid by the first defendant. They are to be agreed or taxed.

Cater v R

Supreme Court, Nuku'alofa
Ward CJ
Cr App 369/99

7 April 1999; 9 April 1999

Criminal procedure — right to bail — surrender of passport — factors to take into account — bail granted

The appellant, a United States citizen, was arrested and charged with two offences: obtaining credit by false pretences and, alternatively, aiding and abetting that offence. He was bailed by the magistrate to appear on 14 July 1999 on his own recognisance of $1,000.00 and two sureties each of $500.00. The conditions imposed by the magistrate were that he should reside in Tonga and not leave without the consent of the court. He had also to surrender his passport to the court and report to the police station each week. He appealed against those conditions. The prosecution opposed the removal of the conditions on the ground that there was not sufficient evidence to satisfy the court that he would attend his trial if he was allowed to leave the country. Counsel for the Crown suggested that there should have been an affidavit in support in order for the court to be satisfied.

Held:

1. The accused was entitled to bail unless the court was satisfied there were substantial grounds for believing that, if bailed, he would fail to surrender to custody. The burden was clearly placed on the prosecution.
2. When the court fixed the sum in which the sureties were to be bound, it was to consider what would be a sufficient sum to ensure the accused would return, not a sum sufficient to cover the debt. The accused was facing a criminal charge. It was not proper to treat such a charge as a means of pursuing a civil debt and the police should be wary of being used in such a way.
3. The court must balance the risk that he would fail to appear against the restriction on the liberty of an unconvicted man and the strength of the case for which he was being held. It was not a strong case on the evidence described.
4. The appeal was allowed. The accused was bailed on his own recognisance of $3,000.00 and two sureties each of $3,000.00 to attend the magistrates' court on 14 July 1999. He was to have his passport returned to him and his right to leave the country was not restricted.

Statutes considered:
Bail Act 1990

Counsel for appellant	:	Mr Foliaki
Counsel for respondent	:	Mr Kefu

Judgment

The appellant is a United States citizen and has been arrested and charged with two offences; obtaining credit by false pretences and, alternatively, aiding and abetting that offence. He was bailed by the magistrate to appear on 14 July 1999 on his own recognisance of $1,000.00 and two sureties each of $500.00. The conditions imposed by the magistrate were that he should reside in Tonga and not leave without the consent of the court. He had also to surrender his passport to the court and report to the police station each week.

He appeals against those conditions.

The prosecution opposes the removal of the conditions on the ground that there is not sufficient evidence to satisfy the court that he will attend his trial if he is allowed to leave the country. Counsel for the Crown suggests that there should have been an affidavit in support in order for the court to be satisfied. I do not agree. Under the Bail Act, the accused is entitled to bail unless the court is satisfied there are substantial grounds for believing that, if bailed, he will fail to surrender to custody. I do not read that as meaning the accused has to satisfy the court he will attend but that the prosecution must satisfy the court he will not. That seems clearly to place the burden on the prosecution. Having said that, in any case involving a foreign national with no ties to this country, the court may well feel that he will fail to surrender to his bail unless there is a condition that he should surrender his passport.

Section 4 of the Bail Act as relevant to the present case provides:

> "4. (1) A person who is arrested or charged with an offence punishable with imprisonment shall be granted bail unless the Court, or a police officer (in the case of a person arrested) is satisfied that -
>
> (i) there are substantial grounds for believing that, if released on bail (whether or not subject to conditions) he will
>
> (a) fail to surrender to custody
>
> (2) In taking the decisions required by subsection (1), the Court … shall have regard to all the relevant circumstances and in particular -
>
> (a) the nature or seriousness of the offence (and the probable method of dealing with the defendant for it) …
>
> (d) the strength of the evidence of his having committed the offence."

The offence in this case relates to an unpaid hotel bill in excess of $40,000.00, which was incurred by a Mr Allan who stayed in the hotel for some months until he died unexpectedly in the early part of this year. In about September of last year, when he

had been staying in the hotel for some months and incurred a bill in the region of $20,000.00, it appears the hotel management was becoming perturbed. The hotel staff understood he was involved in American Football.

The accused is the chief executive of an organisation in the United States called, somewhat ponderously, the National Professional Minor Football League Conference Ltd and he wrote to the Hotel on the letterhead of that organisation saying that he was intending to visit Tonga soon and that he would pay Allan's bill together with an additional sum of around $2,000.00. He asked the hotel not to put Allan out. He did come and also stayed in the hotel. He did not pay Allan's bill but it appears the hotel continued to let Allan add to his bill. After Allan's death, the accused left the hotel. He has paid his own bill in its entirety.

Mr Kefu has told the court that the false pretence upon which the prosecution relies is the letter written by the accused in September last year. That letter, as has already been stated, offers to pay the outstanding bill. Mr Allan had already obtained the credit when the letter was written and so nothing the accused did afterwards could possibly be abetting the obtaining of that credit.

As to the alternative charge, Mr Kefu tells the court his case is that, by the letter, the accused took over the credit and that was only possible because of the false pretence that he would pay.

I have already had this accused before me in a civil application and counsel for the appellant relies on evidence adduced in that hearing and asks that it be considered in this appeal. The accused was sued for the debt by the hotel and prevented from leaving the country when the plaintiff applied for a writ of ne exeat regno. After considering the evidence brought in relation to that, I refused the writ. Counsel for the prosecution tells me that it was only when the application failed that the hotel laid the criminal complaint. Mr Foliaki, for the accused, points out that there was no allegation of fraud in the original claim.

I have used only those matters that were not the subject of dispute in the other proceedings. They were that the accused, as the representative of the NPMFLC had established and equipped American football teams in Tonga, Fiji and the Cook Islands. He has arranged a competition between these teams that is due to start in May of this year. In order to run such a competition he or a member of the NPMFLC will have to come to Tonga. The NPMFLC is a corporation registered in the United States with an office and about six office staff. The members of the Tonga team are included amongst the employees of the NPMFLC and it employs at least three Tongan officials. When the accused first wrote to the hotel, he said that the corporation was interested in buying the hotel. Terms of the sale had been drawn up and included a relatively low purchase price because the hotel was heavily in debt and the purchaser would take those over those debts which would, it must be assumed, have included the bill owed by Allan. At the time of Allan's death, two banking houses in Tonga had offered finance for the purchase. Those offers have since been withdrawn but only after the accused had moved out of the hotel. These matters, as has been said, were not disputed in the civil action although the bona fides of the accused and his ability to carry these plans through were the subjects of fierce challenge by the plaintiff.

I consider the terms of section 4(2)(d) allow me to take all these matters into account in considering the terms of the accused's bail. The magistrate described the offence as very serious and it clearly is, carrying a maximum penalty of three years

imprisonment. The amount of credit obtained is substantial but the seriousness of such an offence lies far more in the nature of the false pretence. In this case the hotel appears to have allowed Allan to continue to incur a greater debt but the prosecution are not alleging that is part of the fraud because they only rely on the letter and the debt incurred up to that time.

Defence counsel tells this court that, when explaining to the magistrate that the accused has reason to return to Tonga, he pointed out that the equipment supplied to the team in Tonga is worth a figure in the region of $50,000.00. The magistrate responded that, as American football is only a minor sport in Tonga, it would not fetch anything approaching that sum if it were to be sold. I think, with respect, the magistrate was confusing the repayment of the debt with the requirement of imposing bail in terms that would ensure the return of the accused. In order to assess the latter, he should consider the value of the equipment to the accused not to a potential buyer in the event of an enforced sale.

Counsel for the prosecution fell into the same trap when he suggested that, should the court allow the accused to leave the country by returning his passport, the two sureties should each increased to $20,000.00 because of the total sum owed. When the court fixes the sum in which the sureties are to be bound, it is to consider what would be a sufficient sum to ensure the accused will return, not a sum sufficient to cover the debt. This accused is facing a criminal charge. It is not proper to treat such a charge as a means of pursuing a civil debt and the police should be wary of being used in such a way.

I have considered this case most anxiously and I am conscious of the risk that the accused will abscond. However, I am also concerned that bail conditions that will prevent him leaving the country for another three months at least may be out of proportion to the offence with which he is charged and the penalty likely to be imposed should he be convicted. I also bear in mind the factors the prosecution will have to establish in order to prove such a charge and the strength of the evidence. No grant of bail, even subject to the most stringent conditions, can fully guarantee the accused will attend his trial. The court must balance the risk that he will fail to appear against the restriction on the liberty of an unconvicted man and the strength of the case for which he is being held. I do not feel this is a strong case on the evidence described to me.

As I have already stated, this is a criminal charge. The hotel's right to the money is not an issue and will properly be pursued through the civil courts.

The grant of bail on terms that prevent the accused attending to his business in his home country and rejoining his family is not a true grant of bail but a form of restricted liberty. In many cases involving foreigners it is justified but in this case for the reasons I have outlined, I consider it is out of proportion to the offences he is facing and the likelihood of conviction.

I allow the appeal. The accused is to be bailed on his own recognisance of $3,000.00 and two sureties each of $3,000.00 to attend the magistrates' court on 14 July 1999. He is to have his passport returned to him and I do not restrict his right to leave the country.

Attorney General v ‘Akau’ola

Supreme Court, Nuku’alofa
Ward CJ
Cr 1319/98

12 April 1999; 14 April 1999

Contempt of Court — publication of comments on credibility of witnesses during trial — deputy editor responsible

On 9 September 1998 the trial of one ‘Isileli Pulu on a charge of criminal defamation was commenced in the Magistrates’ Court. The alleged defamatory matter in that case was a letter to the Taimi ‘o Tonga newspaper about a travel agency, Olympia Travel, in New Zealand operated by the wife of the Minister of Police. It suggested the Minister had authorised only that agency to deal with Tongan passports in New Zealand. At the trial, the Minister was called as a witness for the prosecution and stated he had never given such an authorisation. The officer in charge of the Immigration Branch, Chief Inspector Mele Halapua, also gave evidence that the Minister had never instructed her not to authorise any agency other than that of his wife. At the close of the prosecution case, the hearing was adjourned a number of times until 12 October. On 7 October the Taimi ‘o Tonga contained articles, stated to have been written by a reporter, ‘Ulu’alo Po’uhila. These articles contained comments on the credibility of some of the witnesses in the Court proceedings including a Cabinet Minister and a high ranking public officer. The defendant, Filokalafi ‘Akau’ola, was named in that issue of the newspaper as the deputy editor. The Attorney General filed a notice of motion to have the defendant committed for contempt of court on the grounds that the articles were likely to interfere with the course of justice in the Magistrates’ Court and were calculated to interfere with the fair trial of the proceedings in that court. The defendant contended that he was not involved in the publication of the articles.

Held:

1. It was a contempt of court to publish words tending or calculated to interfere with the course of justice. As such a finding may amount to a restriction on the right to freedom of speech, it was a remedy the courts should use only in the clearest of cases.
2. The articles were published in the newspaper during the course of the trial of ‘Isileli Pulu, they were knowingly referring to the evidence in that trial and, by their nature and content, they were clearly calculated to impair the court’s ability to determine the true facts in the case. There was no doubt

that their publication was likely to prejudice the fair trial of the case and was intended so to do.

3. At the time of the publication of the two articles in Taimi o' Tonga, the defendant was the newspaper's deputy editor and, as such, he was involved in and responsible for the publication of those articles.

4. The defendant was guilty of contempt of Court.

Cases considered:

Attorney General v Times Newspapers Ltd [1974] AC 273; [1973] 3 All ER 54

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

Judgment

On 9 September 1998 the trial of one 'Isileli Pulu on a charge of criminal defamation was commenced in the Magistrates' Court. The alleged defamatory matter in that case was a letter to the Taimi 'o Tonga newspaper about a travel agency, Olympia Travel, in New Zealand operated by the wife of the Minister of Police. It suggested the Minister had authorised only that agency to deal with Tongan passports in New Zealand.

At the trial, the Minister was called as a witness for the prosecution and stated he had never given such an authorisation. The officer in charge of the Immigration Branch, Chief Inspector Mele Halapua, also gave evidence that the Minister had never instructed her not to authorise any agency other than that of his wife. At the close of the prosecution case, the hearing was adjourned a number of times until 12 October. On 7 October the Taimi 'o Tonga contained articles, stated to have been written by a reporter, 'Ulu'alo Po'uhila.

The first article appeared on page 1 under the headline; "Is the minister of police lying?" and suggested the Minister and the officer in charge of the Immigration Branch had "both made statements under oath that are lies in the court in the proceedings against 'Isileli Pulu for defamation." It went on to quote the remarks of a person who ran another agency in New Zealand that he had been prevented from working on Tongan passports by Olympia and that Olympia was the only agency authorised to deal with them.

On page 3 there was a second article headed; "Mele Halapua's statement is questionable, after the discovery of her letter." That article again challenges the accuracy of the evidence of the witness in court and claims the newspaper has a letter in its possession that demonstrates her evidence and that of the Minister was not correct.

The present defendant, Filokalafi 'Akau'ola, is named in that issue of the newspaper as the deputy editor.

The Attorney General has filed a notice of motion to have the defendant committed for contempt of court on the grounds that the articles were likely to interfere with the course of justice in the Magistrates' Court and were calculated to interfere with the fair trial of the proceedings in that court.

Mrs Taumoepeau, for the Attorney General, has filed an affidavit from the prosecuting officer who had the conduct of the trial of Pulu describing the events

already set out above. The defendant has filed an affidavit in reply. In it, he denies being involved in the publishing of the articles. Mr Tu'utafaiva for the defence does not dispute that the defendant is the deputy editor of the paper. He challenges the Attorney General's case on two bases; that there should have been an application for leave before the motion was filed in this action and that his client, as is stated in his affidavit, was not involved in the publication of the articles.

I can deal with the first matter shortly. Mr Tu'utafaiva relies on the provisions of Order 26 rule 12 which allows the Supreme Court or the Court of Appeal to punish contempt by an order of committal, rule 12(1), which, if the contempt was in the face of the court, may be immediate, rule 12(2). Rule 12(3) then provides:

> "(3) where the contempt consists of disobedience to an order of the Court or breach of an undertaking to the Court,
>
> (i) application for leave to apply for an order of committal shall be made ex parte by summons supported by an affidavit stating
>
> (a) details of the order or undertaking;
> (b) the name and address of the person sought to be committed;
> (c) the grounds upon which his committal is sought."

That is the only provision where leave is required and it can be seen that it is only where there has been disobedience to an order or breach of an undertaking. That is not the case here and application for leave to apply is not necessary.

I pass now to the allegation of contempt.

The Supreme Court will always act to prevent interference with the course of justice in the Magistrates' Court and it has long been accepted that it is a contempt of court to publish words tending or calculated to interfere with the course of justice. As this may amount to a restriction on the right to freedom of speech, it is a remedy the courts should use only in the clearest cases. Lord Reid in *Attorney General v Times Newspapers Ltd* [1974] AC 273 at 294; [1973] 3 All ER 54, a case of civil contempt, explained;

> "The law on this subject (contempt) is and must be founded entirely on public policy. It is not there to protect the private right of parties to litigation or prosecution. It is there to prevent interference with the administration of justice and it should, in my judgment, be limited to what is reasonably necessary for that purpose. Public policy generally requires a balancing of interests which may conflict. Freedom of speech should not be limited to any greater extent than is necessary but it cannot be allowed where there would be real prejudice to the administration of justice."

In the same case Lord Morris of Borth-y-Gest pointed out that he found difficulty in framing an exact definition of the conduct that constitutes a contempt of court but he points out that there are some types of conduct that will never be tolerated. One example of that is publications which would prejudice a fair trial.

This is an allegation of a criminal offence and it must be proved to the criminal standard of proof beyond reasonable doubt. On the evidence before me, I am satisfied beyond any doubt that the articles were published in the newspaper during the course of the trial of 'Isileli Pulu, that they were knowingly referring to the evidence in that trial and, by their nature and content, were clearly calculated to impair the court's ability to determine the true facts in the case. I have absolutely no doubt that their publication was likely to prejudice the fair trial of the case and was intended so to do.

The defendant does not seek to deny the nature or effect of the articles but denies any part in the publication. He gives no further evidence of how that is the case. There is no burden on him to prove it; it is up to the prosecution to disprove it. I have considered the evidence of his part in this matter. I am satisfied beyond reasonable doubt that, at the time of the publication of the two articles in Taimi o' Tonga, the defendant was the newspaper's deputy editor. I am similarly satisfied that, as such, he was involved in and responsible for the publication of those articles. Although it is not necessary for the prosecution to prove the defendant knew the contents of the articles, the size of the newspaper and the time between editions leaves me satisfied beyond reasonable doubt that the defendant did know the nature and content of these articles.

He is guilty of contempt of court.

Edwards v Fifita

Supreme Court, Nuku'alofa
Finnigan J
C 214/99

8 April 1999; 24 May 1999

Statutory interpretation — is the superintendent a prison officer? — commonsense approach

The Defendants were constituted as a Court of Inquiry pursuant to the Prisons Act CAP 36 in order to inquire into certain charges that were brought against the Superintendent of Prisons. They commenced hearing the first charge on 8 February 1999 and heard three prosecution witnesses. After that, they directed counsel for the parties to make submissions about whether it had jurisdiction to hear the charges. They identified that question as a legal issue. After hearing submissions they adjourned the hearing and on 15 February 1999 delivered a written decision. In that decision they held that they did not have jurisdiction to inquire into the charges against the Superintendent because he was not a "prison officer" within the meaning of that term in s 2 of the Act. The plaintiff sought orders reviewing and setting aside the decision of the Court of Inquiry, together with a declaration that the Superintendent of Prisons was a "prison officer" within the meaning of that term in the Prisons Act. A further order was sought directing the Court of Inquiry concerned to continue the hearing, which was commenced but was terminated by the decision that was under review.

Held:

1. A prime principle of statutory interpretation was a presumption that the legislature intended to pass legislation that would work. The whole statute must be considered for this purpose, not just the words being interpreted. The history of the legislation was relevant.
2. Another prime principle in statutory construction was commonsense; commonsense suggested that, since the legislature did not amend s 2, it did not intend to change the force of s 2, and thus still intended to include in the definition of a prison officer the senior officer who carries out the duties defined in s 14.
3. The order sought was made and the decision of the Court of Inquiry dated 15 February 1999 was set aside.
4. A further order was made that directed the Court of Inquiry to proceed with its hearing of the charges before it, and to decide the issues necessary for disposal of each of those charges.

Cases considered:

New Zealand Engineering, Coachbuilding, Aircraft, Motor and Related Trades Industrial Union of Workers v Court of Arbitration [1976] 2 NZLR 283 (CA)

Statutes considered:

Interpretation Act CAP 1
Laws Consolidation Act 1988
Prisons Act CAP 36

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

Judgment

The Facts

The Defendants are constituted as a Court of Inquiry pursuant to ss 15 and 16 of the Prisons Act CAP 36 ("the Act"), in order to inquire into certain charges that have been brought against the Superintendent of Prisons. They commenced hearing the first charge on 8 February 1999 and heard 3 prosecution witnesses. After that, they directed counsel for the parties to make submissions about whether it had jurisdiction to hear the charges. They identified that question as a legal issue. After hearing submissions they adjourned the hearing and on 15 February 1999 delivered a written decision. In that decision they held that they did not have jurisdiction to inquire into the charges against the Superintendent because he is not a "prison officer" within the meaning of that term in s 2 of the Act.

The plaintiff seeks orders reviewing and setting aside the decision of the Court of Inquiry, together with a declaration that the Superintendent of Prisons is a "prison officer" within the meaning of that term in the Prisons Act CAP 36. A further order is sought directing the Court of Inquiry concerned to continue the hearing, which has been commenced but has been terminated by the decision that is under review.

The Decision under Review

The Court of Inquiry's decision and a translation of it are before the Court. It records that the Court of Inquiry had expected the defence to raise the issue of its jurisdiction, but had not. The issue as seen by the Court of Inquiry arose out of perceived inconsistencies between s 2 and s 6 of the Act, by reference to the current Act and by reference to its previous (1967) form. Section 2 is the definition section of the Act (which defines a prison officer) and s 6 is the section creating the posts that prison officers may hold. After calling for and considering the arguments, the Court of Inquiry held that the amendment of s 6 from its previous form by Act No 13 of 1987 introduced an inconsistency with s 2, which had never been remedied. All it takes, they held, is a correction of s 2 so that it describes the new posts that are now set out in s 6. To remedy the defect they held was not their function. They referred to inconsistencies that they found between the Tongan and the English versions of s 6. They held that the Interpretation Act CAP 1 cannot apply to remedy the lawmakers' inadvertence, and that to apply it is to impair justice.

They consequently held that the powers of ss 15 and 16 of the Act did not give them authority to proceed with the hearing because the Superintendent of Prisons is not a "prison officer" until s 2 of CAP 36 is amended to be consistent with s 6.

Pleadings

Both parties filed pleadings, but I take these as indications of positions only, and decide the issue by reference to the submissions.

The Submissions

These were of a high order, from both counsel. They are the foundation of my decision, but for brevity I shall not refer to them in detail.

The Statutory Provisions

It is common ground that the Court of Inquiry was set up under ss 15 and 16 of the Act. It is not necessary to set out those provisions. Under s 15, the Court of Inquiry has been constituted a judicial body in the nature of a court. Its function is to inquire into the charges that have been laid against the Superintendent of Prisons, and the president of the court has all the power of a magistrate in regard to summoning and enforcing the attendance and responses of witnesses. Under s 16, the court's power is to hear and determine the charges, and to impose punishment.

S 6 of the Act is as follows:

> 6. The establishment of the prisons shall consist of the Superintendent of Prisons, Assistant Superintendents of Prisons, Chief Warders and such number of officers as may from time to time be provided for in the Annual Estimates of the Kingdom.

S 2 of the Act is (in part) as follows:

> 2. In this Act — (etc) — "prison officer" means a Chief Gaoler or any subordinate officer employed in any prison.

At s 14 the Act prescribes the responsibilities of the Chief Gaoler of each district. It does not say what, it means by districts, but in s 4 it prescribes the places in various parts of the country which are to be prisons. Under s 14 the Chief Gaoler of each district has four defined responsibilities. He is responsible for the safe custody of prisoners committed to the prison of which he has control, for the carrying out of the sentences passed upon the prisoners committed to his custody, for the discipline of all prison officers and prisoners under his charge, and for the safety and the proper care of all instruments tools and other implements connected with the prison of which he has control.

The Act does not refer otherwise to the Superintendent of Prisons or to the Chief Gaoler. It does contain several references to the duties and rights of "every prison officer".

Decision

The power to interpret its own jurisdiction is not given to every judicial tribunal. The powers of any tribunal must be carefully scrutinised to see if that is included. In

the present case the Court of Inquiry was a creature of ss 15 and 16 of the Act. Its powers, i.e. what it may legally achieve as its own work, are set out there. It cannot embark on other work, if it does then it will be outside its powers and doing nothing effective. It has the powers of a magistrate in respect of witnesses, and that is a power at law, to be used if certain facts are proved. It has the power "to hear and determine all charges of (a) intoxication, or (b) serious breaches of good order or discipline or of any prison rule, which may be brought against any prison officer" (s 16). That is largely a matter of fact, but decisions of law may also be needed, e.g. the interpretation of a prison rule.

However there is no power given to this tribunal "to determine … for the purposes of any given case the meaning of provisions in the Act by which it [was] constituted and under which it operates". Those words are taken from *New Zealand Engineering, Coachbuilding, Aircraft, Motor and Related Trades Industrial Union of Workers v Court of Arbitration* [1976] 2 NZLR 283 (CA) at 301, to which Mr Cauchi referred me.

It does however in my view, include a power (and a duty) to be satisfied that any particular person charged before it is a "prison officer" as defined in the Act. This is a decision of law and fact. The law is the interpretation of the definition of a "prison officer" in s 2, and the fact is the assessment of the evidence about the person charged in order to determine whether the person is within that definition.

This is highlighted in the present case. Each of the charges laid alleges directly that the Superintendent of Prisons did a certain things "as a prison officer". That ingredient is common to all of the charges, and must be proved in each of the charges. Since the Court of Inquiry had doubts about this single common ingredient at the outset, it took what I think is a sensible step in seeking to have its doubt resolved early. But in my opinion it fell into error in treating the question as a question of pure law that went to its jurisdiction. The question is one that arose naturally in the course of its deliberations. It is a question of fact and law, to be decided not only on the interpretation of s 2 of the Act, but also on the evidence about the actions of the Superintendent.

I turn to the question of law, the interpretation of s 2.

A prime principle of statutory interpretation is a presumption that the legislature intended to pass legislation that would work. The whole statute must be considered for this purpose, not just the words being interpreted. The history of the legislation is relevant. In the present case, it seems the legislature amended s 6, which creates the establishment of the prisons, without making consequential amendments to ss 2 and 14. The office of Chief Gaoler is the highest rank of prison officer under s 2, but it no longer exists among the positions in the prison service that are named in s 6. Nonetheless, the person holding the position that originally had that title still has the same duties to perform under s 14.

The Court of Inquiry took the view that in order to read s 6 properly one must bear in mind not only what it says but what it used to say before it was amended. That is a valid principle of statutory construction, in its place. The law abounds with examples of resort to the historical setting of legislation in order to determine the intention of the legislature. The essence of the application of this principle however, is that it is used to determine what the legislature intended, not what it may inadvertently have omitted to do.

Allied with that is the presumption against absurdity that I have mentioned. Under these two principles one must first ask, what was intended at the time of passing the amending Act of 1987? The change to s 6 was the main effect of that Act. The previous s 6 was as follows:

> 6. The establishment of the prisons shall consist of such number of Chief Gaolers and subordinate officers as may from time to time be provided for in the Annual Estimates of the Kingdom.

The amendment to s 6 changed and added to the positions and titles of the officers who make up the prison establishment. That was what was intended by the legislature. The other amendments made by the amending Act were minor matters, deleting the word "male" from s 12 and updating penalties. The title or description Chief Gaoler remained unaltered in s 2, and s 14 (above) sets out the responsibilities of the Chief Gaoler. To interpret the statute as the Court of Inquiry did is to make it an absurdity, with nobody to perform those vital functions, whereas it is highly probable that some prison officer must have continued performing those functions after the amendment, and the statute could easily be read in a way that makes it work, despite the bad drafting.

Pursuant to s 11(2) of the Laws Consolidation Act (No 42 of 1988), the text to be interpreted is the English text, and I confine myself to it. I can see no obstacle to interpreting the definition of "prison officer" in s 2 as meaning the chief officer or any other officer subordinate to him who is working in any prison. There is no special significance in the capital letters of "Chief Gaoler". Punctuation may be ignored. The term is not a title or position in s 6. Resort to commonsense, another prime principle in statutory construction, suggests that, since the legislature did not amend s 2, it did not intend to change the force of s 2, and thus still intended to include in the definition of a prison officer the senior officer who carries out the duties defined in s 14. He is the one who has control of a prison and has prisoners committed to his custody. All officers working in prisons who are subordinate to that officer are included.

The defendant in the Court of Inquiry was charged as a prison officer. If the evidence satisfies the Court of Inquiry that he, whether subordinate or chief, was an officer under the Act working in a prison at the time of the matters under inquiry, and either giving or taking the orders necessary for the duties set out in s 14, then in my view, the court should find that prima facie he was at the time included in the s 2 definition. His position or job title may have no relevance if in fact he was charged in respect of acts performed while he was appointed to perform duties in a prison.

The Tongan Wording of the Statute

Pursuant to s 11(2) of the Laws Consolidation Act (No 42 of 1988), the text to be interpreted is the English text. That factor is decisive. However, I was referred by both counsel to the Tongan version of the statute, and should make some remarks about that. It may be that the Court of Inquiry was influenced by the Tongan text. It is clear that the office of *Sela Lahi*, translated as "Chief Gaoler" in the English words of s 2, was not abolished in the amendment (in the Tongan words) of s 6. Indeed, not only was the office of *Sela Lahi* retained there, (in the plural *kau Sela Lahi*) but also a

new position for prison officers, *kau Tokoni Sela Lahi* (Assistant *Sela Lahi* — plural), was created. However, *kau Sela Lahi* came out in the English words of the amended s 6 as "Chief Warders" and *kau Tokoni Sela Lahi* was not in the English text at all, as the Court of Inquiry pointed out.

As well, the amendment of s 6 (in the Tongan words) created the new positions of *Pule 'o e ngaahi 'Api Popula* and *kau Tokoni Pule 'o e ngaahi 'Api Popula*, which appear in the English as "Superintendent of Prisons" and "Assistant Superintendents of Prisons". Therefore, if the Tongan words of this statute were to prevail, there might well be an insoluble conflict between ss 2 and 6, since both are provisions for *kau 'ofisa 'o e ngaahi 'api popula*, but the amendment in Tongan changed them from being consistent provisions for *kau 'ofisa 'o e ngaahi 'api popula* to being inconsistent.

On the other hand, there is another small but significant difference between the texts which might overcome that inconsistency. Section 2 in the Tongan words defines both "*Minisita Polisi*" and "*Ofisa 'o e Api Popula*" in identical initial words, "*oku kau ki ha …*", yet the English text uses a different word in each case. The result of this is that in the English text the term "prison officer" means a Chief Gaoler (etc). The Tongan could have been translated, as it is in respect of the Minister in s 2, as "includes". In the English the definition of a prison officer has been made exclusive, and creates the inconsistency between s 2 and s 6. But in the Tongan words it could readily be argued that the new positions are not excluded from the definition.

In any event, there seem to be inconsistencies between the different texts. Doubtless, correction of these anomalies is within the unusual powers given to the Commissioner in the Laws Consolidation Act, but it has not so far been done.

Directions to the Court of Inquiry

For the reasons I have set out above, I make an order as sought, setting aside the decision of the Court of Inquiry dated 15 February 1999.

I make a further order directing the Court of Inquiry to proceed with its hearing of the charges before it, and to decide the issues necessary for disposal of each of those charges. The issues include the issue of whether the person charged is proved as a matter of fact to be within the definition at law of a "prison officer". In order to decide that issue, the Court of Inquiry is directed to apply to the proven facts the interpretation of that term which this Court has provided above.

I take the opportunity of commenting to the Court of Inquiry that the jurisdiction that it will exercise is the jurisdiction created by s 16 at paragraph (b). Before the person charged may be found guilty of any charge, the Court of Inquiry must be satisfied not only that the person charged is a prison officer, but also that the matters proved in respect of that charge are within the terms "serious breaches of good order or discipline or of any prison rule" (s 16). Those terms are the limit of its jurisdiction.

I make no orders for costs.

Bourke v Police

Supreme Court, Nuku'alofa
Ward CJ
CA 102/99

27 May 1999; 8 June 1999

Criminal procedure — reasons for refusing bail — bail should have been granted
Magistrates — remanded appellant in custody — should have granted bail

Police inquiries into a traffic incident caused them to suspect that the appellant was the driver of the vehicle that struck and killed Valu. The appellant was asked by telephone to come to the police station for questioning in relation to the incident. He attended the police station in response to that request on the morning of 25 January 1999. At 10.00am the police arrested him without warrant and charged him with manslaughter by negligence. Shortly after that the appellant was taken before a magistrate and the court was asked to remand him in custody for two days. The magistrate then remanded the appellant in custody until 10.00am on 27 January. It was common ground that the reason the police sought the remand in custody was to question the appellant further about the offence with which he had been charged. That afternoon, at 3.30, a notice of appeal was filed against the order to remand in custody together with an application for bail pending the appeal. At the hearing, the prosecution asked for the remand to continue in the same terms. The record shows the magistrate replied to that request: "Yes, I believe the application by the prosecution is reasonable because the offences caused death." When counsel for the appellant asked again for bail, the prosecutor objected on the same ground that "the offence caused death". The magistrate then purported to recall his own earlier judgment and halved the remand time. The appellant appealed against both decisions. He argued that there were no proper grounds upon which to remand him in custody and the magistrate had no power to recall his own decision.

Held:

1. The police complied with the requirements of section 22 of the Police Act CAP 35 but then asked for the detention of the appellant for improper reasons. The police officer was following what appeared to have become a common procedure. The magistrate should have refused his request. Instead he allowed it and, in so doing, failed to carry out the duty placed on him by the Bail Act 1990.
2. The reasons for detaining an arrested person must accord with the provisions of the Bail Act 1990.

3. The appeal was allowed. The appeal was to correct the decision of the magistrate. Costs were awarded to the appellant.

Cases considered:

Fifita and Edwards v Fakafanua (unreported, CA 6/98)
Holgate-Mohammed v Duke [1984] AC 437; [1984] 1 All ER 1054
Kingdom of Tonga v Finau (unreported, 1993)
R v Soakai (unreported, CR 29/99, Finnigan J, 31 March 1999)
Soakai v Taulua (unreported, Appeal 6/93)

Statutes considered:

Bail Act 1990
Police Act CAP 35

Counsel for appellant : Mr Niu
Counsel for respondent : Mrs Taumoepeau

Judgment

During the night of 14 November 1998, Angahaki Valu was struck by a motor vehicle and killed. The appellant, Steve Bourke, was also injured as a result of the same accident and was admitted to hospital.

Police inquiries into the incident caused them to suspect that the appellant was the driver of the vehicle that struck Valu. He was asked by telephone to come to the police station for questioning in relation to the traffic incident and the death of Valu. He attended the police station in response to that request in the morning of 25 January 1999.

At 10.00am the police arrested him without warrant and charged him with manslaughter by negligence. Shortly after that the appellant was taken before a magistrate and the court was asked to remand him in custody for two days. The magistrate then remanded the appellant in custody until 10.00am on 27 January. Whilst the record of the proceeding is not clear, it appears to be common ground that the reason the police sought the remand in custody was to question the appellant further about the offence with which he had been charged.

That afternoon, at 3.30, a notice of appeal was filed against the order to remand in custody together with an application for bail pending the appeal. At the hearing, the prosecution asked for the remand to continue in the same terms. The record shows the magistrate replied to that request: "Yes, I believe the application by the prosecution is reasonable because the offences caused death." When counsel for the appellant asked again for bail, the prosecutor objected on the same ground that "the offence caused death".

The magistrate then purported to recall his own earlier judgment. The record quotes him as saying:

> "I order that the order that Steve Bourke is to be kept in custody until the Preliminary Inquiry on the 27 January is recalled. Steve was arrested at 9.00 hours today. After you have dealt with him within 24 hours he should be released and you can make an

application to bail him out. That is what you should do and that is the application that you should make."

The appellant appeals against both decisions. There were, he says, no proper grounds upon which to remand him in custody and the magistrate had no power to recall his own decision.

There is no challenge to the right of the officer to arrest without a warrant in this case and it appears that was not an issue at the magistrates' court. The duty of the police, once such an arrest is made, is set out clearly in section 22 of the Police Act CAP 35:

> "22. (1) A police officer making an arrest without a warrant shall, without unnecessary delay and subject to any provisions under any Act as to bail or recognizance, take or send the person arrested before a magistrate there to be charged or before a police officer of the rank of a sergeant or above or before the officer in charge of the police station. (2) If it is not practicable to bring the person arrested before a magistrate having jurisdiction within 24 hours after he has been so taken into custody, the police officer of the rank of sergeant or above or the police officer in charge of the police station shall inquire into the case and shall grant or withhold bail in accordance with the Bail Act 1990."

The officer properly complied with the section and took the appellant to the magistrate very soon after the arrest and charge.

Section 22 has been described more than once in the Court of Appeal as a safeguard of the rights of a citizen by ensuring that, in any case where the citizen's right of liberty is impugned, it is only done in strict compliance with the law.

The magistrate is involved in the process in order to protect the citizen. Whenever a person is brought before a magistrate under the provisions of section 22, the magistrate's duty is to ensure that he is properly arrested and then to consider whether any application to hold that person in custody is made on proper grounds. Those grounds must accord with the terms of the Bail Act.

Under that Act, every person who is arrested for or charged with a criminal offence shall be released on bail subject only to the provisions of the Act.

Section 4 provides that, where the offence is punishable with imprisonment the court or the police officer can only refuse bail if it or he is satisfied that:

> "(i) there are substantial grounds for believing that, if released on bail (whether or not subject to conditions) he will:
>
> (a) fail to surrender to custody;
>
> (b) commit an offence while on bail; or
>
> (c) interfere with witnesses or otherwise obstruct the course of justice, whether in relation to himself or any other person;
>
> (ii) he should be kept in custody for his own protection or welfare;

(iii) the case has been adjourned for inquiries which it would be impracticable to make unless the defendant is kept in custody;
(iv) he is already in custody pursuant to a sentence of a court; or
(v) he has already been released on bail in connection with the present proceedings and has been arrested pursuant to section 9 of this Act."

In the case of *Fifita and Edwards v Fakafanua* (unreported, CA 6/98), the Court of Appeal dealt with section 22 in relation to the requirement that the person be taken before a magistrate without unnecessary delay. In the present case, as I have already stated, the police observed those requirements properly. What is deeply disturbing is that, once the case was before the magistrate, instead of dealing with the person arrested in accordance with the Bail Act, he chose to deprive the appellant of his liberty on some ground apparently dreamed up simply to allow the police to hold the appellant for questioning. In so doing he not only failed to follow the Act but he clearly had no regard for the true reason why section 22 required the person to be brought before him in the first place. Far from safeguarding the citizen's rights, he appears to have seen his role simply to confirm a request by the police to hold the appellant unlawfully.

Counsel for the respondent suggested that the Court of Appeal in *Fifita*'s case had cited with approval the comment by the Royal Commission on Criminal Procedure in England and Wales that "arrest for the purpose of using the period of detention to dispel or confirm reasonable suspicion by questioning the suspect or seeking further evidence with his assistance is well established as one of the primary purposes of detention upon arrest". That passage forms part of the comments of Lord Diplock in the English case of *Holgate-Mohammed v Duke* [1984] AC 437; [1984] 1 All ER 1054 quoted by the learned judges of appeal but they did not accept that such a suggestion applied here.

They pointed to the cases of *Soakai v Taulua* (unreported, Appeal 6/93), and *Kingdom of Tonga v Finau* (unreported, 1993), which show that section 22(1) gives the police no right to delay taking the person arrested to the magistrate in order to continue questioning him. In *Fifita*'s case they state:

> "What section 22 insists must be done "without unnecessary delay" is not the interrogation of an arrested suspect, but his taking before a magistrate. There is no warrant for reading the provision as if it referred to the practicability of interrogation. Delay caused by a desire to ask questions is not authorized by the section; 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.
>
> In our opinion, it is not right to say that no questions may be asked by police about the offence of which an arrested person is suspected. 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".

As I have said, the police complied with the requirements of the section but then, it appears, asked for the detention of the appellant for improper reasons. I do not suggest that was done with any intention to ignore the law. Cases such as this have been coming before this Court far too frequently and the police officer was following what appears to have become a common procedure. The magistrate should have refused his request. Instead he allowed it and, in so doing, failed to carry out the duty placed on him by the Act.

As recently as March this year, Finnigan J in the case of *R v Soakai* (unreported, CR 29/99, Finnigan J, 31 March 1999) warned:

> "It is quite wrong for either the police or a magistrate to consider the role of a magistrate as permitting the police to hold citizens in custody for the sole purpose of permitting the police to carry out "routine moves". There must be a reason shown by the police for the need to detain a suspect during their enquiries. It is grossly wrong for the police to be authorised by a magistrate to hold a suspect … for interview without special reason being shown for that."

I respectfully agree and would only add that the reasons the police claim as making detention of an arrested person necessary must accord with the provisions of the Bail Act.

At the subsequent hearing of the application for bail pending appeal, the magistrate took an even more extraordinary step. He refused the application but then, apparently on his own motion, purported to recall his own decision and halve the period of detention.

Not only was this wrong but it was done for no apparent reason other than that a notice of appeal had been filed. The police were asking for the original order to be maintained. The appellant was asking for his immediate release pending appeal. Nobody was asking for the period to be halved and no reasons were given by the magistrate for his action.

The result of this has been that the accused was held overnight when he should not have been. Having looked to the magistrate to protect his rights, he found the magistrate ignoring them and making an order that permitted the police to act outside the provisions of the Bail Act.

With the possible exception of calling back a case during the same session in order to correct an error, once a court has pronounced a decision, it is functus officio and has no right to alter it. Correction on alteration is for an appellate court.

By the time this appeal came before the court, the appellant had been released. Counsel for the appellant asked to continue with the appeal because he felt that an important principle was involved. He was right so to do. The purported recall by the magistrate of his decision would, otherwise, have ensured the first order he had made would escape the scrutiny of this Court.

The appeal is allowed. No order is sought or, indeed, is necessary. The appeal was to correct the decision of the magistrate for the reasons I have just stated. In the circumstances, I feel the appellant should also have his costs.

Attorney General v Po'uhila

Supreme Court, Nuku'alofa
Ward CJ
Cr 1319/98

7 June 1999; 8 June 1999

Contempt of Court — publication of comments on credibility of witnesses during trial — editor and reporter fined

The facts of this case are set out at *Attorney General v 'Akau'ola* [1999] Tonga LR 71. The case arose from the publication of an article commenting on the credibility of witnesses during the trial in which they were testifying. On 14 April, the deputy editor of the Taimi 'o Tonga, Filokalafi 'Akau'ola, was found guilty of contempt of court and fined $5,000.00. The editor of the paper, Kalafi Moala, and the reporter who wrote the articles, 'Ulu'alo Po'uhila, were in New Zealand and service upon them of the summons and other documents in the case was ordered. They admitted the contempt and pointed out that the fine ordered against the deputy editor had been paid by the newspaper already. They also published, both in Tongan and English, a report of the finding of contempt against them together with an expression of their regret and apologies for the contempt. They suggested they had not realised that such a publication would amount to contempt of court. Both respondents sought leniency. They pointed out that the paper had already paid a considerable sum in damages from a civil claim for defamation. The financial position of the paper was extremely poor and it was already in the position of having to pay those damages by installments.

Held:

1. The contempt arose from the timing of the publication and its seriousness was the risk that it could prejudice the fair trial of a matter before the court.
2. Independent newspapers play an important role in a free society but press freedom carries with it responsibility and, when the paper failed to pay proper regard to that to the detriment of justice, the court must mark it by an appropriate penalty. The editor inevitably took the primary responsibility for any decision to publish.
3. The editor, Kalafi Moala, was ordered to pay a fine of $5,000 or five months imprisonment in default of payment.
4. Although the reporter was the author of the articles, the case related to the timing of publication rather than to the actual content and he may have had little part in that decision: 'Ulu'alo Po'uhila was ordered to pay a fine of $1,000 or one month imprisonment in default.

5. Both fines were to be paid within two months and the respondents were to pay plaintiff's costs.

Counsel for plaintiff	:	Mrs Taumoepeau
Counsel for defendants	:	Mrs Taufaeteau

Judgment

On 14 April, I found the deputy editor of the Taimi 'o Tonga, Filokalafi 'Akau'ola, guilty of contempt and fined him $5,000.00. The case arose from the publication of an article commenting on the credibility of witnesses during the trial in which they were testifying. The editor of the paper, Kalafi Moala, and the reporter who wrote the articles, 'Ulu'alo Po'uhila, were in New Zealand and I ordered service upon them of the summons and other documents in the case.

They have now filed a joint affidavit with the Court and appear today by lawyer. I do not need to repeat the details of the case; they are set out sufficiently in my earlier judgment.

In their affidavit, they admit the contempt and point out that the fine I ordered against the deputy editor has been paid by the newspaper already. They have also published, both in Tongan and English, a report of the finding of contempt against him together with an expression of their regret and apologies for the contempt. They suggest they had not realised that such a publication would amount to contempt of court.

They also exhibit to the affidavit the documents that gave rise to the article. The publication was the result, they say, of their anxiety to bring to the attention of the public important issues as to the accuracy and truthfulness of some of the witnesses in the court proceedings. As those witnesses included a Cabinet Minister and a high ranking public officer, it was a matter of public interest if they were not speaking the truth.

Freedom of the press to publish matters of public interest and to reveal information that they feel causes concern especially in public affairs is an important and valuable liberty protected by the Constitution. However, that is not what this case is about. I do not need to determine the accuracy of the documents or the newspaper article they spawned. Neither do I need to consider whether or not they revealed a matter of public concern. This contempt arose from the timing of the publication and its seriousness was the risk that it could prejudice the fair trial of a matter before the court.

I find it hard to accept that any newspaper editor with the experience of Moala was so ignorant of the laws of contempt that he did not appreciate it is wrong to publish comments on the credibility of witnesses during the trial. On the other hand, I accept that these two have made apology for the contempt and taken steps to acknowledge it in their newspaper. That inevitably allows the court to exercise a degree of leniency that would not have been available in the face of continued defiance.

Both respondents seek leniency. They point out that the paper is already paying a considerable sum in damages from a civil claim for defamation. The financial position of the paper is extremely poor and it is already in the position of having to

pay those damages by installments. It is, they claim, the only independent weekly newspaper reporting on Tongan affairs published in Tonga.

They admit that they are, jointly with the deputy editor, 'Akau'ola, responsible for the publication and ask that, in those circumstances, the Court may feel able to consider that the fine already ordered against him effectively covers the contempt as a whole.

The defence put forward by the deputy editor previously did not accord with the admission made by these two respondents. He denied any part in the publication of
90 these articles. I found he was involved knowingly and the penalty imposed took into account his continuing evasion of the truth.

I must decide the appropriate penalty for each of these respondents bearing in mind the nature of the contempt, their part in it and their expressions of regret. I accept that the parlous state of the newspaper's finances means this penalty will inevitably increase the burden it already bears. Independent newspapers play an important role in a free society but press freedom carries with it responsibility and, when the paper fails to pay proper regard to that to the detriment of justice, the court must mark it by an appropriate penalty. The editor inevitably takes the primary responsibility for any decision to publish.

100 Bearing in mind the factors already mentioned and the fine already imposed, I order that the editor, Kalafi Moala, must pay a fine of $5,000.00 or 5 months imprisonment in default of payment.

Although the reporter was the author of the articles, this case relates to the timing of publication rather more than to the actual content and I accept he may have had little part in that decision. I order 'Ulu'alo Po'uhila must pay a fine of $1,000.00 or one month imprisonment in default.

Both to be paid within 2 months. Respondents to pay plaintiffs costs.

Talakai v ‘Aipolo

Supreme Court, Nuku’alofa
Ward CJ
C 178/97

8-11 March, 1, 6-9 April 1999; 11 June 1999

Administrative law — unincorporated body ruled by its constitution — must follow procedural rules
Damages — no evidence to quantify — hearing set for later date

The plaintiff was a member of the Assemblies of God of Tonga, which, according to the Constitution, was “a co-operative fellowship of Pentecostal assemblies of like faith”, which first started in Tonga in 1967. It was based on mutual agreements voluntarily entered into by the membership. The year that it started the plaintiff became a member of the fellowship and a deacon of the first Vava’u Congregation. He held the various credentials issued by the church: Christian worker’s permit, licence to preach, and ordination. The plaintiff was suspended more than once and, in about 1987, he finally retired from the position of pastor but continued to preach as a lay preacher. The first defendant was pastor of the First Church and, as such, he was a member of the Board and presided at its meetings. As pastor of the First Church, he was entitled to a monthly monetary support of $600.00 and, on or about 21 April 1995, he withdrew $1,200.00 as his support for the months of May and June because he was to travel to the United States during those months. The plaintiff claimed that the first defendant was travelling on leave and was to attend his son’s ordination. The first defendant claimed he was travelling on church business because he was also the chairman of the World Association of Tongan Assemblies of God and he was to attend a special meeting in the United States. The plaintiff maintained that it was against the rules of the church to withdraw the support in advance in this way. No evidence was led of the nature or extent of the rules. On 7 May, while the first defendant was away, there was a meeting of the Board of Deacons and it was decided to discipline the Superintendent on his return. It was also decided that he must pay back that money and give it to the Assistant Superintendent who was chairing the Board meeting at the time. When the first defendant returned to Tonga in June, he was summoned to another meeting of the Board on 9 June. The purpose of the meeting was to inform the Superintendent of the Board’s earlier decision. It was not to give him an opportunity to state his side. Following that Board meeting, the Executive Committee, chaired by the first defendant, met on 11 June and the plaintiff was called to that meeting. At some stage, after the plaintiff left, the meeting continued as a Credentials Committee meeting. It was resolved then or at the next meeting to remove the plaintiff’s credentials. He told the Court that the question of

his credentials was never mentioned whilst he was present. The next meeting of the Executive Committee was 6 July and following that 8 August. The Credentials Committee decision to strip him of his credentials was communicated to the plaintiff by the secretary over the telephone after either the meeting of June or July. The plaintiff continued to try and raise the matter of the withdrawal of the support money and also the fact that the first defendant had appointed his own son as assistant pastor of the First Church. As a result of these activities, the Credentials Committee excommunicated him. At the general conference, on 23 August, the plaintiff's appeal was heard and was dismissed by a ballot of the members present. The plaintiff challenged the manner in which that part of the conference was conducted. After the conference the plaintiff left the church never to return. The plaintiff sought:

(a) a declaration that the first defendant was an unfit and improper person to be Superintendent of the Fellowship.
(b) an order directing the first defendant not to accept any nomination by the Fellowship to continue as Superintendent.
(c) a declaration that the decision of the General conference of 1995 declining the appeal of the plaintiff was unfairly and improperly reached and therefore null and void.
(d) a declaration that the decision of the Credentials Committee to remove the plaintiff's credentials and also drop him from the Fellowship was unfair, capricious, arbitrary and unlawful.
(f) a declaration the defendants are unfit and improper persons to hold the position of Superintendent and assistant Superintendent.
(g) an order for the return of the plaintiff's credentials.
(h) damages in the amount of more than $2,000 for the plaintiff's suffering, mental distress, and injured feelings.

Held:

1. The church was an unincorporated body and the limits of its rights and powers are determined by the terms of its Constitution and By-laws. Any church may constitute a tribunal to determine whether or not its rules have been broken by its members: the civil courts will enquire into the manner in which it has exercised its power.
2. The courts will not rule on purely spiritual matters. The declarations sought in paragraphs (a), (b), and (f) were not made.
3. The failure of the Credentials Committee to follow the rules made the decision unlawful and unfair and to that extent the declaration sought in paragraph (d) was made.
4. The decision of the General Conference was unfairly reached and the declaration sought in paragraph (c) was made to that extent. The fact the meeting was conducted in such a manner that the decision was unfairly reached does not inevitably mean it was improperly reached. There was no evidence it was reached in any way other than a ballot of the members present as required in the By-laws.

5. Despite finding that the decision to remove the plaintiff’s credentials was unlawful, the court did not make the order sought in paragraph (g) because the declaration was based on the procedures followed and did not deal with the merits of the case.
6. The decision to expel the plaintiff caused him and his family considerable pain and suffering, however, no evidence was brought to quantify this.
7. The questions of damages and costs were adjourned to a date to be fixed.

Cases considered:

Fotu v Fonua (1961) 2 Tonga LR 216
Latu v Fonua (unreported, C 132/79, Williams CJ, 3 March 1983)
Long v Bishop of Cape Town (1863) I Moo NS 411; 15 ER 756

Counsel for plaintiff : Mr Tu’utafaiva
Counsel for defendants : Ms Palelei

Judgment

The plaintiff is a member of the Assemblies of God of Tonga, which, according to the Constitution, is “a co-operative fellowship of Pentecostal assemblies of like faith”, which first started in Tonga in 1967. It is based on mutual agreements voluntarily entered into by the membership.

The year that it started here, the plaintiff became a member of the fellowship and a deacon of the first Vava’u Congregation. He held the various credentials issued by the church; Christian worker’s permit, licence to preach and, finally, ordination. It is not denied by the plaintiff that he was suspended more than once and, in about 1987, he finally retired from the position of pastor but continued to preach as a lay preacher.

The Tonga church has its own Constitution and By-laws which set out the manner in which it is to be administered. By the terms of the Constitution, the supreme authority is vested in the General Conference and, subject to that authority, the church is to be governed by the Executive Committee.

Apart from the power to summon a special session, the General Conference is held once a year, the time being determined by the Executive Committee. All decisions are decided by a simple majority and the members entitled to vote are all the missionaries and ordained or licenced ministers and delegates from each “set-in-order” assembly; the number of delegates depending on the number of members in the assembly they represent.

The officers of the Executive Committee are the Superintendent, Assistant Superintendent and the Secretary-treasurer. The Executive Committee also has the duty to act as Credentials Committee as which it establishes standards and examinations of, and grants credentials to, members. The discipline of ministers is also a matter for the Credentials Committee subject to a right of appeal to the General Conference.

In 1995, the first defendant was the Superintendent and the second defendant the Assistant Superintendent. Originally other members of the committee were also named as defendants but the plaintiff is no longer pursuing the claim against them. As

superintendent, the first defendant presided at all meetings of the Executive Committee, Credentials Committee and all sessions of the General Conference.

By that year, the Nuku'alofa assembly, the First Church, had already achieved the status of a Sovereign Assembly with the right of self-government. It was able to choose its own pastor, elect its own church board and carry out the normal business of running its own affairs. It also had the right to administer discipline to its members according to the Scriptures and its constitution and by-laws. There is no evidence before the Court of the nature of its constitution and by-laws or whether either has been drafted. The board of the First Church was the Board of Deacons one of whom was the plaintiff. The first defendant was pastor of the First Church and, as such, he was a member of the Board and presided at its meetings.

As pastor of the First Church, he was entitled to a monthly monetary support of $600.00 and, on or about 21 April 1995, he withdrew $1,200.00 as his support for the months of May and June because he was to travel to the United States during those months. The plaintiff alleges he was travelling on leave and was to attend his son's ordination. The first defendant claims he was travelling on church business because he was also the chairman of the World Association of Tongan Assemblies of God and he was to attend a special meeting in the United States. Whilst there, he was taking the opportunity to attend his son's ordination. I do not think it is necessary to resolve that issue but, if it is, I accept the first defendant's account of the reason for that visit.

One of the critical facts of the plaintiff's claim relates to the support the first defendant withdrew for the trip. The plaintiff maintains that it is against the rules of the church to withdraw the support in advance in this way. No evidence has been lead of the nature or extent of the rules. On 7 May, while the first defendant was away, there was a meeting of the Board of Deacons during which this was discussed and it was decided to discipline the Superintendent on his return. It was also decided that he must pay back that money and give it to the Assistant Superintendent who, incidentally, was chairing the Board meeting at the time.

When the first defendant returned to Tonga in June, he was summoned to another meeting of the Board on 9 June. The purpose of the meeting was to inform the Superintendent of the Board's earlier decision. It was not, it appears, to give him an opportunity to state his side. There is dispute about what happened at that meeting and at almost every stage thereafter. I shall set out the events and then deal separately with each party's case.

Following that Board meeting, the Executive Committee, chaired by the first defendant, met on 11 June and the plaintiff was called to that meeting. At some stage, but certainly after the plaintiff left, the meeting continued as a Credentials Committee meeting. It was resolved then or at the next meeting to remove the plaintiff's credentials. He tells the Court that the question of his credentials was never mentioned whilst he was present.

The next meeting of the Executive Committee was 6 July and following that 8 August. The Credentials Committee decision to strip him of his credentials was communicated to the plaintiff by the secretary over the telephone after either the meeting of June or July. The plaintiff continued to try and raise the matter of the withdrawal of the support money and also the fact that the first defendant had appointed his own son as assistant pastor of the First Church.

As a result of these activities, the Credentials Committee then excommunicated him.

On 2 August the plaintiff wrote to “the Chairman and Executive Committee” referring to the decision and setting out his “answer” which took the form of a proposal the terms of which were largely a restatement of his allegations but also included the demand that the Superintendent should settle the $1,200.00 and resign from his ministry. He finished by giving the committee seven days “to settle this up within the church, enabling the Board to seek legal advice of misusing of authority on the church’s fund”.

On 14 August he wrote two letters. One was to the Executive Committee and set out, once again, his complaints against the first defendant and enclosing a minute of the motions that had been considered by the Board of Deacons on 7 May. The letter is signed by four of the five members of the Board and the effect of and manner in which that happened is again an issue in the case. The letter starts with the following paragraph:

> “The reason for this letter is to put forward these complaints in accordance with the Bylaws of Assemblies of God of Tonga Article IV, Section 8, for the Credentials Committee to do something about, and if it could not be done before the General Conference, then submit them to this year’s General Conference because these concern the Superintendent S.P. ‘Aipolo, who is Chairman of the Committees.”

The other letter of that date was from the plaintiff alone to the Secretary, Assemblies of God, and was a clear notice of appeal to the General Conference. I set it out in full:

> “I respectfully put forward this matter in the name of our Lord. The reason for this letter is to submit to the upcoming General Conference of the Church this appeal pursuant to By-Laws, Article IV, Section 8(b).
>
> I have been advised by telephone of the following matters:
>
> i) I have been excommunicated from the Church;
> ii) My credentials, eg. Licence to Preach, etc, have been taken off me;
> iii) To prohibit me from contacting fellow members of the Church.
>
> I am very concerned about these matters as they affect my rights physically, naturally, spiritually, conscientiously, legally, etc. The grounds of this appeal are:
>
> 1. I have apparently been punished. I do not know what I have been punished for. I am not aware of any complaints or allegations against me in accordance with the By-Laws Article IV, section 8.
> 2. I have not been given an opportunity to defend any allegation against me. I have the right to know the allegation against me and to defend myself.
> 3. The decision against me is serious one but it was communicated to me by telephone. A respectable way

should have been adopted and advise me in writing with the details of what happened.

4. The procedure adopted against me is exactly the same with man returning to the law of the jungle where lions and strong rule which is totally improper in our communion in Jesus Christ our Lord.

This letter is given so that you please submit this appeal to the General Conference, and that you notify me of the time and date this matter is to be discussed so that I will be there to defend my rights."

At the general conference, on 23 August, his appeal was heard and was dismissed by a ballot of the members present. The Plaintiff challenges the manner in which that part of the conference was conducted.

The plaintiff's case is that, in April before the first defendant was due to go abroad, he went directly to the treasurer of the First Church and asked to be paid the two months support in advance. As a result the Board decided to discipline him. When he returned from abroad, the plaintiff gave him a letter setting out the decision of the Board. The first defendant then attended the next meeting on 9 June and there was a discussion of what had happened. The pastor normally chairs the board but, because of the allegation he did not do so that day. According to the plaintiff's evidence, the first defendant gave no explanation and said he would leave.

Both these meetings of the Board of Deacons, in which the plaintiff played a dominant role, were conducted with as little regard for natural justice as were the subsequent meetings of the Executive Committee, criticism of which is a fundamental part of the plaintiff's claim.

The first defendant then summoned the plaintiff to an Executive Committee meeting two days later. At that meeting the plaintiff again raised the matter of the support money and asked that the pastor be made to pay it back. He told the Court that, instead of saying why he was not being told to do so, he was asked by the pastor to stand together with the others. The plaintiff said that he would but made it clear that he would not back down about the $1,200.00. He then apologised to the meeting for anything he might have said or done that was not good and left.

It was shortly afterwards the secretary told him over the telephone that his credentials had been taken.

He complains to the court that he was not asked to attend the Committee again to be heard on the matter of his excommunication. He wrote the letter of 14 August and handed both to the Secretary at the same time. He told the court that he had written the letter signed by the other members of the Board at their request.

The defence case is that the withdrawal of money in advance is normal practice when the pastor needs it and would certainly be done when he was going abroad. The first defendant said he was travelling on church business but would take the chance to attend his son's ordination. He decided he should take his wife for such an important event and that was why he felt he needed the money in advance. As it was close to the date of his departure, he spoke to the treasurer directly and then sought the approval of the Board by approaching individual members, a practice which, he said, was common.

When he returned and attended the meeting of the Board on 9 June, he explained this and said that he would take the case to the highest authority of the First Church, the meeting of the members. One of the members of the Board then moved a motion that was passed that they should withdraw the allegations against him. That was the position, as he understood it when he held the Executive Committee meeting on 11 June.

At that meeting he asked the Committee to settle the matter between the plaintiff and himself with regard to the support and the appointment of his son as assistant pastor. The plaintiff was present and was crying and apologising for what he had done and asked the Committee not to remove his credentials. The first defendant told the Court that, in such a case, the plaintiff would have known only too well that this was a likely consequence of his accusations. The minutes of that meeting as with those of other meetings are totally inadequate and inaccurate. They refer to the fact that the plaintiff admitted he did wrong and apologised but say the Committee required time to reach a decision.

Under the By-laws of the church, the decision regarding the credentials of the plaintiff was a matter for the Credentials Committee. That Committee is the same as the Executive Committee and the Court was told that, after the plaintiff left, the meeting changed to the Credentials Committee to consider that issue. The minutes make no mention of that. A similar change from the Executive Committee to the Credentials Committee apparently occurred on 6 July and 8 August and the minutes give no indication of that having happened. The secretary, who wrote the minutes, suggested at one time that the letters “NB” are marked in the margin of the minutes at the point when the Committee changed. It appears from the content that may be the case but the letters have been added subsequently by someone else and the original had no reference to the change. This carelessness to the rules of procedure appears at almost every stage of the events related to this action.

The removal of a minister’s credentials in the church is a most important matter and a decision to excommunicate him is even more extreme. Yet it is impossible to ascertain from the church documents exactly when either of these decision was actually made and even the members of the Committee are unsure and gave conflicting accounts. As a result, although the plaintiff accepts he was in fact excommunicated, there is no actual written record of the fact.

The plaintiff attended the General Conference for the hearing of his appeal. The first defendant chaired the meeting and, when the appeal was reached, the plaintiff was called upon to present it. It is his case that he was hardly able to speak before the chairman stopped him and told the Conference that the plaintiff was a bad person and set out a number of allegations against him. The plaintiff’s appeal was not circulated to the members in advance by the secretary and it was not read out at the Conference. The plaintiff said he tried to read it out but was stopped by the first defendant from the chair. After the chairman had made his comments one of the delegates spoke in support of the plaintiff by trying to raise a motion about the support money but he was ruled out of order and prevented from speaking further.

After the conference the plaintiff left the church never to return. He felt hurt, depressed and embarrassed to appear anywhere in the company of Assembly of God members and his family felt the same. The whole family walked, as the plaintiff put it, with bowed heads.

The first defendant's version of events at the conference was that the plaintiff was given the freedom to speak as he liked. No one stopped him. His appeal was not circulated before hand or read out. The first defendant knew the plaintiff had been circulating a document before the conference but that was the other document dated 14 August which contained the allegations against the first defendant. He agreed that one member had tried to present a motion about the support money but was stopped because that was not the matter before the meeting.

Both parties called a number of witnesses and I shall not set out their evidence in any detail except where it is necessary to explain the view I have taken on any particular aspect of the case.

This is not an easy matter to decide. All the witnesses are devout believers and most have given their lives to the preaching of the gospel. In such circumstances, it might be reasonable to expect the events would demonstrate the virtues of tolerance, forgiveness and humility. I regret to have to say that they have been marked far more by intolerance, vindictiveness and pride in the principals who gave evidence.

The plaintiff seeks:

> "(a) a declaration that the first defendant is an unfit and improper person to be Superintendent of the Fellowship
> (b) an order directing the first defendant not to accept any nomination by the Fellowship to continue as Superintendent
> (c) a declaration that the decision of the General conference of 1995 declining the appeal of the plaintiff was unfairly and improperly reached and therefore null and void
> (d) a declaration that the decision of the Credentials Committee to remove the plaintiff's credentials and also drop him from the Fellowship is unfair, capricious, arbitrary and unlawful
> (f) a declaration the defendants are unfit and improper persons to hold the position of Superintendent and assistant Superintendent
> (g) an order for the return of the plaintiff's credentials
> (h) damages in the amount of more than $2,000.00 for the plaintiff's suffering mental distress and injured feelings."

At the close of the plaintiff's case I considered whether the Court had jurisdiction in a case such as this to enquire into and rule on the internal administration of a church. I decided that it would be better to consider that matter at the conclusion of the case as a whole and I now do so.

In July 1997, Lewis J was asked to consider an application to strike out the action on the grounds that it should have been brought as an application for judicial review. He ruled that it was not such a case and it was right to proceed on summons. I consider I am bound by that decision in this case but much of the authority for the examination of the proceedings of a church comes from cases of judicial review.

There have been previous cases in which this Court has clearly considered it had such jurisdiction. In *Fotu and others v Fonua* (1961) II Tonga LR 216 Hammett J giving the opinion of the Privy Council warned of the limitations of the court's power:

> “In our view the Civil courts should be reluctant to interfere with the internal affairs of a Church unless it is first clearly shown that its members or officers are acting contrary to the terms of its Constitution.”

Authorities in England give a limited right to the courts to enquire into such matters and those authorities guide me. However, it is important to distinguish those cases involving the Church of England and many other churches which have become established there by specific acts of Parliament sanctioning by law the church’s organisation and system.

The church in this case is an unincorporated body and the limits of its rights and powers are determined by the terms of its Constitution and By-laws.

It has long been the position that any church may constitute a tribunal to determine whether or not its rules have been broken by its members. In *Long v Bishop of Cape Town* in 1863 it was held that the civil courts will enquire into the manner in which it has exercised its power. I have only the summary of the report in 19 Dig Repl 242 in which it is stated:

> “The Church of England when not established in the colonies, is in the same position there as any other religious body and rules of discipline adopted by members will be binding on all who expressly or by implication have assented to them. If the religious body constitute a tribunal to determine disputes as to such rules, the decision of such tribunal will be binding when it has acted within the scope of its authority, has observed such forms as the rules require, if any forms be prescribed and, if not has proceeded in a manner consonant with the principles of justice. But such tribunal is not in any sense a court and the civil courts will give effect to its decisions as they give effect to the decisions of arbitrators whose jurisdiction rests entirely upon the agreement of the parties.”

I accept that this Court has the authority to enquire into the internal affairs of a church to the extent shown by those authorities. My examination is limited to a consideration of whether any actions of the church or its members have been in accordance with its own rules and have observed the rules of natural justice. On that basis, I now pass to the various limbs of the claim.

Paragraph (a) — Under Article III of the By-laws of the church, the qualifications for Superintendent and Assistant Superintendent are that they:

> “shall be ordained ministers of the Assemblies of God of Tonga in good standing who have shown sound Christian character and leadership ability, who have manifested a genuine interest in and co-operation with the work of encouraging and promoting the spread of the Full Gospel testimony in Tonga”. The evidence shows that the first defendant is an ordained minister of the church.

It has long been a principle that the courts will not rule on purely spiritual matters. Whether or not the first defendant has sound Christian character in the terms of the

tenets of the Pentecostal assemblies is a matter of spiritual belief and interpretation that this court cannot decide.

I have no evidence upon which I can sufficiently judge the remainder of the qualifications under Article III. I shall not make the declaration sought in paragraph (a).

Paragraph (f) — I refuse to make such a declaration as is sought in this paragraph on the same ground.

Paragraph (b) — This is an extension of the previous paragraphs. I have been shown no power under which this Court could make such a declaration. I have considered the judgment of Williams J in the case of *Latu v Fonua* (unreported, C 132/79, Williams CJ, 3 March 1983) when he ruled on application 297/83. In that case he ordered the defendant should no longer stand as President of the church and directed a fresh election. That decision was based on the dishonesty of the defendant in his financial dealings in the church and his continuing contempt of court. I do not consider that established any general power.

I have seen no evidence to suggest the first defendant should be prevented from allowing his name to be put forward to continue as Superintendent. I refuse to make the declaration sought in paragraph (b).

Paragraph (d) — There is a dispute between the plaintiff and the defence about the events at the meetings of the Executive Committee/Credentials Committee when the decision was taken to remove the plaintiff's credentials and to expel him from the fellowship.

I have already commented on the poor state of the minutes of those meetings. They assist very little in resolving the conflicts between the parties. Had proper minutes been taken, much of the dispute in this case would be easily settled. The manner in which the meetings were conducted and the minutes recorded gives some support to the plaintiff's claim that there was a general disregard for the rules by the authorities of the Church. Those who stand for office in such organisations owe it to the members who elect them to carry out the duties for which they have been elected strictly in accordance with the rules. Careless and slovenly practices such as were followed in these meeting are effectively a betrayal of the trust placed in the officers.

However, I must decide, on the evidence I have, what happened at those meetings bearing in mind that the burden rests on the plaintiff to prove the matters he asserts on a balance of probabilities. On the evidence of the people present, I am not satisfied the plaintiff's account is an accurate account of what happened on 11 June. It was clearly an emotional meeting. The plaintiff took the role of an accuser. He came to the meeting to repeat yet again his accusations of impropriety against the first defendant who, in his turn, felt that he had been harshly and wrongly treated by the Board of Deacons in his absence. I also accept the evidence that, at the meeting of the Board on June 9 and despite the signatures on the letter of 14 August to the Executive Committee, the majority of members no longer wished to pursue the first defendant over these allegations.

I accept that the plaintiff not only knew that he was likely to lose his credentials but that it was discussed. Exactly when the meeting turned into a Credentials Committee meeting is not clear save that I accept it was after the plaintiff had left. I cannot accept the plaintiff has demonstrated that the decision was arbitrary or capricious. The plaintiff had made a number of serious allegations against the first defendant. He had chaired a meeting that condemned the first defendant in his

absence and the plaintiff had continued to air his views. The committee had grounds upon which to make the decision it did.

The suggestion it was unfair or unlawful must be read against the Constitution and Bylaws. Article IV section 8 of the By-laws is headed “Discipline of members”. Paragraph a sets out the basis upon which the Credentials Committee must act. I set it out in full:

> “Ministers affiliated with the Assemblies of God of Tonga, who may be charged with unscriptural conduct or doctrine, shall be subject to discipline by the Credentials Committee. Such discipline shall be determined upon the basis of information filed in writing with the Secretary and signed by at least three persons of good standing. The Superintendent and Assistant Superintendent shall make any investigation, and if, in their judgment, the case seems to require a judicial action, the accused shall be given an opportunity to have a proper hearing before the Credentials Committee. If found guilty, the accused may be dropped from the fellowship, removed from office, or otherwise disciplined.”

The plaintiff alleges a failure to follow those procedures. The defence can do little to counter that allegation. There was no evidence of an information in writing appropriately signed. There was no evidence of a decision by the Superintendent and Assistant Superintendent whether the allegations required a judicial decision and although the plaintiff was given a opportunity to speak in the Executive Committee, no interpretation of the By-laws could describe the events of that day as a proper hearing and he was certainly not present at the meeting of the Credentials Committee. There was no formal finding of guilt and there was no evidence, if it was found, of the determination of the appropriate disciplinary action. Nothing in the evidence has shown the Court whether the committee considered the actions of the plaintiff amounted to unscriptural conduct or doctrine.

Such a failure to follow the rules makes the decision unlawful and unfair and to that extent I make the declaration sought in paragraph (d).

Before leaving this part of the case, I would comment that the unfortunate attitude of the Executive Committee is further shown by the way in which, having failed totally to follow the correct procedures in relation to the plaintiff’s credentials, they then ignored the letter of the plaintiff on 14 August. That was an information in writing and signed by at least three people of good standing filed with the secretary and the Superintendent and the Assistant Superintendent had a duty to investigate — a duty they failed to carry out.

Paragraph (c) — Article IV section 8(b) provides;

> “If a member has been found guilty and disciplined by the Credentials Committee, he may appeal to the General Conference where a majority vote shall be required to confirm action already taken by the Credentials committee.”

Section 8(c) begins with the exhortation;

> "In order to render effective the decisions made in the interest of proper discipline, and for the protection of the assemblies, such decision shall be considered by all to be just and final."

There is little guidance in the Constitution or By-laws as to the manner in which an appeal to the General Conference is to be heard. Article IA is expressed in wide terms;

> "In order to expedite the work of the General Conference of the Assemblies of God of Tonga, and its committees and to avoid confusion in their deliberations, the business at all such meetings shall be conducted by accepted rules of parliamentary procedure, in keeping with the spirit of Christian love, courtesy, and fellowship."

Apart from Article VII which simply determines the regular order of business for the annual General Conference there is nothing else to assist.

In deciding whether the rules of procedure have been followed, the Court will also consider whether the procedures have complied with the rules of natural justice.

The evidence of exactly what occurred at the 1995 General Conference is not at all clear. Again the burden is on the plaintiff to prove his assertion that the decision to dismiss his appeal was unfairly and improperly reached.

What is shown is that the meeting was conducted in a confused manner in relation to the plaintiff's appeal. There is no dispute that at least one delegate was prevented from speaking although, having heard his evidence, I accept he was speaking about the plaintiff's allegations against the first defendant rather than to the appeal itself.

It was extremely unfortunate that the first defendant continued to chair the meeting when the basis of the decision to take the plaintiff's credentials had been the allegations he had made against the first defendant. The decision whether to confirm the decision of the Credentials Committee was not his but one for Conference as a whole and so he only had the same right to vote as all the members. As the chairman of the Credentials Committee, he clearly had right to be heard but it would have been fairer to have done that from the floor of the Conference rather than with the authority of the chair.

I accept on the evidence that the plaintiff was invited to present his appeal but I am satisfied on balance that he was not allowed to make the arguments he wished. The Executive Committee had taken no steps to circulate his notice of appeal and I accept that when he tried to read it to the Conference, he was stopped. The minutes support the plaintiff's evidence that the first defendant launched into an attack on him and, on the evidence as a whole, I accept the hearing was conducted by the first defendant in a manner that was far from the ordered and considered debate to which the plaintiff was entitled.

On balance, I consider the decision of the Conference was unfairly reached and I make the declaration sought in paragraph (c) to that extent. I am not satisfied that the decision was necessarily improperly reached. I am unsure the basis of that claim. The fact the meeting was conducted in such a manner that the decision was unfairly

reached does not inevitably mean it was improperly reached. There is no evidence it was reached in any way other than a ballot of the members present as required in the By-laws.

Paragraph (g) — Despite my finding that the decision to remove the plaintiff’s credentials was unlawful, I do not consider I can make the order sought in Paragraph (g). My declaration is based on the procedures followed and does not deal with the merits of the case. I would require far more evidence than the plaintiff has produced to the Court to decide whether to make such an order. It is clear the plaintiff made a number of accusations against the first defendant that could be described as a personal campaign against him. I do not accept that the first defendant acted in any dishonest or improper way when he drew the support money for the two months he was abroad. I accept his evidence that he was travelling to a large extent on church business and I am not satisfied he broke any rules. Had the Executive and Credentials Committees followed the correct procedures, I am not satisfied they would necessarily have come to a different conclusion. The decision whether to order them to return credentials to the plaintiff involves considerations that I do not consider I am able to make on the evidence before me.

Paragraph (h) — I accept that the decision to expel the plaintiff caused him and his family considerable pain and suffering. No evidence has been brought to try and quantify this and I am uncertain how it should be assessed. I shall, at this stage, confine my order to the matters I have dealt with above and hear counsel on the question of damages if that part of the claim is still to be pursued.

The plaintiff claims his costs. He has had a degree of success and the declarations I have made represent the major thrust of his claim. In the circumstances he should have his costs. However, both the length and costs of these proceedings have been increased by the manner in which the plaintiff has cast his net so wide both in terms of the declarations sought and the people sued. In the circumstances I shall also hear counsel on the question of costs before I make such an order.

Therefore my Order is that I give judgment to the plaintiff to the following extent;

1. I declare that the decision of the Credentials Committee to remove the plaintiff’s credentials and to drop him from the fellowship is unfair and unlawful
2. I declare that the decision of the general Conference in 1995 declining the plaintiff’s appeal was unfairly reached.
3. The questions of damages and costs are adjourned to a date to be fixed.

Giles v Police

Supreme Court, Nuku'alofa
Ward CJ
Cr App 355/99

11 June 1999; 15 June 1999

Criminal law — common law defence to assault — available in Tonga
Criminal procedure — Magistrate's finding of fact — appellate court only interfere in exceptional circumstances

The appellant appeared in the magistrates' court and pleaded not guilty to a charge of assault. The evidence was that the complainant came on to the property where the appellant had a workshop in order to speak to the appellant about a water bill he claimed the appellant was liable to pay. It appeared the appellant had previously occupied the complainant's property. The complainant's account of what happened was that, as they argued about the bill, the appellant suddenly punched the complainant in the mouth. They then struggled. He said that the appellant asked him to leave his property about three times but that only occurred after the initial punch had been thrown. The appellant gave evidence that he asked the complainant three times to leave and sort it out with the Water Board. After the final request, the complainant said he would take the appellant to court. The appellant walked away but when the complainant again shouted at him, he turned and hit him in the mouth and they struggled. Two others separated them and the complainant left. Counsel for the defence argued that this was a case of lawful defence of property. He suggested the evidence showed the appellant had asked the complainant to leave three times. He had refused and the punch was necessary force to remove him. The magistrate did not accept such a defence was available in Tonga. It was against that ruling that the appeal was directed. The appellant argued that the common law right to use reasonable force in protection of ones property existed in Tonga and could therefore provide a defence to a charge of assault. The respondent conceded that such a defence existed under Tongan law but opposed the appeal on the basis that the magistrate's finding of fact ruled out such a defence in any event.

Held:

1. The magistrate erred when he held that the common law defence was not available in Tonga. The law had always recognised a reasonable right to self defence as a form of lawful justification of the force used. Defence of property may similarly amount to lawful justification.
2. The magistrate found on the facts that the exchange of words about the complainant leaving the premises was after the punch. He also found that

the punch occurred because the appellant was angry and not because he considered the complainant was a trespasser by his continued presence. The magistrate had the advantage of seeing and hearing the witnesses and, if that was a conclusion open to him on the evidence, the appellate court will only interfere in exceptional circumstances.

3. The appeal was dismissed.

Statutes considered:

Criminal Offences Act CAP 18

Counsel for appellant	:	Mr Niu
Counsel for respondent	:	Miss Tupou

Judgment

The appellant appeared in the magistrates' court and pleaded not guilty to a charge of assault contrary to section 112(a) of the Criminal Offences Act CAP 18.

The evidence was that the complainant came on to the property where the appellant has a workshop in order to speak to the appellant about a water bill he claimed the appellant was liable to pay. It appears the appellant had previously occupied the complainant's property.

Briefly, the complainant's account of what happened was that, as they argued about the bill, the appellant suddenly punched the complainant in the mouth. They then struggled. He said that the appellant asked him to leave his property about three times but that only occurred after the initial punch had been thrown.

The prosecution also called a man, related by marriage to the appellant, who worked for him. He heard the argument about the water bill and came around to see the two men struggling. It appears he was saying that he heard the request to leave the premises before he saw the men struggling.

The appellant gave evidence. He described the dispute about the water bill and said he asked the complainant three times to leave and sort it out with the Water Board. After the final request, the complainant said he would take the appellant to court. The appellant walked away but when the complainant again shouted at him, he turned and hit him in the mouth and they struggled. Two others separated them and the complainant left.

The record of his evidence shows the following explanation of his action:

> "The reason why I beat him is because he had long tried so that I pay the water bill for the workshop. I hit him because he shouted at me. He needed something which was not his. And I frequently told him to leave because the workshop is for business but he refused."

Counsel for the defence submitted that this was a case of lawful defence of property. He suggested the evidence showed the appellant had asked the complainant to leave three times. He had refused and the punch was necessary force to remove him.

The magistrate did not accept such a defence is available in Tonga. He stated;

> "The defence have submitted the common law to evict the complainant i.e. that the punching of the complainant was lawful for he told him several times to leave but he kept on talking to him and refused to leave.
>
> The court believes that the Laws of Tonga is complete together with the Amendment Act No 12/95. Defences to an assault committed are:
>
> 1. that it was not with malice
> 2. that the assault was lawful
> 3. that there was consent."

It is against that ruling that the appeal is directed. Mr Niu for the appellant submits that the common law right to use reasonable force in protection of ones property exists in Tonga and can, therefore, provide a defence to a charge of assault. He asks the court to accept the appellant's evidence that he told the complainant three times to leave before he hit him. It is correct that a lawful entry onto another's land may become unlawful and amount to trespass if the person remains after being told to leave. Similarly a re-entry after the permission has been withdrawn may be a trespass.

The magistrate erred when he held that the common law defence is not available here. The various actions set out in section 112 only become assaults if they are done "wilfully and without lawful justification". The law has always recognised a reasonable right to self defence as a form of lawful justification of the force used. Defence of property may similarly amount to lawful justification.

Under the common law an occupier has the right to use reasonable force to protect his property. If someone trespasses onto another person's property and refuses to leave, the occupier is entitled to use reasonable force to evict him. If he is charged with assault, he may only avail himself of the defence if he has used only so much force as is necessary to remove the intruder. However, the necessary degree of force may depend on the trespasser; if he uses force, the occupier may match force with force. The same principles apply as to the defence of self defence but, even in the days when the common law required a man to have retreated as far as he could before he could justify force to defend himself [no longer a requirement for self defence], it asked no duty to retreat in the face of a trespasser.

Miss Tupou for the respondent concedes that such a defence exists under our law but opposes the appeal on the basis that the magistrate's finding of fact ruled out such a defence in any event.

The magistrate found that the appellant only struck the complainant because he spoke back at him. He found that the exchange of words occurred later. From the context, I accept that he meant the demand the complainant should leave the premises.

That was a finding of fact that he was entitled to make on the evidence before him. As has been stated many times by the appellate courts, the magistrate had the advantage of seeing and hearing the witnesses and, if that was a conclusion open to him on the evidence, it will only interfere in exceptional circumstances.

Mr Niu suggests that, as the magistrate had ruled out the possibility of defence of property, his decision that the assault was not justified was wrongly reached because he did not consider the correct aspects of the evidence.

I would agree that might taint a decision if the only question had been whether the assault was justified. However in this case, there was also a dispute about the order of events. As I have already stated, the magistrate found on the facts that the exchange of words about the complainant leaving the premises was after the punch. He also found that the punch occurred because the appellant was angry and not
130 because he considered the complainant was a trespasser by his continued presence. That is sufficient to prevent the misdirection from tainting the conviction.

I would add that, had he considered the defence, he would also have had to decide whether the force used was reasonable. I would venture to suggest he might have found that a punch to the mouth was simply an angry response to an irritation rather than reasonable force for the purpose of removing a trespasser.

The appeal is dismissed.

Shell Company (Pacific Island) Ltd v Bank of Tonga

Supreme Court, Nuku'alofa
Finnigan J
C 180/99

9 June 1999; 24 June 1999

Practice and procedure — application to strike out — action sufficiently pleaded — not struck out

Shell sold petroleum to a third party, and in payment that third party deposited to Shell's account at the Bank of Tonga ("BoT") a number of cheques drawn on another bank, MBf, which were dishonoured by MBf on presentation. MBf returned the dishonoured cheques to BoT. It was claimed that BoT did not tell Shell immediately of the dishonoured cheques, but "took an average of 14 business days to post the dishonoured cheques to [Shell's] account", and failed "to notify [Shell] for up to 30 days that the cheques had been dishonoured". The claim was that BoT was (i) in breach of its statutory duty under s 49(n) of the Bills of Exchange Act CAP 108, and/or (ii) negligent at common law in the performance of an alleged duty. The duty was said to be "a duty to notify [Shell] within a reasonable time that the cheques had been dishonoured", but was otherwise unspecified. BoT applied to strike out the action. The issue was whether the statement of claim pleaded any reasonable cause of action.

Held:

1. The claimed failure in statutory duty by BoT was a failure to act within a reasonable time as provided in s 49(n). There was a claim of a prior statutory duty, that BoT was obliged to notify Shell that the third party's cheques had been dishonoured. There was no such duty laid on BoT by s 49. Counsel for Shell had not argued to refute the submission of counsel for BoT that there was no such statutory duty. That part of the claim was struck out.
2. The statement of claim pleaded particulars of the alleged breach of a common law duty. The duty claimed was 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 was sufficiently pleaded and was not struck out.

3. Costs on the successful part of the application were awarded to the defendant, and reserved pending the outcome of the substantive action.

Statutes considered:

Bills of Exchange Act CAP 108

Counsel for defendant (applicant) : Ms Tapueluelu
Counsel for plaintiff (respondent) : Mr Appleby

Judgment

This action is brought by an account-holder ("Shell") against its own bank ("BoT") for payment on cheques that were drawn on another bank ("MBf") and dishonoured by that bank. The present application is an application by BoT to strike out the action.

Briefly, the pleaded facts of the substantive claim are that Shell sold petroleum to a third party, and in payment that third party deposited to Shell's account at BoT a number of cheques drawn on MBf which were dishonoured by MBf on presentation. MBf returned the dishonoured cheques to BoT. It is claimed that BoT did not tell Shell immediately of the dishonoured cheques, but "took an average of 14 business days to post the dishonoured cheques to [Shell's] account", and failed "to notify [Shell] for up to 30 days that the cheques had been dishonoured".

The claim is that BoT was (i) in breach of its statutory duty under s 49(n) of the Bills of Exchange Act cap 108, and/or (ii) negligent at common law in the performance of an alleged duty. The duty is said to be "a duty to notify [Shell] within a reasonable time that the cheques had been dishonoured", but is otherwise unspecified.

The Submissions

The application to strike out the claim has proceeded on written submissions. I have considered these at length in order to ascertain the correct principles to apply. The statutory duty claim falls to be decided by the provisions of cap 108, the other by the principles of tort. I shall not refer to the submissions directly, but they are the foundation of the reasoning that follows. The issue is whether the statement of claim pleads any reasonable cause of action.

In responding to the submissions of counsel for BoT, counsel for Shell has applied to amend the statement of claim. He seeks to add reference to ss 45(2)(b) and 46(1). These provisions relate to presentment and delay in presentment of cheques. There is nothing wrong in principle with amending a statement of claim at this stage, particularly where breach of statutory duty is alleged and the amendment is to add further statutory provisions. However I am mystified by the application and the brief submission in support did not cast any light. Presentment does not feature in the pleadings at all. The claim arises out of alleged delay in giving notice after dishonour upon presentment.

I agree with counsel for Shell, who submits that the issue I have to decide is not the factual and legal claim but whether in principle the action pleaded discloses any arguable claim. However I do not agree that all the plaintiff has to do is allege a duty, a breach of that duty and a resultant loss. For a reasonable cause of action the duty

claimed must be specified and arguable. For that reason counsel for BoT was right to refer in argument to the pleaded facts, some of which were supplied by the statement of defence, and to the law pleaded in the statement of claim. Those submissions were not answered by counsel for Shell, except for a submission that in the absence of clear legal provision there should be full argument as to the meaning of the term "indorser". That submission also mystifies, since there is nothing I can detect, either explicit or able to be implied, that imports the indorsement concept into the pleaded claim.

Decision

The pleaded facts for the first claim are these. The third party owed money to Shell. Shell had an account with BoT. The third party paid cheques on its MBf account to BoT for collection from MBf and for credit to the account of the plaintiff. MBf dishonoured the cheques and returned them to BoT. For the first claim, it is alleged that BoT took on average 14 business days "to post the dishonoured cheques to [Shell's] account". In particular Shell claims that BoT failed to notify Shell on the day following dishonour, and thus breached s 49(n) of the Act.

Pursuant to s 48, where a cheque has been dishonoured by non-payment as it was here, notice of dishonour must be given to the drawer and to each indorser and any drawer or indorser to whom such notice is not given is discharged. A "drawer" is not defined, s/he is obviously the person who wrote the cheque. Neither is an indorser defined, but s 32 contains the necessary provisions. There is no indorsement, or anything that is said to be like an indorsement, alleged in the present case. The person to give the notice is, by s 49(a), the holder. A holder is defined in s 2 for present purposes as the payee of the cheque who is in possession of it. Plainly in the present case BoT as agent of Shell was the holder.

A notice must be given within reasonable time of the dishonour, s 49(m). The provision on which the plaintiff relies, s 49(n), makes provision for what may be deemed reasonable time.

There are other relevant provisions in s 49. Pursuant to s 49(f), notice is sufficiently given when the dishonoured cheque is returned to the drawer.

So the pleaded facts are that BoT, the holder of the cheques for collection, did not give notice to Shell, its own customer and its principal. I am bound to say that I can detect nothing in the first pleaded claim that is arguable. The claimed failure in statutory duty by BoT was a failure to act within a reasonable time as provided in s 49(n). There is a claim of a prior statutory duty, that BoT was obliged to notify Shell that the third party's cheques had been dishonoured. There is no such duty laid on BoT by s 49. Neither has counsel for Shell argued to refute the submission of counsel for BoT that there is no such statutory duty. That part of the claim is struck out.

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
130 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.

Costs

Costs on the successful part of the application are awarded to the defendant, and reserved pending the outcome of the substantive action.

R v Polelei

Supreme Court, Nuku'alofa
Ward CJ
511/97

13 July 1999

Customs and excise — defrauding the revenue —sentencing
Sentencing — fine should be within ability of offender to pay — fine reduced
Statutory interpretation — meaning of "shall" — court has inherent power to reduce fine where unjust

Each of the accused was being sentenced for two offences against the Customs and Excise Act CAP 67 and one against the Criminal Offences Act CAP 18. The Crown argued that the court had no discretion as to the sentence on the customs offences and must impose a sentence equal to three times the value of the goods for each conviction under section 210.

Held:

1. It was a fundamental principle of sentencing that a fine should not be imposed when it was clearly outside the means of the person ordered to pay. Not only was the imposition of such a penalty an injustice but the attitude that would inevitably be shown to such a court order would be contemptuous.
2. If, as the Court of Appeal found, the court may mitigate the mandatory penalty by invoking inherent power in relation to the number of charges on which it would record a conviction, it may use the same power to reduce a penalty to prevent the injustice of passing a penalty that was totally beyond the ability of the accused to pay and which everyone accepted would be ignored by accused and government alike.
3. Vakalahi was sentenced on Counts 1 and 2 to $1,000 fine or four months imprisonment in default of payment on each count; and on Count 3 to one year imprisonment suspended for one year. Polelei and Fiu were sentenced as follows: Counts 1 and 2 to $750 fine or three months imprisonment in default of payment on each count; and Count 3 to one year imprisonment suspended for one year.

Cases considered:

Hunter v Chief Constable of the West Midlands Police [1982] AC 529; [1981] 3 All ER 727

Vakameitangake v R [1998] Tonga LR 141 (CA)

Statutes considered:

Criminal Offences Act CAP 18
Customs and Excise Act CAP 67
Plant Quarantine Act CAP 127

Judgment

Sentence

In passing sentence on the three of you, I accept that the first accused, Holani, may well have been the principal in this offence and, without his involvement, the offences could not have occurred. He is outside the jurisdiction and may not return to face trial.

I also note that Lewis CJ has sentenced another offender, Tuineau. I heard nothing of his involvement during the evidence before me but I note he was charged with one offence contrary to section 210(1)(e) and one of receiving stolen goods. Although the indictment on the file is marked in Lewis CJ's handwriting "On 28/7/97 Crown accepts a plea on count two only and seeks to proceed on that count only", there is an Order by Lewis CJ bearing the same date in which the accused is convicted on his own confession on both counts and sentenced to a fine of $10.00 on the Customs offence and a suspended sentence of imprisonment for receiving.

I regard Vakalahi as the more involved because of his more responsible position in the company. I do not distinguish between the other two.

Theft by an employee involves serious breach of trust that strikes at the very basis of business and, as such, will normally be punished by a sentence of immediate imprisonment. However, I intend to suspend the sentence in all your cases because you have had to wait a very long time for the conclusion of this case through no fault of your own and the threat of the sentence has been over you all that time. More important in this case is the extraordinary situation that the company from which you stole still does not accept it has lost anything and has continued to employ you all in the same capacity.

Counsel for the Crown has submitted that the court has no discretion as to the sentence on the Customs offences and must impose a sentence equal to three times the value of the goods for each conviction under section 210. I consider that places the court in an untenable position and I shall pass what I consider the proper penalty for those offences and add my reasons in writing later today.

None of you has any previous conviction and I proceed on the basis that the evidence related to this single incident.

Vakalahi:

Counts 1 and 2: $1,000.00 fine or 4 months imprisonment in default of payment on each count.
Count 3: 1 year imprisonment suspended for 1 year.

Polelei and Fiu: Each of you is sentenced as follows:

Counts 1 and 2: $750.00 fine or 3 months imprisonment in default of payment on each count.
Count 3: 1 year imprisonment suspended for 1 year.

All accused shall have one month to pay. (Suspended sentence explained)

I now give my reasons for failing to impose a sentence of three times the value of the goods on counts 1 and 2 in each case.

Count 210(1) provides that any person who is guilty of an offence under any of paragraphs (a) to (c) "shall … for each such offence incur a penalty of treble the value of the goods or $200 whichever is greater".

Mr Bloomfield for the Crown submits, as I have said, that this leaves the Court with no discretion and that this is not a fine but a commercial penalty for a commercial crime. He points to the use of both terms, "penalty" and "fine" in the Act and to the fact that, in this section, there is no alternative power given, for example, if there should be default. I am not satisfied there is any true difference between the two terms. If a person is convicted of an offence, the court shall impose a financial penalty and, whatever the word used, that is a fine.

Far stronger is his main submission that the section gives the Court no discretion in determining the scale of the penalty. He relies on the decision of the Court of Appeal in *Vakameitangake v R* [1998] Tonga LR 141 (CA). I accept that case is on all fours with this one and the judgment clearly and unequivocally supports his contention. Such a decision is binding upon this court and so it is with some trepidation that I do not follow it but I understand from counsel that he will appeal this decision and I hope the Appeal Court will consider this point further and give some guidance on the points I raise.

The Appeal Court found that the use of the word "shall" in section 210 made it clear the court must impose the penalty and has no discretion. The word "incur" adds little. The Shorter Oxford Dictionary defines it as meaning "to render oneself liable to …". I consider that conveys no more than that such a penalty is possible so it would appear the crucial word is "shall" as the Court of Appeal found.

The courts have traditionally been reluctant to read any provision by the Legislature as effectively removing their discretion to determine sentence in an individual case. It is, of course, possible and does occur but the court should be slow to read a provision in such a way.

It is true that many penalty provisions create liability to a fine with the words "not exceeding" a particular sum but that is not always the case. I give a single example of a repeated form. Section 44 of the Plant Quarantine Act Cap 127, as amended, provides that any person who is guilty of an offence against the Act "shall be liable to a fine of $5,000.00 …". I do not believe it has ever been considered that is a mandatory provision and I do not understand why the same word should be considered to have a different meaning in the two statutes.

If the provision in section 210 is indeed mandatory, each of the accused will be faced with a penalty on each of the first two offences of $21,000.00. I do not believe there is any real prospect the accused, married men with families who earn gross salaries of between $7,000.00 and $9,000.00pa will ever pay a total fine of $42,000.00. The maximum time the court can allow for the payment is three months.

I have always considered it a fundamental principle of sentencing that a court should not impose a fine when it is clearly outside the means of the person ordered to pay.

Counsel for the Crown agrees these fines will never be paid as has apparently occurred in similar cases previously. He does not consider there is any scope for an

alternative default term of imprisonment and he, reasonably, suggests the public authorities are unlikely to execute distress in such a case. What is the point in the court imposing a penalty for a serious offence that everyone agrees will be ignored as the people involved walk through the door of the court? It seems to me that not only is the imposition of such a penalty an injustice but the attitude that will inevitably be shown to the court order is almost contemptuous.

Customs frauds are frequently complex and difficult to prove. In such circumstances this court has repeatedly said that an admission of guilt will result in a reduction of the sentence that would otherwise be passed. If this is a mandatory sentence, there is no value in a plea of guilty. How will the court deal with a case where one of two coaccused pleads guilty and the other does not but is convicted after a lengthy trial?

On the evidence in this case, it would appear that the Customs officer should be punished more severely than the minor players in the offence yet the court must punish each the same. I cannot accept that is just or reasonable. There is no scope for the court to give credit for previous good character or to distinguish between an accused shown by the evidence to have been up to his neck in such frauds for years and a driver reluctantly involved on a single occasion who subsequently assists the authorities.

The Court of Appeal in *Vakameitangake*'s case has suggested that, where as here, two offences are charged under different paragraphs of the section arising out of the same facts, the court may, on the authority of *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529; [1981] 3 All ER 727, use its inherent power to order a stay if it would be an abuse of process to enter a conviction.

In *Vakameitangake*'s case, the court was entering convictions after a plea of guilty. In this case, there was trial and conviction followed proof of each count. Once that is done, I am far from satisfied the court has any power to set aside a conviction once entered. If, on the other hand, it is to do so before conviction it will be deciding the question before it knows anything of the antecedents of the accused. With that knowledge it may well have formed a different view of the wisdom of failing to convict of offences under parallel paragraphs.

If, as the Court of Appeal found, the court may mitigate the mandatory penalty by invoking such inherent power in relation to the number of charges on which it will record a conviction, I am unclear why it may not use the same power to reduce the penalty to prevent the injustice of passing a penalty that is totally beyond the ability of the accused to pay and which everyone accepts will be ignored by accused and government alike.

Faleola v Kingdom of Tonga

Court of Appeal
Burchett J, Tompkins J, Beaumont J
CA4/99 and 5/99

12 July 1999; 23 July 1999

Practice and procedure — claim for judicial review — previously refused — appeal dismissed

The plaintiff was dismissed from his employment. He claimed that the dismissal was wrongful and bad in law. He sought a declaration that his dismissal was invalid and that he was entitled to certain salary and remuneration payments and damages under three separate heads. He had filed a previous application for judicial review which had been refused. By an interlocutory judgment delivered on 20 November 1998, Finnigan J struck out the appellant's action, and directed that each party pay his and its own costs. The appellant appealed against the striking out order and contended that the judge erred in holding that the claim brought was the same as that in respect of which leave had already been refused. The respondent cross appealed against the costs order.

Held:

1. The only cause of action alleged in the statement of claim was that which would, had leave been granted, have entitled the appellant to pursue an application for review. That course was no longer open to the appellant as leave to bring such an application had already been declined.
2. The judge was correct to hold that the action must be struck out. The appeal was dismissed.
3. Costs were within the discretion of the trial judge and the exercise of that discretion will only be interfered with if it can be shown that it had been exercised on a wrong principle.
4. There was no reason for interfering with the costs order made and the cross appeal was dismissed.

Cases considered:

Fotofili v Free Wesleyan Church of Tonga & Kingdom of Tonga [1994] Tonga LR 111

O'Reilly v Mackman [1983] 2 AC 237; [1982] 3 All ER 680 (QB & CA)

Statutes considered:

Government Act CAP 3

Counsel for appellant : Mr Kaufusi
Counsel for respondent : Mr Cauchi

Judgment

The appellant was employed by the Government of Tonga as SubTreasurer, Postmaster, Collector of Customs, and Harbourmaster at Vava'u. He was dismissed on 5 September 1995. On 20 April 1998 he commenced an action against the respondent claiming damages for wrongful dismissal, and other consequential remedies. By an interlocutory judgment delivered on 20 November 1998, Finnigan J struck out the appellant's action, and directed that each party pay his and its own costs. The appellant has appealed against the striking out order. The respondent has cross appealed against the costs order.

The earlier and the present proceedings

On 31 July 1997, the appellant filed an application to extend the time and for leave to apply for judicial review of the Cabinet decision that he be dismissed. Following a hearing, that application was dismissed by Hampton CJ on 11 August 1997 on the grounds that the application had not been made promptly, that it had not been made within 3 months of 5 September 1995 as required by O 27 r 2(2), and that no good reason had been shown for extending the 3 month period. Further, the Chief Justice found that it was apparent that the relevant allegations were put to the plaintiff, and he was given the opportunity to, and did, reply.

The statement of claim in the present proceedings sets out the allegations contained in a letter from the Prime Minister's office concerning the appellant's conduct. In paragraph 8 of the statement of claim, the appellant says that these allegations "were erroneous in part, lacked proper foundation or substance and/or merit." No particulars are given in support of this pleading. Nor is it alleged that, in dismissing the appellant, the respondent acted in breach of any term, expressed or implied, of the contract of service between the appellant and the respondent.

The statement of claim refers to a report from the Auditor General; it alleges a failure to supply the report to the appellant, and that this failure was irregular and unfair. It alleges delay in deciding the appellant's case, and that there was an attempt to force the appellant to resign.

These allegations are summarised in paragraph 17:

> "17. Individually and collectively, the improper grounds for the allegations against the plaintiff, the failure to afford the plaintiff the opportunity to comment on the Auditor's Report, the delay in deciding the plaintiff's case, deciding it on improper grounds, and threatening and demanding the plaintiff's resignation amounted to irregularities, constitute improper grounds for the dismissal of the plaintiff."

The appellant then alleges that "the plaintiff's dismissal was wrongful and bad in law." He seeks declarations that his dismissal was invalid, that he is entitled to certain other salary and remuneration, judgment for $150,000 general damages, $150,000 aggravated damages, $100,000 exemplary damages, and costs.

The judgment under appeal

In his judgment, Finnigan J reviewed the nature of an application for review, describing it as a supervisory remedy in administrative law. After referring to the need for leave to bring such an application, he said that where an application for leave has been refused, that application may not be renewed: 37 Halsbury 4th ed 567-571.

He considered the new action to ascertain whether it was in fact a new action, or whether it was in effect a renewal of the appellant's application for review in the guise of an action. If the latter, or if the appellant is suing in an action for relief at law when the proper course for him to choose is judicial review, the court will not allow him to continue.

After reviewing the grounds set out in the statement of claim, he concluded that the action rested on a claim of failure of procedural fairness and an entitlement to natural justice. There was no claim of any contractual or tortious breach of a duty owed to the appellant. It was not, as counsel for the appellant had submitted, a claim in tort. It was a claim in administrative law seeking a judicial review of an administrative action. As leave to bring such an action had already been refused, he was bound to strike it out.

Conclusion

Counsel for the appellant submits that the judge erred in holding that the claim now brought was the same as that in respect of which leave has already been refused, and that he was bound to strike it out. He submits that the former claim is totally different from what is stated in the present action. The judge erred in saying that there was no claim of breach of duty owed to the appellant. To so hold unnecessarily restricts the jurisdiction of the court.

We do not accept those submissions. When the statement of claim in the present action is considered, particularly paragraph 17, it is obvious that the claim is founded on allegations of procedural unfairness. Nowhere is it alleged that the respondent was in breach of any duty of care, or of some other duty, owed by the respondent to the appellant, which could have founded an action in tort. Nor is it alleged that the respondent was in breach of a term of the plaintiff's contract of employment with the respondent, which could have founded an action for breach of contract. The only cause of action alleged is that which would, had leave been granted, have entitled the appellant to pursue an application for review. But that course is no longer open to the appellant, leave to bring such an application having been declined.

In *O'Reilly v Mackman* [1983] 2 AC 237; [1982] 3 All ER 680 (QB & CA) at 695, Lord Denning MR said, in a passage that was adopted in *Fotofili v Free Wesleyan Church of Tonga & Kingdom of Tonga* [1994] Tonga LR 111, wherever there is available a remedy by judicial review, that should be the remedy to be taken by an applicant, and that it is an abuse of the process of the court for a plaintiff to go by action when he would never have been granted leave to go for judicial review. That is precisely what the appellant in this case is endeavouring to do. The judge was therefore correct to hold that the action in its present form must be struck out. The appeal is dismissed.

The striking out of this action, and the dismissal of the appeal, will not prevent the appellant from commencing and prosecuting an action for wrongful dismissal, if there are proper grounds for doing so, and the claim is clearly founded on a proper

cause of action, which in this case could be breach of a term or terms of his contract of employment. The Tongan Estacode prescribes the terms and conditions of service of officers: Clause 4 of Section A. It contains in Section K (b) the disciplinary procedures, including the procedure for serious charges. Other terms may be incorporated into a contract of service expressly, by implication, by statute, or by custom. There may also need to be considered any relevant statutory provisions, including, for example, s 17(4)(a) of the Government Act (Cap 3), which provides that the Prime Minister, with the consent of the Cabinet, has the power to appoint, dismiss or discipline all Government officers. Any further action, if it can properly be brought and subject to any relevant statutory provisions, will be concerned with whether, in dismissing the appellant in the way it did, the respondent breached any of the terms of the appellant's contract of employment.

The cross appeal

In support of the respondent's cross appeal, Mr Cauchi submitted that, where the appellant's action had been struck out, the Judge was in error in directing that each party should pay its own costs, apparently on the grounds of the appellant's impecuniosity. He submitted that the Judge should have awarded costs to the respondent as agreed or taxed.

It has long been recognised that costs are within the discretion of the trial judge. An appellate court will only interfere with the exercise of that discretion if it can be shown that it has been exercised on a wrong principle. That is not the case here. We see no reason for interfering with the costs order made. The cross appeal is dismissed.

Costs

The appeal and cross appeal have both failed. The major issue was the appeal. In those circumstances we order that the appellant pay the costs of the appeal in an amount equal to one half of what the costs would otherwise have been. If agreement cannot be reached, the costs are to be taxed.

Kaufusi v Kingdom of Tonga

Court of Appeal, Nuku'alofa
Burchett, Tompkins, Beaumont JJ
CA 10/99

13 July 1999; 23 July 1999

Practice and procedure — application to strike out claim — no proof of claim — application granted
Tort — claim of malicious prosecution — burden on plaintiff — particulars — burden not discharged

The appellant, a civil servant, was dismissed due to irregularities in overtime claims. Cabinet referred the matter to the Ministry of Police and charges were laid. In the Supreme Court those charges were dismissed for failure to establish a prima facie case. The appellant sued the respondent in the Supreme Court for damages for malicious prosecution. The respondent moved the Court for orders (a) to strike out the appellant's statement of claim; and (b) to dismiss his action. The learned Chief Justice made both the orders sought. The appellant appealed those orders.

Held:

1. In an action for malicious prosecution, the burden is on the plaintiff to prove malice and absence of reasonable and probable cause. If the defendant denies it, it is not the practice to require the defendant to give particulars of his denial.
2. As no instigator had been named, the statement of claim was struck out.
3. Given the long history and the lapse of time, it was open to his Honour to conclude, on the face of the pleading, that in the interests of justice the action should be terminated.
4. The appeal was dismissed with costs.

Cases considered:

Davy v Garrett [1878] 7 Ch D 473
Griffiths v London & St Katherine Docks Co [1884] 13 QBD 259
Northern Territory v Mengel (1995) 185 CLR 307
Stapeley v Annetts [1970] 1 WLR 20; [1969] 3 All ER 1541
Waters v Sunday Pictorial Newspapers Ltd [1961] 2 All ER 758; [1961] 1 WLR 967

Statutes considered:

Crown Proceedings Act CAP 13

Rules of Court considered:
Supreme Court Rules 1991

Counsel for appellant	:	Mr Edwards
Counsel for respondent	:	Solicitor-General

40 The Supreme Court decision appears at page 28.

Judgment

Introduction

The appellant sued the respondent in the Supreme Court for damages for malicious prosecution. The respondent moved the Court under Order 8, Rule 6(1) for orders (a) striking out the appellant's statement of claim; and (b) dismissing his action.

Order 8, Rule 6(1) and (2) provides:

> "Rule 6.
>
> (1) The court may at any time order that any pleading or part
50 therof be struck out if
> (i) it discloses no reasonable cause of action or defence, as the case may be; or
> (ii) it is scandalous, frivolous or vexatious; or
> (iii) it is unclear, or may otherwise prejudice or delay the fair trial of the action; or
> (iv) it is otherwise an abuse of process of the Court;
> and may order the action to be stayed or dismissed, or judgment to be entered accordingly.
> (2) No evidence shall be heard on an application under
60 paragraph (1)(i)."

The learned Chief Justice made both the orders sought. This is an appeal from those orders.

In order to understand the issues in the appeal, it will be necessary to refer first to the material allegations in the appellant's pleading.

The claims made in the statement of claim

By his amended statement of claim, the appellant "sued (the respondent) in respect of Ministry of Finance", relevantly alleging what follows:

> 1 … (T)he [appellant] at all material times was employed by the [respondent]
70 2 … (T)he [respondent] is sued in respect of the Audit Department, Cabinet and Crown Law.
> 3 … (T)he [appellant] was criminally prosecuted by the [respondent] at the Supreme Court ... with two charges,

one of which related to falsification of account ... and the other of knowingly dealing with forged document ...

4 The [appellant] appeared in the Supreme Court on 13, 17, 18 and 19/3/97 and defended the two criminal charges … against him.

5 The trial of the [appellant] lasted four days and at the conclusion of the prosecution case the learned trial Judge [Lewis J] on the 19th day of March 1997 delivered a written judgment dismissing the criminal charges against the [appellant] as there was no prima facie case against the [appellant].

6 There was no reasonable and probable cause for the proceedings and the [respondent] instituted and carried on the prosecution maliciously.

7 Particulars of the malice alleged aforesaid consist of one or more than one of the following:

(a) In preparing the prosecution the [respondent] or its counsel ought to have known that there was no case or evidence against the [appellant].

(b) The [respondent] or its counsel was grossly ignorant of the law.

(c) During the first week of March, 1997, the [appellant] and his counsel William Edwards were asked to meet with Crown Counsel Mrs Simiki and Miss Tapueluelu. The [appellant] was asked to plead guilty and if so the Crown counsel will ask the court for a conviction and discharge. If the [appellant] refused to plead guilty the Crown would file more charges against the [appellant]. The [appellant] refused to plead guilty and as a result he was indicted with additional 16 charges without any evidence adduced at any preliminary hearing in the Magistrate Court or on any evidence adduced in the Supreme Court for the purpose of such further charges.

(d) The [appellant] was intimidated and threatened to plead guilty and on or about the 13th March, 1997 was charged with an additional 16 charges.

(e) … (T)here were 11 people suspended from the Treasury, and two people from Ministry of Health. There were 7 people from the Treasury who were reinstated and treated differently from the [appellant] and others notwithstanding that they were all alleged to have committed the same improper conduct.

(f) … (T)he work of the [appellant] in the Treasury was carried out openly and on instructions and

authorisation of the Accountant General and also at the request of other Ministries.

(g) ... (T)he said arrangements between the Treasury and other Ministries were agreed upon by the Heads of Department involved and authorised by Accountant General.

8 (T)he 16 additional charges against the [appellant] were brought recklessly and without the proper procedure being applied to lay the proper foundation for the said charges. The court refused to proceed with the said additional charges …"

The reasoning of the primary Judge

The learned Chief Justice first considered whether the proceedings should be struck out on the ground that the statement of claim, on its face, disclosed no reasonable cause of action. His Honour held that the particulars of malice alleged in paragraphs 7(a), (e) and (f) "could reveal a reasonable cause of action [so far as they went] …" and rejected that objection. He added that further consideration needed to be given to "the identity of the [respondent] in relation to the [respondent's further] submission that the pleading was unclear [within the meaning of Order 8 Rule 6(1)(iii)".

His Honour said:

> "In determining whether the pleadings are unclear or may delay the fair trial of the action or that they are an abuse of process, the court may consider evidence. The [appellant] has not sought to produce any. The [respondent] has produced an affidavit by the Chief Establishment Officer in the Prime Minister's Office.
>
> That affidavit sets out a little of the background. He deposes to the fact that, in 1993, the acting Auditor General filed a report that suggested there were irregularities in the payments of overtime by staff in the Treasury. Cabinet considered the matter and, in October of that year, suspended a number of civil servants including the [appellant]. Having sought the [appellant's] explanations, Cabinet decided, in January 1994, to dismiss him. A letter was then sent to Cabinet by a senior Treasury official asking it to reconsider the decision, which it did but, in March 1994, the decision was reaffirmed.
>
> At the time of the decision in January to dismiss the [appellant], Cabinet also resolved to refer the matter to the Ministry of Police to consider charges and such charges were laid. It was those that were dismissed for failure to establish a prima facie case. The judgment in that case is exhibited to the affidavit and shows that the grounds, upon which [Lewis J] found the evidence failed, related to a failure by the investigating police officer to ask the [appellant] whether he did actually work the overtime that formed the basis of the charge. [Lewis J] considered that, on the evidence

> produced by the prosecution, 'a jury may be left suspicious of him but it could never be said that there is sufficient evidence … to enable the jury to reach a verdict.' [Lewis J] concluded: 'Initially I formed the view at the close of the Crown case that there may be cases to answer. On a reconsideration of the evidence and the record of interview I have reversed my opinion'."

After referring to the corresponding English Rule of Court providing for the striking out of a pleading that "may prejudice, embarrass or delay [a] fair trial", the Chief Justice said:

> "Embarrassment has been said to occur if the plaintiff's case is in such an unintelligible form that the defendant is unable to meet it. The pleading should state the facts which will put the defendants on their guard and tell them what they will have to meet when the case comes on for trial.
>
> I can find no authority to assist with the meaning or scope of the word 'unclear' used in our rule. Far too many actions in this Court are commenced by, and tried on, unclearly worded pleadings and so the power to strike out under this provision must be based on something substantially more. Clearly when the rule was made, there was an intention to convey something different from a possibility it may embarrass the other side. The use of the comma followed by the words 'or otherwise' in our rule also show that it was intended to mean something other than that it would delay the fair trial. I take it therefore to be a wider ground for striking out and that it must include any case where the pleading is so unclear that the other party cannot know with any certainty the case he has to answer.
>
> The basis on which the [respondent] suggests the pleadings are unclear relates to the identity of the [respondent] and of the person or body that had malice. By the Crown Proceedings Act, the Government is properly sued in the name of the Kingdom as has been done. The problem is that, if malice is to be established, it is necessary to know who is claimed to have shown that malice and that the malice related to the institution of the prosecution. Without that it is impossible to defend."

Having analysed the pleading and the respondent's affidavit evidence with a view to ascertaining who is said to have had the malice necessary to establish this cause of action, his Honour held that the identity of this party or parties had not been "clarified"; and that the respondent's complaint was justified since it could not "possibly know the case [it] has to answer in order to draft a defence".

The Chief Justice concluded:

> "The application of the [respondent] is that the writ be set aside and the claim be dismissed. The power of the court to strike out pleadings is one that should only be exercised in the clearest

cases. It is an important principle that every man is entitled to his day in court. There is clear authority also that, rather than strike out a defective pleading, the court should always consider whether the defect could be cured by amendment.

This action started as a claim not only for malicious prosecution but also for wrongful dismissal and unfair treatment. I ordered that those were matters for judicial review and that, as the [respondent] was so very far out of time, they would be struck out. I gave time to the [appellant] to amend his pleading and pointed out the need to set out the allegation of malice. Having had time to do so, the present statement of claim has been filed. I do not think, therefore that further amendment would help. On the pleading before me, the [appellant] could never succeed and I am satisfied it is a proper case to order that it is struck out and, for the same reason, I consider the appropriate order is that the [appellant's] action be dismissed." [Emphasis added]

The appellant's grounds of appeal

The appellant's arguments may be summarised as follows:

(1) Not every infraction of the requirements of the Rules of Court will result in a strike out: only where a party can show prejudice will his opponent's pleading be struck out for an irregularity. At the same time, the appellant accepts that the respondent may claim to have the appellant's case pleaded in an intelligible form, lest the respondent be embarrassed in seeking to meet it (reference is made to *Davy v Garrett* [1878] 7 Ch D 473 at 486). However, Order 8, Rule 6 also empowers the Court to amend a pleading. This is in addition to the Court's power to amend under other provisions of the Rules. The incorporation of such a power in Order 8, Rule 6 emphasised that, in a suitable and proper case, the Court may exercise its coercive and curative power at the same time. The strike out remedy should be employed only in plain and obvious cases. The only possible defect is a lack of particularity. This can be cured by an application for further and better particulars.

(2) Where a statement of claim is defective because of the omission of an essential averment, the Court will give leave to amend, rather than dismiss the action (reference is made to *Griffiths v London & St Katherine Docks Co* [1884] 13 QBD 259 at 261). Thus, a pleading will not be struck out if it is merely demurrable - it must be so bad that no legitimate amendment could cure the defect. The strike out power will only be exercised where the case is clear beyond doubt: the Court must be satisfied that there

is no reasonable cause of action (reference is made to *Waters v Sunday Pictorial Newspapers Ltd* [1961] 2 All ER 758; [1961] 1 WLR 967).

(3) His Honour erred in allowing evidence in a strike out application under Order 8, Rule 6 brought on the ground that a pleading discloses no reasonable cause of action. Order 8, Rule 6(2) prescribes that no evidence shall be allowed on such an application.

(4) The primary Judge addressed the issue of malice too narrowly; and reference is made to the following observation of Deane J in *Northern Territory v Mengel* (1995) 185 CLR 307: "Malice will exist if the act was done with reckless indifference or deliberate blindness …"

Conclusions on the appeal

As has been seen, two distinct issues arose for his Honour, one concerned with the pleading, the other with whether the action should be dismissed. We will deal with them separately.

(a) Should the statement of claim have been struck out?

In our opinion, His Honour correctly decided that the statement of claim could not stand in that form.

We accept, in the appellant's favour, that the respondent might, in principle, be held vicariously liable for the actions of its officers (see *Halsbury's Laws of England* (4th Ed) Vol 45 at 164). We also accept that a defendant in an action for malicious prosecution need not be the actual prosecutor: it is sufficient if the defendant procures or instigates the prosecution (including an indictment in the name of the Crown): see Salmond and Heuston *Law of Torts* (19th Ed) at 465. But it is an essential ingredient in any pleading of the tort of malicious prosecution that the defendant (by itself or by its agents) was actuated by malice: see *Halsbury's Laws of England* (4th Ed) Vol 45 at 624. The issue of malice in this context is a question of fact: see *Halsbury's Laws of England* (4th Ed) Vol 45 at 616.

It is true, as the appellant's counsel submitted, that the existence of malice may be inferred. Indeed, malice can be inferred from the absence of reasonable and probable cause for preferring a criminal charge: "Those facts which constitute the want of reasonable and probable cause may also supply evidence of malice" (*Halsbury's Laws of England* (4th Ed) Vol 45 at 621). But the essential requirement of pleading remains that malice, in fact, that is, not in any merely abstract sense, must be alleged in the statement of claim.

Once it is accepted that malice, in this specific, factual sense, must be alleged in the pleading it must follow that the statement of claim was fundamentally flawed: it failed to identify who had the malicious state of mind (see *Halsbury's Laws of England* (4th Ed) Vol 36 at 17). That is, the appellant had to nominate in his pleading the individual person or persons whom he alleged to have instigated his prosecution;

and, he had to further allege that they did so with malice, before any claim of the respondent's vicarious liability could be contemplated.

It should be borne in mind, in this connection, that in an action for malicious prosecution, the burden is on the plaintiff to prove malice and absence of reasonable and probable cause. If the defendant denies it, it is not the practice to require the defendant to give particulars of his denial (see *Stapeley v Annetts* [1970] 1 WLR 20; [1969] 3 All ER 1541). The appellant did not nominate an instigator.

The statement of claim was liable to be struck out accordingly. This part of the appeal therefore fails.

(b) Should the action have been dismissed?

The principles in this area are well known. If a defective pleading is capable of reduction to a proper form, the court will usually, in its discretion, grant leave to amend it. If, on the other hand, the circumstances are such that the pleading should be struck out and it appears not to be possible to plead a reasonable cause of action, the court will usually, again in its discretion, refuse leave to amend and, as a consequence, dismiss the action:

> "If the court concludes that the pleading or any part of it should be struck out, the court will consider whether there is sufficient justiciable issue remaining; if there is not, the court will direct the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be" (*Halsbury's Laws of England* (4th Ed) Vol 36 at 57).

As we have held, his Honour correctly ruled that the pleading was fundamentally defective by virtue of its failure to identify who was alleged to have maliciously instigated the prosecution. Further, as has been noted, the primary Judge went on to hold, on the particulars alleged in the pleading before him, that the action should be dismissed. In so ruling, his Honour had regard to the circumstances mentioned in the passage from his reasons we have quoted above; that is, the facts (1) that the original application for judicial review was so far out of time that it was struck out; and (2) that he had, at the time of striking out the original application, given the appellant time to amend his pleading, pointing out the need for the appellant to set out an allegation of malice.

The chronology of some of these events should be noted here. The appellant's suspension occurred in October 1993. His dismissal was confirmed on 19 January 1994. He did not institute these proceedings until nearly five years later, in October 1998, some 18 months after his criminal trial. On 12 January 1999, the Chief Justice made orders and gave directions as follows:

> "1. The part of the Statement of Claim that refers to unfair treatment and dismissal should have been an application for judicial review, is out of time and shall be set aside.
> 2. The [appellant] have 14 days to file amended Statement of Claim for malicious prosecution that shall include particulars of the malice alleged. The Court will then fix a chambers hearing. The [respondent] need not file a

> defence until after such hearing. Application to strike out is adjourned to that hearing."

The amended statement of claim was filed in January 1999, and, as we have seen, struck out by his Honour in March 1999.

We agree with his Honour that, on the allegations in that statement of claim, the appellant could never have succeeded. The question then for us is: was His Honour in error in concluding, on the pleading, that no sufficient justiciable issue remained?

We have found the question to be not without its difficulties. It is true that his Honour did, at one point, refer to the respondent's affidavit evidence; and that in a proceeding under Order 8, Rule 6(1)(i), Order 8, Rule 6(2) prohibits this. But when his Honour came to dismiss the action, he did so on the face of the pleading, that is, on the basis that it (rather than the evidence) disclosed no reasonable cause of action; and that no further opportunity to re-plead should be given.

We are not persuaded that His Honour fell into error in these respects. We take into account, in this connection, the circumstance that, before his Honour, no submission was put on behalf of the appellant that, should he decide to strike out the pleading, the appellant ought to be given yet another opportunity to re-plead. Given the long history of the matter and the lapse of time, we think that it was open to his Honour to conclude that, in his judgment, there was no sufficient justiciable issue remaining on the appellant's pleading. In all of the present circumstances, we can see no basis for appellate intervention with respect to that discretionary judgment. No error of principle in his Honour's approach has been demonstrated. A power to dismiss was available for use in an appropriate case. In our view, it was open to his Honour to conclude, on the face of the pleading, that, in the interests of justice, the action should then be terminated.

The appeal must be dismissed, with costs.

Postscript

During the course of argument, counsel for the appellant foreshadowed the possibility that his client might institute other proceedings for malicious prosecution. After the above reasons were written, counsel for the appellant provided us with a fresh draft pleading, which we have now read. Having considered the matter generally, there is nothing in the fresh document that suggests that we change anything we had previously written.

Tukuafu v Kingdom of Tonga

Court of Appeal
Burchett, Tompkins, Beaumont JJ
CA 13/99 and 14/99

13 July 1999; 23 July 1999

Administrative law — suspension of school pupil — natural justice — requirements fully met
Administrative law — ultra vires — suspension of school pupil — principal had power to suspend

The Principal of Tonga High School, Mrs Maka, the second respondent to the first appeal and the second appellant in the second appeal, received information on 22 June 1998 that several young girls, who were pupils, had, on Friday 12 June 1998, been drinking alcoholic liquor (a mixture containing rum), at the school and in uniform. One of the young girls was Salome Tukuafu, aged 14, the appellant (by her next friend, her father) in the first appeal, and the respondent to the second. Mrs Maka instituted inquiries and interviewed Salome and a number of students who gave information. After consulting the Deputy Director of Education, who expressed the view that, to be effective, any punishment should be immediate (the practice being that, for serious offences such as drinking alcohol, a suspension was usually immediate), Mrs Maka decided on Monday 29 June that Salome should be suspended from the school for a period. Salome's father believed that his daughter drank the alcohol unknowingly. However, Mrs Maka made further investigations, which satisfied her that what she had originally concluded was in fact correct - that Salome "did drink and she did it knowingly". Salome was suspended for three weeks and served her suspension. Salome sought by her appeal a declaration that the suspension was invalid as being ultra vires, or that the decision to impose it was made in breach of the rules of natural justice. The trial judge's finding was that there was no denial of natural justice, and although he considered the Principal lacked power to suspend a pupil, he did not exercise his discretion to make any declaration. He did, however, make an order for costs against Mrs Maka. The Kingdom of Tonga and Mrs Maka, by their appeal, challenged the conclusion that the decision was ultra vires, and the costs order.

Held:

1. The suspension by the Principal was not ultra vires: there was an initial decision by the Principal, prompt imposition of any necessary punishment being important for its effectiveness, followed by a submission of the matter to a delegate of the Minister for confirmation. That practice

accorded with the true construction of section 18 of the Education Act CAP 86, understood in the light of the authorities. It was emphasised that this conclusion depended on the nature of the power and all the circumstances attending its exercise.

2. The requirements of natural justice had been fully met in the circumstances of the case.
3. The appeal by Salome was dismissed; the appeal by the Kingdom of Tonga and Mrs Maka was allowed; the application to the Supreme Court was dismissed. The costs order made below was set aside, and in lieu thereof it was ordered that the costs of the proceeding below and the costs of the appeal were to be paid by Salome's next friend, Samuela Tukuafu.

Cases considered:

Ainsworth v Criminal Justice Commission (1992) 175 CLR 564
Board of Education v Rice [1911] AC 179
Byrne v Australian Airlines Ltd (1995) 185 CLR 410; 131 ALR 422
Carltona Ltd v Commissioners of Works [1943] 2 All ER 560 (CA)
Golden Chemical Products Ltd, Re [1976] Ch 300; [1976] 2 All ER 543
Metropolitan Borough and Town Clerk of Lewisham v Roberts [1949] 2 KB 608 (CA)
Mobil Oil Australia Pty Ltd v Commissioner of Taxation (1963) 113 CLR 475; [1964] ALR 517
O'Reilly v Commissioners of State Bank of Victoria (1982) 153 CLR 1; 44 ALR 27
Ridge v Baldwin [1964] AC 40; [1963] 2 All ER 66
Russell v Duke of Norfolk [1949] 1 All ER 109 (CA)
South Australia v O'Shea (1987) 163 CLR 378; 73 ALR 1
University of Ceylon v Fernando [1960] 1 All ER 631; [1960] 1 WLR 223

Statutes considered:

Education Act CAP 86
Schools Act 1881

Counsel for appellant : Mr Edwards
Counsel for respondents : Mr Taumoepeau

The Supreme Court decision appears at page 60.

Judgment

These appeals raise important questions concerning government schools in Tonga. Schools are vital to the progress of any people, and Tonga can claim a proud tradition of education. Dr N Rutherford, a recognized authority, has written, in his Shirley Baker and the King of Tonga 1996 edition, at 31, that the new code of laws put forward by King George Tupou I in 1862 included an "innovation [which] was to make school attendance free and compulsory, thus making Tonga one of the very first states to introduce such a measure". Twenty years later, the Schools Act proclaimed in 1881 had the effect (ibid, 136):

> "Attendance at the government schools was to be compulsory for all children between five and sixteen years of age".

Today, government school education is controlled by the provisions of the Education Act (Cap 86) of 1974. The questions before the Court concern an aspect of that control — the exercise of the power of the Minister administering the Act to suspend a pupil on disciplinary grounds.

It is necessary to give a summary account of the circumstances. The Principal of Tonga High School, Mrs Maka, the second respondent to the first appeal and the second appellant in the second appeal, received information on 22 June 1998 that several young girls, who were pupils, had been drinking alcoholic liquor (a mixture containing rum), at the school and in uniform, on Friday 12 June 1998. One of these young girls was Salome Tukuafu, aged 14, who is the appellant (by her next friend, her father) in the first appeal, and the respondent to the second. The others were of a like age. If the information was correct, a serious infraction had occurred of the school rules, clause 7 of which provides (inter alia):

> "No smoking of tobacco, drugs or consumption of liquor or drugs permitted."

The school rules also provide, by cls 1 and 3:

> "1. It is the sole responsibility of the school to protect its good name. Every student's conduct must be at a standard of which the school must be proud. Students must do their best at all times. After a probationary period it is within the power of the Ministry of Education to direct whether a student is to continue on with his studies in this school or that he be transferred to another school.
>
> …
>
> 3. This [the rule is headed "DISCIPLINE and PUNISHMENT"] is to be at the discretion of the Principal …"

Mrs Maka instituted inquiries. She interviewed Salome and another girl particularly implicated in the matter, Latu Taufateau, as well as a number of students who gave information. At a first interview, Salome denied drinking liquor on the occasion in question. But after Latu had admitted putting rum in the bottle from which she, Salome and a third girl, Kelela Tu'ivailala, had drunk, a fourth girl, Nina Tupou, having taken a sip but spat it out, Salome returned to the Principal's office the next day in tears and acknowledged her involvement in the drinking. But she claimed she did not know that Latu had added alcohol to the drink.

After consulting the Deputy Director of Education, who expressed the view that, to be effective, any punishment should be immediate (the practice is that, for serious offences such as drinking alcohol, a suspension is usually immediate), Mrs Maka decided on Monday 29 June that Salome should be suspended for a period from the school. As the Principal of a high school at which Salome was an outstanding student academically of her age, there is no reason to doubt that Mrs Maka had considered the matter with anxious care. Inquiries had been conducted for a week, the allegations had been put to Salome for her response on two occasions, and now Mrs Maka

telephoned Salome's mother to inform her of the impending decision, which was based on the conclusion that Salome had knowingly participated in a very serious breach of the school rules.

Later the same morning, Salome's father asked to see the Principal and also to talk to the students involved. Mrs Maka agreed to this. The father began to question the students, making it clear he "would go to court if necessary". In response to his questions, Latu said Salome did not know there was alcohol in the drink and, whereas previously she had said Salome was afterwards sick in the toilet, now she denied having said so. Other students did not repeat what they had previously told the Principal. Salome's father asserted his belief that his daughter drank the alcoholic drink unknowingly, and told Mrs Maka (as she swore in her affidavit) that she "should make further investigations before letting him know of the decision".

Mrs Maka did make further investigations, which satisfied her that what she had originally concluded was in fact correct - that Salome "did drink and she did it knowingly". On 6 July, four written statements were received from students, three of which set out clear evidence of Salome's knowledge that the drink was alcoholic. Accordingly, Mrs Maka wrote on 9 July a letter to Salome's parents advising them of her decision to suspend Salome "for a period of 3 weeks effective from 13 July 1998". The letter continued:

> "Strong and compelling evidence points out that not only your daughter did consume alcohol on Friday 12 June 1998, in school uniform and at school, but that she did this knowingly. This is a serious breach of Clause 7 of the School Regulations and a Category A offence (usually punishable by suspension) under the school rules.
>
> I regret this most unfortunate news and the delay in the decision taken but I had to ensure that my decision is fair and just."

Two of the other students were also suspended, one for 3 weeks and the second indefinitely, pending a decision whether she should be dismissed from the school, as she was a repeat offender.

By mischance, the letter, sent to the work address of Salome's mother, was not received before 13 July. However, on that day, Salome's father, being told, called on Mrs Maka and was shown the statements. He said he would take the matter to court.

On the same day, the Principal informed the Deputy Director of Education of her decision to suspend Salome, and on 15 July (two days later) she received his endorsement by telephone. In due course, it was confirmed in writing on 21 July.

The period of the suspension has, of course, long expired, and that cannot now be undone; but what Salome seeks by her appeal is effectively a declaration that the suspension was invalid as being ultra vires, or that the decision to impose it was made in breach of the rules of natural justice: cf *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at 581, 582, and 597; but see also *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410 at 430; 131 ALR 422. The trial judge's finding was that there was no denial of natural justice, and although he considered the Principal lacked power to suspend a pupil, he did not exercise his discretion to make any declaration. He did, however, make an order for costs against Mrs Maka. The Kingdom of Tonga

and Mrs Maka, by their appeal, challenge the conclusion that the decision was ultra vires, and the costs order.

As to the issue of ultra vires, the argument put on behalf of Salome was that the power to suspend a pupil was not conferred upon the Principal, but upon the Minister of Education, or his delegate. Although the Education Act contains (in s 2) a definition of "principal teacher" as meaning "in relation to any school, the teacher in charge of the school", s 18 provides:

> "(1) The Minister shall have control within the provisions of this Act of all government schools ...
> (2) Subject to any regulations made under this Act the Minister shall appoint, transfer, suspend or dismiss teachers on the staff of Government schools and shall admit, transfer, suspend or dismiss pupils in government schools."

When s 18 is read, regard should be had to the definition of "control" in s 2 as meaning "in relation to any school the management thereof in accordance with the provisions of this Act".

The fundamental question is one of construction. When s 18(1) gives the Minister "control", in the defined sense of "management", of government schools, which have principal teachers who are "in charge" of them, does s 18(2) require the Minister to "admit, transfer, suspend or dismiss pupils" personally in all government schools throughout Tonga, from 'Eua to Niuafo'ou? It is worth noting that the subsection does not make separate provision for suspension, or even for dismissal, but includes them in the one collocation of words with admission and transfer. The alternative view would see these powers as devolving from the Minister, in accordance with the practice established in his department, to sufficiently senior officers, such as the Principal in charge of a school, who act on the Minister's behalf. The practice evidenced in this case would require a Principal, although deciding for the Minister in the first instance, thereafter promptly to submit a matter as serious as a suspension to a delegate of the power for confirmation. The Deputy Director of Education is such a delegate.

A line of authority has developed in England which supports a construction of statutory powers of this kind as permitting a devolution to agents of the Minister. Such a devolution is to be distinguished from a delegation. When a delegate exercises a power delegated to him, it is his act. But when the Minister exercises a power through an officer as his agent, and not personally, the act remains that of the Minister. The principle by which a statutory power may be so understood is to be traced back to the decision of the Court of Appeal in *Carltona Ltd v Commissioners of Works* [1943] 2 All ER 560, and has been elaborated in *Metropolitan Borough and Town Clerk of Lewisham v Roberts* [1949] 2 KB 608 (CA) and *Re Golden Chemical Products Ltd* [1976] Ch 300; [1976] 2 All ER 543. The rule laid down by these cases was stated by Denning LJ in *Metropolitan Borough and Town Clerk of Lewisham v Roberts* at 621, as follows:

> "Now I take it to be quite plain that when a Minister is entrusted with administrative, as distinct from legislative, functions he is entitled to act by any authorised official of his department. The

> Minister is not bound to give his mind to the matter personally. That is implicit in the modern machinery of government".

These English decisions have been considered by the High Court of Australia in *O'Reilly v Commissioners of State Bank of Victoria* (1982) 153 CLR 1; 44 ALR 27. There, a power was conferred on the Commissioner of Taxation, the exercise of which could have a serious impact on individuals. There was express provision for delegation, and the power was delegated to Deputy Commissioners. Nevertheless, the majority of the High Court held the power could also be exercised by the Commissioner, not personally, but through a properly authorised officer not being a delegate. Gibbs CJ (with whom Murphy J agreed) said (at 10) that the question was "simply one of construction". He continued (at 11):

> "The answer to the question whether the statute requires the power to be exercised personally by the person designated depends on the nature of the power and on all the other circumstances of the case".

After referring to *Carltona Ltd* and to *Re Golden Chemical Products Ltd*, he said:

> "Those authorities established that when a Minister is entrusted with administrative functions he may, in general, act through a duly authorized officer of his department. This result depended in part on the special position of constitutional responsibility which Ministers occupy … . However, they also rest on the recognition that the functions of a Minister are so multifarious that the business of government could not be carried on if he were required to exercise all his powers personally."

Wilson J took a similar view. Mason J dissented, but not on the basis of any rejection of the English authorities.

We have concluded that section 18 should be construed as permitting the Minister to act through appropriately authorised officers. He is not required to exercise the powers conferred on him by the section personally. In the case of the admission of a pupil to a school, it is obvious that he would not be likely to do so. Normally, the Principal, who is in charge of the school, would admit pupils to it and attend to any appropriate transfer to or from the school. The evidence shows that, on the other hand, responsibility for a dismissal, a very serious matter, is not left with the Principal; a delegate of the Minister makes the decision. A suspension is less severe, but is still a serious matter. The practice, as has been indicated, involves an initial decision by the Principal, prompt imposition of any necessary punishment being important for its effectiveness, followed by a submission of the matter to a delegate of the Minister for confirmation. We think this practice accords with the true construction of section 18, understood in the light of the authorities. It should be emphasized that this conclusion depends on the nature of the power and all the circumstances attending its exercise; a passage we have cited from the judgment of Gibbs CJ in *O'Reilly* states these broad considerations as the test.

We turn to the issue of natural justice. The appellant Salome says she was denied natural justice when the Principal failed to give either her or her father an opportunity before 13 July to examine the four written statements obtained after the

father had questioned those who had provided the original evidence. Nor had the father been permitted to cross-examine once more in relation to these new statements. The circumstances include, of course, that his previous intervention had led to some changes in the versions given by some of the children, changes the Principal apparently did not regard as reflecting genuine corrections of errors. Sensitivity is obviously required towards any suggestion of cross-examination of children by a parent. Several of these children had requested confidentiality. The four statements did not change the essential allegation, which had been clearly put to Salome over two interviews, and to her father, that she had knowingly participated in the drinking of alcoholic liquor at school with certain named girls on an identified occasion. Her explanation had been heard. Her father had told the Principal that she "should make further investigations before letting him know of the decision", not that he or his daughter wished to have yet another interview. In *Ainsworth v Criminal Justice Commission* at 578, Mason CJ, Dawson, Toohey, and Gaudron JJ said:

> "It is not in doubt that, where a decision-making process involves different steps or stages before a final decision is made, the requirements of natural justice are satisfied if 'the decision-making process, viewed in its entirety, entails procedural fairness' (*South Australia v O'Shea* (1987) 163 CLR 378 at 389; 73 ALR 1, per Mason C.J)."

Of course, there are many situations where the principle of natural justice, which is a principle of fairness, requires quite detailed information to be furnished to a person who may be affected by a decision, and may even, perhaps, require the provision of an opportunity to have a full hearing. But, as Kitto J pointed out in *Mobil Oil Australia Pty Ltd v Commissioner of Taxation* (1963) 113 CLR 475 at 504; [1964] ALR 517, "fairness is not a one-sided business"; the "interests of other people" must also be considered. In the present case, that included the interests of the children who had requested confidentiality, and of the morale of the school which should not be disturbed, over such a matter, by the deployment of anything like the full panoply of the procedures of litigation between adults.

In determining whether the opportunity to meet the allegation, which had been given to Salome, was sufficient to satisfy the rules of natural justice, the Court should consider the principles expounded by Kitto J in *Mobil Oil* at 503 - 504:

> "[N]otwithstanding what Lord Loreburn said in *Board of Education v Rice* [1911] AC 179 about 'always giving a fair opportunity to those who were parties in the controversy to correct or contradict any relevant statement prejudicial to their view' ([1911] AC at 182), the books are full of cases which illustrate both the impossibility of laying down a universally valid test by which to ascertain what may constitute such an opportunity in the infinite variety of circumstances that may exist, and the necessity of allowing full effect in every case to the particular statutory framework within which the proceeding takes place. By the statutory framework I mean the express and implied provisions of the relevant Act and the inferences of legislative intention to be drawn from the circumstances to which the Act

> was directed and from its subject-matter: cf *Ridge v Baldwin* [1964] AC 40; [1963] 2 All ER 66; [1963] 2 WLR 935 at 947. As Tucker LJ said in *Russell v Duke of Norfolk* [1949] 1 All ER 109 (CA), in a passage approved by the Privy Council in *University of Ceylon v Fernando* [1960] 1 All ER 631 at 637; [1960] 1 WLR 223, there are no words which are of universal application to every kind of inquiry and every kind of tribunal: "the requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject matter that is being dealt with, and so forth" ([1949] 1 All ER at 118). What the law requires in the discharge of a quasi-judicial function is judicial fairness. That is not a label for any fixed body of rules. What is fair in a given situation depends upon the circumstances. And it is not a one-sided business. What is a fair opportunity to allow the taxpayer in a given case is a question which by its very nature forbids an answer in disregard of the interests of other people."

Having regard to these considerations, it is impossible to disagree with the view of the trial judge that the requirements of natural justice were fully met in the circumstances of this case. Natural justice called for a clear statement to Salome of what she was alleged to have done; and that she was given. It called for an opportunity to be given to her to state whether she had done what was alleged, and to make explanation; and that opportunity she had. It did not in the circumstances call for her to be shown the four written statements, or to have something in the nature of a further hearing on top of the interviews in which she and her father had been involved. Salome's appeal must fail.

Accordingly, the appeal by Salome is dismissed; the appeal by the Kingdom of Tonga and Mrs Maka is allowed; the application to the Supreme Court is dismissed, and the costs order made below is set aside, and in lieu thereof it is ordered that the costs of the proceeding below be paid by Salome's next friend, Samuela Tukuafu; and the costs of the appeal are also ordered to be paid by Samuela Tukuafu.

Minister of Lands v Nai

Court of Appeal, Nuku'alofa
Ward CJ, Burchett and Beaumont JJ
CA 16/99

14 July 1999; 23 July 1999

Statutory interpretation — amendment did not affect rights already acquired
Practice and procedure — judicial review was new and separate action

In March 1995, the first respondent filed a claim in the Land Court to be registered as the holder of a town allotment in Ma'ufanga which was, at that time, registered in the name of the second respondent. The Minister was a defendant in that action and filed a defence in which he admitted a mistake had been made and that the first respondent was the rightful holder of the title. That was a position he maintained. The trial started on 24 February 1997 but was adjourned the same day and the matter remitted to the Minister to hear the competing claims of the first and second respondents. On 15 April the Minister decided in favour of the first respondent. As a result, the second respondent then applied out of time for leave to seek judicial review of that decision and, on 15 September 1997, leave was given with the question of costs reserved. No hearing appears to have occurred until, on 7 May 1998, the court by consent resubmitted the question to the Minister to hear the competing claims of the first and second respondents. It was against that order for costs that the Minister appealed. The ground was simply stated. When these proceedings were started in 1995, the proviso to section 152 of the Land Act CAP 132, allowed no order for costs to or against the Crown in such a case. However, on 25 June 1997, the Land (Amendment) Act, No 3 of 1997, came into force and repealed the proviso. Mr Tapueluelu for the Crown suggested that the immunity from an award of costs was a right that accrued on the date the proceedings were commenced and, although the costs order was finally made after the new Act had come into effect, it did not affect the Crown's immunity in pending proceedings. The application for judicial review was a part only of the whole proceeding started in 1995 and was therefore covered by the same immunity. Counsel for the respondents challenged that contention and further suggested that, even if there was immunity in the original claim, the application for judicial review was a fresh action despite the fact it had the same title and cause number. As it was commenced after the operation of Act No 3 of 1997, the order for costs of that application was valid.

Held:

1. The general rule was that, where an amendment is procedural, the courts will presume it affected pending as well as future proceedings. However,

an order for costs is not merely procedural and so such a presumption does not apply.

2. It was a principle of statutory interpretation that where an Act repealed an earlier enactment, it did not affect any right, privilege, obligation or liability acquired, accrued or incurred under that enactment. So far as the order of 28 August purported to award costs in the action commenced in 1995, it was invalid.

3. The judicial review proceedings commenced by the application for leave filed on 2 September 1997 were a separate and distinct action seeking a different remedy. The court was entitled to order costs against the Crown in relation to those proceedings.

4. The appeal was allowed to the extent that the court had no power to award costs against the Crown in relation to the proceedings that arose from the statement of claim filed on 15 March 1995 whenever those proceedings were completed. The part of the order for costs which applied to that action was set aside. The appeal was dismissed in relation to the order for costs in the application for judicial review filed on 3 September 1997.

Statutes considered:

Crown Proceedings Act CAP 13
Interpretation Act CAP 1
Land Act CAP 132
Land (Amendment) Act 1997

Counsel for appellants	:	Mr Tapueluelu
Counsel for first respondent	:	Miss Tonga
Counsel for second respondent	:	Mrs Vaihu

Judgment

This is an appeal against an order for costs made against the Crown in a Land Court case.

In March 1995, the first respondent filed a claim in the Land Court to be registered as the holder of a town allotment in Ma'ufanga which was, at that time, registered in the name of the second respondent. The Minister was a defendant in that action and filed a defence in which he admitted a mistake had been made and that the first respondent was the rightful holder of the title. That is a position he has maintained ever since.

The trial started on 24 February 1997 but was adjourned the same day and the matter remitted to the Minister to hear the competing claims of the first and second respondents. On 15 April the Minister decided in favour of the first respondent.

As a result, the second respondent then applied out of time for leave to seek judicial review of that decision and, on 15 September 1997, leave was given with the question of costs reserved. Curiously, the application for judicial review was filed under the same cause number and with the same title as the original action.

No hearing appears to have occurred until, on 7 May 1998, the court by consent resubmitted the question to the Minister to hear the competing claims of the first and second respondents.

Paragraphs 4 and 5 of the Order that day provided:

> "4. The Hearing of the Judicial Review Application herein be adjourned into open court for hearing on 9th July, 1998, at 10.00 am for the purpose of recording the decision of the Hon Minister of Lands.
> 5. The question of costs is reserved."

On 10 July 1998, the Minister again found in favour of the first respondent and, on 20 August 1998, the court ordered by consent:

> "1. This application for judicial review be dismissed.
> 2. Costs of this application be those of the [first respondent) and the [second respondent] to be taxed or agreed and when certified to be paid by the [appellant] (the Minister of Land) to the [first respondent] and the [second respondent] pursuant to the provisions of the Crown Proceedings Act CAP 13 Section 9.
> 3. …
> 4. The [second respondent] be at liberty to make a further leave application to have judicial review of the decision of the Hon Tu'i'afitu."

Although the order is recorded as having been by consent, counsel advise the court the true position was that counsel for the Crown was asked if he had anything to say on the proposed order for costs but declined to make any submission.

It appears that, eight days later, at the request of counsel, the Judge made a further order:

> "The Order of this court dated 20th, August, 1998, be amended by adding the words "and of these proceedings" after the phrase "this application" in paragraph 2 thereof."

The learned judge then added those words in manuscript to the original Order of 20 August.

It is against that order for costs that the Minister now appeals. The ground is simply stated. When these proceedings were started in 1995, the proviso to section 152 of the Land Act CAP 132, allowed no order for costs to or against the Crown in a case such as this. However, on 25 June 1997, the Land (Amendment) Act, No. 3 of 1997, came into force and repealed the proviso leaving section 152 in the following form:

> "152. The Court may make such order in reference to payment of costs of any proceedings before it as it thinks just."

Mr Tapueluelu for the Crown suggests that the immunity from an award of costs was a right that accrued on the date the proceedings were commenced and, although the costs order was finally made after the new Act had come into effect, it did not affect the Crown's immunity in pending proceedings. The application for judicial review was a part only of the whole proceeding started in 1995 and was therefore covered by the same immunity.

Counsel for the respondents challenges that and further suggests that, even if there is immunity in the original claim, the application for judicial review was a fresh action despite the fact it had the same title and cause number. As it was commenced after the operation of Act No. 3 of 1997, the order for costs of that application is valid.

We consider there are two issues here. The first is whether the effect of the amending Act was to allow the court to order costs in an action started before the provisions of the Act came into force and still pending at that time. The second is whether the application for judicial review is a part of the same action or is a different proceeding.

When an existing statutory provision is amended, the manner in which it comes into effect is frequently covered by transitional provisions. Where there are no such provisions, 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 771]. There is no guidance to be found in the amending Act save that the intention was clearly to allow awards for and against the Crown in all Land cases.

The general rule is that, where an amendment is procedural, the courts will presume it affects pending as well as future proceedings. However, an order for costs is not merely procedural and so such a presumption does not apply.

Before the repeal of the proviso, section 152 gave the Crown a clear right to avoid costs orders. It is a principle of statutory interpretation that where an Act repeals an earlier enactment, it does not affect any right, privilege, obligation or liability acquired, accrued or incurred under that enactment. That principle has been incorporated into our law by section 15 of the Interpretation Act.

> "15. Whenever any Act repeals either in whole or in part a former Act the repeal shall not, in the absence of any express provision to the contrary, affect or be deemed to have affected-
>
> (a) the past operation of or anything duly done or suffered under the repealed act;
>
> (b) any offence committed, or any right, liberty, obligation or penalty acquired or incurred under the repealed act;
>
> (c) any action, proceeding, or thing pending or incomplete when the repealing act comes into operation; but every such action, proceeding or thing may be carried on and completed as if there had been no such repeal."

The present action is clearly covered by the provisions of s 15(b) and (c) and, so far as the order of 28 August purported to award costs in the action commenced in 1995, it is invalid.

The second issue is whether the judicial review proceedings commenced by the application for leave filed on 2 September 1997 form part of the proceedings pending when the repealing Act came into operation.

It arose in an unusual manner. Having remitted the matter to the Minister and received his decision, the court made no final order, which could have been appealed and, instead gave leave to apply for a review of the decision the court had sought.

Despite the manner in which it occurred and the use of the same cause number, this was clearly a separate and distinct action seeking a different remedy. It was commenced after the amending Act came into force and the saving provisions of section 15(c) did not cover it. The court was entitled to order costs against the Crown in relation to those proceedings. There is, perhaps surprisingly, no appeal against the merits of the order.

We allow the appeal to the extent that the court had and has no power to award costs against the Crown in relation to the proceedings arising from the statement of
180 claim filed on 15 March 1995 whenever those proceedings are completed. The part of the order for costs which applies to that action is set aside.

We dismiss the appeal in relation to the order for costs in the application for judicial review filed on 3 September 1997.

In view of the result, we make no order for the costs of this appeal.

Jin-Chuan v Li

Court of Appeal, Nuku'alofa
Ward CJ, Burchett and Tompkins JJ
CA 5/99

15 July 1999; 23 July 1999

Appeal — finding by trial judge — function of appellate court — influence of demeanour of witness
Damages — loss of bargain — proper amount to be allowed

The respondent sued under a contract in writing, made on 11 July 1997, for the purchase of a business from the appellants for $110,000. A deposit of $20,000 was paid at the time of the contract, and settlement was due on 1 August 1997. For some reason, the appellants decided they did not wish to complete, and the respondent, who accepted the repudiation of the contract, sued for the return of the deposit plus interest, and for damages for the loss of his bargain. The appellants defended the claim, contending that the contract (if actually binding) had been terminated by a payment of $25,000 in cash on 21 July 1997, this payment having been made up of a refund of the deposit together with the sum of $5,000 "as apology for the contract not going ahead". On the same day, they said, a further $2,500 was paid on the basis that the $5,000 was not enough. The respondent denied receiving the $25,000, and claimed that the $2,500 was a part payment of a separate debt. The trial judge rejected the first appellant's account of the payment of the $25,000, although there was documentary evidence to support the withdrawal of that sum at the relevant time from a bank account. What weighed ultimately with the trial judge was his impression of the first appellant and of the respondent. The trial judge awarded the sum of $20,000 together with interest, as to which there could be no complaint, and then added to those sums an amount of $38,400 plus interest as being damages for the loss of the respondent's bargain. The sum of $38,400 was calculated on the basis that the business the subject of the contract returned a gross rental income of $3,200 per month, and that the fair compensation for the loss of the bargain would be equal to 12 months of income.

Held:

1. A trial judge's findings of fact based on the credibility of witnesses, where their demeanour may have influenced the decision, will only be set aside in quite rare circumstances. The trial judge reached a firm decision that the respondent's evidence was to be preferred to that of the first appellant. It was not possible for the Court of Appeal to disturb this finding, which was

not improbable, and was not contradicted by any indisputable fact. Accordingly, the appeal did not succeed on the issues of liability.

2. Damages for the loss of the respondent's bargain should have been quite modest given that there was no evidence to demonstrate the amount of the anticipated net income of which the respondent was deprived. Certainly, the gross income could not properly have been allowed.
3. The damages awarded by the trial judge were substituted with the sum of $27,500 (being the $20,000 deposit together with $7,500 additional damages) plus interest at 10% per annum from 1 August 1997.
4. The appeal was otherwise dismissed. The respondent was ordered to pay half the appellants' costs of the appeals.

Cases considered:

Abalos v Australian Postal Commission (1990) 171 CLR 167; 96 ALR 354

Powell v Streatham Manor Nursing Home [1935] AC 243; [1935] All ER Rep 58

Rennie v Commonwealth (1995) 61 FCR 351

SS Hontestroom v SS Sagaporack [1927] AC 37

Watt v Thomas [1947] AC 484; [1947] 1 All ER 582

Counsel for appellants : Mr Tu'utafaiva
Counsel for respondent : Mrs Vaihu

Judgment

In this matter, the first appellant (the first defendant below) and the respondent (the plaintiff below) gave opposite versions of the facts in evidence at the hearing. Although the first appellant had a number of supporting witnesses and the respondent also had a supporting witness, the case ultimately turned on which of the two protagonists was to be believed.

The respondent sued under a contract in writing, made on 11 July 1997, for the purchase of a business from the appellants for T$110,000.00. A deposit of T$20,000.00 had been paid at the time of the contract, and settlement was due on 1 August 1997. For some reason, the appellants decided they did not wish to complete, and the respondent, who accepted the repudiation of the contract, sued for the return of the deposit plus interest, and for damages for the loss of his bargain. The appellants defended this claim, saying that the contract (if actually binding) had been terminated by a payment of T$25,000.00 in cash on 21 July 1997, this payment having been made up of a refund of the deposit together with the sum of T$5,000.00 "as apology for the contract not going ahead". On the same day, they said, a further T$2,500.00 was paid on the basis that the T$5,000.00 was not enough. The respondent denied receiving the T$25,000.00, and claimed that the T$2,500.00 was a part payment of a separate debt.

A quite different factual dispute gave rise to a counter claim brought by the appellants. They asserted that, in about July 1997, they agreed to allow the first appellant's car to be used as security for a loan for the benefit of the respondent. For that purpose, he had been given the registration papers. However, according to them, the respondent had the car transferred into his ownership and persuaded the police to

seize it, on 12 September 1997, on his behalf. Accordingly, they raised a cross claim for damages for the loss of the car. The respondent's defence denied the alleged arrangement, and claimed that, on the contrary, there was a sale of the car at the price of $6,000.00, which was paid in cash. The respondent could produce no receipt, but he was able to produce a photostat of a letter, admittedly signed by the first appellant, which purported to confirm the sale. The photostat was in part illegible, and almost all of it was difficult to read. However, the signature was clear, and it is possible to read "Police" as part of the writing of the name of the addressee, followed by the words:

> "Dear Sir,
>
> This is to inform you that the vehicle with registration no. C-3660 has been sold to Mr Kevin Li.
>
> It is … requested that the ownership of the … vehicle is transferred to Mr Kevin Li.
>
> Your kind assistance …
>
> Sincerely
>
> Lynath Liou
>
> Approved
>
> Li [followed by a date which could be 22/2/92 or 22/7/97]."

The first appellant's evidence in answer to this letter was that he had been persuaded, on a pretext relating to the provision of a loan by a bank, to sign a blank sheet of paper, which must later have had the letter typed onto it.

The trial judge referred to the case as "a contest of credibility". He said:

> "In order to assess the credibility of each [party] I have been given some documentary exhibits, and the accounts of subsidiary witnesses."

The judge discussed the various documents, none of which he regarded as conclusively establishing either version, in respect of the claim or the counter claim. He also discussed the inherent probabilities of the respective versions on both questions. In particular, he made it clear that he did not think the appellant's story about the car was at all believable. On the face of it, the photostat letter, the loss of the original of which was satisfactorily explained, plainly provided strong support to the respondent's evidence.

As regards the claim, the trial judge rejected the first appellant's account of the payment of the $25,000.00, although there was documentary evidence to support the withdrawal of that sum at the relevant time from a bank account. The judge said:

> "It seems to me that the more likely account of the failed purchase … is the one given by the plaintiff. I have reached this conclusion after assessing the documentary evidence, the demeanour and credibility of each of the two parties while they were giving their evidence and the submissions filed by counsel for both parties."

It will be observed that this conclusion makes the case turn squarely on the impression made upon the judge by the oral evidence of the two principal witnesses. Although he had earlier referred to "the accounts of subsidiary witnesses" as bearing on credibility, there is no doubt that what weighed ultimately with his Honour was his impression of the first appellant and of the respondent. In forming that impression, he made it clear that he had received assistance from the submissions filed by counsel. But he did not go into the detail of those submissions, nor did he refer in detail to the evidence of the supporting witnesses, which the submissions discussed.

It was the absence of reference to one of the supporting witnesses that counsel for the appellants emphasized at the hearing of the appeal. He pointed out that his Honour had said nothing of the evidence of a Mr Rong, who supported the first appellant's version of the payment of the $25,000.00. The argument was that the judge must simply have overlooked this evidence. However, Mr Rong's evidence was plainly in dispute, and his genuineness and his independence were under attack. The written submissions of counsel, to which the reasons for judgment refer more than once as having significance in the consideration of the matter, explicitly debated the value of his testimony. In the circumstances, it is impossible to believe that his Honour simply overlooked the support the first appellant's version had received from Mr Rong. It is much more likely that his Honour assessed that support as of little weight, and that he concentrated on the impression made upon him by the principal protagonists themselves.

It is, of course, well established that a trial judge's findings of fact based on the credibility of witnesses, where their demeanour may have influenced the decision, will only be set aside in quite rare circumstances: *SS Hontestroom v SS Sagaporack* [1927] AC 37 at 47, *Watt v Thomas* [1947] AC 484 at 487 and 488; [1947] 1 All ER 582, *Abalos v Australian Postal Commission* (1990) 171 CLR 167 at 178 and 179; 96 ALR 354, *Rennie v Commonwealth* (1995) 61 FCR 351. In *Powell v Streatham Manor Nursing Home* [1935] AC 243 at 255; [1935] All ER Rep 58, Lord Atkin stated the reason for this rule in vivid words, when he said that the appellate court "can never recapture the initial advantage of the judge who saw and believed".

In the present case, the trial judge referred in general terms both to the supporting witnesses and to the inconclusive documentary evidence. Having done so, he reached a firm decision that the respondent's evidence was to be preferred to that of the first appellant. It is not possible for the Court of Appeal to disturb this finding, which is not in itself improbable, and is not contradicted by any indisputable fact. Accordingly, the appeal cannot succeed on the issues of liability.

However, counsel for the appellants pursues an alternative argument. He submits that the award of damages cannot be sustained. What the trial judge did was to award the sum of T$20,000.00 together with interest, as to which there can be no complaint, and then to add to these sums an amount of T$38,400.00 plus interest as being damages for the loss of the respondent's bargain. The sum of T$38,400.00 was calculated on the basis that the business the subject of the contract returned a gross rental income of T$3,200.00 per month, and that the fair compensation for the loss of the bargain would be equal to 12 months of income. But in order to earn that income, the respondent would have had to outlay the balance of the purchase price, namely, T$90,000.00, and he would not have had the T$20,000.00 deposit returned to him. Furthermore, there was no evidence of the amount of the deductions which would have to be made from the gross income in order to derive a net income. In this case,

the bargain went off very soon after it had been concluded, and there was no reason to think the purchaser could not, within quite a short time, have found an alternative investment for his money. In the absence of evidence to demonstrate the amount of the anticipated net income of which the respondent was deprived, damages for the loss of his bargain ought to have been quite modest. Certainly, the gross income could not properly have been allowed.

The conclusion that the award of damages involved error requires this court to consider the appropriate award. On the extremely sparse material available, perhaps the best guide is the first appellant's own evidence that he was willing to pay $7,500.00 "as apology" for the termination of the contract. In all the circumstances, there should be substituted for the damages awarded by the trial judge the sum of $27,500.00 (being the $20,000.00 deposit together with $7,500.00 additional damages) plus interest at 10% per annum from 1 August 1997. The appeal should otherwise be dismissed. The respondent should pay half the appellants' costs of the appeals.

Teisina v R

Court of Appeal, Nuku'alofa
Burchett, Tompkins, Beaumont JJ
CA 3/99

15 July 1999; 23 July 1999

Criminal law — appeal against convictions on rape and indecent assault charges — appeal dismissed
Criminal procedure — admissibility of written statement — no obligation on police to inform of right to consult a lawyer

The appellant was charged with abduction, rape and indecent assault of the complainant on or about 21 September 1996. There were conflicting accounts of the events and the substantial issue at the trial on the rape count was whether the Crown had proved beyond reasonable doubt that, at the time intercourse took place, the complainant was not consenting, and the appellant knew that she was not consenting or was reckless as to whether she was consenting. Following a trial before the Chief Justice, he was, on 18 January 1999, acquitted on the abduction count. He was found guilty on the rape and indecent assault counts. He was sentenced to three and half years imprisonment on the rape conviction, and one year imprisonment on the indecent assault conviction, the sentences to be concurrent. He appealed against both convictions and against sentence.

Held:

1. In normal circumstances there was no obligation on the police officer to inform the appellant of his right to consult a lawyer.
2. None of the grounds advanced on behalf of the appellant on the appeal against the convictions was made out. It was accordingly dismissed.
3. The appeal against sentence was dismissed.

Cases considered:

R v Vaiangina [1990] Tonga LR 118
Schliebs v Singh [1981] PNGLR 364

Statutes considered:

Criminal Offences Act CAP 18
Evidence Act CAP 15
New Zealand Bill of Rights Act 1990 (NZ)

Counsel for appellant : Mr Fifita
Counsel for respondent : Mr Kefu

Judgment

The appellant was charged with abduction, rape and indecent assault of the complainant on or about 21 September 1996. Following a trial before the Chief Justice, he was, on 18 January 1999, acquitted on the abduction count. He was found guilty on the rape and indecent assault counts. He was sentenced to three and half years imprisonment on the rape conviction, and one year imprisonment on the indecent assault conviction, the sentences to be concurrent. He has appealed against both convictions and against sentence.

The Chief Justice made an order pursuant to s 119 of the Criminal Offences Act (CAP 18) that there should not be any publication of the complainant's name nor her evidence. That suppression order remains in force during and following this appeal.

Factual Background

The complainant with others went to a party in Vaini. The appellant, who at that time was not known to her, arrived with others. Later in the evening the appellant, the complainant and three others left in the appellant's vehicle to drive to Nuku'alofa. The complainant said that by that time she was very drunk. For part of the journey she was asleep.

The vehicle broke down. The three passengers other than the complainant pushed the vehicle to start it. When it started the appellant drove off with only the complainant in the vehicle with him, leaving the others behind.

The complainant went to sleep again. When she awoke the vehicle was stationary. The following was her account of what occurred, as found by the Chief Justice. She asked the appellant why he was not taking her home. He said she would have to pay the fare. She said she had no money. He eventually said that the fare would be what he wanted. He then forced sexual intercourse on her, she resisting throughout. Prior to the sexual intercourse, he had pushed his finger into her vagina a number of times, despite her protests and her attempts to stop him. When sexual intercourse was concluded, he said he was sorry. They drove to the Queen Salote Memorial Hall, where they stopped, she said because she thought there might be a friend close by who might be able to help her. The friend was not there. When the appellant finally dropped her off, she walked to a house nearby, where her mother was staying. She told her mother what had happened. Her mother, who had not wanted her to go to the party, was angry and spoke harshly to her. Later that morning she told a friend, Seilose, with whom she had been at the party, what had happened. Seilose gave evidence of this complaint.

The appellant gave evidence. His account of the events at the party and leaving to drive to Nuku'alofa was substantially the same as hers. But after the breakdown, he said she told him to drive on. The complainant moved closer and made advances to him. She took off her clothes. He described the consensual sexual intercourse that followed. After chatting for ten minutes, they had sexual intercourse again. When they reached her home they exchanged telephone contacts and she kissed him as she left.

On 24 September 1996 the appellant was arrested. He was interviewed by a police officer. Following the oral interview, he wrote out two short written statements which amounted to confessions.

It is apparent from these conflicting accounts of the events that the substantial issue at the trial on the rape count was whether the Crown had proved beyond reasonable doubt that, at the time intercourse took place, the complainant was not consenting, and the appellant knew that she was not consenting or was reckless as to whether she was consenting.

The Judgment in the Supreme Court

The Chief Justice made the following findings and reached the following conclusions.

- He was not satisfied that the appellant made the answers recorded in the interview, or signed them, freely and willingly. The whole of the interview was excluded.
- The two written statements were admitted. The Chief Justice did not believe that the appellant was forced in any way to make those statements.
- There is no requirement in the law of Tonga that an accused must be told that he had a right to have a lawyer present when being interviewed. That the appellant was not informed that he had that right was not a reason for excluding the two written statements.
- There is no requirement in the law of Tonga that the evidence of the complainant in a sexual case must be corroborated. In any event it was corroborated by the two written statements of the appellant.
- The evidence of the complainant was credible and accurate. She was very drunk. She did not consent to the appellant's advances.
- He rejected the account the appellant gave to the Court. His written statement that the charge was true and his admission of remorse related to his knowledge that he had committed the offences with which he was charged, namely rape and indecent assault.
- Because of the complainant's drunken state, she did not know she was being taken away. For that reason, and because the appellant had formed the view that the complainant liked him, he may have felt she would agree. For these reasons he was acquitted on the first count of abduction.
- He was satisfied beyond reasonable doubt that the appellant had sexual intercourse against the will of the complainant, and that he was aware that she was not consenting at the time he committed the offence. He was therefore convicted on the second count of rape.

- He was satisfied beyond reasonable doubt that prior to the sexual intercourse, the appellant assaulted the complainant indecently and she did not consent. He was therefore convicted on the third count of indecent assault.

Counsel for the appellant challenged the convictions for rape and indecent assault on several grounds. We refer to each in turn.

The Written Statements

Counsel for the appellant submitted that the Chief Justice erred in admitting the written statements as corroborative evidence. Without them there was no corroboration of the complainant's evidence.

The first written statement was made at 1232 hrs on 25 September 1996. It is on a printed form headed "Written Statement of Charges Form". Written in handwriting are the charges of rape and indecent assault. In answer to the question "Do you wish to say anything?" the appellant has written in Tongan words which translate as "It is true". He signed the statement.

The second statement was made seven minutes later. It is partly printed, partly hand written. It commences by saying "I Tevita T. Teisina wish to make a statement …". It contains the usual caution followed by a statement in Tongan which translates as: "This incident only happened because the girl came close to me. I feel remorseful." It is signed by the appellant and witnessed by a police officer.

Mr Fifita submitted that the Chief Justice, having found that the interview should be excluded because he could not be satisfied that the appellant made the answers recorded in the interview freely and willingly, should similarly have excluded these two written statements, because the conclusion that the appellant did not answer the interview freely and willingly must also have applied to the written statements.

The Chief Justice dealt with this issue in these terms:

> "The two written statements are different [from the interview]. I do not believe the accused was forced in anyway to make these statements. He was no longer alone with the officer who had threatened him and I do not believe the officer dictated them for him to write in front of two other officers. I am satisfied beyond any doubt that they are voluntary and they are admissible".

This is a finding of fact that the Chief Justice made having heard the witnesses, including the police officers concerned and the appellant. It was a finding that on the evidence he was entitled to make. There is no reason to disturb his conclusion.

Mr Fifita submitted that the statements should have been excluded because the police had an obligation to inform the appellant of his right to have a lawyer present during the interview, particularly when the appellant was in custody, and they failed to carry out that obligation.

He cited in support the decision of Webster J in *R v Vaiangina* [1990] Tonga LR 118. Webster J set out relevant principles to be extracted from the Judges' Rules. One was that at any stage of the investigation every person should be able to communicate with and consult a lawyer, provided there is no unreasonable delay and the administration of justice is not hindered. We, with respect, agree with that statement.

Any person being interviewed by the police has the right to ask to consult a lawyer and, if that request is made the person must be given a reasonable opportunity to do so.

He also cited the decision of Miles J in the National Court of Justice of Papua New Guinea in *Schliebs v Singh* [1981] PNGLR 364 at 367. Miles J held that the law in that country was that, if the opportunity to consult a lawyer or friend is not extended to the accused, the confessional material may be regarded as unfairly obtained, depending on the circumstances, and may be excluded from admission into evidence. However, this right arises, not from the common law, but from express provisions of the Constitution of Papua New Guinea. Clause 42(2) provides that a person who is arrested or detained:

> "(b) shall be permitted whenever practicable to communicate without delay and in private with a member of his family or a personal friend, and with a lawyer of his choice …; and
>
> (c) shall be given adequate opportunity to give instructions to a lawyer of his choice in the place where he is detained,
>
> and shall be informed immediately on his arrest of his rights under this subsection."

Similarly, in New Zealand, the New Zealand Bill of Rights Act 1990 provides in s 23(1) that any person arrested or detained under any enactment-

> "(b) Shall have the right to consult and instruct a lawyer without delay and to be informed of that right …"

In England the obligation to inform a person of the right to consult a solicitor is contained in the Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers: 11(1) *Halsbury's Laws of England* (4th Ed) §722.

In each case, therefore, the obligation of the police to inform an arrested or detained person of his or her right to consult a lawyer arises from an express provision in a constitution, statute, or code, not from the common law. 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 physical or medical disability. No such circumstances were present in this case. There was no obligation on the police officer to inform the appellant of his right to consult a lawyer.

Mr Fifita submitted that it should be implied from s 11 of the Evidence Act CAP 15 that the evidence of the complainant must be corroborated. That is not so. Section 11 provides that in criminal proceedings for sexual offences, evidence that the person, at or shortly after the crime was committed, voluntarily made a statement relating to its commission, may be given, not as corroboration, but as showing that the person's conduct is consistent with his or her evidence at the trial. The Chief Justice was correct when he said that there was no requirement for corroboration of a complainant's evidence in the law of Tonga. The common law applies.

Though corroboration of the evidence of the complainant is not essential in law, it is the practice to warn the jury against the danger of acting on his or her uncorroborated evidence, particularly where the issue is consent or no consent: Archbold *Criminal Pleading Evidence & Practice* (38th Ed) § 2888 and the cases there cited. However this issue does not arise here once the two written statements of the appellant are admitted, since, as the Chief Justice found, they provide corroboration of the complainant's evidence.

Alleged Inconsistency

Mr Fifita submitted that the Chief Justice erred in failing to recognise inconsistency in the evidence of the complainant. More particularly he submitted that where the complainant left the appellant was closer to the police station than to the house to which she went. If she had acted consistently, she would have reported the matter to the police then. Further, there was evidence that a taxi driver had asked the appellant and the complainant, when they had stopped by Queen Salote Memorial Hall, if they needed help, and received a negative response.

We do not accept that submission. It is perfectly understandable that a young girl, having been raped and sexually assaulted, should choose to go straight to the house where her mother was, rather than go to the police station. The taxi driver came from the same village as the appellant and knew him personally. That the complainant elected to make no complaint to him does not give rise to any inconsistency in her evidence.

The complainant did later that morning make a complaint to her friend Seliose who had been with her at the party the previous night. She told that friend that she had been raped. Her friend gave evidence of that complaint in the same terms. That evidence was admissible pursuant to s 11 of the Evidence Act as showing that her doing so was consistent with her evidence at the trial.

Evidence of Resisting

Mr Fifita submitted that the Chief Justice was justified in rejecting the evidence of the appellant only if there were some evidence to corroborate the complainant's account of sexual intercourse without consent in the form of medical evidence of injuries or bruising, or evidence of damaged clothing. We do not accept that submission either. Sexual intercourse without consent or belief of consent can and frequently does occur without physical injury or damage to clothing. The issue was entirely one of credibility. The Chief Justice was entitled, for the detailed reasons he gave, to accept the evidence of the complainant and reject the evidence of the appellant.

The Acquittal on the Abduction Count

Mr Fifita submitted that the finding that the appellant thought that the complainant liked him, which resulted in his acquittal on the abduction count, means also that the appellant believed that the complainant had consented to go with him and have sexual intercourse. It means no such thing. What it does mean is that she left the party and accompanied the appellant in his vehicle willingly. It does not mean that, having done so, she must also have consented to the sexual advances that the appellant made to her or that he had reasonable grounds for believing that she was so

consenting. The sexual advances occurred later, well after she had consented to go with him. There is no inconsistency in her agreeing to go with him, believing he was going to take her home, and his being aware later that she was resisting his sexual advances.

The Appeal against Conviction

For the reasons we have set out, none of the grounds advanced on behalf of the appellant on the appeal against the convictions has been made out. It is accordingly dismissed.

The Appeal against Sentence

Mr Fifita submitted that the sentence of three and a half years for the rape conviction was excessive because it failed to take sufficient account of the delay that occurred between the commission of the offence in 1996 and the trial and sentencing in 1999. During that period the appellant had married and had two young children who, at the time of sentencing, were one year and eight months, and four months old.

In imposing sentence, the Chief Justice said that he took the starting point for an offence of this kind to be a term of imprisonment of five years. He reduced that to three and a half years to take into account the delay and other mitigating factors. In our view, he was correct in both respects. The appellant, in raping and indecently assaulting the complainant in these circumstances, particularly taking advantage of her state of advanced intoxication, committed serious offences for which a sentence of five years or even more was appropriate. By reducing that sentence to three and a half years, the Chief Justice made a reasonable allowance for the delay that had occurred. Indeed, even allowing for that factor, the sentence could be regarded as lenient.

The appeal against sentence is dismissed.

Tuita v R

Court of Appeal, Nuku'alofa
Burchett, Tompkins, Beaumont JJ
CA 15/98 and 2/99

15 July 1999; 23 July 1999

Criminal law — offences against the Drugs and Poisons Act — appeal against conviction dismissed
Sentencing law — sentence imposed for offences against the Drugs and Poisons Act — not excessive

Tuita and Mafi were charged with offences against the Drugs and Poisons Act CAP 79. They were both found guilty and Tuita was sentenced to four years imprisonment on each of the first three counts. On the fourth count relating to the ammunition he was convicted and discharged. Mafi was sentenced to four years imprisonment on both counts. All sentences are concurrent. The Acting Chief Justice ordered that in both cases the last year of the sentences were suspended for one year. Tuita and Mafi appealed against their convictions. They also appealed against their sentences on the grounds that they were excessive. The Crown applied for leave to appeal against all sentences, except that relating to the ammunition charge, on the grounds that the sentences were inadequate.

Held:

1. The Court could not find any error of fact or of law and the conclusions that the Acting Chief Justice reached were properly based on the evidence he heard and the exhibits produced. There was no basis for reversing any of the findings made by the Acting Chief Justice. Accordingly, the appeals against the convictions were dismissed.
2. A firm deterrent sentence was essential to drive home to persons minded to become engaged in an operation of this kind, that it was not worth the risk. The sentences of four years imprisonment for an operation on this scale may well be at the lower end of the appropriate sentencing scale but neither sentence was so inadequate that it would be justified to increase it. Accordingly, the application by the Crown for leave to appeal against the sentences was dismissed.

Cases considered:

Anders v Police Department [1974-80] TLR 60
R v Misinale (Court of Appeal, CA 13/99, 23 July 1999)

Statutes considered:
Drugs and Poisons Act CAP 79

Appellants Tuita and Mafi in person
Counsel for respondent : Mr Cauchi

Judgment

Because there are two appeals, and to avoid confusion between appellant and respondent, we refer to the parties by name.

Tuita was charged on four counts:

1 Growing 743 Indian hemp plants in or about the month of November 1996 at his tax allotment in Fungamisi Neiafu Vava'u, contrary to s 36(a) of the Drugs and Poisons Act (CAP 79) ("the Act"), and
2 Having in his possession on or about 29 November 1996 at the same tax allotment approximately 453 Indian hemp seeds, contrary to s 36(b) of the Act, and
3 Having in his possession on or about 29 November 1996 at his tax allotment approximately 743 Indian hemp plants, contrary to s 36(b) of the Act, and
4 Having in his possession on or about 29 November 1996 at his tax allotment live ammunition without a licence, contrary to s 4(2) of the Act.

Mafi was charged on two counts:

1 Growing 743 Indian hemp plants in or about the month of November 1996 at the tax allotment of Tonga Tuita in Fungamisi Neiafu Vava'u, contrary to s 36(a) of the Act, and
2 Having in his possession on or about 29 November 1996 at the tax allotment of Tonga Tuita approximately 743 Indian hemp plants, contrary to s 36(b) of the Act.

Following a trial before Finnigan J, Acting Chief Justice, both were, on 17 November 1998, found guilty on all counts. Tuita was sentenced to four years imprisonment on each of the first three counts. On the fourth count relating to the ammunition he was convicted and discharged. Mafi was sentenced to four years imprisonment on both counts. All sentences are concurrent. The Acting Chief Justice ordered that in both cases the last year of the sentences be suspended for one year.

Tuita and Mafi have appealed against their convictions. They have also appealed against their sentences on the grounds that they are excessive. The Crown has applied for leave to appeal against all sentences, except that relating to the ammunition charge, on the grounds that the sentences are inadequate.

Mafi had earlier pleaded guilty to possession of Indian hemp seed, for which he was sentenced to 15 months imprisonment. The sentences imposed were concurrent with that sentence.

The Findings of the Acting Chief Justice

The Crown called four police officers, the Assistant Land Registrar to prove ownership of the allotment, and a medical scientist to prove the identity of the plant material.

The police evidence concerned an operation conducted on 29 November 1996 when a body of police officers went to the tax allotment owned by Tuita at Fungamisi Neiafu Vava'u to execute a search warrant. They found and produced in Court a large number of items. Included amongst them were some 453 seeds and about 743 or 747 plants. The Acting Chief Justice found that the circumstances in which those plants were being cultivated, and the presence of a device capable of being used for smoking, raised a strong suspicion that some person or persons were at that time engaged in cultivating a commercial crop of Indian hemp. The plants were growing in four distinct and separate blocks. A letter which was found with the seeds was addressed on the envelope to "Tonga and Sam", a clear reference to Tuita and Mafi.

Sergeant Finau conducted two interviews with Tuita. Although he acknowledged that the tax allotment was his, and that he and Mafi had lived there for about three weeks, he did not say who had planted or cultivated the plants. He did, however, say that he recognised the seeds, which had been found with a letter, as marijuana seeds. The letter and the seeds had arrived for Mafi within the three weeks they had been living there together.

Constable Falakisini, together with Sergeant Finau, interviewed Mafi. He said the seeds had been sent to him from Tonga by a man he knew. He had thrown the seeds out because he knew they were dangerous to process. This officer formally interviewed Mafi at the police station. He said that the plants on the tax allotment had been grown from Indian hemp seeds that he had brought with him, and from some that had been brought by another man. He described how the seeds had been planted. Those found at the side of the house, where he threw them, were the ones left over. The purpose of growing was "for smoking by us, and to sell them out".

There was evidence from Sergeant Finau that he took the plants to be examined by Dr Pakalani at a hospital. Dr Pakalani described a chemical test that he carried out on the samples which gave a positive result for the presence of marijuana. He also subjected the samples to microscopic examination which again led him to the conclusion that the samples contained marijuana.

At the close of the Crown case, Mr Vaipulu, counsel for Tuita and Mafi, submitted there was no case to answer. That submission was rejected. He then elected to call no evidence.

After referring to the submissions made by Mr Vaipulu, the Acting Chief Justice set out his findings. In respect of the charges against Tuita, he found that he was the person growing the little plants on his allotment, that he was aware of and in possession of the seeds that were found, and that Tuita, as owner and user of the tax allotment where the plants were found, was aware of their presence and was in possession of them.

In respect of Mafi, the Acting Chief Justice concluded that both charges were proved for the same reasons as those he had expressed concerning the charges against Tuita.

Finally he found that the plants and the seeds were proved beyond reasonable doubt to be Indian hemp as defined in s 33(2) of the Act. He reached this conclusion on the chemical tests, not on the microscopic examination which he rejected.

The Acting Chief Justice's judgment does not make any reference to the count of possession of ammunition, but Tuita's conviction on that charge was not challenged.

The Appeals against Conviction

Tuita and Mafi addressed this Court at length. Much of what they said were not submissions relating to the evidence given, and the findings of the Acting Chief Justice, in the Supreme Court. Rather it was evidence that they may have been able to give, had they elected to give evidence at trial. The grounds of appeal set out in the notice of appeal related solely to the testing of the plants and seeds by Dr Pakalani, and to whether the plant and seeds he tested had been sufficiently identified as the same as those taken from Tuita's allotment. The submissions they made to this Court did not address those grounds.

Tuita submitted that it was not appropriate for the same counsel to represent him and Mafi at the trial. He said it was wrong that the lawyer appearing for him should be trying to rescue Mafi as well. This issue had not been raised at the trial.

He accepted that the judgment was based on the evidence called by the Crown. But his lawyer, he said, did not give him the chance to give evidence. He further submitted that the police were wrong to disregard statements he had made about going to another allotment.

Mafi acknowledged that he had pleaded guilty to possession of marijuana seeds because he knew the person who had sent him the seeds. Much of what he said to this Court was directed to a challenge to the admissibility of the statement that he had made to the police, that amounted to admissions of the counts to which he had pleaded not guilty. He claimed that he was threatened with physical violence and that the police used obscene language. Because he was afraid, he said he would do what the police wanted him to do.

None of these allegations was raised in the trial. There was no application for a *voire dire*. Counsel appearing for Mafi did not in any way at the trial challenge the admissibility of the statements Mafi had made to the police. This Court can only act on the assumption that Mafi was adequately advised concerning his rights, and that, if his counsel were informed of what Mafi has said to this Court about the statements, a decision was taken not to mount a challenge to them. Such a challenge cannot be made for the first time at the appeal hearing.

We have carefully considered the findings made by the Acting Chief Justice on the evidence put before him, and the conclusions that he reached on that evidence. We are unable to find any error of fact or of law. The conclusions that he reached were properly based on the evidence he heard and the exhibits produced. We do not find, on the submissions put before this Court at the hearing of the appeal, any basis for reversing any of the findings made by the Acting Chief Justice. In particular, we are satisfied that the grounds set out in the notice of appeal relating to the examination of the plants and seeds by Dr Pakalani are not made out.

The appeals against the convictions are dismissed.

The Appeals against Sentence

In their brief submissions to this court on sentence, Tuita and Mafi each referred to other sentences that they said had been passed that indicated that the sentences

imposed on them were not consistent with these other sentences. We do not consider that the sentences imposed on them, together with the orders for suspension, can in any way be said to be excessive or inappropriate. Their appeals against sentence are dismissed.

Mr Cauchi, in his submissions that the sentences together with the suspensions were too low, invited this court to give some guidelines on appropriate sentences for growing marijuana. He referred to the decision of Hill J in *Anders v Police Department* [1974-80] TLR 60. The appellant had been charged with growing and processing marijuana. He was fined $100.00 on the growing charge. On the charge of possession he was sentenced to six months imprisonment. It was against that sentence that he appealed to the Supreme Court, which dismissed the appeal. The Judge regarded the sentence as extremely lenient.

He went on to comment on the appropriate sentence for growing marijuana. He, in our view rightly, held that growing marijuana in Tonga can be a very serious offence, because the population is spread over many islands and it is easy for persons to persuade locals to grow it. We add that this factor also makes it extremely difficult to locate the areas where marijuana is being grown, and to obtain convictions for doing so. Hill J concluded that anybody who encouraged or promoted the growing of marijuana may expect to receive a minimum sentence of three years, and in addition to be at risk of having confiscated any vessel or vehicle used in the commission of the offence.

We agree with this approach and the reasons for it. In our view, a conviction for growing any significant amount of marijuana should carry a sentence within the range of three to five years imprisonment. That sentence would not normally be suspended in whole or in part unless there are good reasons relating to rehabilitation, along the lines of the judgment of this Court in *R v Misinale* (CA 13/99, 23 July 1999). Further, we consider that similar sentences should be imposed on persons convicted of possession for supply of amounts of marijuana that indicate a commercial scale operation.

There is another matter. Mr Cauchi has submitted, and we agree, that the present legislation for the control of prohibited drugs is out of date. It does not contain detailed provisions relating to different types of controlled drugs and different penalties for possession or dealing in them. Nor does it contain, for example, provisions altering the onus of proof on charges of possession for supply if a person is found in possession of a nominated quantity of a prohibited drug. Such provisions are common in modern drug legislation in other jurisdictions. We have been informed that the misuse of drugs, particularly the more serious drugs, has not been a major feature in Tonga. But this may well not continue to be so. Should there be an escalation in the abuse of prohibited drugs in Tonga, it is vital that the courts should have an effective armoury with which to counter any such escalation. We recommend that the Legislature should give active and prompt consideration to enacting drug legislation in line with that in force in other jurisdictions, such as in Australia and New Zealand with which we are familiar.

We now turn to the sentences imposed in the present case. We have regard to the following factors. The volume of plants and seeds was large. The conclusion is inescapable that Tuita and Mafi were engaged in a commercial scale operation likely to produce, if it were successful, a volume of marijuana far beyond what would reasonably be required for their own use. A firm deterrent sentence is essential to

drive home to persons minded to become engaged in an operation of this kind, that it is not worth the risk. Tuita committed these offences while he was serving a suspended sentence for house breaking. We are not aware that either appellant have any other convictions.

This is a Crown appeal. We approach it on the basis that we set out in *Misinale*. Taking into account all of these factors, the sentences of four years imprisonment for an operation on this scale may well be at the lower end of the appropriate sentencing scale. But we are not satisfied that either sentence is so inadequate that we would be justified in increasing it.

We turn to consider the suspensions of the sentences. We discussed the principles to apply in *Misinale*. There is no pre-sentence report. The Acting Chief Justice had the advantage of hearing what he described as all the good things their then counsel said on their behalf. These submissions caused him to refer to them both as good young men and good citizens of Tonga, apart from this offending. He gave no reasons for suspending the last year of the sentences, other than that they had not been in prison before, which in itself would not be an adequate reason. We are prepared to accept that there may be good reasons relating to their rehabilitation to justify a suspension of the sentence for part of the term. The suspension for twelve months of the last twelve months of the sentence has not been shown to be excessive.

The application by the Crown for leave to appeal against the sentences is dismissed.

Fifita v Bailiff Officers

Court of Appeal, Nuku'alofa
Burchett, Tompkins, Beaumont JJ
CA 21/99

16 July 1999; 23 July 1999

Sale of goods — vehicle seized under writ of distress — question of ownership of vehicle — when does property pass?
Creditors' remedies — vehicle seized under writ of distress — question of ownership of vehicle

The appeal was concerned with questions of title to, and property in, a motor vehicle that arose in interpleader proceedings. The appellant agreed to sell a vehicle to the fourth respondent for the price of $8,987 (including insurance). After payment of a deposit of $3,500 there was a balance of $5,487 to be paid. Under the agreement the vehicle was registered and licenced in the appellant's name and would remain so until the fourth respondent had paid the balance in full. The fourth respondent had possession of the vehicle upon the signing of the agreement and the payment of the deposit but was to return the vehicle to the appellant if the fourth respondent breached any part of the agreement. The fourth respondent paid the appellant some of the instalments due under the agreement, but then defaulted. By 19 September 1997, the fourth respondent was in default and owed the appellant $4,237. Meanwhile, the second, third and fourth respondents became involved in litigation in the Supreme Court in which the fourth respondent was ultimately the unsuccessful party. On 19 September 1997, the vehicle was seized by a Bailiff Officer under a Writ of Distress issued by order of the Supreme Court dated September 1997. The appellant gave notice of his claim to the vehicle (dated 25 September 1997) to judgment creditors (the second and third respondents). By their notice of dispute of claim dated 30 September 1997, the second and third respondents gave the appellant notice that they disputed his claim of title. On 6 July 1998, in a reserved judgment, the Judge made orders to this effect: the appellant's claim was dismissed; the sale of the vehicle was directed to proceed; the Bailiffs' costs were to be deducted from the proceeds of sale; the costs of the second and third respondents were also to be deducted from the proceeds; and the balance of the proceeds were to be paid to the fourth respondent. On 18 September 1998, the vehicle was sold by the Bailiffs pending a final court order (the Bailiffs held the net proceeds of sale, $2,850, in a Bank Term Deposit). The appellant appealed from the orders made at first instance on 6 July 1998.

Held:

1. The intention of the parties, as shown by the terms of the contract, the conduct of the parties and the circumstances of the case determine the time when the property in the goods was to be transferred.
2. The provisions of the agreement evinced an intention on the part of both the seller and the buyer that, unless and until the whole of the purchase price was paid, the seller was to retain the property in the goods, even if the buyer was to have possession so long as he performed the agreement.
3. The appeal was allowed and the orders at first instance were set aside. It was declared that, prior to its seizure and sale by the Bailiffs, the vehicle was the property of the appellant, who was entitled to the proceeds of its sale.
4. The Court ordered that the second and third respondents pay the costs of (i) the appellant and (ii) the Bailiffs of both the proceedings at first instance (including interlocutory proceedings) and on the appeal.

Cases considered:

'Alatini v LDS Church [1990] TLR 1
Mitchell v Ede (1840) II Ad & El 888; 113 ER 651

Statutes considered:

Sale of Goods Act 1893 (UK)
Traffic Act CAP 99

Counsel for appellant	:	Mr Tu'utafaiva and Mrs Taufateau
Counsel for second and third respondents	:	Mr 'Etika
Counsel for Bailiffs	:	Mr Malolo

Judgment

Introduction

This appeal is concerned with questions of title to, and property in, a motor vehicle arising in interpleader proceedings. The history of the matter follows.

By an agreement in writing dated 12 February 1997 ("the agreement"), Tevita Misa Fifita, the appellant, agreed to sell a motor vehicle ("the vehicle") to Penisimani Vaka'uta, the fourth respondent, for the price of $8,600.00, together with the cost of insurance, $387.00, a total of $8,987.00. Payment by the fourth respondent of a deposit of $3,500.00 was acknowledged, thus leaving a balance of $5,487.00 to be paid (para 2 of the agreement).

The appellant then agreed:

> "3. The (appellant) will register and licence the vehicle under it's name until the (fourth respondent) will pay all the amount shown on the 2nd paragraph as the 'Balance to be paid'

…

5. It will give the (fourth respondent) the vehicle after the (fourth respondent) pay for the Deposit shown on the 2nd paragraph and when both parties signed the agreement of this agreement.
6. The (appellant) will make it possible and do some work to change the licence and the registration of the vehicle to the (fourth respondent) after the (fourth respondent) paid in full the 'Balance to be paid' as shown on the 2nd and 3rd paragraph."

The fourth respondent then agreed:

"7. He/She will accept the vehicle and use it sensibly, take care and look after it properly until he/she paid off the 'Balance to be paid', to the (appellant) according to the payment procedure shown on the 8th paragraph.
8. He/She will pay back the 'Balance to be paid' as such.
   (a) First payment to be done on the day: Last week of March, 1997 which is $457.00.
   (b) The continuation of payment will be for $457.00 in every month/two weeks/week until the amount for 'Balance to be paid' is paid in full. Give one (1) year to pay the rest.

…

10. He/She will return, without any dispution, the vehicle the (appellant) IF the (appellant) will contact him/her to return the vehicle to them because the (fourth respondent) breaks any section of this agreement."

The vehicle was at the time of the agreement, and thereafter, registered in the name of the appellant, and a certificate of registration under the Traffic Regulations issued to the appellant.

The fourth respondent paid the appellant some of the instalments due under the agreement, but then defaulted. By 19 September 1997, the fourth respondent was in default and owed the appellant $4,237.00.

Meanwhile, the second, third and fourth respondents became involved in litigation in the Supreme Court in which the fourth respondent was ultimately the unsuccessful party.

On 19 September 1997, the vehicle was seized by a Bailiff Officer under a Writ of Distress ("the Writ") issued by order of the Supreme Court dated September 1997. (At the time of the seizure, as has been noted, the balance owed by the fourth respondent to the appellant was $4,237). The Writ, in proceedings no 34 of 1997 between the fourth respondent as plaintiff and the second and third respondent as defendants, recited that on 20 May 1997, the second and third respondents had obtained judgment against the fourth respondent in the sum of $1,768.00, (being for costs on the dismissal of proceedings brought by the fourth respondent against the second and third respondents); and that this sum remained unpaid. The Writ commanded the Bailiff officers, unless the amount was paid, to seize the property of

the fourth respondent (with some immaterial exceptions) and to sell that property by public auction until a sufficient sum was secured and to pay the proceeds of such sale to the Registrar of the Supreme Court; and if no property could be found, to certify to that effect to the Registrar of the Supreme Court.

By his notice to judgment creditors of a claim to goods taken in execution (dated 25 September 1997) the appellant gave the second and third respondents notice of his claim to the vehicle. By their notice of dispute of claim dated 30 September 1997, the second and third respondents gave the appellant notice that they disputed his claim of title.

The Bailiffs having interpleaded, the proceedings ultimately came before a Judge of the Supreme Court on 9 June 1998 for a final hearing of the issue of title to the vehicle, as between the appellant and the second and third respondents. (Several interlocutory orders were made in the interim, but they are not significant for present purposes).

On 6 July 1998, in a reserved judgment, the learned primary Judge made orders to this effect: (1) The appellant's claim was dismissed. (2) The sale of the vehicle was directed to proceed. (3) The Bailiffs' costs were to be deducted from the proceeds of sale. (4) The costs of the second and third respondents were also to be deducted from the proceeds. (5) The balance of the proceeds were to be paid to the fourth respondent.

On 18 September 1998, the vehicle was sold by the Bailiffs, who now hold the net proceeds of sale, viz $2,850, in a Bank Term Deposit, pending a final court order.

The appellant now appeals from the orders made at first instance on 6 July 1998.

The Reasoning at First Instance

The learned primary Judge first referred to some observations of Webster J in *'Alatini v LDS Church* [1990] TLR 1 at 2 on the effect of registration as evidence of ownership. (We will refer to these observations below).

The primary Judge then said:

> "Now, what is the (fourth respondents) position? He has a contract with the (appellant), under which he paid part of the purchase price and on the same day took possession of the car. At that moment he had enforceable rights against the (appellant), which could be enforced only by action, and no longer by taking possession. For example, had the (appellant) then proceeded to purport to sell the car to another, the (fourth respondent) was entitled to come to court and have that stopped. In that sense, it was already his car. Since that time, he paid more and reduced the balance which the (appellant) is entitled to receive, and in return, his claim to ownership of the car strengthened. So long as he kept his side of the agreement and paid the instalments on time and in full, he would have become entitled to the legal ownership, or to damages, for which he could sue. It happens (I am told, but expressly do not find) that he has not kept up his payments, and that the (appellant) wished to exercise a right of repossession claimed under clause 10 of the written terms, only to find that the

second and third respondents and the bailiff had got in first. Since that time the (fourth respondent) reduced the balance due by another $400. The Court does not know the effect of the subsequent payment. It cannot be said that the (appellant) has actually exercised a repossession right, nor is it established in the present proceedings that he has that right. There is no evidence about why the (fourth respondent) made no further payments after the $400 in October 1997, but it is reasonable to suppose that this is linked to the seizure of the car and its subsequent detention while the (appellant) tried to make good his claim. The vehicle has now been detained and unused for nine months. I am bound to treat the agreement as if it was being complied with and was in full effect at the time of seizure by the bailiff.

This means that the (fourth respondent) at that time was, and at the present time still is, vested with a chose in action, a right to sue the (appellant) for continued possession of the vehicle so long as the instalments continued. This chose in action is a right which he is entitled at law to assign to another, ie his interest in the vehicle is something he can sell. This interest is available to the (second and third respondents) in satisfaction of the debt due to them. For this reason, which rests on the merits of the (appellant's) claim, I hold that the bailiff is entitled to seize the vehicle to satisfy the (fourth respondent's) debt. …

The (appellant) of course is free to bid for the vehicle at the public auction, and thus buy out the (fourth respondent). In the present proceedings I decline his claim, for the reason set out above."

The Appellant's Ground of Appeal

In essence, the appellant's ground of appeal is that, at the time of seizure, the fourth respondent did not have any enforceable right of action against the appellant, and thus no title to the vehicle.

Conclusions on the Appeal

In our opinion, there is substantial force in the appeal.

The starting point for our consideration of the question of title to or property in, the vehicle, must be the terms of the written agreement between the appellant and the fourth respondent which bear upon the passing of property. We will analyse them below, against the background of English common law.

No Tongan Sale of Goods legislation was applicable to this transaction. However, this circumstance does not appear to be significant here. At common law, whether property passes depends upon the intention of the parties [see *Mitchell v Ede* (1840) II Ad & El 888; 113 ER 651]. For present purposes, the rules as to the passing of property under the English Sale of Goods Acts appear to be the same as those at common law: "The intention of the Sale of Goods Act 1893 (UK) was not to change but merely to codify the existing law relating to the sale of goods" (Halsbury's Laws

of England, 4th Ed, Vol 41 at 560). The general rule, both at common law and under the Sale of Goods Act, is as stated by Halsbury, op cit at 648:

> "The intention of the parties, as shown by the terms of the contract, the conduct of the parties and the circumstances of the case determine the time when the property in the goods is to be transferred."

Halsbury goes on to say (at 648 and 649):

> "The parties may provide by their contract that although the buyer is entitled to possession of the goods, the property in the goods is not to pass until the price is paid … A reservation of the legal title will normally prevent the goods from forming part of the general assets of the buyer in the event of his insolvency …"

In our opinion, these statements of principle are applicable in all the circumstances of the present case. (We note, as Halsbury does (at 649(2)) that a buyer, acting wrongfully may yet give a good title on disposition to a third person acting in good faith. But that is not this case, since the fourth respondent did not attempt to dispose of the vehicle).

Turning then to the terms of the contract between seller and buyer, we find provisions to the following effect:

- The vehicle will be registered in the appellant's name until payment of the balance of the purchase price (para 3). Upon this being paid, the vehicle will be registered in the name of the fourth respondent (para 6).
- The fourth respondent is to obtain possession of the vehicle upon the signing of the Agreement and payment of the deposit (para 5); but the fourth respondent will return the vehicle to the appellant if the fourth respondent breaches any part of the Agreement (para 10).
- The fourth respondent will take care of the vehicle until he pays the balance purchase price (para 7).
- The fourth respondent will pay the balance by instalments (para 8).

In our view, these provisions, read as a whole, evince an intention on the part of both the seller and the buyer that, unless and until the whole of the purchase price is paid, the seller is to retain the property in the goods, even if the buyer is to have possession so long as he performs the agreement.

There is nothing in *'Alatini*, above, which contradicts this. On the contrary, it is consistent with our conclusion. Webster J there said (at 2):

> "The Traffic Act (CAP 99) Part II is written on the basis that a vehicle is registered by the owner and that a change in ownership requires a change in registration. While Inspector Faletau on behalf of the Police submitted that, in terms of section 11, registration should be conclusive for all matters, in the absence of definite words in the Act the contents of the Register of Motor

> Vehicles only carry a strong presumption that they tell the true state of affairs. In the absence of evidence to the contrary the contents will be upheld, but can be displaced by such contrary evidence, as in this case."

Here, the registration was consistent with the parties' intention that, until payment in full, the appellant retained the property in the vehicle. If anything, the presumption of regularity arising from registration only serves to reinforce the parties' actual intention to ensure that, unless and until the balance of the price was paid, the appellant was to retain title.

It further follows that, at the time of the Bailiff's seizure of the vehicle, it was the appellant's property; furthermore, the appellant had a contractual right to resume possession of the vehicle. That is to say, at the time of seizure, the fourth respondent had no property in the vehicle which the Bailiff could seize under the Writ of Distress as the property of the fourth respondent.

For completeness, although the question does not arise here, we might add that the only right that the fourth respondent might possibly have asserted as a buyer would be (if there were appropriate circumstances) to seek equitable relief against the forfeiture of the deposit and instalments already paid. But this relief can only be granted where the seller's conduct is unconscionable (see Chitty on Contracts, 26th Ed, Vol 11 at 652 and 653). There is no suggestion of this here, where the appellant has, it appears, suffered a loss overall on the transaction. In any event, if a remedy by way of execution were to be available to the second and third respondents, it would be by way of attachment or garnishee of a debt (being the claim for relief against forfeiture) rather than a writ of distress levied against the (tangible) proper of the fourth respondent.

The appeal must be allowed and the orders at first instance set aside. In lieu thereof, it should be declared that, prior to its seizure and sale by the Bailiffs, the vehicle was the property of the appellant, who is now entitled to the proceeds of its sale.

As to the appellant's costs, the second and third respondents must pay these at first instance (including any costs incurred by the appellant in the interlocutory proceedings) and on the appeal. The fourth respondent has incurred no costs, not having appeared in the proceedings at any stage.

As to the Bailiffs' costs, Mr Malolo has drawn our attention to the following statement of English practice in the Supreme Court Practice, the White Book, [1997] Vol 1 at 287:

> "As a general rule, in a sheriff's interpleader, where the claimant fails, the sheriff is entitled to his costs (including possession money) from the time of the notice of claim or from the sale, whichever be the earlier. Where the claimant succeeds, the sheriff is entitled as against the execution creditor to costs from the time when the latter authorised the interpleader proceedings - i.e., generally from the return of the interpleader summons. But in either case the sheriff gets his costs from the execution creditor, who (if successful) obtains a remedy over against the claimant. Similarly a successful claimant gets his costs against the execution creditor from the return of the interpleader summons."

This practice is, we think, appropriate for adoption in Tonga. Accordingly, we propose to order that the second and third respondents pay the Bailiffs' costs, both below and before us.

Orders on the Appeal

We make the following orders:

(1) Appeal allowed.

(2) Set aside the orders made at first instance on 6 July 1998. In lieu thereof make the following orders:

(a) Declare that, prior to its seizure and sale by the Bailiffs, the appellant had the property in the subject vehicle; and that, accordingly, the appellant is now entitled to its net proceeds of sale.

(b) Direct the Registrar of the Supreme Court to pay to the appellant the sum of $2,850 standing to the credit of the Term Deposit Account, together with any accrued interest.

(c) Order that the second and third respondents pay the costs of (i) the appellant and (ii) the Bailiffs of both the proceedings at first instance (including interlocutory proceedings) and on the appeal.

R v Uluilakepa

Court of Appeal, Nuku'alofa
Burchett, Tompkins, Beaumont JJ
CA 22/99

20 July 1999; 23 July 1999

Sentencing — perjury admitted — considerations in sentencing
Criminal law — perjury — sentence where guilty plea

The appellant was charged with perjury in that on or about 13 April 1994 he did state on oath that he was the heir to his father's tax allotment at Haveluloto knowing full well that such statements were false. He pleaded guilty on arraignment. When he came before the court for sentence on 10 June 1999, it was ordered that he be discharged without conviction. The Court referred to the offending occurring in the family situation between his brother, his father, and him; the Court also considered his employment and was satisfied that the respondent had had sufficient punishment and that his job should remain open to him. The Crown applied for leave to appeal against sentence.

Held:

1. The appellant deliberately made the false affidavit for the purpose of misleading the Minister of Lands and there was no possible effect on his employment that could justify the Judge's decision. A discharge without conviction may have had the effect of concealing what he did. It was for his employer, the Government, to decide what action if any should be taken in the light of the conviction. In discharging without conviction, the Judge was acting on a wrong principle.
2. The application for leave to appeal was granted. The order made in the Supreme Court that the respondent be discharged without conviction was quashed. In lieu thereof, he was convicted of the charge of perjury and fined the sum of $1,000. To that extent the appeal was allowed.

Counsel for appellant : Mr Kefu
Counsel for respondent : Ms Tonga

Judgment

The appellant was charged with perjury in that on or about 13 April 1994 he did state on oath that he was the heir to his father's tax allotment at Haveluloto knowing full well that such statements were false. He pleaded guilty on arraignment. When he

came before Finnigan J for sentence on 10 June 1999, the Judge ordered that he be discharged without conviction. The Crown has applied for leave to appeal against this sentence.

The Offending

Samiu Kaufusi had a tax allotment in Haveluloto known as "Tufitokelau". He died about 1981. The allotment was registered in the name of his eldest son, Tevita Uluilakepa Kaufusi. This son married twice. From his first marriage he had a son named Viliami Uluilakepa Kaufusi. From his second marriage he had the accused and two other children.

Tevita surrendered the tax allotment, apparently with a view of the respondent obtaining title to it. The respondent applied for the allotment. In support, he made an affidavit on 13 April 1994 which is in Tongan. The following is a translation of the relevant paragraphs:

> "3. That I Mo'ale Uluilakepa, heir of the deceased
> 4. That the following are the deceased's next of kin;
> Mo'ale Uluilakepa (heir)
> Atimata Uluilakepa (m)
> Tupou Uluilakepa (m)
> 5. That it is in my belief and best of knowledge that there is no one who can lay claim to the tax allotment, apart from myself."

The affidavit was sworn before a Police magistrate. It was tendered in support of the respondent's application to have the tax allotment registered in his name. The Minister of Lands, in reliance on the affidavit, registered the tax allotment in the name of the respondent.

The affidavit was false in several respects. The respondent was not the heir of Tevita. Tevita's eldest son was Viliami, who was alive when the affidavit was sworn. The affidavit sets out Tevita's next of kin from his second marriage but failed to set out the next of kin from his first marriage. His claim in paragraph 5 that there was no one who could lay claim to the tax allotment apart from him he knew to be false. It was also at least inaccurate in referring to his father as the deceased when he was still alive.

Tevita's eldest son by his first marriage, Viliami Kaufusi and others commenced proceedings in the Supreme Court seeking to have set aside the registration of the tax allotment to the respondent. Lewis J set aside the registration which enabled the tax allotment to be registered to Viliami Kaufusi. The respondent and his father appealed against that decision. The appeal was dismissed by this Court by a judgment delivered on 7 August 1998. His brother, the heir, had died before the appeal was heard.

The Reasons for Sentence

The Judge's sentencing remarks are brief. He referred to the offending occurring in the family situation between his brother, his father, and him. He also considered his employment. He was satisfied that the respondent had had sufficient punishment and that his job should remain open to him. It was for those reasons that he discharged the respondent without conviction.

The Respondent

He was aged a few months under 30 years when the offence occurred. He is married with four children. He had entered the Police Force in 1989 as an engineer on the Police rescue boat. By the time of the hearing he was employed as an engineer at the Police Training School.

At the hearing of the appeal, the Court sought some information about the likely effect of a conviction on the respondent's employment, as this appeared to be a factor that influenced the Judge. At our invitation, counsel for the Crown has now filed a memorandum setting out the Crown's position. Although employed by the Ministry of Police, the respondent is not a member of the Police Force. He is a civil servant, as a result of which his name appears in the Civil Service List. He is thus a permanent employee of the Government.

There is no express provision dealing with the employment of a civil servant who is convicted of an offence. Counsel advises that, as a matter of practice only, a civil servant is not automatically dismissed upon conviction. He may be, depending on the circumstances of the case. If he is sentenced to a term of imprisonment, dismissal is likely. If not, the final decision on the appropriate disciplinary action is a matter for Cabinet.

The Offence of Perjury

Perjury has long been recognised as a very serious offence, as is indicated by the maximum sentence of seven years imprisonment. It strikes at the very foundation of Tonga's judicial system and at the administration of justice. Persons who commit perjury usually do so to mislead a court into giving a wrong decision, or, as here, to cause a wrong administrative decision to be made. The consequence of giving false evidence or making a false affidavit can be far reaching and serious. Where a case of deliberate lying on oath has been established it must be met with a stern response. The Court is bound to impose a penalty that marks the seriousness of the offence, and will act as a strong deterrent to others minded to give false statements on oath. The Court will normally be considering a sentence of imprisonment. It is only where there are significant mitigating factors that a non-custodial sentence will be appropriate.

Conclusion

There are some mitigating circumstances in this case. As is apparent from the action in the Supreme Court and the Court of Appeal to which we have referred, this was a family dispute that involved allegations that Viliami Kaufusi had renounced his inheritance. The respondent's father wanted the respondent to succeed to the allotment. There was a close relationship between the respondent and his father. We accept that the respondent may have been motivated by a belief that he was acting in accordance with his father's wishes. His counsel submits that he made the affidavit because his father told him to. He has no previous convictions. He was genuinely remorseful for what he had done. He pleaded guilty.

However, these considerations cannot justify a discharge without conviction following a plea of guilty for such a serious offence. The appellant deliberately made the false affidavit for the purpose of misleading the Minister of Lands. We do not consider any possible effect on his employment can justify the Judge's decision. Indeed, on the contrary, we see no reason why his employer should not be made

aware of the respondent's dishonesty. A discharge without conviction may have the effect of concealing what he did. It will be for his employer, the Government, to decide what action if any should be taken in the light of the conviction. We consider that, in discharging without conviction, the Judge was acting on a wrong principle.

Nor do we consider that this offending should go unpunished. For the reasons we have expressed, we are satisfied that a penalty should be imposed. As it is a
130 Crown appeal, it is appropriate that the penalty should involve a measure of leniency. In all the circumstances, the respondent should be fined the sum of $1,000.

The Result

The application for leave to appeal is granted. The order made in the Supreme Court that the respondent be discharged without conviction is quashed. In lieu thereof, he is convicted of the charge of perjury and fined the sum of $1,000. To that extent the appeal is allowed.

Teta Tours Ltd v Ramanlal & Sons Ltd

Court of Appeal, Nuku'alofa
Burchett, Tompkins, Beaumont JJ
CA 12/99

20 July 1999; 23 July 1999

Agency — whether acting as principal or agent — held that liability as principal was not negatived
Contract law — interpretation — whether direct relationship or agency relationship

Ramanlal was the owner of the Pacific Royale Hotel. Teta was the owner of Tour and Travel Agencies. Teta was the agent for, or representative of, Hawaiian Airlines ("HAL") in Tonga. Teta was selling air tickets for HAL and was providing tour and transport facilities for passengers and tourists. In 1989, Ramanlal agreed to provide accommodation for passengers represented by Teta, on account of and for payment by Teta. At the same time, Teta would provide tours and transport for guests of Ramanlal and air tickets for Ramanlal's employees on account. Instead of settling these accounts by monthly payments, they balanced the respective debts and allowed each other equal credit to cancel whichever debt was the less, and the party still owing paid the balance to the other. The primary judge found that the arrangement had ended in 1992, and that since then the parties had attempted a "final accounting", which was largely a question of fact [not itself complex] although there was room for the application of the law of principal and agent. His Honour noted that the accountants had "found" that only $16,969.06 was owed to Ramanlal, and that they had "assessed" Teta's part of that debt as being only $469.53, with $16,499.53 "payable" by HAL. Ramanlal's position was that the dealings of the parties throughout were direct dealings, creating contractual relations between them — hence its claim was only for the balance due "in an equalizing process"; whereas Teta's position, on the other hand, was that, when requesting accommodation, it was only the agent and thus not liable; whilst in the supply of airline tickets, Teta was contracting direct with Ramanlal, which was liable to Teta in that respect. The judge found that Teta was acting as principal not as agent and so did not negative liability. The Judge accepted the quantum of the debt owed by each party as ascertained by the expert accounting evidence, and applied an offset of the smaller debt owed to Ramanlal to the larger debt owed to Teta, and ordered Ramanlal to pay Teta the difference, $9,252.19. Costs were declined. Teta appealed the decision and contended that his Honour erred in legal principle in holding that Teta had not negatived its personal liability for the cost of this accommodation. Ramanlal sought leave to cross-appeal the aspect of costs.

Held:

1. When regard was had to the considerations of background, context, the facts and the evidence, in particular to the previous settled course of conduct of the parties over a long period, the inference was open to the primary Judge that Teta had not, by its conduct, viewed objectively, evinced an intention to disclaim its own liability for the debts incurred.
2. The appeal was dismissed with costs.
3. There was no basis for interfering with the discretionary judgment not to award costs. Leave to cross-appeal refused.

Cases considered:

Benton v Campbell Parker & Co Ltd [1925] 2 KB 410; [1925] All ER Rep 187

Hichens Harrison Woolston and Company v Jackson and Sons [1943] AC 266; [1943] 1 All ER 128

HO Brandt & Co v HN Morris & Co Ltd [1917] 2 KB 784 (CA)

McCutcheon v David MacBrayne Ltd [1964] 1 All ER 430; [1964] 1 WLR 125

N and F Vlassopulos v Ney Shipping Ltd (the "Santa Carina") [1977] 1 Lloyd's Rep 478

Universal Steam Navigation Co Ltd v James McKelvie & Co [1923] AC 492

Yeung Kai Yung v Hong Kong and Shanghai Banking Corporation [1981] AC 787; [1980] 2 All ER 599 (PC)

Counsel for appellant : Mr Lemoto

Counsel for respondent : Mr Niu

The Supreme Court decision appears at page 34.

Judgment

Introduction

The respondent to this appeal, Ramanlal & Sons Ltd ("Ramanlal"), sued the appellant, Teta Tours Ltd ("Teta"), in the Supreme Court in 1993 for debt, claiming the sum of $9,150.35. By its statement of claim Ramanlal alleged the following:

- Ramanlal was the owner of the Pacific Royale Hotel.
- Teta was the owner of Tour and Travel Agencies. Teta was the agent for, or representative of, Hawaiian Airlines ("HAL") in Tonga. Teta was selling air tickets for HAL and was providing tour and transport facilities for passengers and tourists.
- In 1989, Ramanlal agreed to provide accommodation for passengers represented by Teta, on account of and for payment by Teta. At the same time, Teta would provide tours and transport for guests of Ramanlal and air tickets for Ramanlal's employees on account, the difference to be paid by the party indebted in cash.

- Ramanlal extended the said credit to Teta upon the trust of Ramanlal in the financial capability of Teta, and for 3 years there was no major difficulty between them. But in about September 1992, Ramanlal found that Teta was indebted to HAL for a substantial sum, and that HAL was removing its agency from Teta.
- Ramanlal accordingly terminated the credit arrangement with Teta. At this time, the account payable by Ramanlal to Teta was $20,495.73, and the account payable by Teta to Ramanlal was $29,655.08. The difference, $9,159.35, was payable by Teta to Ramanlal.

By its statement of defence, Teta said, inter alia, that "(Teta) and the Principal (i.e. HAL) had separate accounts with Ramanlal and (they were) always kept separate." Teta admitted that Ramanlal owed Teta $20,495.73, but Teta denied owing Ramanlal $29,655.08. Otherwise, Teta denied the substantive allegations in the statement of claim.

By its counterclaim, Teta sued Ramanlal for $20,775.48 for debt, alleging the following:

- Ramanlal had, since 1989, an account with Teta and Ramanlal used Teta's fleet for tours and airport transfers on account; further, Ramanlal ordered air tickets from Teta.
- Teta had its own separate account with Ramanlal "and its Principal namely HAL had its own account with Ramanlal which was paid by cheques endorsed to Ramanlal and not Teta."
- Teta used Ramanlal's hotel to accommodate its tourists and this was deducted from the services on the tours and airport transfers conducted by Teta.
- By December 1992, Ramanlal owed Teta a total of $20,775.48.

By its reply to Teta's counterclaim, Ramanlal repeated its claim that it owed Teta $20,495.73 (i.e. not $20,775.48), but that Teta owed it $29,644.08, i.e. a difference of $9,159.35. Ramanlal also said that it had terminated the credit agreement with Teta when Ramanlal discovered that Teta was indebted to HAL; and Teta subsequently ceased orders and all credit arrangements as Teta knew that Ramanlal terminated the credit arrangement and demanded that the outstanding debts be paid.

By its amended statement of defence, filed in 1998, Teta repeated, in essence, its earlier defence. Teta also then filed an amended counterclaim, claiming judgment against Ramanlal for $26,221.25 for debt, and alleging the following:

- Ramanlal since 1989 had an account with Teta. Ramanlal used Teta's fleet for tours and airport transfer on account. Further Ramanalal ordered airline tickets from Teta.
- Teta had a separate account with Ramanlal under its own name. Teta's principal, HAL had its own separate account

with Ramanlal and HAL would pay this account with HAL cheques made payable to Ramanlal.

- Teta used Ramanlal's hotel to accommodate tourists. HAL's delayed flight passengers used Ramanlal's hotel for accommodation and they used HAL coupons as payment of their accommodation.
- In December 1992 Ramanlal owed Teta $20,775.48 which was still outstanding.
- In December 1992 Teta stopped all orders from Ramanlal because of the unpaid debt of $20,775.48.
- In January 1996 Howard Alexander, Ramanlal's accountant, and Sione Mapa, Teta's accountant, "agreed to certain figures and prepared a Summary of accounts" as follows:
  a) Total amount owing by Ramanlal to Teta was $26,221.25
  b) Amount owing by Teta to Ramanlal was $469.53
  c) Amount owing by HAL to Ramanlal was $16,499.53
- Teta had not received payment of the sum of T$26,221.25 from Ramanlal despite numerous requests.
- Teta stated that it was not liable for the debt of it's Principal HAL, owed to Ramanlal.

The Orders Made at First Instance

The learned primary Judge held that Teta was liable to Ramanlal in the sum of $16,969.06 for the costs of Ramanlal's services in supplying accommodation for HAL passengers; and that Ramanlal was liable to Teta in the sum of $26,221.25 for the costs of Teta's services in supplying transport and airline tickets; so that Ramanlal was ordered to pay Teta the difference, viz. $9,252.19.

His Honour declined to make any order for costs.

The Findings and Reasons of the Primary Judge

His Honour said that for more than 10 years, the parties had used each other's services, each rendering the other monthly accounts. Instead of settling these accounts by monthly payments, "they balanced the respective debts and allowed each other equal credit to cancel whichever debt was the less, and the party still owing paid the balance to the other."

The judge found that the arrangement had ended in 1992, and that since then the parties had attempted a "final accounting", which is largely a question of fact [not itself complex] although there is room for the application of the law of principal and agent.

Having noted that there were deficiencies in the documentary evidence, his Honour referred to calculations, made by a committee of two accountants appointed, one by each party, that the total amount owing by Ramanlal to Teta was $26,221.25. The Judge said:

> "In his closing submissions, Mr Niu on behalf of (Ramanlal) continued (Ramanlal's) admission of only $20,495.73, identifying that sum as the amount due for HAL tickets bought by (Ramanlal). There were however other services purchased by (Ramanlal) i.e. tours and airport transfers for its customers and staff, and the quantum of (Ramanlal's) debt was fixed at $26,221.25 in a detailed process by the accountants appointed by the parties. The parties had terminated part-heard a previous hearing of these claims in order to have the accountants assess as accurately as possible what each owed the other, with a view to settling the claims out of court. The assessment that they did was not just a balancing-out. It was a calculation of the parties' indebtedness from an independent assessment of all the invoices that the parties were able to make available to the accountants. I heard evidence from one of the accountants in an earlier hearing, in October 1998, and I have assessed their conclusions for myself. I cannot find any basis at all in the evidence for rejecting or amending their findings. Theirs was the first and best assessment that was carried out."

His Honour went on to note that the accountants had "found" that only $16,969.06 was owed to Ramanlal, and that they had "assessed" Teta's part of that debt as being only $469.53, with $16,499.53 "payable" by HAL.

His Honour remarked that HAL had become "defunct" and insolvent.

The Judge proceeded upon the footing that the onus was upon Ramanlal to show some error in the expert assessment.

His Honour noted that Ramanlal's position was that the dealings of the parties throughout were direct dealings, creating contractual relations between them - hence its claim was only for the balance due "in an equalizing process"; whereas Teta's position, on the other hand, was that, when requesting accommodation, it was only the agent and thus not liable; whilst in the supply of airline tickets, Teta was contracting direct with Ramanlal, which was liable to Teta in that respect.

Turning to the first issue, Ramanlal's claim against Teta for debt, his Honour referred to the observations of Lord Scarman in *Yeung Kai Yung v Hong Kong and Shanghai Banking Corporation* [1981] AC 787 at 795; [1980] 2 All ER 599 (PC) at 604 that -

> "… a person is liable for his engagements … even though he is acting for another, unless he can show that by the law of agency he is to be held to have expressly or impliedly negatived his personal liability."

The Judge said:

> "In my opinion, far from negativing its personal liability in making the arrangement which it did, (Teta) assumed liability. The contract which it made, and for many years carried out, was that it would provide commercial services for (Ramanlal) (transport and airline tickets), and would accept in payment a

> credit against what it owed (Ramanlal) for services (accommodation when it required it for its airline agency customers). It seems to me that (Ramanlal) was entitled to sue on that contract had (Teta) not honoured it, and, had (Teta) wished, it could have joined the airline as a third party or claimed in turn under its own contract with the airline.
>
> In my assessment therefore, in making their contra arrangement, the parties made a contract between themselves, upon which one could sue the other and establish liability. They did business under this contract for more than 10 years. The claims now raised by (Teta) for protection under the law of agency are ill-founded."

Next, addressing the second issue, Teta's claim against Ramanlal for debt, his Honour held that in respect of both the provision of airline tickets and transport services, there was, between Ramanlal and Teta, "a direct party and party contract relationship"; so that, "if ever unpaid by Ramanlal on their agreed credit terms, Teta was always entitled to sue for payment on this contract, just as Ramanlal is doing now."

In giving his decision on Ramanlal's claim and Teta's counterclaim, the Judge accepted the quantum of the debt owed by each party as ascertained by the expert accounting evidence, and applied an offset of the smaller debt owed to Ramanlal to the larger debt owed to Teta, thus ordering, as has been noted, Ramanlal to pay Teta the difference, viz. $9,252. 19.

Finally, on the question of costs, his Honour said:

> "Costs
>
> (Ramanlal) has been successful in its claim and (Teta) successful in its counterclaim, but (Ramanlal) is liable to (Teta). I have considered the merits of the actions of both parties in conducting this litigation. In all of the circumstances, I decline an order for costs."

Teta's Appeal

Teta now appeals from the part of the judgment below which held it liable to Ramanlal for the costs of Ramanlal's services in supplying accommodation for HAL passengers. In essence, the ground of the appeal is that his Honour erred in legal principle in holding that Teta had not negatived its personal liability for the cost of this accommodation.

Conclusions on Teta's Appeal

We are not persuaded that his Honour fell into any error of principle, or otherwise, in finding that Teta was indebted to Ramanlal on account of the accommodation charges for HAL's passengers.

On the question of the application of the principles of the law of agency, we would agree that those principles were, with respect, correctly stated by Lord Scarman in *Yeung*.

On behalf of Teta, much reliance is sought to be placed upon the decision of the English Court of Appeal in *N and F Vlassopulos v Ney Shipping Ltd (the "Santa*

Carina") [1977] 1 Lloyd's Rep 478. In an action to recover the cost of the supply of oil bunkers, the defendants succeeded on appeal in denying liability on the ground that their request for supply had been made on behalf of their principals, the time charterers of the vessel; and that, although the plaintiffs did not know who the principals were, they did know that the defendants acted as agents.

Lord Denning, M.R., in allowing the appeal from Mocatta J., said [at 481]:

> "The Judge held that the brokers who ordered the fuel were personally liable. He was much influenced by the cases where a person gives a written order for goods or signs a written contract when he is known to be acting as an agent. Nevertheless, although he is known to be acting as an agent, he will be liable on that order or liable on that contract if he signs in his own personal name without qualification. That is settled by cases both in this Court and in the House of Lords: see *HO Brandt & Co v HN Morris & Co Ltd* [1917] 2 KB 784 (CA) at p 796 per Lord Justice Scrutton, and *Hichens Harrison Woolston and Company v Jackson and Sons* [1943] AC 266 at p 273; [1943] 1 All ER 128 per Lord Atkin. In order to exclude his liability he has to append to his signature some such words as 'as agent only' or 'for and on behalf of' or such exclusion must be apparent elsewhere in the document. That is clear from *Universal Steam Navigation Co Ltd v James McKelvie & Co* [1923] AC 492 at pp 505-6.
>
> The Judge thought that those cases on written orders and written contracts should be applied to the present case of an oral contract."

But Lord Denning went on to distinguish the case of the oral contract. He said [at 481]:

> "Those cases still apply today to written orders and written contracts. But they do not apply to oral orders or oral contracts. At any rate not so rigidly. In many cases if a man, who is an agent for another, orders goods or makes a contract by word of mouth, but does not disclose the name or standing of his principal (so that his credit is unknown to the other contracting party) the agent himself is liable to pay for the goods or to fulfil the contract. It may be that the other contracting party knows that the man is only an agent, but, as he does not know who the principal is, it is to be inferred that he does not rely on the credit of the principal but looks to the agent. That, I think, is the thought underlying the dictum of Mr Justice Salter in *Benton v Campbell Parker & Co Ltd* [1925] 2 KB 410 at p 414; [1925] All ER Rep 187, and the American Restatement on Agency in the comment to par 321. But in other cases that may not be the proper inference. There are cases where, although the man who supplied the goods knows that the other is an agent and does not know his principal, nevertheless

> he is content to look to the credit of that principal whoever he may be."

Lord Denning noted [at 482] that the accounts for the fuel had always been paid by the principals, either directly or through the brokers. He concluded [at 482]: "It cannot be supposed that the brokers were ever intended to be personally liable." He added [at 482]:

> "It is just the same, it seems to me, as if the brokers had given a written order for the bunkers and added to their signatures 'as agents only'. In that case they would not have been personally liable. Nor should they be liable in this case when it was done by word of mouth and when the inference from the conduct and the whole of the circumstances was that they were ordering the fuel as agents only."

Roskill LJ was of the same opinion, referrring [at 483] to the "allimportant" background that the parties to the litigation were two Baltic brokers, each contracting as agents for principals. Lord Roskill said [at 583]:

> "If (the defendants) had signed an order for bunkers without qualification of any kind, and the plaintiffs (assuming them to be entitled to sue at all) had sued upon a written contract so signed without qualification, I do not doubt that on the authorities the plaintiffs would have been entitled to recover; but that is not the position here. Like … Lord [Denning], I see no reason why one should assimilate the case of a contract in writing, where the intricacies of the parol evidence rule apply, to a simple everyday oral contract made between two brokers on the telephone.
>
> One has to look at the background against which this contract was made, and I approach the matter in the same way as [in] … Lord Reid's speech in *McCutcheon v David MacBrayne Ltd* [1964] 1 All ER 430; [1964] 1 WLR 125 where Lord Reid quoted from the Scottish textbook, Gloag on Contract:
>
> '… The judicial task is not to discover the actual intentions of each party; it is to decide what each was reasonably entitled to conclude from the attitude of the other'."

Lawton LJ agreed, adding [at 484-5] that the case was to be decided "on the evidence" rather than the case law.

We doubt whether it is possible to extract any universal or even general principle from *The Santa Carina*, except perhaps that oral transactions should, in this area, be treated differently from written ones. But this distinction is not pertinent here. In any event, we take the law to be as subsequently explained by Lord Scarman.

What does emerge clearly from *The Santa Carina* is the importance of the background or context, and, of course, the facts and the evidence. When regard is had to these considerations in the present case, in particular to the previous settled course of conduct of the parties over a long period, the inference was open to the primary Judge that Teta had not, by its conduct, viewed objectively, evinced an intention to

disclaim its own liability for the debts incurred. The procedure adopted of offsetting their respective debts is consistent with this.

In short, it was open to his Honour to find that, by its conduct, Teta had not disclaimed liability for the debts incurred in its dealings with Ramanlal. No warrant for our interference with that conclusion has been demonstrated. It was clearly open as a matter of legal principle. No other basis for upsetting his Honour's judgment, has been made out. As has been seen, his reasoning was essentially based upon the proper inferences to be drawn from the parties' conduct. The inferences drawn were, we think, appropriate in the circumstances. Moreover, his Honour was entitled to have regard to, yet not be bound by, the expert evidence on the questions of accounting that arose.

The appeal must be dismissed, with costs.

Ramanlal's Cross-Appeal on Costs

As has been seen, his Honour, for the reasons he gave, declined to award costs.

Ramanlal has sought leave to cross-appeal on this aspect.

In our view, there is no basis for interfering with this discretionary judgment. It was plainly open.

Leave to cross-appeal is refused. We make no order for the costs of the cross-appeal.

Orders on Teta's Appeal and Ramanlal's Cross-Appeal

We make these orders:

1. Appeal dismissed, with costs.
2. Leave to cross-appeal refused.

Secretary of Fisheries v Lanivia

Court of Appeal, Nuku'alofa
Ward CJ, Burchett and Tompkins JJ
CA 17/99

21 July 1999; 23 July 1999

Practice and procedure — costs — should be paid by unsuccessful party
Costs — borne as being in ordinary course of business — should be paid by unsuccessful party

The appellant was the first of two defendants in an application by the respondents for leave to apply for judicial review out of time. The learned judge refused the application on the ground that no sufficient case of a breach of natural justice had been shown in the decision of the appellant to with-hold a fishing licence for 1998. He then continued to hold that costs were awarded in favour of the second defendant, to be agreed or taxed. The first defendant was expected to carry its costs in the case in the ordinary course of its business. The first defendant appealed the decision that he should not have his costs paid by the unsuccessful party.

Held:

1. The fundamental principles relating to costs were that costs were in the discretion of the Court and costs normally follow the event.
2. Sometimes in cases of judicial review, a point of law is involved that is of sufficient public importance for the court to exercise its discretion not to order the unsuccessful party to pay the costs. That was not the case here and the judge did not suggest it was. Although the action was brought in administrative law it was effectively little more than a claim in private law and there was no reason to interfere with the usual practice.
3. The appeal was allowed. The order that the first defendant should carry its own costs was set aside and substituted with an order that the first defendant's costs should be paid by the plaintiffs to be taxed if not agreed. The plaintiffs must also pay the costs of the appeal.

Cases considered:

Donald Campbell and Co Ltd v Pollak [1927] AC 732
Ottway v Jones [1955] 2 All ER 585; [1955] 1 WLR 706
Ritter v Godfrey [1920] 2 KB 47; [1918-19] All ER Rep 714
Scherer v Counting Instruments Ltd [1986] 2 All ER 529; [1986] 1 WLR 615

Statutes considered:
Supreme Court Act CAP 10

Rules of Court considered:
Supreme Court Rules 1991

Counsel for appellant	:	Mr Kefu
Counsel for respondents	:	Mr Tu'utafaiva

Judgment

The appellant was the first of two defendants in an application by the respondents for leave to apply for judicial review out of time.

The learned judge refused the application on the ground that no sufficient case of a breach of natural justice had been shown in the decision of the appellant to with-hold a fishing licence for 1998. He then continued:

> "Costs in the present application are awarded in favour of the second defendant, to be agreed or taxed. I expect the first defendant to carry its costs in the case in the ordinary course of its business."

This appeal is against that order that the appellant should not have his costs paid by the unsuccessful party.

The fundamental principle that costs are in the discretion of the Court has been enacted as section 15 of the Supreme Court Act CAP 10, and the proviso to that section is clearly based on the equally fundamental provision that costs normally follow the event.

Our Supreme Court Rules give no further guidance on the general principles upon which costs may be ordered and the court has followed the practice in England. What, then, are the principles upon which a judge may exercise his discretion to order costs other than in accordance with the general principle that they should follow the event? The position was explained by Atkin LJ in *Ritter v Godfrey*[1920] 2 KB 47 at 60; [1918-19] All ER Rep 714:

> "… as the discretion is only to be exercised where there are materials upon which to exercise it, it seems important to ascertain the principles upon which a judge is to discern whether the necessary materials exist. In the case of a wholly successful defendant, in my opinion the judge must give the defendant his costs unless there is evidence that the defendant (1) brought about the litigation, or (2) has done something connected with the institution or the conduct of the suit calculated to occasion unnecessary litigation and expense, or (3) has done some wrongful act in the course of the transaction of which the plaintiff complains."

These principles have been restated many times. Whilst expressing his reservation about the use of the word "must" in the second sentence of the passage quoted above,

Viscount Cave LC, in *Donald Campbell and Co Ltd v Pollak* [1927] AC 732 at 811 points out that the discretion, like any other discretion, must be exercised judicially and ought not to be exercised against the successful party except for some reason connected with the case. More recently Buckley LJ in *Scherer v Counting Instruments Ltd* [1986] 2 All ER 529; [1986] 1 WLR 615 at 621 and 622 set out in some detail the principles upon which a court may exercise the discretion.

In the present case Mr Tu'utafaiva suggests that the conduct of the appellant in his decision over the fishing licences generally added to the litigation. We do not agree that is the case here.

It should be remembered that this was an application for leave to seek judicial review out of time. That was the cause of action. In *Ottway v Jones* [1955] 2 All ER 585 at 591; [1955] 1 WLR 706 Parker LJ pointed out once again that:

> "… the discretion cannot be exercised arbitrarily; it must be exercised judicially and on fixed principles dictated by reason and justice. One starts with this, that, as a general principle, costs follow the event and the successful party is entitled to be paid his costs unless there are special grounds to order otherwise and those grounds, it is well settled, must be grounds connected with the cause of action."

The facts raised by Mr Tu'utafaiva are not matters connected with the cause of action here which, as we have pointed out, was an application for leave to apply for judicial review of the appellant's decision.

In that action the judge had found against the respondents. There was no qualifying matter and the appellant should normally have had his costs. The learned judge gave only one reason for not following the usual rule, namely that the appellant should carry the costs in the normal run of its business. That is not a ground arising out of the cause of action and neither does it follow any principle of costs.

Sometimes in cases of judicial review, a point of law is involved that is of sufficient public importance for the court to exercise its discretion not to order the unsuccessful party to pay the costs. That is not the case here and the judge did not suggest it was. Although the action was brought in administrative law it is effectively little more than a claim in private law and we see no reason to interfere with the usual practice.

The appeal is allowed. The order that the first defendant should carry its own costs is set aside and we order instead that the first defendant's costs shall be paid by the plaintiffs to be taxed if not agreed. They must also pay the costs of this appeal.

Bank of Tonga v Tulikihakau

Court of Appeal, Nuku'alofa
Ward CJ, Burchett and Tompkins JJ
CA 17/98

22 July 1999; 23 July 1999

Contract — duress — payment sought to be returned on grounds of economic duress
Tort — intimidation — plaintiff claimed to have been intimidated into making payment

The respondent was employed by the appellant bank as a bank officer in Vava'u. He was offered employment at a higher salary by the MBf Bank. On 30 June 1994, he wrote a letter of resignation to the appellant "to be effected on 30th July, 1994", but apparently MBf wanted his services as soon as possible. It agreed to "take over his outstanding personal and housing loan of about $15,000 from Bank of Tonga" and to pay 15 days pay to the Bank of Tonga for his release in mid July. The respondent wrote accordingly to his employer on 14 July asking it to confirm to MBf the amount to be paid by it and to "deduct $198 from my Retirement Fund proceeds [for a necessary adjustment] and balance to credit to my S/A … under advise [sic] to myself". He politely sought "prompt action". A reply was sent the next day, informing the respondent "your last day of duty to be today 15 July 1994". However, the Retirement Fund payment was withheld. MBf settled the loan on 15 December. The respondent made numerous requests for the Retirement Fund payment. All were met with requests for him to settle part of his father's debt with the Bank. On 24 January 1995 the Manager Management Services offered to pay him the Retirement Fund payment if he paid $1,100 towards his father's debt. On 10 February 1995 he yielded and agreed to a deduction of $1,000 towards his father's loan. Within six months the respondent consulted a lawyer who demanded payment of the $1,000 by the respondent on the grounds that the respondent only agreed to the deduction under duress. The Bank relied on the consent it had obtained. The Supreme Court found that illegitimate pressure was brought to bear by an implied threat to continue to withhold the respondent's money. The Bank appealed that decision.

Held:

1. It was open to his Honour, having heard the evidence of the respondent and of the Manager Management Services of the Bank, to conclude that illegitimate pressure, within the meaning of the authorities, was brought to bear by an implied threat to continue to withhold the respondent's money.

That threat became express when the letter of 24 January 1995 was written. His Honour's conclusions of fact should not be disturbed.

2. The grounds of appeal did not include any challenge to the quantum of the award. The judge awarded, in addition to the sum of $1000, damages of $4000, which included damages in the nature of interest over a substantial period.

3. The appeal was dismissed with costs.

Cases considered:

Barton v Armstrong [1976] AC 104; [1975] 2 All ER 465 (PC)

Crescendo Management Pty Ltd v Westpac Banking Corporation (1988) 19 NSWLR 40 (NSW:CA)

Dimskal Shipping Co SA v International Transport Workers Federation [1992] 2 AC 152; [1991] 4 All ER 871; [1992] 1 Lloyd's Rep 115

North Ocean Shipping Co Ltd v Hyundai Construction Co Ltd [1979] QB 705; [1978] 3 All ER 1170

Occidental Worldwide Investment Corporation v Skibs AS Avanti [1976] 1 Lloyds Rep 293

Pao On v Lau Yiu Long [1980] AC 614; [1979] 3 All ER 65 (PC)

Rookes v Barnard [1964] AC 1129; [1964] 1 All ER 367

Skeate v Beale (1841) 11 Ad & El 983; 113 ER 688

Universe Tankships Inc of Monrovia v International Transport Workers Federation [1983] 1 AC 366; [1982] 2 All ER 67

Counsel for appellant : Ms Tapueluelu

Counsel for respondent : Mr Piukala

Judgment

This appeal is of a rare kind. It concerns the doctrine of duress and the tort of intimidation. Quite special, and, fortunately, not common, circumstances are required to make out such a case. Various kinds of pressure, even rigorous pressure from competitors and others, must be accepted as part and parcel of a free enterprise society. But, in exceptional situations, where unlawful means are used to apply pressure to force someone to "agree" to some demand, the tort of intimidation may be committed, and any contract concluded as a result may be avoided on the ground of duress. The classical case is a threat of violence, as in the extraordinary duress decision of the Privy Council *Barton v Armstrong* [1976] AC 104; [1975] 2 All ER 465 (PC), where there was a threat to murder. But the modern decisions allow account to be taken also, in some cases, of illegitimate pressure amounting to economic duress.

In Fleming on *The Law of Torts* (7th Ed 1987) at 661, it is stated that "the House of Lords in *Rookes v Barnard* [1964] AC 1129; [1964] 1 All ER 367 … confirmed beyond all doubt as a tort, commonly known as intimidation, to coerce a person by unlawful threats into doing or abstaining from doing something that he would otherwise have every right to do, like firing a particular employee or ceasing to do business with an old customer." More recent authorities have refined the notion of unlawful threats. McHugh JA (as he then was), in a judgment which received the

approval of four of the law lords in *Dimskal Shipping Co SA v International Transport Workers Federation* [1992] 2 AC 152 at 165 and 166; [1991] 4 All ER 871; [1992] 1 Lloyd's Rep 115, said in *Crescendo Management Pty Ltd v Westpac Banking Corporation* (1988) 19 NSWLR 40 (NSW:CA) at 45:

> "The rationale of the doctrine of economic duress is that the law will not give effect to an apparent consent which was induced by pressure exercised upon one party by another party when the law regards that pressure as illegitimate: *Universe Tankships Inc of Monrovia v International Transport Workers Federation* [1983] 1 AC 366 at 384; [1982] 2 All ER 67 per Lord Diplock."

And he added (at 46):

> "The proper approach in my opinion is to ask whether any applied pressure induced the victim to enter into the contract and then ask whether that pressure went beyond what the law is prepared to countenance as legitimate? Pressure will be illegitimate if it consists of unlawful threats or amounts to unconscionable conduct. But the categories are not closed. Even overwhelming pressure, not amounting to unconscionable or unlawful conduct, however, will not necessarily constitute economic duress."

In *Dimskal Shipping Co*, Lord Goff of Chieveley (with the agreement of Lord Keith of Kinkel, Lord Ackner and Lord Lowry said (at 165 and 166):

> "We are here concerned with a case of economic duress. It was at one time thought that, at common law, the only form of duress which would entitle a party to avoid a contract on that ground was duress of the person. The origin for this view lay in the decision of the Court of Exchequer in *Skeate v Beale* (1841) 11 Ad & El 983; 113 ER 688. However, since the decisions of Kerr J in *Occidental Worldwide Investment Corporation v Skibs AS Avanti* [1976] 1 Lloyds Rep 293, of Mocatta J in *North Ocean Shipping Co Ltd v Hyundai Construction Co Ltd* [1979] QB 705; [1978] 3 All ER 1170, and of the Judicial Committee of the Privy Council in *Pao On v Lau Yiu Long* [1980] AC 614; [1979] 3 All ER 65, that limitation has been discarded; and it is now accepted that economic pressure may be sufficient to amount to duress for this purpose, provided at least that the economic pressure may be characterised as illegitimate and has constituted a significant cause inducing the plaintiff to enter into the relevant contract (see *Barton v Armstrong* [1976] AC 104 at 121, per Lord Wilberforce and Lord Simon of Glaisdale (referred to with approval in *Pao On v Lau Yiu Long* [1980] AC 614 at 635, per Lord Scarman) and *Crescendo Management Pty Ltd v Westpac Banking Corporation* (1988) 19 NSWLR 40 (NSW:CA) at 46, per McHugh JA). It is sometimes suggested that the plaintiff's will must have been coerced so as to vitiate his consent. This approach has been the subject of criticism: see Beatson, *The Use and Abuse of Unjust*

> *Enrichment* (1991) pp 113-117; and the notes by Professor Atiyah in (1982) 98 LQR 197-202, and by Professor Birks in [19901 3 LMCLQ 342-351. I myself, like McHugh JA, doubt whether it is helpful in this context to speak of the plaintiff's will having been coerced."

However, precisely, the effect of the pressure should be stated, it is clear that it must have been, as Lord Goff put it, "a significant cause inducing the plaintiff". In *Barton v Armstrong*, the Privy Council held that, once a serious threat was shown, the onus lay on the defendant to prove it had no effect, and the Court need only conclude it was a reason, not necessarily the only reason, for the plaintiff's action.

We turn to the facts of the present case. The respondent was employed by the appellant bank as a bank officer in Vava'u. He was offered employment at a higher salary by a bank referred to as MBf. On 30 June 1994, he wrote to the appellant a letter of resignation "to be effected on 30th July, 1994". But apparently MBf wanted his services as soon as possible. It agreed to "take over his outstanding personal and housing loan of about T$15,000.00 from Bank of Tonga" and to pay 15 days pay to the Bank of Tonga for his release in mid July. The respondent wrote accordingly to his employer on 14 July asking it to confirm to MBf the amount to be paid by it and to "deduct T$198.00 from my Retirement Fund proceeds [for a necessary adjustment] and balance to credit to my S/A … under advise [sic] to myself". He politely sought "prompt action". A reply was sent the next day, informing the respondent "your last day of duty to be today 15 July 1994".

However, the Retirement Fund payment was withheld. MBf also delayed in taking over the loan. On 9 September, the appellant's Manager Management Services wrote to the respondent about MBf's delay. She suggested the respondent should lodge your Retirement Fund to your loans", the bank to "reimburse your total Retirement Fund" upon the loan being taken over. The respondent did not agree. He wrote on 14 September that MBf would complete the loan "soon". He added:

> "I would appreciate if you only deduct the arrears of $368 due to you from my Retirement Funds and I shall continue to pay the instalment until full redemption on the outstanding is receive[d] from MBf Bank Limited and henceforth remit the balance of my Retirement Fund to me."

The appellant replied the same day that this was "acceptable", but did nothing about paying the Retirement Fund moneys.

On 7 October, the respondent wrote to the appellant's General Manager seeking payment of the Retirement Fund moneys. He wrote "I really need it for my family needs" and to pay for labour for pollination of a family vanilla plantation. The trial judge accepted the reality of this need, which the Bank did not deny. But the General Manager's response, sent on 11 October, was: "If your loans with us are not refinanced within one month I will apply all of your Retirement Fund in reduction of the Personal Loan".

The General Manager's threat was not carried out, but on 15 December the loans were paid off by MBf, with a minor unexplained shortfall of T$274.23. But, while this was being arranged, the Manager Management Services wrote on 13 December to the General Manager of the appellant seeking approval to lodge the

Retirement Fund moneys to the respondent's loan account, a course to which she quite wrongly (on the trial judge's findings, confirmed by the correspondence) suggested he had agreed. She added:

> "On receipt of the settlement of his total debt from the MBf, we can negotiate with [the respondent] on the amount to be further lodged to his father's debts."

Beneath this proposal, the General Manager wrote, on the same day, "Declined".

The General Manager's rejection of the proposal was, of course, proper. The Bank had no right to continue to withhold the respondent's money in order to "negotiate … on the amount to be further lodged" to pay a debt that was not his. The memorandum's language shows clearly an intention that a sum will be extracted - it is the amount of it which is to be negotiated. The respondent's position was such that this confidence was justified. He needed some money, as he had made clear two months before. On the very day of settlement of the loans, 15 December, he wrote asking payment "to credit to my Saving Account", and followed this letter up the same day by telephone.

Despite the rejection of her proposal to the General Manager, the Manager Management Services wrote an extraordinary letter to the respondent on 16 December, as follows:

> "I'm pleased to advice all your debts have been cleared.
>
> Further to our phone conversation today which you requested the balance of your Retirement Fund to be made available to reduce the arrears in your fathers vehicle account. I was expecting say half of the $2,106.83 towards the vehicle loan. You were reluctant to my request. Langoia as you are aware of your family's obligation over $121,000. All these loans you were the major player in disbursing of funds and your family were relying on you for advice even at the state where your family in New Zealand misused funds received from sales of the proceeds.
>
> To ask for such an amount to assist your own family debts - to me is reasonable especially you know the whole situation.
>
> To be fair to both parties I have spend a lot of time trying to negotiate your loan (even that is part of my duty) but I was counting on you for a fair deal.
>
> In the meantime I will wait and hope for a special favour and consideration on your part.
>
> I await you response."

The first sentence of the second paragraph is just wrong, and the trial judge, who heard and saw both persons, described it as "a mistake". The judge found the respondent "never wanted to agree to deductions to pay his father's debt", but he was under pressure "because he needed money". The pressure was clearly illegitimate in some sense, since the respondent had been entitled to the money since the previous

July. At the time the letter of 16 December was written, there was not the flimsiest excuse not to pay him.

On 30 December, the respondent replied agreeing "to deduct the amount of T$600.00 from my retirement fund and credit to my father's loan account … Kindly forward the remaining balance by Bank Cheque to myself ...

I hope that this letter may satisfy your requirements."

(The last word is significant as to how the respondent understood the position.)

There was, however, only further delay, followed by a letter dated 24 January 1995 from the Manager Management Services to the respondent:

> "Thank you for your respond to my letter about your Retirement Fund. You offered $600 towards your father's debt. I would like to bring to your attention that if we were to continue deducting your normal repayments towards your loan we would have deduct $445 to your personal and $415 towards your housing loan, a total of $860. If this amount is added to the $600 you offered it would make a total of $1,460.
>
> We intend to take the so called arrears mentioned above even [though] it is now all cleared plus the $600. Langoia I would not mind reducing the amount with $1,100.00. Please confirm."

It will be seen that this letter states an intention to deduct moneys which were certainly not due to the Bank, and then invites a counter-offer. In argument, counsel for the appellant relied on the obvious unlawfulness of the action the Bank said it would take as a reason to conclude the respondent was not compelled to agree. But the respondent had now been kept out of money he needed for 7 months, and to sue the Bank was not an inviting course. He was clearly under pressure. In those circumstances, he yielded on 10 February 1995, agreeing to a deduction of $1,000 towards repayment of his father's loan.

Within six months, the respondent consulted a lawyer who demanded payment of the $1,000 by the respondent. The Bank relied on the consent it had obtained.

The Bank attempted to defend its early failure, in late July 1994, to pay out the respondent's moneys by reference to a clause in the loan agreement:

> "3. That the bank will transfer credit fund in accounts of debtor to set off debt (towards clearance of debt) if loan is in arrears or repayment in default".

But the loan was not in arrears when the request for payment of the retirement entitlement was made in July. More importantly, that entitlement was not in an account of the debtor; it was a separate entitlement of his as an employee.

Once the settlement of the loan occurred on 15 December, there was, of course, no colour of right for the continued retention of the respondent's money for almost a further three months.

It has been repeatedly said that, where a judge has accepted or rejected oral evidence, and particularly if his estimate of the person is relevant to the conclusion, an appellate court cannot in general interfere. In this case, the trial judge accepted the respondent, and his measure of the man must have been relevant to the finding of duress. In our opinion, it was also open to his Honour, having heard the evidence of

the respondent and of the Manager Management Services of the Bank, to conclude that illegitimate pressure, within the meaning of the authorities, was brought to bear by an implied threat to continue to withhold the respondent's money. Of course, that threat became express, at least when the letter of 24 January 1995 was written. His Honour's conclusions of fact should not be disturbed.

The grounds of appeal do not include any challenge to the quantum of the award. The judge awarded, in addition to the sum of T$1000, damages of T$4000, which, of course, included damages in the nature of interest over a substantial period.

As there has been no appeal and no argument directed to the issue of quantum, it should be understood that the decision cannot be regarded as an authority on the measure of damages appropriate to such a case. Very often, restitution of the sum extorted by duress, together with interest expressed as a rate over a period, will be the appropriate order.

An argument was raised that the respondent had affirmed the deduction by his delay in bringing a claim. The delay was not long, and a claim against a bank is a serious matter. We think the true bearing of delay is on the finding that duress was a cause of the respondent's consent. So viewed, the argument must fail since the judge who heard the evidence believed the respondent was caused to consent against his will.

Having regard to the findings of fact in this very unusual case, the appeal must be dismissed with costs.

R v Fiu

Court of Appeal, Nuku'alofa
Burchett, Tompkins, Beaumont JJ
CA 24/99

22 July 1999; 23 July 1999

Customs and excise — defrauding the revenue — appeal against sentence
Statutory interpretation — judicial discretion removed where "shall" used — mandatory fine
Practice and procedure — power to order stay of criminal process — power could be invoked after conviction

Each of the respondents was charged with three offences: removing uncustomed goods with intent to defraud the revenue [count 1]; knowingly being concerned in their fraudulent removal [count 2]; and theft [count 3]. Counts 1 and 2 were both contrary to section 210 of the Customs and Excise Act CAP 67 and count 3 was contrary to s 143 of the Criminal Offences Act CAP 18. The Chief Justice convicted each accused on each charge. However, the Chief Justice decided not to impose a penalty of three times the value of the goods on counts 1 and 2 in each case. (The value of the goods was $7,000). Instead he imposed a reduced penalty to prevent the injustice of passing a penalty that was beyond the ability of the accused to pay. The Crown sought leave to appeal from the sentencing decision and applied to the Court of Appeal to re-sentence the respondents.

Held:

1. The use of the word "shall" in legislative provisions made it clear, beyond argument, that the legislature intended that this aspect of the sentencing process was not to be subject to the traditional judicial sentencing discretion. Therefore, the penalty provisions of section 210(1) are mandatory.
2. The provisions of s 210(1) should be interpreted as mandatory once they were operative; they were not self-executing. The court's inherent power to stay its criminal process where that process could be used oppressively or unfairly, remained available. The stay power could, if appropriate, be invoked after conviction as well as before proceeding to conviction.
3. The stay power should have been exercised by allowing the statutory penalty to be incurred by each respondent in respect of one customs offence only. No other or further sentence was appropriate for those offences.

4. The following orders were made: leave to appeal was granted; appeals were allowed in part; the sentencing orders made by the Supreme Court in respect of each respondent on the customs offences were quashed. In lieu thereof each respondent on the customs offences was sentenced on count 1 to a penalty of $21,000 and all convictions on count 2 were stayed.

Cases considered:

Hunter v Chief Constable of the West Midlands Police [1982] AC 529; [1981] 3 All ER 727

Vakameitangake v R [1998] Tonga LR 141 (CA)

Statutes considered:

Criminal Offences Act CAP 18

Customs and Excise Act CAP 67

Customs and Excise Act 1996 (NZ)

Counsel for appellant : Mr Bloomfield

Counsel for respondents : Ms Tonga

Judgment

Introduction

These are applications by the Crown for leave to appeal in criminal matters. They raise questions as to the meaning and operation of the penalty provisions of s 210(1) of the Customs and Excise Act (CAP 67).

Relevantly for present purposes, s 210(1) provides:

> "210(1) Every person who …
>
> (d) Knowingly acquires possession of or is in any way knowingly concerned in carrying, removing, depositing, concealing, or in any manner dealing with intent to defraud the revenue of any duties thereon, or to evade any prohibition or restriction of or applicable to such goods; or
>
> (e) is in any way knowingly concerned in any fraudulent evasion or attempt at evasion of any import … duties of customs, or of the laws, and restrictions, of the customs relating to the importation, warehousing, delivery, removal, loading … of goods
>
> shall be guilty of an offence and for each such offence incur a penalty of treble the value of the goods or $200 whichever is the greater ; …" [Emphasis added].

Each of the respondents was charged with, and tried in the Supreme Court on, 3 offences: removing uncustomed goods with intent to defraud the revenue, contrary to s 210(1)(d) [count 1]; knowingly being concerned in their fraudulent removal contrary to s 210(1)(e) [count 2]; and theft, contrary to s 143 of the Criminal Offences

Act (CAP 18) [count 3]. The Chief Justice convicted each accused on each charge. The Chief Justice passed sentence on the accused as follows:

- On the respondent Vakalahi -
  - — on counts 1 and 2: $1,000.00 fine or 4 months imprisonment in default of payment, on each count.
  - — on count 3: 1 year imprisonment, suspended for one year.
- On each of the respondents Polelei and Fiu -
  - — on counts 1 and 2 : $750 fine or 3 months imprisonment in default of payment on each count.
  - — on count 3: 1 year imprisonment, suspended for 1 year.

Each accused was granted one month to pay.

However, for the reasons we summarise below, the learned Chief Justice decided not to impose a penalty of 3 times the value of the goods on counts 1 and 2 in each case. (The value of the goods was $7,000.00). The Crown now seeks leave to appeal from the sentencing decision and applies to the Court of Appeal to re-sentence the respondents.

The Reasoning at First Instance

The Chief Justice acknowledged that the decision of the Court of Appeal in *Vakameitangake v R* [1998] Tonga LR 141 (CA) was on all fours with the present case, and that this supported the Crown's contention that the penalty provisions of s 210(1) were mandatory, leaving the Court with no discretion to determine the scale of the penalty.

The Chief Justice said:

> "If the provision in section 210 is indeed mandatory, each of the accused will be faced with a penalty on each of the first two offences of $21,000.00. I do not believe there is any real prospect the accused, married men with families who earn gross salaries of between $7,000.00 and $9,000.00 pa, will ever pay a total fine of $42,000.00. The maximum time the court can allow for the payment is three months.
>
> I have always considered it a fundamental principle of sentencing that a court should not impose a fine when it is clearly outside the means of the person ordered to pay.
>
> Counsel for the Crown agrees these fines will never be paid as has apparently occurred in similar cases previously. He does not consider there is any scope for an alternative default term of imprisonment and he, reasonably, suggests the public authorities are unlikely to execute distress in such a case. What is the point in the court imposing a penalty for a serious offence that everyone agrees will be ignored as the people involved walk through the

> door of the court? It seems to me that not only is the imposition of such a penalty an injustice but the attitude that will inevitably be shown to the court order is almost contemptuous."

After giving other examples of possible injustices, his Honour said:

> "The Court of Appeal in Vakameitangake's case has suggested that, where as here, two offences are charged under different paragraphs of the section arising out of the same facts, the court may, on the authority of *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529; [1981] 3 All ER 727, use its inherent power to order a stay if it would be an abuse of process to enter a conviction.
>
> In Vakameitangake's case, the court was entering convictions after a plea of guilty. In this case, there was trial and conviction followed proof of each count. Once that is done, I am far from satisfied the court has any power to set aside a conviction once entered. If, on the other hand, it is to do so before conviction it will be deciding the question before it knows anything of the antecedents of the accused. With that knowledge it may well have formed a different view of the wisdom of failing to convict of offences under parallel paragraphs.
>
> If, as the Court of Appeal found, the court may mitigate the mandatory penalty by invoking such inherent power in relation to the number of charges on which it will record a conviction, I am unclear why it may not use the same power to reduce the penalty to prevent the injustice of passing a penalty that is totally beyond the ability of the accused to pay and which everyone accepts will be ignored by accused and government alike."

Conclusions on the Applications for Leave to Appeal

We have concluded that leave to appeal should be granted and the appeals allowed in part.

Two questions arise. The first concerns the proper construction of the penalty provisions of s 210(1). The second is the relevance here of the stay power explained in *Hunter*. Both raise important legal questions in the administration of criminal justice. We will deal with them separately.

(a) Are the penalty provisions of s 210(1) mandatory?

In our opinion, the use of the word "shall" in these provisions makes it clear, beyond argument, that the legislature intended that this aspect of the sentencing process was not to be subject to the traditional judicial sentencing discretion. In others, this part of the sentence should, we think, be treated as mandatory, as the Court of Appeal has twice previously held. The intention to remove the Judge's discretion here may be contrasted with the retention of the traditional discretion in, for instance, s 220 and s 247 of this Act ["the penalty adjudged to be paid"] and in comparable New Zealand legislation, which we annex to these reasons. Those

charged with law reform might wish to consider this as more appropriate than the present provisions of s 210(1). We agree with the observations of the Chief Justice as to the unsatisfactory rigidity of the present statutory scheme.

For completeness, we should add that we see no basis, as a matter of statutory construction, for reading into s 210(1) an implication that would have the effect of restoring the usual judicial discretion.

(b) Are the penalty provisions of s 210 (1) self-executing, or is there scope for the application of the stay power explained in *Hunter*?

Whilst, in our view, these provisions should be interpreted as mandatory once they are operative, we do not interpret them as self-executing. In other words, as we held in *Vakameitangake*, the court's inherent power to stay its criminal process where that process could be used oppressively or unfairly, remains available. We think that it was open to the sentencing Judge to utilise that power here, in order to avoid the "manifestly unfair result" we described in *Vakameitangake* (at 147 and 148) where two or more offences relate to the same transaction, and at least to mitigate the harshness of the operation of s 210(1) in such a case. That is the position here. We see no reason, of logic or principle, why the stay power could not if appropriate, be invoked after conviction as well as before proceeding to conviction.

In these circumstances, we are of the view that the stay power should be exercised here by allowing the statutory penalty to be incurred by each respondent in respect of one customs offence only. No other or further sentence is appropriate for those offences.

Orders

We make the following orders:

1. Leave to appeal granted.
2. Appeals allowed in part.
3. Quash the sentencing orders made by the Supreme Court in respect of each respondent on the customs offences. In lieu thereof, sentence each respondent on the customs offences as follows:
   - On count 1, order that a penalty be incurred of $21,000.00.
   - On count 2, all proceedings on these convictions to be stayed.

New Zealand legislation — Customs and Excise Act 1996

Section 211. DEFRAUDING THE REVENUE OF CUSTOMS

(1) Every person commits an offence who does any act or omits to do any act for the purpose of

(a) Evading, or enabling any other person to evade, payment of duty or full duty on goods:

(b) Obtaining, or enabling any other person to obtain, money by way of drawback or a refund of duty on goods to

which that person or that other person is not entitled under this Act:

(c) Conspiring with any other person (whether that other person is in New Zealand or not) to defraud the revenue of the Customs in relation to goods:

(d) Defrauding in any other manner the revenue of the Customs in relation to goods.

(2) Every person who commits an offence against this section is liable on conviction,

(a) In the case of an individual, to imprisonment for a term not exceeding 6 months or to a fine not exceeding $10,000; or

(b) In the case of a body corporate, to a fine not exceeding $50,000; or

(c) In either case, to a fine of an amount not exceeding 3 times the value of the goods to which the offence relates.

R v Veamatahau

Supreme Court, Nuku'alofa
Ward CJ
Cr 619/99

30 July 1999

Magistrates —jurisdiction for trying indictable offence — sentencing
Criminal procedure — jurisdiction of Magistrate in indictable offence — sentencing

The accused was charged with two offences arising out of the same attack on his wife. The charge under section 112 was of a summary offence whilst that under section 107 was indictable because the sentence for the offence was 5 years. The magistrate sent the case to the Supreme Court for sentence under section 35(3) of the Magistrates' Courts Act CAP 11.

Held:

1. Offences that arose from the same incident must be tried by the same court. If one was indictable and was committed to the Supreme Court, the other case cannot be dealt with by the magistrate and should be remitted to the higher court to be dealt with at the same time.
2. Section 35 of the Magistrate's Courts Act CAP 11 provided the only power for a magistrate to try an indictable offence summarily and the requirements of the section must be complied with before the magistrate may exercise it. It was necessary for the magistrate to ascertain the general nature and scale of the evidence the prosecution was seeking to present. Only on hearing that, could the decision be made and, as with all judicial decisions, it should be recorded with the reasons why the magistrate reached that decision. The magistrate failed to consider the nature or circumstances of the case and equally failed to record any reasons for the decision.
3. The case was not properly committed for sentence. In view of the remarks of the magistrate the case could not be sent back to the magistrate for sentence. The Court passed sentence but was limited to the powers of a magistrate.

Cases considered:

Cocker v Police (unreported, Cr App 1252/98, Finnigan J)
Hu'ahulu and another v Police [1994] Tonga LR 93
Practice Direction No 1/91 [1991] Tonga LR 16

R v Hartlepool Justices ex p King [1973] CrimLR 637
R v King's Lynn Justices, ex p Carter [1969] 1 QB 488; [1968] 3 All ER 858
R v Kula (unreported, Cr 940/95, Hampton J, 15 January 1996)
R v Palanite (unreported, 126/93)

Statutes considered:
Criminal Offences Act CAP 18
Magistrates' Courts Act CAP 11

Counsel for prosecution : Miss Tupou
Accused in person

Judgment

The accused in this case appeared before the magistrates' court charged with one offence of causing harm, contrary to section 107 of the Criminal Offences Act, and one offence of common assault, contrary to section 112 of the same Act. The magistrate has sent the case to this court for sentence under section 35(3) of the Magistrates' Courts Act.

There are many aspects of this case that cause me concern but they are not unique to this particular case. Cases are coming before the Supreme Court far too frequently in which the magistrate has not only failed to follow the procedure set out in the Magistrates' Courts Act but has shown only too clearly that little or no notice is being taken of earlier judgments of this Court.

The position of magistrate is entirely statutory. Although like any judicial officer, he has considerable discretion in the exercise of his judicial role, his powers are created by and limited by statute. The exercise of his functions is subject to appeal to this Court and he must accept the decisions of this Court as binding upon him. His duty to the State and the public is to ensure that he keeps abreast of developments in the law including the rulings of the Supreme Court and Court of Appeal. This is yet another case where the magistrate has apparently not borne those factors in mind.

In the present case, the accused was charged with two offences arising out of the same attack on his wife. The charge under section 112 was of a summary offence whilst that under section 107 was indictable because the sentence for the offence was 5 years. In such a case, the lesser offence should go with the more serious and so the magistrate needed to hold a preliminary inquiry.

There appears to be some uncertainty as to the correct course for the magistrate when, as here, the accused faces indictable and summary offences arising out of the same incident. The confusion stems from the remarks by Hampton CJ in the case of *R v Kula* (unreported, Cr 940/95, Hampton J, 15 January 1996), questioning the power of the Supreme Court to hear purely summary offences. The point had not been argued and his comments were purely obiter. The proper procedure is still that stated by Martin CJ in *Practice Direction No 1/91* [1991] Tonga LR 16 and referred to by Dalgety J in *R v Palanite* (unreported, 126/93). Offences arising from the same incident must be tried by the same court. If one is indictable and is committed to the Supreme Court, the other case cannot be dealt with by the magistrate and should be remitted to the higher court to be dealt with at the same time.

The record in the present case shows that the magistrate pointed out to the prosecutor that one offence was summary and the other indictable. The record continues:

> "Prosecutor — Your worship, I hereby request for these two cases to be both heard under your jurisdiction.
> Court — Accused, what do you say?
> Accused — That is correct your Worship. I agree to that."

The magistrate then checked that the accused understood the charges and the pleas were taken. The accused pleaded guilty to both charges and the case continued as a summary trial.

I pause there. Section 35(1) of the Magistrates' Courts Act appears in Part III, which deals with preliminary inquiries. It provides:

> "If at any time during the preliminary inquiry into the offence it appears to the Magistrate, having regard to any representations made in the presence of the accused by the prosecutor or made by the accused, and to the nature and circumstances of the case, that the punishment that the magistrate has power to inflict … would be adequate, the Magistrate may … proceed to deal with the case summarily …".

That section provides the only power for a magistrate to try an indictable offence summarily and the requirements of the section must be complied with before the magistrate may exercise it. This has been pointed out by this Court many times. As recently as October 1998 in the case of *Cocker v Police* (unreported, Cr App 1252/98), Finnigan J, in a careful and exhaustive account of the effect of section 35, disagreed with the submission of the prosecution that the magistrate was properly acting under that section. He stated:

> "… I have been unable to agree for the following reasons. First, the magistrate was not acting "during a preliminary inquiry into the offence", as he was required to be for exercise of that jurisdiction. Second, the magistrate did not act for the reasons that are set out in section 35(1) as necessary conditions precedent to the exercise of the jurisdiction. Third, the magistrate did not give the accused the option that he was bound by section 35(2) to offer him, nor seek his consent, nor explain to him what is meant by being tried summarily."

I am willing to accept that the magistrate in the present case was acting during a preliminary inquiry. There is nothing wrong with the prosecutor asking the magistrate to consider summary trial at the very outset of a preliminary inquiry. Indeed, if he has already decided the case is suitable for summary trial, it is sensible to make that representation as soon as possible. However it is not sufficient for the magistrate simply to check that the accused consented and then proceed with summary trial as happened here. The grounds upon which a magistrate may decide whether to proceed summarily are clearly stated in the section. The decision is only to be made when the magistrate has had regard to any representations made by the prosecutor or accused

and to the nature and circumstances of the case. Having heard those, the only question for the magistrate is whether, in view of what he has heard, he considers the punishment he has power to inflict will be adequate.

As I pointed out in *Hu'ahulu and another v Police* [1994] Tonga LR 93, in order to assess that nature and circumstances of the case, it is necessary for the magistrate to ascertain the general nature and scale of the evidence the prosecution will be seeking to present. Only on hearing that, can the decision be made and, as with all judicial decisions, it should be recorded with the reasons why the magistrate reached that decision. In this case the magistrate failed to consider the nature or circumstances of the case and equally failed to record any reasons for the decision.

The consent of the accused is required, as was pointed out by Finnigan J in *Cocker*'s case, but it only becomes relevant when and if the magistrate has decided the case is one in which his powers of sentence would be adequate.

The reason why this is an important decision is that it will bind the magistrate's power of sentencing. By section 35(3), the magistrate has the power to commit the accused to the Supreme Court for sentence but only in limited circumstances. In *Hu'ahulu*'s case, I explained:

> "Section 35(3) provides that, where the accused is convicted on summary trial, the magistrate may only send him to the Supreme Court for sentence "if, on obtaining information about his character and antecedents the magistrate is of opinion that they are such that greater punishment should be inflicted for the offence than the magistrate has power to inflict." If, having allowed summary trial and heard the case, the magistrate considers it is more serious than he originally thought, he is not empowered to send it up for sentence on that basis. The words underlined in the passage above mean that he can only commit for sentence if he receives information, unknown to him when he agreed to summary trial, relating to previous convictions or other matters concerning the accused's character: *R v King's Lynn Justices, ex p Carter* [1969] 1 QB 488; [1968] 3 All ER 858, *R v Hartlepool Justices ex p King* [1973] CrimLR 637. It is only in the rarest cases that a man with no previous convictions can be sent for sentence to the Supreme Court after summary trial."

Clearly, as the magistrate should only consent to try a case summarily after a consideration of the nature and circumstances of the case, the seriousness of the case will be within his knowledge. Thus, that cannot be a ground for committing it to the Supreme Court for sentence, as was the case here. What he cannot be told at this stage, of course, is whether the accused has any previous convictions so the decision has to be made without knowledge of those.

In the present case, the accused had no previous convictions and there was nothing in his character and antecedents that gave the magistrate the right to send the case up for sentence.

During the prosecutor's statement of facts after the plea had been taken, he referred to the fact that the assault by the accused caused his wife harm. The magistrate then asked how big was the cut and the prosecutor said he had no medical report but the cut was a "small thing". The magistrate pressed him for more

information on the size and was told it was approximately half an inch at which the magistrate commented that a cut of half an inch on either the head or forehead is not a small cut.

I mention this for two reasons. The first is that, as this was effectively the only evidence of the scale of the injuries, it was presumably the basis for the decision that the magistrate's powers of sentence were insufficient. I consider that was scant evidence upon which to decide that a sentence of 2 years imprisonment would not be adequate. Second, when the case appeared before me, counsel for the prosecution told the court that there was, in fact, no evidence that there had ever been a cut. There can be no blame on the magistrate for that; it lies entirely on the prosecutor. No prosecutor should make any statement as to the facts of the case, which he is not able to prove by evidence he has at that time.

Finally, the magistrate concluded with the following words:

> "In addition, the magistrate does not agree when the prosecutor always reduces the wife's right in common assault and bodily harm cases. With respect to these proceedings, it was the prosecutor who suggested they be heard in the magistrates' court even though there is a bodily harm charge."

I am uncertain what exactly is meant by the reference to the prosecutor always reducing the wife's right. Even if it is correct, the fact other cases were wrongly tried summarily can never be a reason to send this particular case to the Supreme Court. The danger of such a remark is that it could be seen as suggesting the magistrate is taking a subjective view based not on the facts of the case but on a personal opinion of cases of a particular type.

More important is the suggestion by the magistrate that the decision is that of the prosecutor. The prosecutor's role is to suggest summary trial where he considers it appropriate. It is limited to making representations to that effect. The decision is that of the magistrate alone. Unless the magistrate agrees, no indictable offence can be tried summarily and, as the decision to try the offence summarily can have such a limiting effect on the maximum sentence available, it is the magistrate's duty to ensure any request for summary trial is made on good grounds.

For reasons I have given, I do not consider this case was properly committed for sentence. However, in view of the remarks of the magistrate in the hearing, I do not consider I can properly send the case back for sentence by the trial Magistrate. I have, therefore, passed sentence but limited myself to the powers of a magistrate.

Taufa v Veamatahau

Land Court, Nuku'alofa
Finnigan J
L 924/97

3, 4 August 1999; 17 August 1999

Land law — competing claims on an allotment — registered lease defeated unregistered claim
Land law — pre-conditions to registration — surrender and payment of fee

The first plaintiff had lived with his family on a town allotment in Haveluloto since 1973. He contended that he paid the first defendant, who was registered holder of the allotment, $500 in 1971 and other sums besides, pursuant to an agreement for transfer of the allotment to him. He did not apply to register himself as legal holder of the allotment, but in 1996 his son did. That application was prevented by the registration of a 20-year lease of the allotment to the first defendant's son-in-law (the second defendant). The Ministry of Lands rejected the application for the stated reason that it did not have the signature of the legal holder, the first defendant which was a necessary pre-condition to the surrender of the land by the legal landholder provided for in s 54 of the Land Act CAP 132. The first defendant wrote a surrender of the allotment in favour of the first plaintiff dated 14 October 1970. He received a written reply from the then Minister, dated 29 October 1970. The surrender was not sufficient to be taken as the necessary pre-condition for the next step in registering the first plaintiff as the new legal owner of the land. The Minister rejected it. The first defendant did not tell the first plaintiff about this and the first plaintiff never became aware of it. The Minister approved the next surrender by the first defendant, which was for the purpose of the application to lease to his son-in-law. Cabinet approved the latter surrender on 6 August 1996. There was no evidence that the first surrender was ever put to Cabinet for approval. The plaintiffs asked the Court for orders to cancel the lease to the second defendant and to direct that the allotment be registered in the name of either the first plaintiff or the second plaintiff. They also sought damages in the sum of $100,000 and costs.

Held:

1. There were six case law principles as a guide: (i) where claim was made to an allotment each case must be decided on its own facts; (ii) good title was shown not by one fact alone, even by registration alone, and, to the contrary, it was not necessary to prove registration; (iii) the priority of applications was no more than a factor to be taken into account in deciding between competing claims, and weighed with all the other relevant factors;

(iv) the fact that an estate-holder has unfairly approved two applications for the same allotment was not sufficient to upset the completed registration of one of them; (v) to upset a registration a plaintiff must show that in making the grant the Minister acted on wrong principles; (vi) more particularly, the Court will upset a grant only if the person challenging its validity established that the Minister acted contrary to statute, or in breach of the rules of natural justice, or in breach of a clear promise by the Minister and the estateholder.

2. There was no evidence at all to show that in issuing that the deed of lease the Minister acted contrary to statute, or in breach of the rules of natural justice, or in breach of a clear promise by the Minister and the estate-holder. There was no reason shown to disturb this action by the Minister, and while the lease remained it prevented any further registration in respect of the allotment until 2017.
3. Whenever a purported surrender was made after 1970 it could not be effective without the consent of Cabinet. The registered landholder, the first defendant, did not give a proper surrender of the allotment to the first plaintiff. Also, there was no record of any fee paid by either plaintiff as required by s 43.
4. The second defendant had a valid 20-year lease and the plaintiffs had no right to registration. The Court upheld the prayer of the defendants that the plaintiffs' claim to registration be dismissed. The plaintiffs were ordered to pay the defendants' costs.

Cases considered:

Afu v Falakiko Lebas II [1923-1962] TLR 167
'Fifita Manakotau v Vaha'i (Noble) (1959) 2 TLR 121
Hausia v Vaka'uta & Minister of Lands [1974-1980] TLR 58
Havea v Tu'i'afitu [1974-1980] Tonga LR 55
Motuliki v Pohahau L670/97, (unreported, 12 May 1999)
OG Sanft & Sons v Tonga Tourist Development Co Ltd [1981–1988] Tonga LR 26
Ongosia v Tu'inukuafe & Minister of Lands [1981-1988] TLR 113
Vaea v Minister of Lands & Fetu'ufuka [1974-1980] TLR 13

Statutes considered:

Land Act CAP 132

Counsel for plaintiffs : Mr Paasi
Counsel for defendants : Mr 'Etika

Judgment

The Facts

The first plaintiff lives sometimes in Hawaii for medical treatment, but in the broad view has lived with his family on a town allotment in Haveluloto since 1973. He says that he paid the first defendant, who is registered holder of the allotment,

$500 in 1971 and other sums besides, pursuant to an agreement for transfer of the allotment to him. He did not apply to register himself as legal holder of the allotment, but in 1996 his son did. That application was prevented by the recent registration of a 20-year lease of the allotment to the first defendant's son-in-law (the second defendant).

Since before the time of his occupation, i.e. since 1971, the first plaintiff has built and maintained two houses on the allotment, at notable expense. His son, the second plaintiff, actually lodged the application in 1996, on 8 May 1996, and sought registration for himself. The application was endorsed by the estate-holder, Hon Fielakepa, on 8 July 1996 after a survey had been done. No further steps were taken about that application by either the plaintiffs or the Ministry of Land, the application just lay in the file.

At that time the other application in respect of the same allotment had already been filed. This was by the son-in-law of the registered holder, who is second defendant. The Deed of Lease to the second defendant was put before the Court. It shows that Cabinet approved this application on 6 August 1996. One may assume that it was already well advanced when the application of the second plaintiff was endorsed by the estate-holder. The lease became effective on 23 April 1997, for 20 years.

Although the Registrar of Land gave evidence and produced the Deed of Lease, he did not produce any of the prior documents. The Court can make only one assumption, that the application complied with the Land Act, and can do nothing other than accept the Deed of Lease as the evidence of who is the current legal holder of the allotment.

Until the Deed of Lease was issued, the record shows that the legal holder of the allotment had been the first defendant. The first plaintiff had done nothing about registration until 1996, even though he had been living on the allotment since 1973. In evidence he said that this was because he had been busy educating his children and sending them overseas, and he had had some illnesses. He said he had applied at the first opportunity. He told the Court that although he was not himself registered his youngest son had made the application because he had provided for his eldest son an allotment in Hawaii.

The application was produced by the Registrar of Land. There is no record on it that a survey fee had been paid, and the plaintiffs did not produce a receipt. The first plaintiff told the Court that he gave $60 for the survey fee to the first defendant, it seems in 1973. The first defendant had been Assistant Chief Draughtsman in the Ministry of Land in 1970, and left the Ministry in 1982.

The Ministry of Land rejected the application, the first plaintiff said, for the stated reason that it did not have the signature of the legal holder, the first defendant. This refers to the absence of a surrender of the land by the legal holder, a necessary pre-condition, which is provided for in s 54 of the Land Act. There was a conflict in the evidence about whether the first defendant had filed a written surrender.

It is entirely clear from the evidence that the first defendant wrote a surrender of the allotment in favour of the first plaintiff dated 14 October 1970. This had received a written reply from the then Minister, dated 29 October 1970. A major conflict between these two parties in their evidence was over the terms of the surrender, and the letter itself was not produced in evidence. The Court was told that it had not been found. However the Minister's reply, which was, is clear. He told the first defendant

that a road was intended through the school grounds of Tailulu to the first defendant's allotment and concluded (in translation)

> "… it is difficult, but please consider another possibility because it seems unreasonable for a road to go through school grounds [to a town allotment]."

It is clear, and it is the Court's finding, that the surrender was not sufficient to be taken as the necessary pre-condition for the next step in registering the first plaintiff as the new legal owner of the land. The then Minister had rejected it. Unfortunately the first defendant did not tell the first plaintiff about this and it seems the first plaintiff never became aware of it. Neither was the Court told whether the road had been constructed, but it seems the Minister approved the next surrender by the first defendant, which was for the purpose of the application to lease to his son-in-law. Cabinet approved the latter surrender on 6 August 1996. There is no evidence that the first surrender was ever put to Cabinet for approval.

The Claim

The plaintiffs ask the Court for orders cancelling the lease to the second defendant and directing that the allotment be registered in the name of either the first plaintiff or the second plaintiff. They also seek damages in the sum of T$100,000 and costs.

The Law

Counsel for both parties made admirably clear and concise submissions. However, neither referred the Court to any particular provisions of the Land Act, nor did they refer the Court to any decided authorities upon which either party relies. Mr 'Etika, on behalf of the defendants, submitted that there is no place for equity in the present application. He submitted that the Land Act is a complete code. He relied on a decision of the Privy Council, *OG Sanft & Sons v Tonga Tourist Development Co Ltd* Appeal No 2/1981, as authority for that proposition. That judgment has been reported in [1981 – 1988] Tonga LR 26.

From the Land Act I note that s 7 is the general entitlement to a grant, and s 43 prescribes three rules, including the rule that an applicant must pay the prescribed fees. The other statutory provision that applies is s 54. This applies in a pre-1973 form because the purported surrender was lodged in 1970. My research indicates that the wording of s 54 in force in 1970 was enacted in Act No 19 of 1934, as published in the 1967 edition of the statutes. It may be that in 1970 surrender was permitted only to aged, ill or infirm people, but be that as it may, surrender at that time required, as it has continued to require to the present day, the approval of Cabinet. Whenever a purported surrender was made between 1970 and the present day, it could not be effective without the consent of Cabinet. There were substantial additions to s 54 by Act No 18 of 1991, which came into effect with the Royal Assent on 4 February 1992. Mr 'Etika submitted that the 1991 amendments cannot apply, and that is correct. These are of no effect because they post-date the events. In any event they did not repeal the requirement for Cabinet approval.

Apart from those statutory provisions, the plaintiff must rely upon case law principles. In addition to *OG Sanft & Co Ltd* (above), there are at least six decisions

of the Privy Council which are important contributions to the law governing this case, *'Fifita Manakotau v Vaha'i (Noble)* (1959) 2 TLR 121, *Afu v Falakiko Lebas II* [1923-1962] TLR 167, *Vaea v Minister of Lands & Fetu'ufuka* [1974-1980] TLR 13, *Havea v Tu'i'afitu* [1974-1980] Tonga LR 55, *Hausia v Vaka'uta & Minister of Lands* [1974-1980] TLR 58, and *Ongosia v Tu'inukuafe & Minister of Lands* [1981-1988] TLR 113.

The principles that I extract from the cases are as I set them out in *Motuliki v Pohahau* L670/97, (unreported, judgment delivered 12 May 1999). For some of these principles there may be more than the one authority cited.

(i) where claim is made to an allotment each case must be decided on its own facts — *Ongosia v Tu'inukuafe & Minister of Lands* [1981-1988] TLR 113:

(ii) good title is shown not by one fact alone, even by registration alone, and, to the contrary, it is not necessary to prove registration — *Fifita Manakotau v Vahai (Noble)* (1959) 2 TLR 121:

(iii) the priority of applications is no more than a factor to be taken into account in deciding between competing claims, and weighed with all the other relevant factors — *Vaea v Minister of Lands & Fetu'ufuka* [1974-1980] TLR 13:

(iv) the fact that an estate-holder has unfairly approved two applications for the same allotment is not sufficient to upset the completed registration of one of them — *Afu v Falakiko Lebas II* [1923-1962] TLR 167:

(v) to upset a registration a plaintiff must show that in making the grant the Minister acted on wrong principles - *Afu* (above):

(vi) more particularly, the Court will upset a grant only if the person challenging its validity establishes that the Minister has acted contrary to statute, or in breach of the rules of natural justice, or in breach of a clear promise by the Minister and the estateholder — *Havea v Tu'i'afitu* [1974-1980] Tonga LR 55.

I accept the main submission made by Mr 'Etika. The case must be decided on its own facts. There is no room for equitable principles, except in deciding whether the Minister in registering the first defendant failed in any statutory duty, and/or breached the rules of natural justice and/or broke a clear promise made to the plaintiff by himself or by the estate-holder. For this proposition I rely upon the provisions of the Act itself, as reinforced by the decision in *OG Sanft & Co Ltd* (above), and the other decisions of the Privy Council which I have set out above.

The Decision

The plaintiffs seek two things. First they seek removal of the current registered lease. Second they seek registration of one of them as the titleholder. Both the first plaintiff and the first defendant put a great deal of emphasis on the history of the matter, each telling the story from his point of view. They were strongly in conflict.

This is a pity, and their conflict is unnecessary, because this claim in the Land Court must be decided by the code that is set out in the Land Act. The essential evidence is what is recorded in the Ministry of Land.

First, Cabinet approved on 6 August 1996 the surrender of the land on lease for 20 years to the second defendant, and the Minister subsequently issued a Deed of Lease. There has been no evidence at all to show that in issuing that Deed of Lease the Minister acted contrary to statute, or in breach of the rules of natural justice, or in breach of a clear promise by the Minister and the estate-holder. There has been no reason shown to disturb this action by the Minister, and while the lease remains it prevents any further registration in respect of this allotment until 2017.

Second, there was no proper surrender of the allotment by the first defendant to the first plaintiff. There was initially an attempt to surrender the land to the first plaintiff, but the Minister promptly required the first defendant to reconsider. There was no surrender of the land after that by the first defendant, until he surrendered it to his son-in-law for lease. It may have been unfair that the first plaintiff was not told of this immediately, but the first plaintiff took no steps to safeguard whatever rights he had acquired in 1970. Had he done so he might have learned there was no adequate surrender and he may have had a remedy in contract. The end result is that the registered landholder did not give a proper surrender. Even if he had, there is no record that it was approved by Cabinet, which is a necessary part of any surrender under s 54.

Third, there is no record of any fee paid by either plaintiff as required by s 43.

The only conclusions to which the Court can come are that the second defendant has a valid 20-year lease and the plaintiffs have no right to registration. The Court must uphold the prayer of the defendants that the plaintiffs' claim to registration be dismissed.

I turn to the claim for damages. As pleaded in paragraphs 22 to 24 of the statement of claim, it seems to be based in both tort and contract. This claim was not otherwise explained, either as to its basis or as to its quantum. It was pleaded without reliance on any provisions in the Land Act. In the evidence there were totally conflicting accounts by the first plaintiff and the first defendant about what their arrangement had been. On the balance of probabilities, we reached certain conclusions about that, but this is not the place to express them. Claims in tort and contract are for the civil courts. This claim likewise is dismissed.

In closing, Mr 'Etika sought an order evicting the plaintiffs from the allotment. This was not part of the case pleaded by the defendants, who did not file any claim nor seek any remedy. The case was about the plaintiffs' claim to registered title. This was not litigation about the plaintiffs' right to occupy the land. The only order that the court can make in the defendants' favour is the one they sought in the proceedings, dismissal of the claim to registration.

Costs

There will be an order for costs following the event. The plaintiffs must pay the defendants' costs, to be agreed or taxed.

Masila v Helu

Supreme Court, Nuku'alofa
Finnigan J
C 864/98

26 July 1999; 24 August 1999

Practice and procedure — motion to strike out — verbose statement of claim — motion denied

The plaintiff filed a statement of claim which pleaded in its prayer for relief two separate causes of action. The first was a claimed wrongful "suspension demotion" with related failure to pay annual increments, the second was a claimed wrongful suspension and dismissal by the first defendant. In the preceding narrative the plaintiff claimed that the two were closely linked. He contended that he was dismissed for sexually harassing a fellow-employee, but that was a disguise for other reasons going back to 1995 which were not sufficient for even the "suspension demotion" that had occurred earlier, let alone the ultimate dismissal. He then pleaded that he and his family suffered loss and damages and shame because of his wrongful dismissal by the second defendant. The remedies he sought were reinstatement and back pay, and general damages of $100,000. By agreement, on 26 July 1999, a motion to strike out the action was argued in place of the substantive trial. It was based on the four grounds in the Supreme Court Rules that (i) the statement of claim disclosed no reasonable cause of action, (ii) the action was scandalous frivolous or vexatious, (iii) that it was prejudicially unclear, and (iv) that it was an abuse of process.

Held:

1. The statement of claim, verbose and meandering and repetitive though it was, clearly claimed that the defendants could not justify their actions of suspension, demotion and dismissal because they were in breach of his rights at law: the plaintiff challenged not only the process but the decision itself. The first ground, that the statement of claim disclosed no reasonable cause of action, could not succeed.
2. The words 'frivolous and vexatious' were the contrary of 'a serious question to be tried'. The question was, does the statement of claim state a serious question for trial?. There was a serious question stated, in fact more than one, and the defendant disclosed in his affidavit the facts of his intended defence. This ground could not succeed.
3. The third ground to strike out was that the pleading was unclear or may otherwise prejudice or delay the fair trial of the action. 'Unclear' must [be

taken to] include any case where the pleading was so unclear that the other party could not know with any certainty the case which he had to answer. After considering the first defendant's affidavit it was revealed that the first defendant knew full well the case that was pleaded. That ground failed.

4. The fourth ground was that the writ was an abuse of process because it was the wrong procedure; the proper proceeding was Judicial Review. However, the plaintiff was entitled to seek by writ a declaration of his rights and remedies for breach so the fourth ground failed.

5. The statement of claim was sufficient to survive a motion to strike it out, but it was directed that certain superfluous and distracting parts of it be severed. The amended statement of claim was to be filed and served before 4pm on 31 August 1999. The matter would then be called at a directions hearing so that further delay was minimised.

6. The plaintiff successfully resisted the motion to strike out the statement of claim, but it was not a case where he should have his costs. The inexpert pleadings have been wasteful in the Court's hearing time and in the time of counsel. There was no order for costs.

Cases considered:

American Cyanamid Co v Ethicon Ltd [1975] AC 396; [1975] 1 All ER 504
Faleola v Kingdom of Tonga [1999] Tonga LR 114 (CA)
Fotofili v Free Wesleyan Church of Tonga & Kingdom of Tonga [1994] Tonga LR 111
Kaufusi v Kingdom of Tonga [1999] Tonga LR 28
Kaufusi v Kingdom of Tonga [1999] Tonga LR 118 (CA)
Lanivia v Sunia (unreported, C366/99, 29 June 1999)

Statutes considered:

Water Board Act CAP 92

Rules considered:

Supreme Court Rules 1991

Counsel for plaintiff	:	Mr Hola
Counsel for defendants	:	Mr Taumoepeau

Judgment

The matter for decision is an interlocutory motion to strike out the claim.

The writ was issued on 24 June 1998 and a statement of defence was filed on 29 July 1998. The statement of defence pleaded to all the allegations in the statement of claim, and raised an alternative defence that the proceeding should be by way of Judicial Review.

The present motion was filed on 1 July 1999. On 6 July the plaintiff filed, in this action, an application for leave to seek Judicial Review. The application does not acknowledge that it is made out of time or that it needs further leave for that reason. It should not be part of the present action.

By agreement the motion to strike out the action, which was left rather late, was argued in place of the substantive trial on 26 July 1999. It is based on the four grounds in the Supreme Court Rules (SCR) O8 R6(1) that (i) the statement of claim discloses no reasonable cause of action, (ii) the action is scandalous frivolous or vexatious, (iii) that it is prejudicially unclear and (iv) that it is an abuse of process.

I pause to mention in summary the statement of claim. It pleads in its prayer for relief two separate causes of action. The first is (a) a claimed wrongful "suspension demotion" with related failure to pay annual increments, the second is (b) a claimed wrongful suspension and dismissal by the first defendant. In the preceding narrative the plaintiff claims that the two are closely linked. He says he was dismissed for sexually harassing a fellow-employee, but that this was a disguise for other reasons going back to 1995 that by themselves were not sufficient for even the "suspension demotion" that had occurred earlier, let alone the ultimate dismissal. He then pleads (c) that he and his family suffered loss and damages and shame because of his wrongful dismissal by the second defendant. The remedies he seeks are (d) reinstatement and back pay, and (e) general damages of $100,000.

The defendants rely on SCR O8 R6. I consider first the first ground of the motion to strike out the claim. There is no place for evidence in this. SCR O8 R6(2) provides that no evidence shall be heard on an application to strike out a pleading on this ground. The decision is made on the pleading itself. Both counsel proceeded on that basis. The submission is that the statement of claim seeks remedies that amount to orders of certiorari and/or declarations, which are remedies obtainable by Judicial Review. The claim having been filed more than three months after the pleaded date of the second (later) cause of action, the submission runs that Judicial Review would not have been available without leave, and cannot be sought by the subterfuge of an ordinary action. Counsel for the defendants submitted that Judicial Review was the correct form of proceeding because the statement of claim sought to challenge the nature of the decision-making process and not the merits of the decision itself. The authority on which he relied is *Fotofili v Free Wesleyan Church of Tonga & Kingdom of Tonga* [1994] Tonga LR 111.

Counsel for the defendants supplied copies of all the cases he relied on, and that is appreciated.

The essence of that judgment, and this argument is that if/when the claimant seeks to challenge a decision-making process by the particular remedy of review by the Court, then Judicial Review is the proper procedure. The question raised by this submission is whether the plaintiff is seeking to use that procedure under the guise of an ordinary action or whether he is simply seeking remedies for claimed wrongs as actions which on their merits were in breach of his rights at law.

It seems to me that the statement of claim, verbose and meandering and repetitive though it is, clearly claims that the defendants cannot justify their actions of suspension, demotion and dismissal because they were in breach of his rights at law. He challenges not only the process but the decision itself. That is a claim to be brought by writ of summons and tried on its merits. It has been my frequent experience that in such cases the remedy sought and, where appropriate granted, is a declaration that the defendant's actions were wrongful. Declaration is a remedy available by writ. The first ground, that the statement of claim discloses no reasonable cause of action, cannot succeed.

The second ground is that the action is scandalous, frivolous or vexatious. For this, counsel relies on an affidavit sworn by the first defendant. In his submission the affidavit shows clearly that the plaintiff was dealt with in accordance with the principles of natural justice, and that the claim of wrongful dismissal is clearly contrary to the evidence. This argument cannot succeed until the Court has made findings of fact. The rule "*audi alterem partem*" dictates that both parties must have given their evidence and had it tested before the Court may make findings of fact. Counsel relied on the decision of this Court in *Lanivia v Sunia* (unreported, C366/99, 29 June 1999), but that was a final determination of an application for extension of time in which to seek leave to apply for Judicial Review. Both parties had filed affidavits about the facts for the purpose of that determination. That has not occurred here. The plaintiff has not sought to respond by affidavit, except to affirm on oath the main claims in the statement of claim.

The words 'frivolous and vexatious' are the contrary of 'a serious question to be tried', see *American Cyanamid Co v Ethicon Ltd* [1975] AC 396 at 408; [1975] 1 All ER 504, per Lord Diplock. The question is, does the statement of claim state a serious question for trial. There is a serious question stated, in fact more than one, and what the defendant has disclosed in his affidavit is (perhaps some of) the facts of his intended defence. This ground cannot succeed.

The third ground, as argued, is related to the second. This is that the pleading is unclear or may otherwise prejudice or delay the fair trial of the action. Counsel relied on Halsbury 4th ed Vol 36 at #74. The law stated there is that the defendant is entitled to have the case against him presented in an intelligible manner, but that the power to strike out should be used only in plain and obvious cases. Severing the objectionable parts is an alternative to striking out if the remaining pleading clearly discloses a cause for trial, and I shall return to that aspect. I bear in mind what this Court said in *Kaufusi v Kingdom of Tonga* [1999] Tonga LR 28 (which Ruling generally was upheld on appeal [1999] Tonga LR 118 (CA)). This is that 'unclear' must [be taken to] include any case where the pleading is so unclear that the other party cannot know with any certainty the case which he has to answer. That finding is in accordance with the general application of O8 R6. The discretion to strike out is reserved for obvious cases.

Here again the Court is entitled to consider the first defendant's affidavit. Having done so, it reveals that the first defendant knows full well the case that is pleaded. It reveals also that he is in possession of evidence which, if accepted in entirety, would amount to a complete answer to the plaintiff's claims. However, the Court has not heard evidence from the plaintiff about his claims. This ground must fail.

The defendants' fourth ground is that the writ is an abuse of process because it is the wrong procedure. Counsel relied on *Fotofili* (above), and submitted that the present claim should be struck out because the proper proceeding is Judicial Review. *Fotofili* was a clear case of proceedings brought in the Supreme Court by writ, which could only have been brought by way of application for Judicial Review. A similar case is *Faleola v Kingdom of Tonga* [1999] Tonga LR 114 (CA), which counsel mentioned. What is the justification for claiming that the plaintiff is in fact seeking Judicial Review? The justification offered is that the remedies claimed, declaration, reinstatement and damages are similar to or in the nature of certiorari. But the plaintiff has not pleaded any breach of natural justice, or any excess of authority,

error of law or any wrong-doing by any inferior court or tribunal or by any other entity that is charged with the performance of public acts or duties. He is not seeking supervision of a public body's administrative actions. It is not just the decision-making process that he challenges, but also the merits of the decisions to suspend, demote and/or dismiss him. He is entitled to seek by writ a declaration of his rights and remedies for breach; see Halsbury 4th ed Vol 37 #252. Reference to the Water Board Act CAP 92 shows beyond doubt that the second defendant is a public body, but no reliance is placed on that by counsel for the defendants in the argument. Neither is the point helpful in itself, the second defendant as a public body may be sued in tort and/or contract. The fourth ground likewise must fail.

Decision

It is clear to me that the statement of claim is sufficient to survive a motion to strike it out, but in the exercise of my discretion I shall direct that certain superfluous and distracting parts of it be severed.

Before that however, there is a question of particulars. The question emerges from the pleadings, what is the legal basis of the plaintiff's claim? I have described the statement of claim above as verbose and meandering and repetitive. It is worse than that, it moves back and forth in time and it particularises any number of facts that have no place in a basic pleading. But worst of all it does not particularise the plaintiff's claims by stating what made the acts of the defendants wrong. Is this a clam in tort? On its face that is the more likely conclusion. But is it for breach of contract? Or is it for breach of the Water Board Act, or some other law?

The plaintiff must particularise that part of his claim in an amended statement of claim. It will be insufficient for him to rely on vague aspirations of unfairness. The Court will expect in the statement of claim a clear concise statement of what law is relied on. The authorities above make it clear that the defendants have the right to know what case they have to answer. The plaintiff must specify the nature of the legal principle/s relied on, in a way that fully and fairly informs the Court and the defendants of the legal aspects of his claim. In doing so he must state a case that is triable at law. If the plaintiff fails to do that then he may expect the court itself to act of its own motion to strike out the pleadings.

I return to the severance point. In filing the amended statement of claim, counsel for the plaintiff is directed to omit paragraph 1, and to amend paragraph 4 so that it reads:

> 4. The second defendant is a body corporate that appoints the first defendant.

Thereafter, after the heading 'Particular of Facts', omit the following paragraphs: 9, 10, 11, 12, 13, 15, 18, 20, 22, 24, 25, 26, 28 and 29. The remaining 15 paragraphs are to be re-numbered accordingly and before the prayer for remedies there is to be further pleading of what is the claim at law.

I further direct that the amended statement of claim be filed and served before 4pm on 31 August 1999. If that is done the matter will then be called at a directions hearing so that further delay is minimised.

Costs

The plaintiff has successfully resisted the motion to strike out the statement of
220 claim, but it is not a case where he should have his costs. The inexpert pleadings have been wasteful in the Court's hearing time and in the time of counsel. There is no order for costs.

Lolohea v Police

Supreme Court, Nuku'alofa
Ward CJ
Cr App 893/99

29 September 1999; 5 October 1999

Criminal law — sentencing for commercial growing of marijuana — sentence increased
Magistrates — sentencing power — should follow recent case law — sentence increased

On 7 July 1999, Lavaka Lolohea appeared before the Ha'apai Magistrate's Court and pleaded guilty to four charges of growing Indian Hemp and possessing seeds. Both the prosecution and the accused asked the magistrate to deal with the case summarily and the magistrate, after hearing an outline of the case, considered it was within his power of sentencing and accepted jurisdiction. The facts were that the accused, who was only 23 years old, was employed to grow Indian Hemp on Tofua. He was supplied with the seed and planted 1000 plants in April followed by another 100 plants the same month and a further 2300 plants in June. When the police raided the island in June, he still had a further 2346 seeds. The magistrate accepted that he was being employed by someone else and was paid $12.00 per day. He gave credit for the plea of guilty, his good character and the fact that the person who employed him had not been charged at that time. The magistrate then sentenced him to two years imprisonment on each charge concurrent. The accused appealed against that sentence and the Crown cross-appealed. At the hearing, the accused withdrew his appeal and it was dismissed. The Crown pursued its appeal on the basis that (1) it was a case where the magistrate should not have taken the case and (2) it was a serious charge of commercial growing and the sentence passed by the magistrate was out of line with recent sentences in such cases.

Held:

1. Had the Magistrate borne the previous case law in mind he would not have considered his powers of sentence adequate in a case involving that many plants and would have declined the request for summary trial.
2. The prosecution appeal was allowed but, by the Magistrates' Courts Act, the Court was limited to the power the magistrate could have exercised. Therefore the sentences passed were quashed and the accused was ordered to be imprisoned for three years on each count concurrent giving a total term of three years.

3. The police knew the true scope of the case far better than the information any magistrate could glean from a brief summary. It was thus the responsibility of the police to ask for summary trial only in a case where it was clear it could fall within the sentencing power of the Magistrates' Court.

Cases considered:

Anders v Police (1974-1980) TLR 60

Tuita and Mafi v R (unreported, Appeals 2, 15 and 122 of 1998)

Statutes considered:

Magistrates' Courts Act CAP 11

Counsel for appellant : Mr Tu'utafaiva

Counsel for respondent : Mr Cauchi

Judgment

On 7 July 1999, Lavaka Lolohea appeared before the Ha'apai Magistrate's Court and pleaded guilty to four charges of growing Indian Hemp and possessing seeds.

Both the prosecution and the accused asked the magistrate to deal with the case summarily and the magistrate, after hearing an outline of the case, considered it was within his power of sentencing and accepted jurisdiction.

The facts were that the accused, who was only 23 years old, was employed to grow Indian Hemp on Tofua. He was supplied with the seed and planted 1000 plants in April followed by another 100 plants the same month and a further 2300 plants in June. When the police raided the island in June, he still had a further 2346 seeds.

The magistrate accepted that he was being employed by someone else and was paid $12.00 per day. He gave credit for the plea of guilty, his good character and the fact that the person who employed him had not been charged at that time. The magistrate then sentenced him to two years imprisonment on each charge concurrent.

The accused appealed against that sentence and the Crown cross-appealed.

At the hearing, the accused withdrew his appeal and it is dismissed.

The Crown pursues its appeal on the basis that (1) this was a case where the magistrate should not have taken the case and (2) this was a serious charge of commercial growing and the sentence passed by the magistrate was out of line with recent sentences in such cases.

Sentencing guidelines in such cases were suggested by Hill J as long ago as1978 in *Anders v Police* (1974-1980) TLR 60. In the recent case of *Tuita and Mafi v R* (unreported, Appeals 2, 15 and 122 of 1998), the learned Judges of Appeal adopted his comments.

Tuita's and Mafi's case concerned growing plants and possessing seeds amounting to a total of 1196. The court commented:

> "The volume of plants and seeds was large. The conclusion is inescapable that Tuita and Mafi were engaged in a commercial scale operation likely to produce, if it were successful, a volume

> of marijuana far beyond what would reasonably be required for their own use. A firm deterrent sentence is essential to drive home to persons minded to become engaged in an operation of this kind, that it is not worth the risk."

They suggested that a conviction for growing any significant amount of marijuana should carry a sentence within the range of three to five years imprisonment.

It is noteworthy that Hill J in *Anders* case specifically stated, "I want all the magistrates in this country to take notice of this judgment because I expect them to follow my directions." Had the very experienced magistrate who tried the present case borne that case and the *Tuita and Mafi* case in mind, he would not have considered his powers of sentence adequate in a case involving four times as many plants and would have declined the request for summary trial.

Similarly one would have expected a police prosecutor to be aware of any guideline cases before asking the magistrate to deal with a case of this nature.

This was a very substantial operation — far larger than that in *Tuita and Mafi*. The magistrate did not have the principal offender before him but he was sentencing a person who was willing to commit a very serious offence knowing only too well what he was doing. Such a case should not be at the lower end of the scale of sentencing and would, therefore, be out of the magistrate's jurisdiction.

The prosecution appeal is allowed. The sentence must be increased but, by section 80 of the Magistrates' Courts Act, I am limited to the power the magistrate could have exercised. I therefore quash the sentences passed and instead order that the accused shall be imprisoned for three years on each count concurrent giving a total term of three years.

This court has recently expressed concern at the number of cases in which Magistrates have accepted a request for summary trial of offences that should, because of their gravity, have been committed to the Supreme Court.

It would help if the police prosecutors gave them more assistance. The police know the true scope of the case far better than the information any magistrate can glean from a brief summary. It is thus the responsibility of the police to ask for summary trial only in a case where it is clear it could fall within the sentencing power of the Magistrates' Court.

Equally magistrates must remember that they are there to make their own decisions on the material they have before them. That can never mean blindly accepting the suggestions of either the prosecution or the defendant.

In future a magistrate should deal with cases of growing or possessing substantial amounts of marijuana only in the most exceptional circumstances which should be stated.

Finally, before leaving this case, I must mention another matter. It is clear that this accused was only the employee of the person really responsible. That person was responsible for establishing a very substantial plantation. He presumably had obtained the supply of seeds to do so and he had found a relatively remote place in which to carry out his business.

In a case on such a scale, it would be reasonable to expect the police to use every means at their disposal to arrest the principal offender. In order to determine a fair and proper sentence, the court needs to know what has happened to the principal

offender or the likelihood he will be arrested and charged and it will expect to be given such information by the prosecution.

However, when I asked Crown Counsel whether the principal offender had been identified and/or arrested, counsel informed the court he had not been able to ascertain the present state of the investigation because the file had not been made available to him. Counsel for the accused also advised the court that, following sentence in the Magistrate's Court, the accused had not been detained in prison but in a place and in a manner that was different from the normal method of detention. Again, counsel for the Crown was unable to assist about why this had been done.

There are, of course, many reasons why the police may not wish to open a file to another department and there may be good reason why a particular prisoner should be treated differently from others. In such cases the court will be careful not to request information that may compromise the police or prison authorities but there are aspects of the case the court must know if it is to do justice and it will expect to be sufficiently informed of those matters.

This appeal was in open court and I have no doubt members of the public are anxious that the main offenders in cases such as this are being pursued vigorously. The public and the court share a need to know that the police are carrying out proper investigation.

In future I shall expect the prosecution to be sufficiently informed about the case he is presenting to be able to give information about any related investigation if requested by the court. If he is unable to do so, the hearing will be adjourned where necessary and a senior officer summoned to give it.

Touliki Trading Enterprises Ltd v Procorp Ltd

Supreme Court, Nuku'alofa
Ward CJ
C 1047/99

6, 7 October 1999; 8 October 1999

Injunction — damages would be adequate remady — injunction lifted

Both parties were exporters licensed to export squash in the 1999 season and, as such, both were signatories to an Agreement made on 2 March 1999 with the Ministry of Labour, Commerce and Industries and the exporter. The Agreements were separately made by each company but were in identical terms. The Agreement stated that the Company had been granted a licence and had accepted it subject to those terms of the Agreement; these terms were an attempt to achieve a standard approach to the conduct of the squash industry in accordance with the aspirations expressed in the preamble. Central to that were the Exporters and the major thrust of the Agreement was to try and achieve some measure of consistency in the manner in which they conducted their business in order to prevent the problems that were likely to arise should the industry be governed only by the desire for immediate and easy profit. The plaintiff applied for an injunction based on the suggestion that the defendant was purchasing squash that had not been grown by its registered growers (which was against the terms of the Agreement). Faced with the Minister's absence abroad, with the urgency of the export timetable, and with the extremely perishable nature of the squash, the plaintiff came to the court for an interlocutory order to restrain the alleged breach of the agreement by the defendant. The interim injunction ordered that the defendant was restrained from purchasing any squash from any person who was not its registered grower. Liberty was given to apply to vary that injunction but no application was made until the return date at which time, the defendant applied to have the writ and statement of claim set aside and the interim injunction lifted. The order was served on the defendant on 1 October and the plaintiff alleged that the defendant breached it the following day. Application was made by the plaintiff to have the defendant and its Chief Executive Officer punished for contempt.

Held:

1. The Court was required to be satisfied the plaintiff had established an arguable claim to the right he was seeking to protect. The Court did not have to decide the merits of the claim, only that there was a serious question that might be tried. If the applicant failed to demonstrate that, there could be no injunction. The grant or refusal of the injunction depended on the balance of convenience. That was a matter for the

exercise of the Court's discretion and there were many factors the court may take into account in reaching its decision. In many cases the principal test will be whether damages would be a sufficient remedy.

2. The balance of convenience was against the continuation of the injunction and any breach of the Agreement could be compensated by an award of damages.
3. The injunction ordered on 1 October was cancelled on the undertaking by the defendant company that a separate record was to be maintained by it of all purchases it made from anyone other than its registered growers.
4. The basis on which the writ was filed was not an unwillingness to submit the dispute to arbitration but the fact that such a referral would take too long because of the absence of the Minister. The application to set aside was refused but instead it was ordered that the action be stayed. The defendant did not need to take any further step in his defence until further order of the court.
5. The application to commit the defendant and its Chief Executive Officer for contempt of the order was to be heard in open court on 15 October.

Cases considered:

American Cyanamid Co v Ethicon Ltd [1975] AC 396; [1975] 1 All ER 504

Scott v Avery (1856) 5 HL Cas 811; 10 ER 1121; [1843 - 60] All ER Rep 1

Counsel for plaintiff : Mr Niu
Counsel for defendants : Mr Edwards

Judgment

On Friday 1 October, on the ex parte application of the plaintiff company, Touliki Trading Enterprises Limited, I issued an interim injunction against the defendant company, Procorp Limited, returnable on 6 October. The defendant has applied to lift the injunction and to set aside the writ.

Both parties to this action are exporters licensed to export squash in the 1999 season and, as such, both are signatories to an Agreement made on 2 March 1999 with the Ministry of Labour, Commerce and Industries and the exporter. The Agreements were separately made by each company but are in identical terms.

The background and intention of the agreement is clearly set out in the preamble:

> "The squash industry continues to be vital for the economic livelihood of the Kingdom. The Ministry therefore considers it necessary to put in place strategies and measures to ensure the continued profitability and sustainability of the squash trade to Japan. An essential ingredient in this effort is the high quality and credibility of Tonga's squash industry particularly as perceived by the Japanese squash market. Integral also to the Ministry's efforts is the common good for all participants in the squash industry. This Agreement is therefore, aimed at encouraging the Ministry, approved squash exporters, growers and related institutions to

> work together towards enhancing the efficiency and sustainability of the industry."

The Agreement then states that the Company had been granted a licence and had accepted it subject to the terms of the Agreement. It is not necessary to set out the terms in extenso but, in general, they are an attempt to achieve a standard approach to the conduct of the squash industry in accordance with the aspirations expressed in the preamble. Central to this are the Exporters and the major thrust of the Agreement is to try and achieve some measure of consistency in the manner in which they conduct their business in order to prevent the problems that are likely to arise should the industry be governed only by the desire for immediate and easy profit.

It is not a comprehensive Agreement and neither is it well drafted. Many of the clauses are obscure in their meaning and effect. It requires each Exporter to register the growers that will supply it and to submit a list of such growers to the Ministry no later than the end of August 1999. The Agreement does not specify how the growers are registered to a particular Exporter but it appears the basis is that the Exporters supply them with finance for seed and fertilizer and possibly labour at the beginning of the season in return for the right to purchase any exportable squash they produce.

The Agreement requires each Exporter to enter a written agreement with its respective growers which must incorporate certain specified terms including the requirement that the grower must sell his exportable squash to the Exporter with which he is registered and that the Exporter and the growers shall endeavour to ensure that each grower is registered with only one Exporter. These terms are clearly a vital part of the attempt to ensure the orderly conduct of the industry.

Clause (3) of the Agreement sets out the obligations that apply to the Exporter and paragraph (v) provides for the settling of disputes. It requires the Exporter to;

> "(v) Comply and observe the procedure for settling disputes and squash matters as follows:
> (a) All squash complains and disputes whether it is between exporter and exporter, grower and exporter or between grower and grower that cannot be satisfactorily resolved by relevant parties will be adjudicated by the Minister. The Minister shall for the purpose of resolving the dispute exercise discretion as to the actions done to resolve the dispute or assist with a decision on the dispute. Exporters shall provide all relevant information on the dispute and to cooperate with the Minister in resolving the dispute."

It is important to note that this clause is clearly expressed as being between the Minister and the exporter only. They are the sole signatories to the Agreement. Despite the inclusion of the growers, their involvement with the procedure for resolution of disputes by the Minister would appear to arise, presumably, only if and when the written agreement between the exporter and the grower includes such a clause. The Minister is defined in clause (1) of the agreement as "the Minister of Labour, Commerce and Industries or his nominee."

The application by the plaintiff for an injunction was based on the suggestion that the defendant was purchasing squash that had not been grown by its registered growers. It alleged that;

> "(1) The defendant has acted with deliberate intention to breach and circumvent a set of rules and procedures, which government has set and upon which the exporters and growers of squash have agreed, for its own selfish and individual gain at the expense and loss of the plaintiff and the rest of the growers registered with it.
> (2) Government has warned and reminded growers and exporters of those rules, and in particular, not to buy squash from other exporters' growers. In the week prior to 21/9/99, that warning and reminder was broadcast on radio A3Z seven times, and a letter was sent by the Ministry to the exporters to further impress upon them the need to abide by the agreement.
> (3) It is desirable and indeed absolutely necessary that the practice which the defendant has begun to perpetrate, be stopped immediately and that it pays the sum for which it is liable into safe custody, until the Minister returns to the Kingdom and/or his nominee hears the dispute and make the appropriate orders …"

The reference to the Minister's return is explained in the affidavit of the Chief Executive of the plaintiff. The Minister is abroad and is not expected to return until the end of this month. There is, as usual, another Minister appointed to act during his absence but only the Minister or his nominee can settle disputes arising out of the Agreement. Despite the length of his absence and the vital part the short and hectic squash exporting season plays in the national economy, it appears from a letter from the Secretary of the Ministry that nobody has been nominated to deal with urgent referrals. The terse letter was the response to a request by the plaintiff and states;

> "I wish to advise that the Hon. Minister for Labour, Commerce and Industries is away overseas, and all matters relating to settlement of squash disputes is vested only in the substantive Minister."

Faced with that, with the urgency of the export timetable and with the extremely perishable nature of the squash, the plaintiff came to the court for an interlocutory order to restrain the alleged breach of the agreement by the defendant. The interim injunction ordered that:

> "the defendant … its employees, agents and any person authorised by it, are forthwith restrained and prohibited from purchasing or offering to purchase and from shipping any squash which it has acquired or has in its possession from any person who was not its registered grower …"

Liberty was given to apply to vary that but no application was made until the return date at which time, the defendant applied to have the writ and statement of claim set aside and the interim injunction lifted.

The order was served on the defendant on 1 October and the plaintiff alleges that the defendant breached it the following day. Application has therefore been made by the plaintiff to have the defendant and its Chief Executive Officer punished for contempt.

I deal first with the application to lift the injunction. Various grounds of objection were raised by counsel for the defence challenging the court's jurisdiction in this matter but they are no longer pursued and I am happy not to deal with them further. They were based, not on any claim that the conduct of the defendant was in accordance with the agreement but on an attempt to impugn the very agreement that the defendant had apparently voluntarily entered. Matters have been raised before the court that reflect poorly on the attitude of the defendant if considered against the stated aims and intentions of the parties to the agreement. At the same time it would appear that others have also breached the agreement and the defendant is not alone in his attempts to go behind it in order to purchase squash from growers registered with other exporters.

The defendant seeks to have the restrictions imposed by the injunction removed on two main grounds.

The first is that, although the defendant has purchased from some growers registered with the plaintiff, the plaintiff has never made written agreements with those growers as required by paragraph (ix) of the Agreement. The growers are therefore not bound to sell to the plaintiff. I have already referred to the fact that this Agreement is between the Minister and the exporter only and the basis upon which the grower is bound is not apparent. However, even proceeding upon the basis that they are so bound, counsel, with respect, misses the point. The injunction he seeks to remove is directed at the exporter and prohibits it from purchasing from growers who are not registered with it.

It has no power over the growers. Mr Edwards takes his submission further however. He points out that the court will not normally grant injunctive relief if the effect is to compel specific performance by others. The effect of the restriction on the defendant company effectively prevents growers not registered with it from selling to it and is thus forcing them to sell in accordance with the Agreement. Ingenious though it is, I do not accept this argument is a valid objection. The order is directed only at the exporter. Whilst I accept it would prevent it taking squash from growers registered with others and thus restrict the growers' choice of outlet for his produce, it does not force them to perform the agreement they should have made with the plaintiff. The application fails on this ground.

The defendant is on much firmer ground in his second submission. He relies on the well established principles as explained by Diplock LJ in *American Cyanamid Co v Ethicon Ltd* [1975] AC 396; [1975] 1 All ER 504.

Those principles require the court to be satisfied the plaintiff has established an arguable claim to the right he is seeking to protect. The court does not have to decide the merits of the claim, only that there is a serious question that might be tried. If the applicant fails to demonstrate that, there can be no injunction. However, I am satisfied about both, subject to the application to set aside the writ with which I shall deal later.

Once the plaintiff has satisfied the court of these matters, the grant or refusal of the injunction depends on the balance of convenience. This is a matter for the exercise of the court's discretion and there are many factors the court may take into account in reaching its decision. In many cases the principal test will be whether damages would be a sufficient remedy. If they would be then the court should not grant the injunction.

The defendant suggests that is the case here. If it should later be demonstrated that the defendant has injured the plaintiff's interests by purchasing and exporting

squash from growers registered with the plaintiff, the extent of the damage can be assessed and could be accurately and simply quantified and remedied by a monetary award.

Mr Niu for the plaintiff points out the well established qualifications of that general principle that an injunction will not be granted if damages would be an adequate remedy. The first is that damages will never be an adequate remedy if, once awarded, the other party is unlikely to be able to pay them. He suggests that the defendant is, in effect, gambling on the price of squash in the Japanese market and, should his gamble fail, the consequences could be so profound that the company may have to go into liquidation. I would need substantial evidence to support such an objection and I have nothing beyond counsel's conjecture.

More relevant to this application is his second point that the courts have generally followed the principle that it is usually better to delay a new activity than to risk damaging one that is already established. The principle is that the court can and should consider whether granting the injunction would cause more harm than refusing it. Mr Niu points out that the terms of the injunction do no more than to enjoin the defendant to observe the terms of the agreement he voluntarily entered. If the injunction is lifted, it will been seen by all the exporters as a green light for the general free for all the Agreement was specifically intended to avoid. There is considerable force in that argument.

What then is the proper decision in this case? I am satisfied that damages would be an adequate remedy should it later be decided that the defendant's actions were wrong. I am not willing to take into account the submission that the defendant may not be able to pay them should he be found liable. On the other hand, the defendant by his deliberate action is attempting to avoid the Agreement he entered and possibly to destroy the whole accord that was the stated aim of the various parties to the Agreement.

My decision turns in the end on the Minister. The aim of the Agreement and in particular the requirement that all disputes should be resolved in the first instance by the Minister was to ensure an effective way of settling disputes such as this with the absolute minimum delay. It was intended to allow the short but busy squash season to proceed with as little hindrance as possible. Had it been possible to refer this matter for resolution under the Agreement, there would have been no need for the plaintiff to seek relief from the court.

I asked counsel to confirm that there was indeed no Minister's nominee. I am advised that is the case. I therefore asked that enquiries be made to ascertain how soon the Minister would be able to deal with this dispute and it appears he will not be returning to the Kingdom until 24 October. The squash season is short and the commodity perishable. It is in the national interest that the market in Japan in particular is not prejudiced by any loss of confidence from damage to or failure to supply the squash. As I have pointed out more than once in this judgment, this Agreement grew from the hope that disputes will be settled promptly so as not to prejudice the overseas markets. Unfortunately the absence of the Minister makes that impossible. Already, this action has taken a week to reach this point. A further two weeks must pass before the Minister can resolve it in accordance with the terms of the Agreement.

If it had been possible for the reference to take place within a day or two, I would have had no hesitation in leaving the injunction in place. I accept that the

plaintiff is motivated to an extent by a wish to preserve the terms of the Agreement but, from the scant material before me, it appears that his intentions are not shared by all the licensed exporters. Already others not affected by this injunction are apparently going behind the Agreement. Middlemen have also appeared to entice growers from the exporters with whom they are registered and the produce thus obtained is being purchased by exporters. All this needs resolution under the Agreement without delay if the whole arrangement is not to collapse in a free for all governed solely by the thirst for greater individual profit. However, if this injunction is left as it is against the defendant alone, it will not achieve any check on the industry as a whole. The original application included the suggestion that the imposition of the injunction would warn other exporters who were contemplating similar actions. That is not a ground for continuing this order because it does not bind them. The only effective way in which to warn the others by a complaint against one would be a rapid decision by the Minister and the use if necessary of his power, stated at the end of the Agreement, to cancel the exporter's licence.

I have already commented on the inadequacy of the terms of the Agreement. Many of the clauses are unclear and imprecise. It is silent on the basis upon which the growers are bound to seek the resolution of disputes by the Minister. Registration and the requirement that the growers sell to a particular exporter would appear to be based more on hope than contractual obligation. I am uncertain how the Minister will resolve many of these problems and, in the face of such doubt, this court is reluctant to take any action that may appear to prejudge the interpretation of these provisions. As I have already stated, the motive behind this Agreement was the national interest. That is a matter peculiarly within the judgment of the Minister — not of the court.

In the circumstances, I am driven to the conclusion that the balance of convenience is against the continuation of this injunction and that any breach of the Agreement can be compensated by an award of damages.

However, any purchase of squash by an exporter from a grower who is not registered with him appears prima facie to be a deliberate attempt to go behind the Agreement he has entered with the Minister. In those circumstances, I shall lift the injunction ordered on 1 October on the undertaking by the defendant company that a separate record shall be maintained by it of all purchases it makes from anyone other than its registered growers. It must specify the name of the grower, the date and the amount of squash accepted by the exporter and the price paid to the grower. The name of the grower must be the name used on the national list of growers referred to in paragraph (ix)(c) of the Agreement and the grower must confirm the details by his signature. Where the purchase is from a person other than the grower, that person must also be named. The first such list shall be submitted to the Ministry on 18 October and each fortnight thereafter.

Mr Edwards, on behalf of the defendant, has given that undertaking and so I order that the injunction be cancelled from 3.15pm today.

That leaves three further matters.

First, the plaintiff has sought an order that the defendant should pay a sum into court to cover the alleged loss suffered by the plaintiff from the actions of the defendant. I do not consider that would be appropriate now that the injunction has been removed. The Agreement makes little mention of the specific powers of the Minister short of the cancellation of an offending exporter's licence but I would

suggest with respect that he should be supplied with those figures when he is considering any referral for his resolution.

Second is the application by the defendant to set the writ aside. This application was based on a challenge to the court's jurisdiction over such a dispute. I do not need to set it out in detail. The Agreement cannot oust the jurisdiction of the court. There is no clause purporting to do so and, had there been, it would have been void. The Agreement includes an acknowledgment by the parties that it is intended to create a legal binding contract for a period of one year from the date of signing. On the other hand, the court, in its discretion, will normally only try an action arising from the Agreement after the arbitrator has completed his determination even where, as is the case here, there is no specific *Scott v Avery* clause ((1856) 5 HL Cas 811; 10 ER 1121; [1843 - 60] All ER Rep 1). The basis on which the writ was filed was not an unwillingness to submit the dispute to arbitration but the fact that such a referral would take too long because of the absence of the Minister. I therefore order that the application to set aside is refused but I order instead that the action be stayed. The defendant does not need to take any further step in his defence until further order of this court.

In light of the views I have expressed of the conduct of the parties and the terms of the agreement itself, I shall make no order for costs until the Minister has completed any consideration of and adjudication on this matter. When that is done counsel may apply to address me further on the question of costs.

Finally there is the application to commit the defendant and its Chief Executive Officer for contempt of the order. I shall hear that matter in open court on 15 October at 10.00am. The parties shall have liberty to file and exchange affidavits by 13 October and to file any in reply prior to the hearing.

Bank of Tonga v Hautau

Supreme Court, Nuku'alofa
Finnigan J
C 775/96

22 October 1999; 22 October 1999

Limitation period — runs from the expiry of last loan agreement — prima facie claim is statute-barred
Practice and procedure — service of documents — should follow directions

The plaintiff lender sought judgment for $38,659.26 +12.5% from 31 January 1996 and for $16,237.51 + 10% from 31 January 1996, and judgment for delivery of the securities. The lending commenced on 12 August 1987, and continued from then with the balance overdue steadily growing. The original security was the borrower's house at Okoa. Other securities were added in December 1989. The last advance was on 13 July 1990, with the whole balance due for repayment by December 1990. The lender demanded repayment by a letter on 31 August 1994. It filed the action on 2 August 1996. The issue was whether the claim was statute barred and what was the commencement date for the five year limitation period.

Held:

1. The limitation period must run from the expiry of the last loan agreement (so from an unstated date in December 1990) unless a payment had been made since then. Prima facie judgment was not available to the plaintiff on its application for judgment by default.

Statutes considered:

Supreme Court Act CAP 10

Counsel for plaintiff : Ms Tapueluelu
Counsel for defendant : Mr Piukala

Judgment

The Writ was filed 2 August 1996. It sought judgment for $38,659.26 +12.5% from 31 January 1996 and for $16,237.51 + 10% from 31 January 1996, and judgment for delivery of the securities. The lending commenced on 12 August 1987, and continued from then with the balance overdue steadily growing. The original security was what the borrower said was his house at Okoa. Other securities were added in December 1989. The last advance was on 13 July 1990, with the whole balance due for repayment by December 1990. The lender demanded repayment by a letter on 31 August 1994. It filed the action on 2 August 1996.

See the Supreme Court Act CAP 10, s 16. The limitation period is 5 years. This Court has held in a previous case that the period (in that case) ran from the date of the demand. But that is not what s 16 provides in the circumstances of the present case, where the period must run from the expiry of the last loan agreement, i.e. from an unstated date in December 1990, unless a payment had been made since then. No payments since then are pleaded.

Prima facie then, judgment was not available to the plaintiff on its application for judgment by default. I invite submissions from counsel for the Judgment Creditor.

If the claim is out of time it is statute barred, and that is the end of the matter. However, at the hearing on 22 October 1999 I stated that I would mention other matters in respect of service.

In applying for judgment, counsel for the plaintiff filed an affidavit by a senior manager of the bank that purported to prove that service of the writ on 13 June 1996, over a year before the writ was filed. The supporting evidence for that improbable statement was a copy of a fax, in which the date cannot be read. It may have been 13 June 1997. The Court usually insists on original documents, had that requirement been observed, the mistake may have been avoided. The original has never been filed. The outcome is that there is no certainty that the writ was served.

Judgment was entered on 16 October 1997. Later an order was made for service of the judgment by registered airmail at “Faleniu, American Samoa”. The date of the order is 24 October 1996. Subsequently a postal certificate was filed showing postage of the documents to that address, on 19 March 1998. In my view, even assuming the date of the order should have been 24 October 1997, the address was insufficient and there are too many errors here. That aside, the original judgment order has not been

60 varied, and it directed service within 14 days of that order. As it happens, another order was made for service of these documents, on 6 February 1998. That order was made some weeks before the posting took place. But that order directed personal service, and it has still not been complied with. The errors are compounded, and the result is that the Judgment and its enforcement are now subject to challenge.

After I have the response of counsel for the Judgment Creditor to the first part of this Memorandum, and after I have clear and reliable evidence of the whereabouts of the Judgment Debtor, I shall arrange the Directions Hearing.

Koloa v Helu

Supreme Court, Nuku'alofa
Finnigan J
C 1315/98

9, 10, 11, 12, 13 August 1999; 29 October 1999

Employment law — probationary contract — unjustified dismissal
Employment law — reasonableness is implied term of employment contract — employer breached this

The plaintiff was employed by the Tonga Water Board as Chief Production Officer, "conditional on serving a probation period of 6 months". About four weeks after he started, he was warned about his behaviour, and a little later was told to be sure not to mix his private work with that of the Board. After about six weeks he was one of the recipients of written warning from the General Manager about his performance. Ten days after that a letter was written, purportedly on behalf of all the 21 employees whom he supervised, making specific allegations of dishonesty against him. He was suspended so that the allegations could be investigated. Simultaneously 11 of the 21 employees wrote that the letter of complaint was malicious and incorrect in claiming it had their authority. The 11 claimed that the writer of that letter was wrong and acting from wrong motives. The defendants knew that the writer had been the subject of a bad work report by the plaintiff the previous month. The general manager spoke to some of the employees, and from among the employees to whom he spoke, one wrote him a letter. This employee said that he personally had been involved in four of the five allegations of dishonesty. He joined the original letter-writer in accusing the plaintiff of the fifth allegation and he added two more. At about the same time, the plaintiff wrote a detailed explanation for each of the first five allegations. The Board decided to dismiss the plaintiff. The plaintiff claimed that he was wrongfully suspended then dismissed from his employment with the second defendant. He claimed that he was dismissed on the ground of stealing the second defendant's property, and that this was wrongful because he was given no opportunity to offer a defence on his own behalf. He claimed that this caused damage to his reputation and loss of employment and financial hardship from then on for the rest of his life. He claimed three years' salary, $23,310, plus $10,000 for damage to his reputation.

Held:

1. 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 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. The plaintiff's claim that his suspension was in breach of his contract was not proved and that part of his claim failed.

2. The employer was bound by an implied term of the contract to act reasonably when it exercised its right to dismiss the plaintiff. It was bound further not to conduct itself in a way that, objectively viewed, was likely to destroy or seriously damage the degree of trust that the plaintiff was entitled to have in the second defendant as his employer. The onus was on the plaintiff to show that the employer did not act reasonably and on reasonable grounds when it dismissed him.
3. There was no lower standard governing the treatment of employees who are on probation. The same implied standards of reasonableness govern the employment contract, whether the employee was on probation or not.
4. The employer was in breach of an implied term of the contract to act reasonably when it exercised its right to dismiss the plaintiff. It was in breach further of an implied term that it would not conduct itself in a way that, objectively viewed, was likely to destroy or seriously damage the degree of trust that the plaintiff was entitled to have in the second defendant as his employer.
5. As damages for loss of income a sum roughly equivalent to three month's salary was awarded. This sum was awarded as damages and not salary. The amount of the damages awarded for loss of income was $1,750.
6. For his humiliation and distress and the injury to his reputation, as the Court assessed them from the evidence given by himself and his witnesses, in the whole of the circumstances, the amount awarded was $4,750.
7. Costs were awarded to the plaintiff.

Cases considered:

McClory v Post Office [1993] 1 All ER 457 (ChD)
Malik v Bank of Credit and Commerce International SA [1997] 3 All ER 1 (HL)
Ogilvy & Mather (New Zealand) Ltd v Turner [1994] 1 NZLR 641 (CA)
Ogilvy & Mather (New Zealand) Ltd v Turner [1996] 1 NZLR 641 (CA)
Ridge v Baldwin [1964] AC 40; [1963] 2 All ER 66

Statutes considered:

Employment Contracts Act 1991 (NZ)

Counsel for plaintiff : Mr Kengike
Counsel for defendants : Mr 'Etika

Judgment

The plaintiff claims against the defendants for acts that he says were wrongful because they were a breach of his contract of employment. In his statement of claim he claims that he was wrongfully suspended then dismissed from his employment with the second defendant. His claim is that he was dismissed on the ground of stealing the second defendant's property, and that this was wrongful because he was

given no opportunity to offer a defence on his own behalf. He claims that this caused damage to his reputation and loss of employment and financial hardship from then on for the rest of his life.

For remedies, he claims three years' salary, T$23,310, plus T$10,000 for damage to his reputation.

The Facts

The major facts of the matter are not in dispute. From the evidence put before me, I find them as follows. The plaintiff had been self-employed. On 1 June 1995 he commenced employment with the second defendant in the position of Chief Production Officer. The appointment was "conditional on serving a probation period of 6 months effective from the date of appointment", which is a standard commencement condition for the second defendant's employees. He carried out his duties from the second defendant's compound at Mataki'eua. On 27 June 1995 the first defendant wrote to all the employees at Mataki'eua, setting detailed standards of conduct, for which they had to accept the directions of the plaintiff. The same day the first defendant wrote to the plaintiff, telling of an allegation that he had (a) allowed persons to drink alcohol on the premises the previous Friday, and (b) lied to the first defendant about it. The letter was a warning and a request for an explanation. The plaintiff responded in writing, giving an explanation, acknowledging misconduct and accepting the warning. He promised no repetition.

On 3 July 1995 the first defendant again wrote to the plaintiff, advising that there was to be no private work done during his employment, in order to prevent any conflict of interest with the plaintiff's workshop. On 14 August 1995 the first defendant wrote to the Production Division at Mataki'eua, sending the memorandum to the Chief Engineer and to the plaintiff, and to the senior mechanic, who was the officer below the plaintiff. In the memorandum he complained that there was a serious water level and low pressure problem about which insufficient in his view was being done. He told the recipients that if there was no immediate improvement he would assume they were not capable of doing their duty.

On 24 August 1995, one of the employees at Mataki'eua, Kepu by name, wrote to the first defendant. He said that he was writing on behalf of all the employees there. There were 21 employees there altogether. The letter stated that the staff did not agree with the working procedure of their manager, the plaintiff, and that he was misusing his position in a dishonest manner. Five specific allegations were set out in numbered paragraphs.

In order to confine this case to its issues I do not set out the allegations. They were all allegations of improperly using the second defendant's fuel, stock, tools and employees for his own purposes.

The next day, 25 August 1995, the first defendant submitted the employee's letter to the chairman of the second defendant, along with his recommendations. These were (1) that the plaintiff be suspended with effect from the next working day, Monday 28 August, and (2) that the first defendant investigate the allegations and submit his findings to the Board for its final decision. The chairman approved the recommendations the same day, and, still on that day, the first defendant wrote to the plaintiff. His letter told the plaintiff to surrender his keys to the senior mechanic and leave the compound. Attached to it was a copy of the letter of complaint.

At about the same time, 28 August if my reading is correct, another letter was written to the first defendant from the Mataki'eua compound. It was signed by eleven of the 21 employees there. These 11 employees stated that the writer of the complaint letter did not have their consent to say that he wrote on behalf of them. They claimed that the writer of the complaint letter did not do any work, and had acted to upset them and had acted with malice and hatred for the plaintiff, who in their opinion was a very responsible honest and helpful person to the Board. It is relevant that in his June monthly report, dated 7 July, the plaintiff had reported to the first defendant that all employees at the compound had carried out their responsibilities in the month of June except two. He reported that those two workers had been alerted or warned by him, but that he had been ignored. One of the two workers named was the person Kepu who wrote the complaint letter.

Also on 28 August, the plaintiff wrote to the first defendant in response to the suspension. He made the first defendant aware of a list of his personal items which he was using in the service of the second defendant, and other items of the second defendant which he had taken to his home for repair.

On 30 August 1995, in response to the first defendant's inquiries, one of the employees at the compound, Vunga by name, wrote a letter to the first defendant. He stated that he personally had carried out four of the five actions alleged in the earlier letter by Kepu. He said he had done these things at the direction of the plaintiff. He said that he had reported these actions to the senior mechanic, the foreman and the leading hand, Kepu. He said that he did so because he did not want to be accused of breach of trust in his work. It was the leading hand Kepu who had written the original complaint letter. A person who helps another to commit an offence is an accomplice. The writer of this letter was an accomplice.

This is not to say that the writer of the letter was guilty of any offence, but only that his letter claimed that he was involved in carrying out four of the actions of which he accused the plaintiff. In his letter, Vunga went on to make three other accusations against the plaintiff. One of these was the fifth allegation in Kepu's letter, the other two were new.

On that day 30 August 1995 the first defendant wrote again to the plaintiff, telling him that he was required to submit a written explanation of the five allegations within 14 days of 28 August. On 4 September 1995 the plaintiff wrote a lengthy letter, giving in detail his responses to the five allegations, each in turn.

On 13 September 1995 the first defendant wrote to the Acting Solicitor General, sending a copy of the appointing resolution and of the complaint letter. He stated that the subcommittee that had considered the matter had by that time recommended that the plaintiff be dismissed. He sought advice on the appropriate action to take and wording to use. There was no reply by 15 September 1995, when the second defendant met as a Board and considered the recommendation of the subcommittee. The Board decided to dismiss the plaintiff and to pay his salary until the date of his dismissal, 15 September.

The Minutes of the Board Meeting of the second defendant on 15 September 1995 were subsequently confirmed and signed by the chairman at the meeting of 20 October 1995. They show that the topic of the plaintiff's employment was discussed. The minute is as follows:

> "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 …"

The plaintiff was advised by letter on 18 September 1995.

The plaintiff immediately sought legal advice and on 27 September his lawyer wrote challenging the dismissal, both as to its procedure and as to its grounds. He asked the second defendant to review its decision. On 11 October the first defendant wrote again to the Solicitor General, informing of the dismissal, passing on the lawyer's letter and seeking advice. On 7 November he wrote again to the Solicitor General, stating that he was going to submit the lawyer's request for a review to the second defendant the following week and seeking advice urgently. On 8 November the Solicitor General replied, reviewing the steps taken, and noting that there had been allegations made, an explanation offered, and refutation of that explanation by other employees and by the first defendant himself which showed that "Mr Koloa's versions were not true". The letter went on: "Mr Koloa's employment was then terminated by the Board as he was still on probation." The Solicitor General's legal opinion was that the procedures taken appeared to be in order. The Solicitor General suggested nonetheless that the lawyer's letter with all the relevant documents be referred to the Board so that it could reappraise the situation. He said that if the Board decided to uphold its previous decision, he would be happy to reply to the lawyer's letter if asked to do so.

On 17 November 1995 the second defendant considered again its decision to dismiss, and decided to uphold the dismissal decision.

Later the plaintiff was prosecuted for theft of items belonging to the second defendant, but the case came to nothing when the complainant party did not appear at the hearing.

There was much else besides in the evidence. What I have stated above, as my findings of fact, are my findings from the evidence relevant to the plaintiff's claim. There is much else also in the statement of claim. However, in the present case there has been no evidence at all to support a discussion of the relevance, or a decision, of these other claims.

Decision

In his statement of claim, the plaintiff claims that he had a contract of employment. The defendants do not deny this. Next, he claims that he was wrongfully dismissed, i.e. dismissed in breach of his contract. The defendants deny this. What was the term of his contract that the plaintiff says was broken? He does not specify the term in his statement of claim, but at paragraph 18 he lists the 7 things that he says the employer did that he claims were breaches of his contract. Among these, he claims that he was suspended before being asked for any explanation. He claims that the defendants failed to examine the grounds of his dismissal and his explanation. He claims that they failed to recognise the clear fact that there was no merit in the grounds, and that they failed subsequently to obtain a further explanation from him.

In summary, what occurred was this. The plaintiff was appointed, "conditional on serving a probation period of 6 months". About four weeks after he started, he was warned about his behaviour, and a little later was told to be sure not to mix his private work with that of the Board. After about six weeks he was one of the recipients of a memorandum from the General Manager about the low level and low pressure. Ten days after that a letter was written, purportedly on behalf of all the 21 employees whom he supervised, making specific allegations of dishonesty against him. He was suspended so that the allegations could be investigated. Simultaneously 11 of the 21 employees wrote that the letter of complaint was malicious and incorrect in claiming it had their authority. The 11 claimed that the writer of that letter was wrong and acting from wrong motives. The defendants knew that the writer had been the subject of a bad work report by the plaintiff the previous month. The general manager spoke to some of the employees, and from among the employees to whom he spoke, one wrote him a letter. This employee said that he personally had been involved in four of the five allegations of dishonesty. He joined the original letter-writer in accusing the plaintiff of the fifth allegation and he added two more. At about the same time, the plaintiff wrote a detailed explanation for each of the first five allegations.

This was the material that the subcommittee had available to it for consideration. There is no evidence whether the letter from the 11 employees was given to the subcommittee. There is no evidence whether it was ever considered. It may have been. The recommendation of the subcommittee itself was the last stage before the employer's decision. To a large degree the subcommittee had itself relied on the general manager.

This in my view was in order, but it was for the second defendant to make the decision and take responsibility for it. It is clear that the second defendant knew this, because it sought legal advice before making the decision and later its acting chairman raised the question of legal advice while the decision was being discussed at the Board meeting.

It is necessary, as the acting chairman recognised, to call to mind the law that governs this contract.

The written terms of the contract are simple and few. They are in the initial advertisement, the appointment letter and the job description or schedule of duties (document D3). There is no written term governing suspension and/or dismissal. The breaches claimed are breaches of terms that the plaintiff says have to be implied. About that proposition there are authorities, and in the time I have taken to find them

I have selected a few only for mention. *Ridge v Baldwin* [1964] AC 40; [1963] 2 All ER 66 is perhaps a starting point for present purposes. That was a case of dismissal from an office in circumstances [what Lord Reid in his judgment categorised as a third class] where there had to be something against an employee to warrant dismissal. In that case there was a statutory power to dismiss, and the court held that in exercising the power the employer must act fairly. The House of Lords decided that, in the facts of that case, the rules of natural justice were imported into the employment contract. Lord Reid said (at p 71G) that in the law of master and servant, [the first of the three categories of dismissal case] no reason need be given, but if a master terminates the contract of employment in a manner not warranted by the contract, then he must pay damages for breach of contract.

To get to that point in the present case, the plaintiff must show that there was a term implied in his contract that was broken by the employer. The principles of natural justice do not help him. In *McClory v Post Office* [1993] 1 All ER 457 (ChD) the Court held with ample authority that the rules of natural justice cannot be imported into the purely contractual relationship of employer and employee merely because the Court thinks it is reasonable to do so. The parties are free to create their own terms.

I shall pause now to deal with the plaintiff's claim about his suspension.

In *McClory*'s case there was a written contract, and it contained a clause that permitted the employer to suspend for cause. The employer had an express contractual right to suspend. The court was asked to imply a term that the employer's contractual right had to be exercised fairly. The Court declined to do that. A term can be implied, but only when that is necessary to give full expression to the bargain made by the parties, or if it is so obviously intended that it was not expressed; i.e. only if it is clear that this is what the parties intended when they made their contract. That term, if imported, cannot normally be a term imposing fairness, but it can be a term that provides for reasonable behaviour.

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.

In the case before me, there was no express right to dismiss for cause. Can one be implied? Of course. Not even the plaintiff denies the employer had a right to dismiss for cause, and it must be accepted that the employer had that right, and was intending to exercise it. The next step is, does the contract have a term that the employer's right will be exercised in any particular way?

In *McClory*'s case, the Court held that the right to suspend had with it an implied obligation to act reasonably. Specifically, it implied a term that the employer could exercise its right to suspend only on reasonable grounds, and could continue a suspension only so long as there were reasonable grounds for doing so. It held that to imply this term is not to substitute the Court's judgment for the employer's, and falls short of importing into the contract an obligation to act in accordance with natural

justice. In my view, the same principle applies where there is a contractual right to dismiss.

The reasoning in *McClory*'s case alone is enough to support that conclusion. Apart from that however, there is a principle at law that in a contract of employment the parties must conduct themselves in a way that is not likely to destroy or seriously damage their relationship. This principle is illustrated in a 1997 case about repudiatory breach in an employment contract, *Malik v Bank of Credit and Commerce International SA* [1997] 3 All ER 1 (HL). At p 5f and following Lord Nicholls made the following observation:

> … [the bank in that case] was under an implied obligation to its employees not to conduct a dishonest or corrupt business. This implied obligation is no more than one particular aspect of the portmanteau, general obligation not to engage in conduct likely to undermine the trust and confidence required if the employment relationship is to continue in the manner the employment contract implicitly envisages …
>
> The trust and confidence required in the employment relationship can be undermined by an employer, or indeed an employee, in many different ways. I can see no justification for the law giving the employee a remedy if the unjustified trust-destroying conduct occurs in some ways but refusing a remedy if it occurs in others. The conduct must, of course, impinge on the relationship in the sense that, looked at objectively, it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer …

Further, he commented (at p 5h and j and p 6a):

> [To contravene this principle, the employer's] conduct must, of course, impinge on the relationship in the sense that, looked at objectively, it is likely to destroy or seriously damage the degree of trust and confidence the employee is reasonably entitled to have in his employer …
>
> A breach occurs when the proscribed conduct takes place …
>
> Proof of a subjective loss of confidence in the employer is not an essential element of the [employer'sl breach …

That is the principle that governs the present case. There is implied into the employment contract of these parties a term that the employer would not conduct itself in a way that, when objectively viewed, was likely to destroy or seriously damage the degree of trust and confidence that the plaintiff was reasonably entitled to have in his employer.

I hold that the employer was bound by an implied term of the contract to act reasonably when it exercised its right to dismiss the plaintiff. I hold that it was bound further not to conduct itself in a way that, objectively viewed, was likely to destroy or seriously damage the degree of trust that the plaintiff was entitled to have in the second defendant as his employer.

The onus lies in the present case on the plaintiff to show that the employer did not act reasonably and on reasonable grounds when it dismissed him.

The plaintiff was suspended and given the first letter of two letters of allegation against him. He was given a period of 14 days in which to consider and write a carefully worded reply to the first of them, which was the only complaint that the employer had at that time. That was reasonable. There is no objection at law to a procedure that provides the employee with the known details of a complaint against him and an opportunity to explain or answer in writing. In almost all circumstances a written explanation can be readily described as a reasonable procedure, because the employee has complete freedom to gather information if he needs to, and consider carefully what he will say, knowing that what he says will be taken into account.

However, the opportunity to respond must be to respond to what the employer has before him. Sometimes after the initial allegation, the employer receives other information that attacks the employee. If it intends to rely on that information, then it must give that information also to the employee for his response. If it receives information that favours the employee but intends not to rely on it, then that information must be shown to the employee for his response. It must then take the further responses into account. Not everything gathered by the employer needs be put to the employee, but it is usually clear in the circumstances whether material needs to be shown to the employee with a reasonable opportunity of response.

In the present case, after the employer passed on the initial letter to the plaintiff, it received two further letters. One was a letter signed by more than half the employees denying the allegations made by the first employee. On the evidence, it seems to have been ignored. The second was a letter from a person who claimed to have been involved in four of the alleged instances of dishonesty. This second letter clearly contained material information, and was more detailed than the allegations given to the plaintiff for response. It should have been given to the plaintiff. The defendants put it before the Court as material allegations, tending to show that the plaintiff had committed the misdemeanors of which the original letter had accused him. But it was not shown to the plaintiff for his response. This letter was a detailed accusation from a man who admitted being involved in some of the dishonest deeds that were alleged, and who claimed to have been acting under directions from the plaintiff. The plaintiff's response was needed before the employer could reasonably assess its worth, and decide what weight to give that letter. This failure alone is ground for a finding that the subcommittee did not do a reasonable investigation of the allegations.

I turn now to the Board's deliberations on the subcommittee's report. The minute of the Board's meeting is set out above. The minute records that the Board decided to dismiss the plaintiff because he was still on probation and his conduct and service had not been satisfactory, as evidenced by the continuous low water level. It records that the Board felt that it should not ignore the allegations against the plaintiff because his performance was unsatisfactory while he was still on probation.

He 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 minute. The conduct was said to include the continuous low water levels. The general manager's memorandum about that had been sent to the chief engineer as first recipient, and it did not tell the plaintiff that

low water levels were considered a cause for dismissing him without further warning. The second defendant diverted itself onto other matters upon which the plaintiff had had no opportunity to comment. In the minute, and in the evidence of the first defendant, 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. None of these things had been put to the plaintiff as reasons for dismissing him. He was never made aware that the employer considered he was liable to be dismissed for those reasons.

As well, he was accused of falling below a standard he had not met as a probationer. He was not made aware of this, or given the opportunity to comment. The term is said to be universally in use by the second defendant, even the first defendant was on probation when he started. But what does this term mean? It certainly cannot at law mean that the employee is easier to dismiss. There is no lower standard governing the treatment of employees who are on probation. The same implied standards of reasonableness govern the employment contract, whether the employee is on probation or not.

The meaning of the term "conditional on serving a probation period of 6 months effective from the date of appointment" was used in the plaintiff's appointment. What does it mean? It must mean that the continuation of the employment after 6 months was conditional on the appointee's proving himself. His work was to be watched for 6 months to see whether he was fit for the job. The Concise Oxford Dictionary defines "probation" in this setting as "testing of the conduct or character of a person for employment". There is nothing in any of this to say that if the plaintiff is found unsatisfactory then the fact that he is on probation can be added to that, to make a reason for dismissing him before the end of the probationary period. Putting an employee on probation imposes obligations on the employer as well as the employee. It is, after all, the employer who imposes the probationary term, and decides the period. It is a period during which the employee has to prove himself. The 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.

What I have said applies to probationary employment where a term is implied that requires the employer to act reasonably in exercising its rights. If the rights of the employer in respect of probationary employment are set out in the express terms of the contract, then those terms govern the employer's conduct. In the present case the employer's rights are governed by implied terms for reasonable and trust-worthy conduct.

The employer made no record, and presented no evidence, that it decided that the five allegations that were shown to the plaintiff were sufficiently serious by themselves to warrant dismissal with no other reason added.

If it had dismissed the plaintiff for only those five allegations of dishonesty as set out in the initial letter from Kepu, it may not have acted unreasonably because it had considered the plaintiff's explanations. However, it had more detailed accusations from the other employee. It did not give the plaintiff the opportunity to respond to those. It did not tell him that the accomplice had added two new allegations. In addition it considered other reasons, which the plaintiff did not have an opportunity to respond to, either by showing that his work was of a reasonable standard or by working harder in the remainder of the probation period. It dismissed him for those other reasons. Those reasons were premature, and were decided without any opportunity for the plaintiff to put his case. This was not reasonable conduct, nor was it trust-worthy conduct.

Thus it follows, and I hold, that the employer was in breach of an implied term of the contract to act reasonably when it exercised its right to dismiss the plaintiff. I hold that it was in breach further of an implied term that it would not conduct itself in a way that, objectively viewed, was likely to destroy or seriously damage the degree of trust that the plaintiff was entitled to have in the second defendant as his employer.

Conclusions on Liability

Thus I hold that the dismissal was a breach of implied terms in the plaintiff's employment contract as he has claimed. These terms were (i) that the second defendant would exercise its dismissal rights in a reasonable manner, and (ii) that each party would not act in a way that undermined the trust of the other party.

I hold however that the decision to suspend the plaintiff from 28 August 1995 was a reasonable action. I dismiss the plaintiff's claim that the suspension was wrongful.

Conclusions on Damages

I turn now to the issue of damages. Here I must pause again to consider principles. I am more familiar with the authorities in the New Zealand courts, but the common law principles are the same as in England and in Tonga. One case is sufficient for our purposes, though it produced several judgments. This is *Ogilvy & Mather (New Zealand) Ltd v Turner*, an action for breach of contract and wrongful dismissal at common law. In this case, which pre-dated *Malik*'s case, both the Employment Court and the Court of Appeal upheld the two implied terms that I have found above. Both courts then considered the issue of damages.

The principles were reinforced by the Court of Appeal in both of its judgments in *Ogilvy & Mather (New Zealand) Ltd v Turner* [1994] 1 NZLR 641, first in 1993 and again in *Ogilvy & Mather (New Zealand) Ltd v Turner* [1996] 1 NZLR 641. This is that damages are recoverable on the basis of breach of an implied term, but are recoverable primarily to compensate for the breaches of the contract. Next, for wrongful dismissal in breach of contract there are settled principles for calculating damages assessed on the plaintiff's proved financial loss, and damages are available for distress and humiliation that arises from the manner of the dismissal.

I am satisfied by the evidence that the plaintiff in the circumstances of this case was dismissed in breach of his contract and that his reputation has suffered as a result of his dismissal. I am satisfied by his evidence and that of his wife and other witnesses that the damage to his reputation is by itself integral with a sense of humiliation and distress. I accept that claim as a claim for humiliation and distress. I find as a fact that the plaintiff is qualified for and capable of self-employment, and that for normal purposes in that employment he relies on his reputation. I note his evidence about his loss of self-esteem and about his difficulties in re-establishing his workshop business. However, it seems to me that the continuation of the employment for an indefinite period was not a foregone conclusion. For the lost employment I would hold on the facts of the case that three months' net salary and cost of living allowance at most should be awarded in damages. In any event I note and adopt a statement of principle by McKay J in the earlier reported *Turner* judgment, [1994] 1 NZLR 641 at 655. Referring to the statutory remedy of a minimum of three months' remuneration for unjustifiable dismissal, he said:

> For many workers, the minimum payment of 3 months' remuneration under s 41 [of the (NZ) Employment Contracts Act 1991] in cases to which it applies, such as unjustifiable dismissal, will represent *more than* they would be able to obtain at common law. (Emphasis added)

I award as damages for loss of income a sum roughly equivalent to the net amount of salary that he would have received in the three months following the dismissal had the dismissal not occurred. This sum is awarded as damages and is not salary. From the evidence that I have, I calculate a round sum of $1,750. That is the amount of the damages award for loss of income.

His humiliation and distress and the damage to his reputation was not catastrophic and will not be permanent. I take that into account. However, I am satisfied that as a consequence of the wrongful dismissal the idea circulated that the plaintiff was dismissed for dishonesty. That ground was not properly established in a reasonable and fairly conducted enquiry as a cause for the dismissal, nor relied on as a sufficient cause by the second defendant. For his humiliation and distress and the injury to his reputation, as I assess them from the evidence given by himself and his witnesses, in the whole of the circumstances, I assess an amount of $4,750.

The award in damages totals $6,500. This is not a liability of the first defendant personally, and is to be paid by the second defendant.

Costs should follow the event in this case, and are awarded to the plaintiff, to be agreed or taxed.

R v ‘Ahokovi

Supreme Court, Nuku’alofa
Finnigan J
Cr 1522/98

30 September, 1 October 1999; 29 October 1999

Magistrates — remanded appellant in custody — should have granted bail
Bail — should be good reason for depriving person of liberty — bail should have been granted

On 1 October 1999 after a trial lasting 2 days the accused was acquitted on three charges. The reasons for that acquittal were given.

Held:

1. On the balance of probabilities it was clear that after the summonses were issued in the Magistrates’ Court the accused was taken into custody and assaulted while in custody by both police officers before the statements were made.
2. If a Magistrate was not given by the police a sound reason why the Magistrate should deprive the suspect of his liberty, and the Magistrate authorised the police to detain him, then the Magistrate may be liable in damages under s 92 of the Magistrates’ Courts Act CAP 11; under the Bail Act 1990 the Magistrate must decline an application for custody unless he is satisfied of certain things that are stated there; under the Constitution, the suspect is entitled to his liberty unless sound reason is shown to keep him in custody. The Magistrate was the protector of that liberty.
3. The evidence of the accused and of his father was to be transcribed and referred to the Attorney General for consideration of prosecutions of the two officers involved, if prosecution action had not already been commenced independently by the police or the complainant.

Cases considered:

R v Malupo (unreported, CR 743/99, Finnigan J, 22 September 1999)
R v Vaiangina [1990] Tonga LR 118

Statutes considered:

Bail Act 1990
Evidence Act CAP 15
Magistrates’ Courts Act CAP 11

Counsel for Crown : Mr Havea
Counsel for accused : Mrs Taufateau

Judgment

On 1 October 1999 after a trial lasting 2 days I acquitted the accused on three charges.

I said then that I would issue in written form the reasons I gave on that day. These are the reasons for that acquittal.

1. There was a voir dire. In the voir dire 2 police officers gave evidence. They were Uilisone Finau and Maile Latu. Their evidence was that the defendant had admitted being the offender, and that the statements were voluntarily made. No evidence was called at the voir dire to challenge their claim that the admissions made by the accused were voluntary. When it was put to them in cross-examination that the accused had been assaulted while in police custody, Finau had replied that he "refused to answer questions about the assault on the accused," and Latu answered that he had "no answer to that question". The police officers gave other evidence also, about the arrest and detention of the accused. The statements made to the police officers were admitted into evidence after the voir dire.

2. The evidence against the accused came from 5 witnesses. Two of them were the police officers. Apart from the statements put in evidence of the 2 police officers, the evidence of none of the witnesses, either by itself or taken with other evidence, positively identified the offender. The accused and his companion gave evidence which added doubt to any circumstantial evidence that may have implicated the accused. The only evidence that the offender was in fact the accused was the written evidence of the statements said to have been made to the two police officers, and the oral evidence of the two police officers about their interviews with the accused.

3. Having heard the evidence of the police officers, the accused and his father about the circumstances of his arrest and detention I was unwilling to rely on the evidence of the 2 police officers Finau and Latu. I excluded it without hesitation under the proviso to s 22 of the Evidence Act CAP 15. This was for two reasons. First, the charges had been drawn up and signed by a Magistrate even before he was taken formally into custody under the warrant of another Magistrate. However he was not charged, he was instead taken into custody for questioning. As well, the statements had been made and recorded without the special caution which is required after a police officer has made up his mind that he has sufficient evidence to charge (see *R v Vaiangina* [1990] Tonga LR 118). Second, when confronted in cross-examination with the evidence of the accused and his father, both officers were evasive, and both refused outright to answer the questions. I assumed that they were exercising a privilege against self-incrimination. It is clear on the balance of probabilities from the evidence that was put before me that after the summonses were issued in the Magistrates' Court the accused was taken into custody and assaulted while in custody by both police officers before the statements were made.

4. The evidence of the statements included evidence of certain clothing that was described and evidence of a knife. These items had been taken into police custody. All of these items were material to the Crown case, and relevant to evidence given by

the other witnesses, some of which, about the clothes, was contradictory. None of them were produced in evidence by the police officers.

5. While the accused was in custody he was visited by his father, who gave evidence that upon seeing the condition of the accused he went to see the Minister of Police. He said he asked the Minister to release the accused for medical treatment, to which the Minister is said to have replied that the matter was not within his authority or power because the accused was under the authority of a Magistrate. The Minister’s answer, as reported, brings into focus the part played in this matter by the Magistrate. It appears that the accused was arrested on Friday 6 November 1998 at about 8am. He was drunk. He was identified at that time by the complainant as being the offender, but he denied it. He was taken to and kept in a police cell where he slept, and next he was taken so that an order might be made that he be kept in custody. No need was shown before the Court why he should be in custody. No evidence was given about whether the Magistrate was given any reason. The Magistrate ordered that the police detain him for 24 hours. Some time during that Friday night the accused was questioned and denied the allegations. On the evidence before me, he was assaulted. His statements were not recorded. During the morning of Saturday, 7 November 1998, he was again questioned, he continued to deny, and on the evidence before me he was assaulted. His denials were not recorded.

Later that day he was taken again to the Magistrate at his home. The only evidence about what occurred there is that of the accused. He said he remained in the police car. He said the 2 police officers spoke to the Magistrate after which the Magistrate called to him that he must return to the police station and remain there until Monday. He was kept that night in a cell and on the morning of the following day Sunday 8 November 1998 he was visited by a lawyer. That afternoon he was again questioned and he made the statements that the police officer Finau produced to the Court.

I am satisfied that the statements are unreliable. I am satisfied that the accused was assaulted in the police station while held under a warrant issued by a Magistrate. The Magistrate may or may not have been aware, but another Magistrate had issued summonses to the accused on the Friday, before the police applied for a warrant. The police were wrong to seek a warrant for a suspect when they already had enough evidence to obtain a summons. They were wrong to question him without making it clear to him that the summonses already issued made further questioning unnecessary and any statement unnecessary and entirely voluntary.

If a Magistrate is not given by the police a sound reason why the Magistrate should deprive the suspect of his liberty, and the Magistrate authorises the police to detain him, then the Magistrate may be liable in damages under s 92 of the Magistrates’ Courts Act CAP 11. Under the Bail Act 1990 and its amendments, the Magistrate must decline an application for custody unless he is satisfied of certain things that are stated there. Under clauses 1, 9 etc of the Constitution, the suspect is entitled to his liberty unless sound reason is shown to keep him in custody. The Magistrate is the protector of that liberty.

A similar situation occurred as late as June 1999, in a case of an 11 year old boy which the Court recently heard (*R v Malupo* (unreported, CR 743/99, Finnigan J, 22 September 1999)). The Supreme Court had made these principles clear on more than one occasion well before November 1998 and June 1999. The principles are still

being dishonoured, by some police officers and by some Magistrates. The Court has to set its face against abuses of fundamental liberties. The evidence of the accused and of his father in this case is to be transcribed and referred to the Attorney General for consideration of prosecutions of the two officers involved, if prosecution action
130 has not already been commenced independently by the police or the complainant.

Application re Havea

Supreme Court, Nuku'alofa
Ward CJ
RG 771/98

3 November 1999

Evidence — death certificate — date where death is presumed by the Court

In May 1998, Fiepoto Havea, the son of the deceased, applied to the Court to register the death of his father who went missing on 29 May 1985. The Court ordered that the death should be registered and the date of the death recorded as 8 June 1985. The Court was then asked to consider whether that was correct.

Held:

1. The Evidence Act CAP 15 did not allow the court to make any presumption as to the actual time of death and, if any particular date was to be named, the person asserting that to be the date must prove it.
2. No date of death could be recorded but for the purposes of any rights that others may acquire as a result of the death, the date at which the presumption was made should be taken as representing the death. In the present case, the date that presumption was made was the date of the judge's order which was the 18 June 1998 and the death certificate should record under date of death; "presumed dead by court, 18 June 1998". It was ordered to correct the certificate accordingly.

Statutes considered:

Evidence Act CAP 15

Judgment

In May 1998, Fiepoto Havea, the son of the deceased, applied to the Court to register the death of his father.

The circumstances were that his father was a fisherman and set out with others in a vessel, "Halatoamui", in windy conditions on 29 May 1985. They did not return. The vessel was seen submerged near Tau Island on 7 June 1985 and recovered the next day. None of the bodies of the fishermen have been recovered.

The family conducted traditional funeral ceremonies at that time. One year later, the family and relatives gathered at the father's residence to declare he was dead and to mourn his death.

The Court ordered that the death should be registered and the date of the death recorded as 8 June 1985. I have now been asked to consider whether that is correct.

Section 42 of the Evidence Act CAP 15, allows a presumption of death to be made after seven years if the missing person has not been heard of during that time. That has to be proved to the court and, if it is, the presumption shall be made. However, the section does not allow the court to make any presumption as to the actual time of death and, if any particular date is to be named, the person asserting that to be the date must prove it.

Thus, in this case, the application to register the death depended on the presumption of death being made. In order for that to be made, the court needed to be satisfied that the seven year period had elapsed but it did not allow it to make any further presumption. Therefore, no date of death can be recorded but for the purposes of any rights that others may acquire as a result of the death, the date at which the presumption is made should be taken as representing the death. In the present case, the date that presumption was made was the date of the judge's order which was the 18 June 1998 and the death certificate should record under date of death; "presumed dead by court, 18 June 1998". I order that it be corrected accordingly.

Vuna v ‘Ahio

Land Court, Nuku’alofa
Finnigan J
L 949/97

27, 28 September 1999; 12 November 1999

Land law — registration of title is final proof — must have Deed of Grant
Tort — misfeasance in public office — is an available remedy

Huapaongo inherited Ma’anga’ulua I when his father died in 1966. It was a tax allotment. He did not want it and elected not to take it. He swore the heir’s affidavit, but otherwise took no legal steps about that. He saw the Minister in 1991 in order to get the legal steps taken. The Minister agreed that Huapaongo’s son Fine, the grandson of the deceased, should succeed to Ma’anga’ulua I as heir. Fine, however already held a tax allotment, Ma’anga’ulua III. Without consulting Fine the Minister purported to divest Fine of the Ma’anga’ulua III allotment as if he had surrendered it. Without application by Sekope, Fine’s second son, the Minister granted Fine’s allotment to Sekope. When the Minister was later made aware of the existence of an elder son, ‘Alatini, he purported to take Ma’anga’ulua III from Sekope without consulting him and to grant it to ‘Alatini. There had been no surrenders or Cabinet consents or applications as required by section 54 of the Land Act CAP 132. The grant to Sekope had been entered in the register book, though no Deed of Grant had issued to Sekope. Relying on the register book, Sekope entered a five-year lease with a stranger, and the Minister approved that. Soon after this, the grant of the land to ‘Alatini was noted in the register book. The stranger (the first defendant) complained to the Minister. The Minister then noted by entry in the register book that the grant to ‘Alatini was suspended until Sekope’s lease expired. At no time were any of the transactions over Ma’anga’ulua III given Cabinet approval, nor did the Minister issue any Deed of Grant. This was a claim by two members of the Vuna family against both defendants for damages for five years’ wrongful exclusion of the first plaintiff who claims to be its true holder, and damages for plants and trees which are said to have been destroyed by the first defendant. The first defendant throughout took the stance that for the term of the lease, five years until 24 December 1998, he was a bone fide holder of good leasehold title, granted to him by the first plaintiff’s brother. Both defendants denied liability. The Minister was involved as second defendant, because his predecessor took certain steps in respect of registration. Those steps were challenged as being made by mistake. As summarised by counsel for the plaintiffs, the case against the Minister was that he unlawfully took the plaintiffs’ land and gave it to another.

Held:

1. The final and conclusive evidence of title to an allotment under the Land Act was registration under the Act. Registration was not complete until the grant was registered both in the register book, and in a Deed of Grant. Registration was final, unless it came about as the result of an error of Law (contrary to the Act), or as a result of a mistake, or was in breach of a promise made by the Minister, or was in breach of natural justice.
2. The second plaintiff, Fine, was the titleholder of the land; the first plaintiff claimed through him. He had the second plaintiff's authority to use the land, and was the lawful and intended heir, to whom the second plaintiff attempted to transfer it. The plaintiffs had standing to bring the action, but the legal rights were the second plaintiff's alone.
3. The essence of an award of damages was to provide by action compensation to a plaintiff for damage, loss, or injury caused in breach of a legal duty. The duty sued on must be a duty in tort or in contract. The first defendant relied on his lease and the support of the Minister. He was not in breach of any duty in tort to the plaintiffs.
4. There were no submissions on which the Court could find that the Minister was liable in damages to the plaintiffs.

Cases considered:

Bourgoin SA v Ministry of Agriculture Fisheries and Food [1986] QB 716; [1985] 3 All ER 585 (CA)
Ma'asi v 'Akau'ola (1956) 2 Tonga LR 107
Tokotaha v Deputy Minister of Lands (1958) 2 Tonga LR 159
Garrett v Attorney-General [1997] 2 NZLR 332
Havea v Tu'i'afitu [1974-1980] Tonga LR 55
Northern Territory v Mengel (1995) CLR 307
Rawlinson v Rice [1997] 2 NZLR 651 (CA)
Taufa v Veamatahau [1999] Tonga LR 200
Three Rivers District Council v Bank of England (No 3) [1996] 3 All ER 558
Vailea v Sakalia (unreported, CA 11/95, 31 May 1996)
Vakameilalo v Vakameilalo & Minister of Lands [1989] Tonga LR 98 (PC)

Statutes considered:

Land Act CAP 132
Land (Amendment) Act 1991

Counsel for plaintiffs	:	Mr Appleby
Counsel for first defendant	:	Mr Tu'utafaiva
Counsel for second defendant	:	Mr Havea

Judgment

This is a claim by two members of the Vuna family. The first defendant was for 5 years the leasehold occupier of one of the family's allotments. The claim is against both defendants for damages for 5 years' wrongful exclusion of the first plaintiff who

claims to be its true holder, and damages for plants and trees which are said to have been destroyed by the first defendant.

The first defendant throughout has taken the stance that for the term of the lease, 5 years until 24 December 1998, he was a bone fide holder of good leasehold title, granted to him by the first plaintiff’s brother. Both defendants deny liability.

The Minister is involved as second defendant, because his predecessor took certain steps in respect of registration. Those steps are challenged as being made by mistake. As summarised by counsel for the plaintiffs, the case against the Minister is that he unlawfully took the plaintiffs’ land and gave it to another.

All of the relevant events on which the plaintiffs base their action took place within their own family and between their family and the Minister.

The Relevant Facts

The narrative spans 4 generations of the Vuna family, and three allotments. The allotment in issue is the one called Ma’anga’ulua III. The original landholdings were as follows.

First plaintiff’s Great-grandfather — Sione: MA’ANGA’ULUA I
First plaintiff’s Grandfather — Huapaongo: HA’APAULALO
First plaintiff’s Father (the 2nd plaintiff) — Fine: MA’ANGA’ULUA III
First plaintiff — ‘Alatini, and his brother — Sekope

Sione died on 7 August 1966, and Huapaongo filed an heir’s affidavit. He took no further action about registering a new title-holder for his father’s allotment, Ma’anga’ulua I. Huapaongo himself had held another allotment, Ha’apaulalo, since 1934. In 1991, he took steps to complete the registration. On a day which the Minister’s minute book shows as 28 June 1991, Huapaongo went to the then Minister. He said he preferred to live on his own allotment, and arranged with the Minister that his father’s allotment Ma’anga’ulua I would pass to his son, the first plaintiff’s father Fine. Fine was already living on it. However, Fine had already been the registered title-holder of another allotment, Ma’anga’ulua III, since 1952. Huapaongo arranged with the Minister for this (Fine’s) allotment to pass to his second-eldest grandson Sekope. Sekope was Fine’s second son, the younger brother of the first plaintiff. The elder grandson ‘Alatini, the first plaintiff, he said would have to wait and inherit Ha’apaulalo, the allotment on which he Huapaongo was then living. As it happens, Huapaongo is still living, aged 97, and as it happens, Sekope has died.

A few days later, on 1 July 1991, the Minister gave directions in accordance with Huapaongo’s request. He directed that Fine be entered in the register as transferee of Sione’s land, Ma’anga’ulua I (page 33 of the register book, Exhibit 31). He directed that Sekope be entered in the register book as transferee of Fine’s land, Ma’anga’ulua III (#12, book of copied documents). I was not told whether a Deed of Grant for Ma’anga’ulua I has been issued to Fine. At this stage it should be noted that there has never been any formal consent by Fine to the disposal of Ma’anga’ulua III, although he clearly could not continue to hold it if he accepted Ma’anga’ulua I (see the Land Act CAP 132, s 48). So far as I am informed, he himself took no formal steps either to accept Ma’anga’ulua I, or to relinquish his own land Ma’anga’ulua III. He simply accepted his father’s wishes.

However, after a while ‘Alatini came from America where he was living, and wished to have access to land. He went to his father Fine to see what was his legal

position. On or about 23 September 1992, Fine and ‘Alatini went to see the Minister. When the Minister learned that ‘Alatini was Fine’s elder son it seems he was angry with Fine for not objecting to the transfer of his land to Sekope when it should have been inherited by ‘Alatini as the older brother. Fine accepted the rebuke, as he had accepted the will of his father Huapaongo.

The Minister then said that ‘Alatini would have his father’s land. At that time, on 23 September 1992, he recorded and approved the re-arrangement of the allotments in his Minute Book (book of copied documents, # 11). He directed what should be done. He specified that Sione’s allotment (Ma’anga’ulua I) be transferred to Fine, and that Fine’s allotment (Ma’anga’ulua III) be transferred, not to Sekope, but rightfully, to Fine’s heir ‘Alatini.

The next day, 24 September 1992, ‘Alatini and/or his father paid the necessary registration fees. His fee payment was the only formal step that Fine took under the Land Act to apply for Ma’anga’ulua I, or to surrender Ma’anga’ulua III. He has not formally surrendered that allotment, nor has there been any Cabinet approval as required by S 54 of the Act.

On 6 October 1992, after payment of a further fee, the Secretary for Lands and the Minister’s clerk issued a document to ‘Alatini. It was a printed document of the Ministry of Lands, which had been amended by typewriter to be called a Certificate of Statutory Landholding, (book of copied documents, # 16). With that as his authority, ‘Alatini entered on the land, Ma’anga’ulua III and added to the trees already planted there by his mother and others a crop of young pineapple plants. He then left these to the care of his brother and sister and his father Fine. From the evidence it seems that they cared for some corn and some maniocs that was there. It seems Fine weeded the pineapple plants, but that very little interest was taken in them.

About a year later, the first defendant was seeking land for squash, and he went to his good friend Sekope. Sekope offered to lease him his land, which was the same piece. Sekope died less than a year later, (on 12 August 1994). There was no evidence to suggest whether or not Sekope was aware that his father and brother had seen the Minister about the land. As it happened, the Minister’s office had taken no further steps to register ‘Alatini as title-holder after issue of the certificate of statutory landholding. The register book in the Ministry of Lands still recorded Sekope as holder of the title. That is what the first defendant discovered when he took the precaution of attending at the Ministry to verify that Sekope had good title to lease to him. An agreement was then reached between Sekope and the first defendant, and a lease document in the proper form was drawn up. It was executed on 17 November 1993 and approved by the Minister the same day. The first defendant was to occupy the land from 24 December 1993 until 24 December 1998. Not only was the first defendant’s prudence rewarded by verification of Sekope’s title, but also the Minister approved the lease.

A little later the first defendant went to see the register book again, and found that Sekope’s name had been crossed out. The name of ‘Alatini had been entered as title-holder. The first defendant went to the Minister and told him of his disappointment. The Minister moved to help the first defendant. On 6 April 1994 he directed that the details of the lease be noted in the register book for Ma’anga’ulua III and the entry was noted accordingly. He then wrote that same day to both Sekope and ‘Alatini, sending a copy of his letter to the first defendant. In the letter he informed

that he had approved and signed the lease by Sekope to the first defendant. He said that the lease would run until 24 December 1998. He cancelled from the date of the letter his previous approval of the transfer of the land from Sione to ‘Alatini, stating that the land would return to Sekope until the lease expired on 24 December 1998, after which further orders would be made to transfer the land to ‘Alatini.

To this day the Deed of Grant (#7 in the book of copied documents) records that the titleholder of Ma’anga’ulua III is neither Sekope nor ‘Alatini. It is Fine. There has been no subsequent Deed issued. The evidence of the plaintiffs about the Deed was given by Fine and by ‘Alatini. Neither of them seemed to attach much importance to it until asked. They both said, and from the manner of their evidence I accept, that Fine took it when they went to the Minister. Fine said the Minister examined the original of it. The Minister told them that the allotment was ‘Alatini’s and sent them to see the Secretary to pay the fees. Both Fine and ‘Alatini said that Fine gave the Deed to ‘Alatini when they met the Secretary. ‘Alatini was clear that it was needed to identify the allotment they were discussing, and to prove that Fine had title to it. He said they gave it to the Secretary.

The Registrar of Lands who gave evidence was familiar with these transactions, and had been involved. His evidence was entirely clear about the matter. He said that the application by Fine to have the land transferred to ‘Alatini was complete, but the work that should have been done thereafter is not. I presume he meant preparation of a surrender for cabinet approval, with advertising then application (S54), and subsequent preparation of a new Deed. He said that the transfer to ‘Alatini took place in the register book only, and that the Deed of Grant was never produced by the titleholder. The Registrar said that the Ministry of Lands can produce a new Deed of Grant only when the original held by the previous title-holder is produced. If that has been lost, then in its place there must be an affidavit of loss sworn in the Ministry office. From the evidence I find that the Deed has in fact been lost, but from the evidence must find that it was lost in the Ministry’s office.

After ‘Alatini received the Minister’s letter dated 6 April 1994, a dispute arose. He wrote to the first defendant, asking him to vacate the land. The first defendant replied, sending a copy of the Minister’s 6 April 1994 letter and asking ‘Alatini to wait till the lease expired. Both ‘Alatini and Fine protested. ‘Alatini wrote to the Minister, asking him to correct the situation, which had caused him monetary loss while the first defendant had profited. Fine went to the allotment and assaulted the first defendant. ‘Alatini wrote again to the first defendant asking him to vacate. He and his father commenced these proceedings. The lease has now expired. The plaintiffs are ‘Alatini and his father, they seek damages from the first defendant and the Minister for trees and plants which they say were destroyed during the tenure of the first defendant, and damages for loss of use.

To complete the narrative, the land was in a separate dispute in 1995 and 1996. In 1995 the widow of Sekope brought an action, No L251/95. She claimed a widow’s life estate as successor of Sekope. However, the widow remarried in 1996. The action was effectively abandoned partway through the trial when this was revealed, and it was dismissed for want of prosecution. In the case before me, though estoppel was not pleaded, counsel for the plaintiffs wished me to find an estoppel on the basis of an admission said to have been made in that earlier case on behalf of the Minister. The admission is said to have been that the name of ‘Alatini was entered on the register book. There is nothing I can find in the file of that action which conveys that

admission, but in any event I should be reluctant to extrapolate from undecided proceedings. Even if I were, an admission of that fact, since it is proved as a fact, cannot detract from the Minister's position in the present proceedings. What matters is its legal effect.

The Issue, and the Essential Facts

The real issue is who was the lawful owner of the allotment Ma'anga'ulua III at the time when Sekope leased it to the first defendant? The plaintiffs' claim as pleaded is that Fine had good title, to the exclusion of Sekope. However, as argued at trial their claim is that the titleholder was 'Alatini, and his certificate of title was the certificate of statutory landholding issued on 6 October 1992.

It is necessary, I think, to isolate that issue, because it seems to me that remarks might otherwise be diverted to aspects of this matter that are indeed remarkable but which are not essential to the decision. For that reason, I make the following findings, as the strictly pertinent facts.

Huapaongo inherited Ma'anga'ulua I when his father died in 1966. It was a tax allotment, it seems. He did not want it and elected not to take it. He swore the heir's affidavit, but otherwise took no legal steps about that. He saw the Minister in 1991 in order to get the legal steps taken. The Minister agreed that his son Fine, the grandson of the deceased, should succeed to Ma'anga'ulua I as heir. That person, Fine, however already held a tax allotment, Ma'anga'ulua III. Without consulting Fine, perhaps presuming his consent, the Minister purported to divest Fine of this allotment as if he had surrendered it. Without application by Sekope, Fine's second son, perhaps presuming such application, the Minister granted Fine's allotment to Sekope. When the Minister was later made aware of the existence of an elder son, 'Alatini, he purported to take Ma'anga'ulua III from Sekope without consulting him, perhaps presuming his agreement, and to grant it to 'Alatini. There had been no surrenders or Cabinet consents or applications as required by S54. The grant to Sekope had been entered in the register book, though no Deed of Grant had issued to Sekope. Relying on the register book, Sekope entered a 5-year lease with a stranger, and the Minister approved that. Soon after this, the grant of this land to 'Alatini was noted in the register book. The stranger (the first defendant) complained to the Minister. The Minister then noted by entry in the register book that the grant to 'Alatini was suspended until Sekope's lease expired. At no time, so far as the evidence reveals, were any of the transactions over Ma'anga'ulua III given Cabinet approval, nor did the Minister issue any Deed of Grant.

The Submissions

The statute governing the matter is the Land Act CAP 132 ["the Act"]. Counsel for the plaintiffs submits that the then Minister made several mistakes in acting as he did. In his submission, valid steps to remove Fine's allotment from Fine could be taken only by Fine, its titleholder. He relies also on s 54 of the Act, in respect of surrender. He submits that not only did Fine not consent for the purposes of the Act to Huapaongo's plan for the transfer of Fine's allotment to his second son, but also that neither Huapaongo nor Fine surrendered that allotment in the manner required by the Act. Until that occurred, he submits, no further valid steps could be taken. He submits that if, the attendance by Fine on the Minister and his payment of a fee in September

1992 can be held to be a surrender of his allotment for the purposes of the Act, then that surrender could not be hedged about with conditions and the land had to devolve upon the elder son ‘Alatini, who had no land and was thus not disqualified by s 48.

He relies on the certificate of statutory landholding to prove that title was validly transferred to ‘Alatini. He submits that the authority for that is a judgment of the Court of Appeal, *Vailea v Sakalia* (unreported, CA 11/95, 31 May 1996).

Counsel for both defendants contend that the certificate is not a certificate of title under the Act, and has no force. I find that such a certificate is mentioned in the judgment cited, but only in passing, as part of a statutory and evidentiary train that concluded with “the confirmatory memorandum of grant on the Deed of Grant”(at p 7). I must say that the judgment cited does not seem to me to uphold the proposition that such a certificate is a statutory certificate of title. Neither can I find any provision in the Land Act for a certificate of statutory landholding. If such a certificate does not report what is recorded in the register and in a confirmatory Deed of Grant that has been issued, or will be issued, then it must be an empty document, incorrect and of no effect at all.

On the assumption that the above submissions fail, counsel for the plaintiff then submits that the lease approved by the Minister was not authorised by the Act, and conferred only a right in personam. That right, he submits, died with Sekope and could not enure for the benefit of his estate or his heirs, or for the benefit of the other contracting party. In his submission, any rights that the first defendant may have had came to an end when Sekope died and his tenure of the land after that was without authority. He was made by the death a trespasser. He persisted in his trespass till the end of the lease period and exacerbated the damages.

Counsel for the first defendant submits that Fine has accepted Ma’anga’ulua I, and is registered as titleholder (page 33 of the register book, Exh 31). Fine was thus, he submits, disqualified by s 48 from continuing to hold Ma’anga’ulua III. Thus, in his submission, ‘Alatini can make no claim of right by inheritance. Neither has that land however, in his submission, passed to ‘Alatini, because ‘Alatini has never applied for it under s 54, or been granted it in his own right. In his submission, the plaintiffs have followed none of the proper procedures under Ss 43, 54 and (if it applies, he submits it does not) 122.

He submits that the effect of the register book is only that it shows the intention of the Minister to approve transfer of the allotment to Sekope, then to ‘Alatini, then back to Sekope for the duration of the lease. In this he submits that the Minister first is himself bound by the Act, and second has not in any event taken the necessary statutory steps to install ‘Alatini as titleholder. His fundamental submission however is that title to an allotment cannot be complete until there has been both an entry in the register book and issue of a Deed of Grant. The authorities that he advanced for that proposition include a 1958 judgment of the Privy Council, *Tokotaha v Deputy Minister of Lands* (1958) 2 Tonga LR 159. I accept that submission. The difficulty for the first defendant in the submission is that the Minister did not install the brother Sekope as titleholder.

About the lease, he submits that approval was open to the Minister, and once approved the document had full force and effect though on its face it was not transferable or assignable. He submits that if the Court finds that registration in the register book by itself (i.e. without registration in a Deed of Grant) bestows an

interest, then it follows that Sekope was at all material times the titleholder and the first defendant was the registered leaseholder.

Counsel for the Minister submits that after the Minister approved Huapaongo's request and had the register book noted on 1 July 1991, the register book was the evidence of ownership, unless mistake or fraud be shown. He submits there is no evidence of either, the plaintiffs' claim of mistakes by the Minister being unfounded claims of mistakes of law. He submits that while the Minister is bound by the Act, he still has discretions under s 19(2). In his submission, when the Minister's first decision was registered in the register book on 1 July 1991, and when his partial reversal of that was ordered on 23 September 1992 (and subsequently registered in the register book), and when he again had the register book varied on 6 April 1994, he was acting within his allowable discretion. He was correct in application of principle, i.e. of the Land Act, was not making any mistake of fact and was not being fraudulent or defrauded. Thus, in counsel's submission, the register book was sufficient to give title to Sekope at the time of the lease, and the plaintiffs can have no remedy against the Minister.

The authority relied on by counsel for his submission that the register book is sufficient evidence of title is a 1956 decision, *Ma'asi v 'Akau'ola* (1956) 2 Tonga LR 107. That case however decided a contest between the register book and an allegation of fraud, and the Court merely preferred the register book to an allegation of fraud that had not been strictly proved. There was no derogation from the principle in *Tokotaha* (above) that for proof of title both the register book and the Deed of Grant are required.

In respect of consent, counsel for the Minister referred to the 1989 decision of the Privy Council, *Vakameilalo v Vakameilalo & Minister of Lands* [1989] Tonga LR 98. There it was held that the consent of an heir is not necessary under s 54, and that an heir must lodge his claim to a surrendered allotment within 12 months of the surrender. The Privy Council recommended an amendment to s 54 in order to enshrine the latter principle in the Act. That amendment became statute law in the Land (Amendment) Act 1991, with effect from 4 February 1992.

Decision

I have considered all of these submissions. I have considered the judgments cited to me, and other recent judgments about succession and about certainty of title under the Act. The first step to resolution of the plaintiffs' claim is the evidence of title. I have no doubt that the final and conclusive evidence of title to an allotment under the Act is registration under the Act. Registration is not complete until the grant is registered both in the register book, and in a Deed of Grant. The Act and the judgments are clear and there should no longer be doubt in the minds of lawyers about this. There is no room for equity. Registration is final, unless it has come about as the result of an error of Law (i.e. contrary to the Act), or as a result of a mistake, or is in breach of a promise made by the Minister, or is in breach of natural justice.

That is the effect of Part VII, Division II of the Act, Ss 120 to 123. For registration to take place it is the obligation of the successor to produce to the Minister within one month of becoming entitled, the Deed of Grant of his predecessor, or some other proof if unable to produce the Deed. The former Deed is not cancelled until the new Deed has been issued. It is not the register book that is the

register of allotments. The register of allotments is the book of the original Deeds, of each of which the Minister is obliged to issue one signed duplicate. The register book has been judicially noticed for many years now. However, it is not a necessary part of the legal process, only of the administrative. To say that registration is not complete until the grant is registered both in the register book and in a Deed of Grant is merely to acknowledge the fact that the register book is used. Should that book at any time be not available, or in conflict with the register book that is made by binding together the original Deeds of Grant, then it is the latter which is the final and conclusive evidence of title. The Minister’s intentions are not relevant, in the absence of a mistake, or a promise, or an error in applying the Act, or some breach of natural justice: see *Havea v Tu’i’afitu* [1974-1980] Tonga LR 55 and *Taufa v Veamatahau* [1999] Tonga LR 200.

So I determine the crucial issue by finding that neither Sekope nor ‘Alatini have or have had title to Ma’anga’ulua III. The Cabinet has never approved Fine’s surrender, so no new Deed can issue. The Minister, whatever his intentions, has never proceeded to register either of them. The Minister never proceeded to sign and deliver to either of them a Deed of Grant as required by s 121. He never had an original prepared for binding into the register book. The only extant Deed of Grant is the original bound Deed of Grant to Fine. Fine’s duplicate of that was produced to the Secretary for cancellation, but it seems to have been lost. The issue of a new Deed is necessary under s 123. There is no new Deed. The Minister has never cancelled Fine’s title to Ma’anga’ulua III.

I find that the second plaintiff, Fine, is the titleholder of the land. I find that the first plaintiff clearly claims through him. He has the second plaintiff’s authority to use the land, and is the lawful and intended heir, to whom the second plaintiff has attempted to transfer it. I therefore hold that the plaintiffs have standing to bring this action, but the legal rights are the second plaintiff’s alone.

I turn to the claim that the plaintiffs make for damages. The essence of an award of damages is to provide by action compensation to a plaintiff for damage loss or injury caused in breach of a legal duty. The duty sued on must be a duty in tort or in contract. The plaintiffs’ claim is that they have suffered injury in that (a) a pineapple crop planted by the first plaintiff was ploughed in by the first defendant, (b) some trees on the land were cut down during the time of the first defendant’s occupancy, (c) they were kept off the land by the first defendant for 5 years, and (d) they were thus deprived of rents and other income.

The claim may be in tort, perhaps in trespass, but the amended statement of claim does not plead any duty to the plaintiffs that the claim has been breached by either defendant.

Putting that aside, the quantification of the claimed losses is not convincing. The original trees allegedly destroyed are self-valued by the plaintiffs with no objective evidence. There is some difference between the plaintiffs about their number and value. The first plaintiff said, without having counted, that there were between 30 and 50 coconut trees cut down. The second plaintiff counted 17, but on a single occasion only. Of tuitui trees, the first plaintiff said there were about 4 cut down, and I understood the second plaintiff to say about 50. If he meant 15, the discrepancy still makes the evidence unreliable. The first plaintiff said one mango tree, the second plaintiff said there were 2 or 3. For breadfruit trees the numbers were 4, and about 7. The second plaintiff added koka trees, which he said died when they were burned,

and a tava tree that was burned. There is no evidence at all that the first defendant destroyed any of these. He denied doing so.

For the claimed 300 pineapple plants, there was only the first plaintiff's claim in evidence. They were self-valued by the first plaintiff without any objective support. The evidence of their increasing annual value was no more than subjective estimation, based on a presumed increasing annual production and estimated market values for pineapples in each of the five years. The impression made by the evidence of the first plaintiff about this business venture is that it was not reliable as business information, being rather his catalogue of hopes. As it happened, he left the pineapple crop in the care of the second plaintiff, but the second plaintiff did little or nothing to care for it. The evidence of the first defendant must be taken into account, and he said he saw only cattle and overgrowth on the allotment, being unaware that among the verdure that he was ploughing in there were pineapple plants. My overall impression is that there was little of value in the pineapple crop by the time the first defendant came onto the land. In respect of other income such as rents that were lost, there was some evidence of land lease values, but by itself it did not help that claim.

Putting aside any duty, and proof of loss, I turn briefly to causes. One needs to stand back only a little in order to see the cause of whatever misfortune the plaintiffs have suffered. The crucial element in the plaintiffs' disappointment was the 5-year lease agreement made by Sekope, their son and brother. How did it come about that Sekope was able to do that? The answer in the evidence is that his name was in the register book as titleholder. How did that come about? The answer in the evidence is that Huapaongo arranged it with the Minister. The second plaintiff, Fine the titleholder, said he accepted his father's wishes and allowed it to happen though he did not like it. That was for him to decide and the consequences were for him to accept. It was the act of his father, which he accepted, that caused Sekope's name to appear on the register book. As it happened, the law favoured his wishes, and the land was never registered as Sekope's.

But neither was it registered as 'Alatini's, because the Minister and his staff did not proceed to issue a Deed of Grant. How did that happen? Whatever happened in the Ministry office cannot on the evidence that I heard be clearly stated. However from the evidence of the plaintiffs and the Land Registrar, I accept that Fine delivered his Deed of Grant to the Secretary for Lands. After he had seen the Minister in September 1992 and the Minister had made it clear that the land should go to his heir, and a fee had been paid, he handed over the Deed, and the next step was approval of the surrender by Cabinet, with advertising and then application by 'Alatini under the amended S 54. Thereafter the Law required the issue of a new Deed.

Against that backdrop, the first defendant relied on his lease and the support of the Minister. Has he been in breach of any duty in tort to the plaintiffs? I cannot say he has.

Was the Minister in breach of any duty to the plaintiffs? One might think it his duty to the public, including the plaintiffs, to apply the Act in accordance with its terms as clear on their face and as judicially construed from time to time. Does that constitute a duty of care in tort? Does it constitute a statutory duty? These propositions were not advanced in argument. I did not hear any submission on which I could base a finding that the Minister in the present case is liable in damages to the plaintiffs.

Misfeasance in Public Office

Perhaps the plaintiffs' claims against the Minister are claims of misfeasance in public office, though not pleaded or argued as such. I pause briefly to mention that area of the law of torts. In England the leading cases may be *Bourgoin SA v Ministry of Agriculture Fisheries and Food* [1986] QB 716; [1985] 3 All ER 585 (CA) and *Three Rivers District Council v Bank of England (No 3)* [1996] 3 All ER 558. There are judgments recently also in the High Court of Australia — *Northern Territory v Mengel* (1995) CLR 307 — and the Court of Appeal of New Zealand — *Garrett v Attorney-General* [1997] 2 NZLR 332 and *Rawlinson v Rice* [1997] 2 NZLR 651 (CA).

This tort is not frequently claimed, and is not expansively interpreted by the Courts, but it is available in appropriate cases to litigants seeking remedies for wrongs done by public officials. It seems from the judgments that the ingredients of this tort are that the defendant is the holder of a public office, and has acted in breach of a duty that rested on him (or her), and knew that a duty was being breached or acted with malice, knew that loss to the plaintiff or people like the plaintiff was likely, and caused loss to the plaintiff by the breach of the duty.

None of this formed part of the plaintiffs' case, and I do no more than record here the availability of the remedy.

Conclusion

I determine the claim by entering judgment for the defendants. Costs will follow the event; the costs of both defendants are awarded against the plaintiffs. These are to be agreed or taxed.

R v Funaki

Supreme Court, Vava'u
Finnigan J
Cr App 437/99

22 October 1999; 30 November 1999

Criminal law — abetting theft — theft not over even though complete
Statutory interpretation — offence of abetting — words all read together

A principal offender committed the crime of theft by uprooting kava plants and carrying them to the roadside. He then approached the other accused, the respondent, who came in his car and helped the principal offender, by transporting the stolen goods. The respondent with the car was charged with abetting the crime of theft, under s 8 of the Criminal Offences Act CAP 18. The learned Magistrate held that the crime of theft had been complete before the respondent became involved. The Magistrate thus held that he was not guilty of abetting that crime under s 8, but that he could have been found guilty had he been charged under s 13 of that Act. The Crown appealed against the finding of the learned Magistrate. The Crown did not seek to deprive the respondent of the benefit of his acquittal; the Crown sought a ruling on the application of s 8 to the facts as found by the Magistrate.

Held:

1. The offence of abetting was defined by four words, "commands, incites, encourages, or procures" that must be read together, even when interpreting only one of them. The words take their colour from each other. Therefore, the general sense of s 8, must be taken from all of the words, and was broad rather than narrow. The act of the respondent in helping a thief to carry away stolen kava plants, was encouraging the thief.
2. An offence was not necessarily over even though it was legally complete. Therefore, the offender was still engaged in the theft of the kava plants when he left them and went away to get help to carry them. He was still engaged in the theft when he came back with the respondent to get them. As soon as the respondent did some action or said some word that incited or encouraged the principal offender to continue taking the kava plants, knowing that he had stolen them, he was a party to the theft.
3. The law permitted conviction of the respondent for the offence of abetting theft. No further orders were made and the decision of the learned Magistrate, by which he acquitted the respondent, was left undisturbed.

Statutes considered:
Criminal Offences Act CAP 18
Magistrates' Court Act CAP 11

Counsel for appellant : Mr Cauchi
No appearance for respondent

Judgment

This is an appeal against a finding of the learned Magistrate in a hearing of a charge of abetment of a crime. The facts are these. A principal offender committed the crime of theft by uprooting kava plants and carrying them to the roadside. He then went and got the other accused, the respondent in this case, who came in his car and helped the principal offender, by transporting the stolen goods.

The man with the car, the respondent, was charged with abetting the crime of theft, under s 8 of the Criminal Offences Act CAP 18. The learned Magistrate held that the crime of theft had been complete before the respondent became involved. The Magistrate thus held that he was not guilty of abetting that crime under s 8, but that he could have been found guilty had he been charged under s 13 of that Act.

I have my doubts about whether the facts fit within s 13, which is the crime of assisting a criminal by doing something to impede his apprehension, prosecution or sentence. Certainly, under s 148, the respondent would have committed a crime of receiving, once he had taken some or all of the stolen property into his possession knowing it had been stolen. It is possible too that the evidence may have established the offence of being in possession of stolen property under s 153. However, the question for the learned Magistrate was whether, in what occurred, the respondent committed the crime of abetting theft.

In arguing this appeal against the learned Magistrate's ruling, Mr Cauchi did not seek to deprive the respondent of the benefit of his acquittal. What the Crown seeks is only a ruling on the application of s 8 to the facts as found by the Magistrate. Mr Cauchi submitted that in applying s 8, the Magistrate had considered only the words "commands, incites", and had overlooked the overall sense of s 8 for which one must also take into account the associated words "encourages or procures". He referred to the wording of similar provisions in other jurisdictions, such as "aids, abets, counsels or procures", and submitted that although the words in s 8 are different, their meaning is the same. In his submission the respondent could at law become involved and be an abettor of the theft even though a theft has been completed.

I accept that submission. There are two points to be made. The first is that the offence of abetting is defined by four words that must be read together, even when interpreting only one of them. The words take their colour from each other. The principle *noscuntur a sociis* is perhaps best translated as "words of a feather flock together". Therefore, the general sense of s 8, even with the restrictive interpretation applied to criminal statutes, must be taken from all of the words, and is broad rather than narrow. In the words of s 8, an abettor of an offence committed by another person is "every person who directly or indirectly commands, incites, encourages or procures the commission of [that] offence". This means that an abettor is a person

who does any action within that range. The act of the respondent in the present case, helping a thief to carry away stolen kava plants, was encouraging the thief.

The second point is that an offence is not necessarily over even though it is legally complete. There are many examples of this, a common one is the offence of exceeding a legal speed limit. That offence can be completed in the blink of an eye, but the offender may continue, still committing the same offence, for a period of time. A person may encourage that offender by word or action (some authorities say, even by inaction and silence) after the offence is complete and is still continuing. Theft provides another example. A person may pick up a coin belonging to another, intending to deprive the owner of it permanently, and be guilty of theft as soon as the act of taking is complete, i.e. within a very short period of time. Sometimes proof of the *mens rea* is available immediately, e.g. from words said during the action, or almost immediately, e.g. from concealing the coin in a hand, or putting the coin in a pocket. Proof of the *mens rea* may not come till later, e.g. from the fact that the taker walks out of the room with the coin still concealed, or walks out of the building with it, or arrives at another place some time later with it. The crime of theft was complete as an offence as soon as the act of taking and the intention to deprive permanently were both complete. Whether the necessary evidence that proves the offence becomes available immediately or does not come until some later point during the journey, it is still the same theft. By merely transporting a stolen item, a thief does not add anything to the theft, but he does continue the theft, and he is adding further acts by which the seriousness of his offence may be judged. The theft is still going on, even though the ingredients of theft have all been present for some time.

Therefore, the offender in the present case was still engaged in the theft of the kava plants when he left them and went away to get help to carry them. He was still engaged in the theft when he came back with the second man to get them. As soon as the second man did some action or said some word that incited or encouraged the first to continue taking the kava plants, knowing that the first man had stolen them, he was a party to the theft.

Determination

Therefore, pursuant to s 80 of the Magistrates' Court Act CAP 11, in determining this appeal I declare that in the present case the law permits conviction of the respondent for the offence of abetting theft. I make no further orders and leave the decision of the learned Magistrate, by which he acquitted the respondent, undisturbed.

Attorney General v Ulakai

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

1, 6 December 1999; 15 December 1999

Contempt of Court — real risk of prejudicing fair trial — balance with freedom of press
Contempt of Court — intention of defendant relevant to penalty
Contempt of Court — more serious when committed by officer of the Court

On 1 October 1999 Radio Tonga broadcast a news item about two civil actions which had just been filed in the Supreme Court. The item was broadcast four times; twice in Tongan when it was presented by the first defendant, Viola 'Ulakai, and twice in English when the presenters were the second and third defendants, Laumanu Petelo and Nanise Fifita. All were employees of the sixth defendant, the Tonga Broadcasting Commission of which the fifth defendant was the General Manager. The plaintiff in the two cases referred to was a New Zealand barrister, Barry Wilson, and his claim was against a Tongan law practitioner and the Attorney General for the payment of costs awarded in favour of his clients in a case he had conducted here in the Supreme Court in 1996. The defendant law practitioner had apparently represented Wilson's clients in the costs hearing and it was stated that, despite written and oral demands, she had refused to pay. The allegation against the Attorney General was that the costs had been improperly set off against other awards of costs made against the law practitioner's clients. Those writs had been filed in the court that same day and the copies had been placed in the rack in the registry for collection by the lawyers involved. By the time the broadcast went out over the air, no document had been seen by either defendant and a complaint was made to the Registrar by the law practitioner because the broadcast was the first she had heard of the action against her. The news item started with a statement that the actions had been filed and named the law practitioner and, later, the Attorney General as defendants. However, it then went on to detail a number of alleged facts from the claim. These so closely followed the wording of the statement of claim that it was clear the writer of the news item had used a copy of that document. Those claimed facts alleged impropriety by the lawyer and the Attorney General and the news item concluded with the statement that the plaintiff had also lodged a formal complaint to the Tonga Law Society. The information for the broadcast was supplied by the fourth defendant, Nalesoni Tupou, the lawyer representing the plaintiff who had just filed the papers. The defendants were summoned, on the motion of the Attorney General, to show cause why they should not be committed or found liable for contempt. The fifth defendant wrote a

letter to the court on behalf of the Broadcasting Commission and its employees. He pointed out that the procedure used in the report was in accordance with a long established and hitherto unchallenged practice of Radio Tonga News. The item contained no editorial comment or expression of opinion and it was broadcast in good faith and without any malice. He apologised for any possible contempt. The fourth defendant filed an affidavit disputing the suggestion he had been guilty of a contempt. He appeared on his own behalf as soon as he was able to come to Tonga.

Held:

1. The purpose of the law of contempt was to prevent publication of material that would give rise to a real risk of prejudicing the fair trial of the action and thus the due administration of justice.
2. The media had the right to publish issues of public importance and also to publish them in such a way as to stimulate discussion. It is important that the media was not unduly restricted in what it reported and, when it was, the courts must always be careful to see that the rules of contempt were not used to gag the reporting and discussion of matters of public interest or concern for the wrong reasons. Equally it must be vigilant to ensure the right of the public to expect a fair and effective trial process was not compromised by careless or irresponsible publication.
3. It was the position at common law that if there was real risk of prejudice, once it was shown that there was an intention to publish, there will be a contempt even if there was no intention to prejudice the trial. The first, second, third, fifth, and sixth defendants did commit a contempt but the Court considered that it was not a very serious one.
4. The intention of the defendants was relevant to the proper penalty and there was no penalty imposed on the first, second, third and fifth defendants. The sixth defendant was ordered to pay a fine of $1,000.
5. With regard to the fourth defendant, he gave the documents to the fifth defendant and added the information that a complaint had been made to the Law Society with the deliberate intention of influencing the trial of the action by putting pressure on the defendants to deter them from defending the action or to settle rather than have the court decide issues that had already been made public through the media. That was a serious contempt and all the more so for being committed by an officer of the court. He was guilty of contempt.
6. The fourth defendant confined his submissions to disputing the allegation of contempt and had not, therefore, had an opportunity to address the Court on the appropriate penalty. That question was adjourned to a date to be fixed to give him that opportunity.

Cases considered:

Attorney General v BBC [1981] AC 303

Attorney General v Guardian Newspapers Ltd (No 2) [1990] 1 AC 109; [1988] 3 All ER 545

Attorney General v Leveller Magazine Ltd [1979] AC 440; [1979] 1 All ER 745

Attorney General v MGN Ltd [1997] 1 All ER 456

Attorney General v News Group Newspapers Ltd [1987] QB 1; [1986] 2 All ER 833 (CA)
Attorney General v Times Newspapers Ltd [1974] AC 273; [1973] 3 All ER 54
Attorney General (NSW) v John Fairfax & Sons Ltd [1980] 1 NSWLR 362 (CA)
Lonrho plc, Re [1990] 2 AC 54; [1989] 2 All ER 1100
Packer v Peacock (1912) 13 CLR 577; 18 ALR 70
R v Parke [1903] 2 KB 432

Statutes considered:
Contempt of Court Act 1981 (UK)

Counsel for prosecution : Mr Kefu
All defendants in person

Judgment

On 1 October 1999 Radio Tonga broadcast a news item about two civil actions which had just been filed in the Supreme Court. The item was broadcast four times; twice in Tongan when it was presented by the first defendant, Viola 'Ulakai, and twice in English when the presenters were the second and third defendants, Laumanu Petelo and Nanise Fifita. All are employees of the sixth defendant, the Tonga Broadcasting Commission of which the fifth defendant is the General Manager.

The plaintiff in the two cases referred to is a New Zealand barrister, Barry Wilson, and his claim was against a Tongan law practitioner and the Attorney General for the payment of costs awarded in favour of his clients in a case he had conducted here in the Supreme Court in 1996. The defendant law practitioner had apparently represented Wilson's clients in the costs hearing and it was stated that, despite written and oral demands, she had refused to pay. The allegation against the Attorney General was that the costs had been improperly set off against other awards of costs made against the law practitioner's clients. Those writs had been filed in the court that same day and the copies had been placed in the rack in the registry for collection by the lawyers involved. By the time the broadcast went out over the air, no document had been seen by either defendant and a complaint was made to the Registrar by the law practitioner because the broadcast was the first she had heard of the action against her.

The news item started with a statement that the actions had been filed and named the law practitioner and, later, the Attorney General as defendants. However, it then went on to detail a number of alleged facts from the claim. These so closely followed the wording of the statement of claim that it was clear the writer of the news item had used a copy of that document. Those claimed facts alleged impropriety by the lawyer and the Attorney General and the news item concluded with the statement that the plaintiff had also lodged a formal complaint to the Tonga Law Society.

The information for the broadcast was supplied by the fourth defendant, Nalesoni Tupou, the lawyer representing the plaintiff who had just filed the papers.

The defendants have been summoned, on the motion of the Attorney General, to show cause why they should not be committed or found liable for contempt.

The fifth defendant has written a letter to the court on behalf of the Broadcasting Commission and its employees. He points out that the procedure used in this report was in accordance with a long established and hitherto unchallenged practice of Radio Tonga News. The item contained no editorial comment or expression of opinion and it was broadcast in good faith and without any malice. He apologised for any possible contempt. He repeated those comments in court and I accept them all.

For reasons I shall set out later in this judgment, I find this broadcast constituted a contempt but I shall take no further action against the first, second, third and fifth defendants and shall pass a relatively nominal fine against the sixth defendant.

The fourth defendant was unable to attend on the return date and filed an affidavit disputing the suggestion he had been guilty of a contempt. He appeared on his own behalf as soon as he was able to come to Tonga.

He is a barrister and solicitor of the High Court of New Zealand and is enrolled as a law practitioner of this court. In the light of the latter, it was startling to find that he sought to pass the blame for some of the events on the registry staff who had attempted to assist him in filing the writ. The assistance he admits he sought from them showed that he was ignorant both of the normal rules of civil procedure in this court and of day to day registry practice. Although it is an unfortunate basis for such a decision in relation to the professional conduct of a practitioner, I accept he did believe, albeit incorrectly, that he had arranged service of the writs when he left the registry that afternoon. However, it is also clear that he must have known that those documents could not have been seen by the defendants involved before the broadcast.

In his affidavit he explained how he went to Radio Tonga and, whilst talking of other things with the fifth defendant, was asked if the writs had been filed. He then went to his car and handed over two copies of the writ and statement of claim. When he appeared before the court, it was clear that was not an accidental event as the affidavit might have been taken as suggesting. He told the court that he went to the radio office specifically to deliver the documents and had prepared a number of extra copies for that reason. Indeed he went from there to the offices of the Tonga Chronicle and also of one of the other defendants in the case in which Wilson had appeared. In each case he similarly gave copies to them. He also told the fifth defendant of the complaint filed with the Tonga Law Society.

His affidavit states that he told the fifth defendant to contact the court registry to check when it would be proper to broadcast such an item. In his written submissions he suggests:

> "This is a situation where reasonable steps were taken by the solicitor and the defendants from the radio. The solicitor actually delivered a copy of the statement of claim to Radio Tonga at their request. It is submitted that the solicitor informed the Radio to make contact with the Registrar before making any broadcast. The solicitor had no further control from that point as to when the broadcast would be broadcast but was satisfied on advising the radio that they must first seek the permission of the registrar before broadcasting."

I cannot avoid the comment that he, as a qualified lawyer conducting the case, was in a better position to advise on such matters than the court staff. He agreed he would never have expected the equivalent court officials in New Zealand to give such

advice. I cannot accept it is proper conduct by a lawyer to give such a warning and then consider he is relieved of any further responsibility as appears to be his reasoning. I certainly do not accept that the steps he admits taking could be considered reasonable.

When asked in court whether he had his lay client's permission to release these documents, he stated that released the papers on the express instructions of his client and suggested that shifted in some way the responsibility from him for any possible contempt. I appreciate his client is a senior barrister of some eminence in New Zealand and it may be difficult to question his instructions in such a case but the seniority or importance of the client does not absolve a lawyer from his responsibility to advise about the propriety or otherwise of anything his client asks him to do.

He stated in his affidavit that, "at no time, I had any intentions whatsoever of causing any embarrassment, inconvenient or any motive of similar nature against any persons or organisations or the institution of the law Courts in Tonga during the events of Friday 24th of September 1999 and thereafter. At no time that I encouraged promoted or represented any mannerism that may seem to be in contempt of Court."

I suggested to the law practitioner who appeared for the fourth defendant at the first hearing of this motion that she should advise him I would be particularly interested to hear just what was his intention when he released these documents to the media. He did not explain further in his affidavit and, when asked in court, gave no explanation apart from the fact that they had all been interested in the earlier case.

However, the main thrust of the fourth defendant's submissions was that his admitted conduct did not amount to contempt and I now pass to that aspect of the case.

His submission is that this publication did not create a real risk that the course of justice would be impeded or prejudiced. He relies principally on the English cases of *Attorney General v MGN Ltd* [1997] 1 All ER 456, *Re Lonrho plc* [1990] 2 AC 54; [1989] 2 All ER 1100 and *Attorney General v News Group Newspapers Ltd* [1987] QB 1; [1986] 2 All ER 833 (CA). Whilst I accept the principles enunciated in those case as to the general risk of influencing potential jurors or the trial judge, the judgments are tailored to the English Contempt of Court Act 1981 and, in particular the extent and meaning of section 2 in relation to the strict liability rule. That Act does not apply in Tonga.

The power of this court to punish for contempt is derived from the inherent power of the court as developed through the common law. The 1981 Act in England was an attempt to modify that position especially in relation to publications in the media. In the *News Group Newspapers* case, Lloyd LJ pointed out;

> "…the statutory purpose behind the 1981 act was to effect a permanent shift in the balance of public interest away from the protection of the administration of justice and in favour of freedom of speech."

The balance between the need to protect fair trial and the equally important right of freedom of discussion, of which freedom of the press is a part, has been the subject of a long series of cases through which the common law has been developed. The result of the attempt to preserve both these rights has, to some extent, inevitably resulted in a compromise but the courts have repeatedly regarded the proper administration of justice as the over-riding interest. Therefore, whenever the circumstances are such

that one must prevail, it one will be the protection of the due administration of justice. Whatever the recent developments in England, that is still the law in many common law jurisdictions including Tonga.

The result has been often severe restrictions on what may be published about legal proceedings until they are complete. The justification for this was seen not just in the need to ensure a fair trial but in the fact that the restrictions imposed simply postponed the publication and were not a continuing ban. Thus, once the legal proceedings are completed, the restrictions on publication imposed by the law of contempt are in general terms lifted.

It is perhaps worthy of mention that the position in the United States of America is that, as a result of the First Amendment to the Constitution, the balance is firmly tipped the other way. The difference and its effect was seen very vividly recently in the trial of O J Simpson. The elaborate steps necessary to select a jury unaffected by the free publication of matters that would be regarded here as sub judice are a direct consequence.

Most other common law jurisdictions, including Tonga, have chosen not to follow that path and have preserved the court's right to restrict, at least to some extent, by the law of contempt, the publication of matters that are sub judice.

The purpose of the law of contempt of court is to safeguard the effective administration of justice. It is a phrase that has been criticised frequently in England, Australia and New Zealand as suggesting that it is to protect the dignity of the court or its judicial officers. That is not the case and the term is unfortunate in that respect. In *Attorney General v Leveller Magazine Ltd* [1979] AC 440; [1979] 1 All ER 745, Lord Diplock pointed out that contempt takes many forms and continued:

> "...they all share a common characteristic: they involve an interference with the due administration of justice either in a particular case or more generally as a continuing process. It is justice itself that is flouted by contempt of court, not the individual court or judge who is attempting to administer it."

In *Attorney General v Times Newspapers Ltd* [1974] AC 273; [1973] 3 All ER 54 (the Sunday Times case), Lord Simon pointed out that the rules that are embodied in the law of contempt are the means by which the law vindicates the public interest in the due administration of justice.

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. Equally it must be vigilant to ensure the right of the public to expect a fair and effective trial process is not compromised by careless or irresponsible publication.

However, it should be remembered that the media are part of the public and have no more rights than does a member of the public. I do not consider that the separate references to freedom of the press and of speech in article 7 give any special right to the press over the rest of the general public. In a frequently quoted passage, Donaldson MR stated;

> "I yield to no-one in my belief that the existence of a free press, in which term I include other media of mass communication, is an essential element in maintaining parliamentary democracy … But it is important to remember why the press occupies this crucial position. It is not because of any special wisdom, interest or status enjoyed by proprietors, editors or journalists. It is because the media are the eyes and ears of the general public. Their right to know and their right to publish is neither more nor less that that of the general public. Indeed it is that of the general public for whom they are trustees." (*Attorney General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109; [1988] 3 All ER 545)

In the present case, the radio published this as a matter of general interest arising from the original application for habeus corpus in which the plaintiff first appeared here. I accept the defendants from Radio Tonga quoted the contents of the statement of claim accurately. The third defendant in her memorandum to the general manager, suggested that there was no added commentary or expression of opinion. The test she applied was one that would hold in many of our neighbouring common law jurisdictions. However the test must be based on the conditions here in Tonga. In this country comment and discussion is widespread. So also is gossip and the allegations in this claim could soon be circulating as if they were statements of proven fact.

The sources of information through the media here are not comprehensive. It is also common that, once an item has been published, later developments may be disregarded. In the case of reporting of court cases it is not uncommon for the result of a case that has been the subject of an earlier media report to go unreported. Thus discussion of any news item may be based entirely on that single source of information and single view of the facts alleged.

These were, of course, civil cases. Had this report been confined to the general facts of the case, such as the names of the parties and the general nature of the claim, it would have been unobjectionable. What gives rise to the risk of prejudging the trial is the fact that it cites a number of allegations of fact that have yet to be proved. Many listeners to that broadcast will have only that upon which to base any comment or discussion. The final comment that a complaint had been lodged with the Law Society did not come from the claim in the court cases. It adds to the unproved suggestions of impropriety and I feel, despite the third defendant's assertion, falls within the description of comment.

The risk is that the report will be taken as the end of the matter and it will be decided on those facts alone. Anyone later involved in the trial will have been subject to a one sided version of the facts that could well influence the way he ultimately assesses the evidence.

As I have stated the purpose of the law of contempt is to prevent publication of material that will give rise to a real risk of prejudicing the fair trial of the action and thus the due administration of justice. In the Sunday Times case, Lord Diplock set out the requirements of the due administration of justice as;

> "First that all citizens should have unhindered access to the constitutionally established courts of criminal or civil jurisdiction for the determination of disputes and to their legal rights and liabilities, secondly, that they should be able to rely upon

obtaining in the courts the arbitrament of a tribunal which is free from bias against any party and whose decision will be based upon those facts only that have been proved in evidence adduced before it in accordance with the procedure adopted in courts of law; and thirdly, that, once the dispute has been submitted to a court of law, they should be able to rely on there being no usurpation by any other person of the function of that court to decide it according to law. Conduct which is calculated to prejudice any of these three requirements or to undermine the public confidence that they will be observed is contempt of court."

In the third edition of Borrie's and Lowe's "Law of Contempt", the present authors suggest:

"The immediate object of limiting what can be said during the currency of legal proceedings is, in broad terms, to protect the fairness of that trial. The underlying fear is that without such protection there would be 'trial' by the media and participants in the proceedings, such as witnesses and jurors, could be influenced. As Lord Reid said in *Attorney General v Times Newspapers Ltd*:

> 'There has long been and there still is in this country a strong and generally held feeling that trial by newspaper is wrong and should be prevented.'

The objection to such 'trials' is that they usurp the power of the court without any of the safeguards that are to be found in legal proceedings such as those provided by rules of procedure and evidence. As Wills J put it in *R v Parke* [1903] 2 KB 432 at 437, they:

> '… deprive the court of the power of doing that which is the end for which it exists — namely, to administer justice duly, impartially and with reference only to the facts judicially brought before it. Their tendency is to reduce the court which has to try the case to impotence, so far as the effectual elimination of prejudice and prepossession is concerned.'

In short, the objection to 'media' trials is that they put at risk the due administration of justice in the particular case. The long term fear, however, is that such trials could undermine confidence in the judicial system generally. Lord Reid said in the Sunday times case that trial by newspaper is intrinsically objectionable:

> 'not only because of its possible effect on that particular case but also because of its side

> effects which may be far reaching. Responsible 'mass media' will do their best to be fair but … if people are led to think that it is easy to find the truth, disrespect for the processes of the law could follow and, if mass media was allowed to judge, unpopular people and unpopular causes will fare very badly.'"

That is the problem in this case. I do not suggest that the report that is the subject of these proceedings could ever be described as trial by the media in the sense in which that is used in the Sunday Times case. The danger is that, in this society, even that one-sided report of unproved facts carries a substantial risk that the public will decide these issues before trial. Witnesses and jurors may be included in those who have considered them. By the time the matter is concluded in the courts, that conclusion may not be reported and the public view will remain based solely on the original report.

The courts have been asked to give some guidance to the media as to what is and what is not permissible but have consistently declined to set out any hard and fast rule. It will always depend on the facts of the case as a whole and the local circumstances. The news presenters on Radio Tonga are well placed to make an assessment based on such considerations.

One case in which it was attempted was in the High Court of Australia in *Packer v Peacock* (1912) 13 CLR 577; 18 ALR 70. This concerned publication of the facts of a criminal trial but the principles apply in all cases.

> "One question is common to all these appeals, namely, "to what extent is a public journal warranted by law in publishing matter relating to a criminal charge?" We were invited to formulate limits within which such publication is lawful. But this, we think is neither desirable nor practicable. In this as in many other cases, it may be difficult to lay down a precise line of demarcation, but not difficult to say on which side of the line a particular case falls. One rule, however may be stated with confidence. A publication which tends to prejudice the public mind, either on one side or the other, and so to endanger a fair trial, is unlawful and a contempt of Court. The whole matter published must be considered, and its tendency must be regarded as a whole."

Later in the same judgment, Griffith CJ attempted to take it a little further. He stated the courts opinion that the public is entitled to entertain a legitimate curiosity in some things and it would be lawful for any person to publish information as to the bare facts relating to such matters.

> "By "bare facts" we mean (but not as an exclusive definition) extrinsic ascertained facts to which any eye witness could bear testimony, such as the finding of a body and its condition, the place in which it is found, the persons by whom it was found, the arrest of a person accused, and so on. But as to alleged facts depending upon the testimony of some particular person which

> may or may not be true and may or may not be admissible in a court of justice, other considerations arise."

As I have stated this was a criminal case and, in as small a community as Tonga, even some of the matters he considered acceptable as bare facts may not be acceptable but that is more a question of sense and taste than of contempt and will always depend on the good sense of the publisher.

It should also be borne in mind that, although the courts are always sensitive to the interest of the public in many matters, there is no "public interest defence" in contempt despite the attempts of some judges to introduce it.

Mr Tupou has pointed out that the English authorities have tended to play down the risk of influencing the judge and I accept that is the case. No judge, as Salmon J stated in *Attorney General v BBC* [1981] AC 303, would be influenced in his judgment by what may be said by the media. If he were he would not be fit to be a judge. However, that comment arose from the earlier statement that, in England, jury trials in civil actions have almost ceased to exist. Far stricter rules apply to criminal cases where jury trial is common.

In Tonga, trial by jury in civil matters is less common that in criminal but Mr Tupou's assumption that there will not be one in this case is misplaced. Our law gives the right of jury trial to both parties and for Mr Tupou to make an assumption before the papers had even reached the defendants that it will not be exercised by them in this case was as bold as it was wrong.

The position at common law is that it is not necessary to prove actual prejudice to a case. It is sufficient if the conduct is shown to have a tendency to prejudice the case. Its nature must be such that prejudice might result. Mr Tupou points out, correctly, that the court must not lose sight of the fact that the risk must be a real one. The courts should not invoke such mandatory power lightly. The New South Wales Court of Appeal has stated:

> "Without purporting to state the test exhaustively, it can be said that contempt will be established if a publication has a tendency to interfere with the due administration in a particular proceedings. This tendency is to be determined objectively, by reference to the nature of the publication; and it is not relevant for this purpose to determine what the actual effect upon the proceedings has been, or what it probably will be. If the publication is of a character which might have an effect on the proceedings, it will have the necessary tendency, unless the possibility of interference is so remote or theoretical that the de minimis principle should be applied." (*Attorney General (NSW) v John Fairfax & Sons Ltd* [1980] 1 NSWLR 362 (CA) at 368)

Earlier in the judgment the Court had adopted the remarks of Lord Reid in the Sunday Times case:

> "Lord Reid stated the test as being that "there must be a 'real risk as opposed to a remote possibility'" of influence and that there is no contempt if the possibility of influence is remote. The qualification, he said, was an application of the de minimis rule.

> Lord Diplock adopted the same test. The 'risk' to which Lord Reid referred is the possibility that the publication might cause prejudice. If it might cause prejudice, it is a real possibility, unless the possibility is a remote one."

As I have stated, I do not consider the actions of the Tonga Broadcasting Commission and its employees was a very serious contempt. The attitude expressed on their behalf by the fifth defendant is responsible and I have no doubt they were misled by the fact this information was given to them by a lawyer. They are however guilty of contempt. It has long been the position at common law that if there is real risk of prejudice, once it is shown that there was an intention to publish, there will be a contempt even if there was no intention to prejudice the trial.

However, their intention is relevant to the proper penalty and I impose no penalty on the first, second, third and fifth defendants and I order the sixth defendant to pay a fine of $1.000.00.

The position of the fourth defendant is different. He was an experienced lawyer. He took the decision to pass these papers to the media. He has given no adequate reason for so doing.

Far from having no intention to prejudice the proceedings, his own statement quoted above shows a reckless disregard for any use to which the documents might be put by Radio Tonga. However, I go further. I am satisfied beyond reasonable doubt that he gave those documents to the fifth defendant and added the information that a complaint had been made to the Law Society with the deliberate intention of influencing the trial of this action by putting pressure on the defendants to deter them from defending the action or to settle rather than have the court decide issues that had already been made public through the media. That is a serious contempt and all the more so for being committed by an officer of the court.

I find him guilty of contempt. He confined his submissions to disputing the allegation of contempt and has not, therefore, had an opportunity to address me on the appropriate penalty. I shall adjourn that question to a date to be fixed to give him that opportunity.